

## ARTICLES

### THE MIXED BLESSINGS OF (NON-)ESTABLISHMENT

*René Reyes\**

#### I. INTRODUCTION

The prohibition against established churches has long been celebrated as a key component of religious liberty in America.<sup>1</sup> Various benefits of non-establishment have been identified: it safeguards freedom of churches by preventing state interference in matters of internal governance;<sup>2</sup> it protects liberty of conscience by prohibiting compelled financial support for religion;<sup>3</sup> and it promotes equality by making religious identification irrelevant to one's standing as a citizen.<sup>4</sup> Congress is barred from passing laws

---

\* Visiting Assistant Professor, Amherst College. A.B., Harvard College; J.D., Harvard Law School. I am grateful to Jessica Reyes and Mark Tushnet for comments on drafts. All remaining errors are my own.

<sup>1</sup> See, e.g., Letter from Thomas Jefferson, President of the U.S., to Nehemiah Dodge et al., Comm. of the Danbury Baptist Ass'n (Jan. 1, 1802), <https://www.loc.gov/loc/lcib/9806/danpost.html> ("I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."); James Madison, *Memorial and Remonstrance against Religious Assessments*, [ca. 20 June] 1785, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-08-02-0163> (last updated Mar. 30, 2017) (outlining and discussing various threats to liberty posed by establishments); see also generally NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY (T. Jeremy Gunn & John Witte, Jr. eds., 2012) [hereinafter NO ESTABLISHMENT OF RELIGION] (providing a historical background of the Establishment Clause and its role in promoting religious liberty in the United States).

<sup>2</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 565 U.S. 171, 188–89 (2012) ("According to the state the power to determine which individuals will minister to the faithful . . . violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.").

<sup>3</sup> See *Mitchell v. Helms*, 530 U.S. 793, 870 (2000) (Souter, J., dissenting) ("Madison's and Jefferson's now familiar words establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it."); Madison, *supra* note 1.

<sup>4</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.").

respecting an establishment by virtue of the First Amendment,<sup>5</sup> and the states by virtue of the Fourteenth.<sup>6</sup>

Compare this arrangement with the situation in Britain.<sup>7</sup> The laws and government of the United Kingdom recognize and support the right to religious freedom, but not by means of a ban on religious establishments. To the contrary, the Church of England has been an officially established religion since the seventeenth century.<sup>8</sup> The British monarch is the titular head of the Church and holds the title of “Defender of the Faith,” while twenty-six of the Church’s bishops are entitled to sit in Parliament as “Lords Spiritual.”<sup>9</sup> The government has a say on issues of religion, and the Church has a say on issues of government.<sup>10</sup>

In light of these differences, it would seem to follow almost axiomatically that the line of separation between church and state is much brighter in the United States than it is in the United Kingdom. But “separation” is a complex and nuanced concept that cannot be adequately appreciated by a narrow focus on establishments alone. This article takes a wider look at the role of religion in public life, and argues that there may actually be a much greater degree of separation between church and state in Britain than there is in the United States—at least in some contexts.

This article begins with a history and overview of establishments in the United States and Britain. The next section offers an examination of contemporary relationships between religion and government in each country. In particular, the section examines recent campaigns for major public office and debates over issues such as same-sex marriage, and shows that religious considerations have been far more important among American voters than they have been among their British counterparts. The final section suggests that while non-establishment is indeed an important

---

<sup>5</sup> See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

<sup>6</sup> See *id.* amend. XIV, § 1; *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947) (incorporating the Establishment Clause against the states under the Fourteenth Amendment and upholding a state-authorized school transportation system that included reimbursement for bus fares paid by parents of children attending religious schools).

<sup>7</sup> This article generally refers to the British nation as “Britain” or the “United Kingdom” (“UK”). Specific reference is made to the constituent countries of England, Scotland, Wales, and Northern Ireland where appropriate. See generally ANTHONY KING, *THE BRITISH CONSTITUTION* 179–214 (2007) (providing a general discussion of the constitutional and political relationship among these various countries within the UK).

<sup>8</sup> See James W. Torke, *The English Religious Establishment*, 12 J.L. & RELIG. 399, 408 (1996).

<sup>9</sup> See *id.* at 411–12.

<sup>10</sup> See *id.*

constitutional value, it does not always lead to greater religious liberty or equality for all citizens.

## II. BRITISH AND AMERICAN ESTABLISHMENTS: A BRIEF HISTORY

The story of the Pilgrims fleeing from England in search of religious freedom is a familiar part of American foundational mythology. While the history of religious freedom in America is considerably more complex than many accounts from popular culture would suggest, experiences with the Church of England did loom large in the founding era. Indeed, “[t]o most founders, the most notorious example of religious establishment . . . was the established Anglican Church that prevailed in the American colonies until the 1776 revolution.”<sup>11</sup> Thus, to understand the significance of the American approach to establishment, it is helpful to understand the British approach that came before it.

The Church of England emerged from a long tradition of Christianity in Britain. Beginning with the Synod of Whitby in 664 CE and lasting until the mid-1530s, Roman Catholicism was the religion of the realm.<sup>12</sup> The Pope held the ultimate spiritual authority, with King Henry VIII himself expressing his devotion to the papacy as late as 1521.<sup>13</sup> Such devotion famously began to wane during Henry VIII’s divorce from Catherine of Aragon and remarriage to Anne Boleyn.<sup>14</sup> By 1534, the break from Rome had become official.<sup>15</sup> The Act of Supremacy of 1534<sup>16</sup> declared the King and his heirs to be “the only supreme head [o]n earth of the Church of England, called *Anglicana Ecclesia*,” and recognized the monarch’s authority to correct any and all errors in matters spiritual.<sup>17</sup>

Yet, the initial establishment of an independent Church of England did not result in a complete departure from preexisting religious practices. Rather, Henry VIII seemed to prefer a middle-of-the-road approach, which “often involved claiming a commitment to reform and renewal in the Church, while simultaneously

---

<sup>11</sup> John Witte, Jr., *Introduction* to NO ESTABLISHMENT OF RELIGION, *supra* note 1, at 6.

<sup>12</sup> See Torke, *supra* note 8, at 406, 407.

<sup>13</sup> See FELICITY HEAL, REFORMATION IN BRITAIN AND IRELAND 16 (2003); see also Torke, *supra* note 8, at 407 (noting that the Pope named Henry VIII as “Defender of the Faith” in 1521 in recognition of his response to the Lutheran Reformation).

<sup>14</sup> See HEAL, *supra* note 13, at 117, 119–20, 122–23.

<sup>15</sup> See *id.* at 125.

<sup>16</sup> Act of Supremacy 1534, 26 Hen. 8 c. 1 (Eng.).

<sup>17</sup> *Id.* (spelling modernized from the original).

insisting on unity and on the essential truths of the Catholic faith.”<sup>18</sup> Additional reforms such as the adoption of the *Book of Common Prayer* and a new Ordinal were enacted during the short reign of Henry VIII’s successor, King Edward VI,<sup>19</sup> but these measures were suspended when England returned to Roman Catholicism under Edward VI’s sister Mary (whose reign is perhaps best remembered for religious persecutions and the burning of heretics).<sup>20</sup>

England once again became Protestant under Mary’s successor, Queen Elizabeth I.<sup>21</sup> Updated Acts of Supremacy<sup>22</sup> and Uniformity<sup>23</sup> (which had been repealed under Mary) were reinstated in 1559, with the latter act making attendance at church services mandatory for all inhabitants of the realm and threatening fines or imprisonment for clergy who deviated from authorized rites. While such statutes were often aimed at Roman Catholics,<sup>24</sup> other measures specifically targeted other Protestants—particularly the Puritans, “English Calvinists who viewed the Church of England as far too Catholic.”<sup>25</sup> Tensions between sects of Protestants continued during the reigns of Kings James I and Charles I, culminating in the English Civil War of the 1640s.<sup>26</sup> The Parliamentary victory resulted in the execution of King Charles and the establishment of Puritan worship services in England under Oliver Cromwell’s Commonwealth.<sup>27</sup>

Following the restoration of the monarchy under King Charles II in 1660, the Church of England was re-established once again. The Act of Uniformity of 1662<sup>28</sup> reinstated the mandatory use of the *Book of Common Prayer*,<sup>29</sup> and the Test Act of 1673<sup>30</sup> limited

<sup>18</sup> HEAL, *supra* note 13, at 134; *see also* Torke, *supra* note 8, at 407–08 (“[I]n its early stages, the break with Rome was more legal and proprietary than theological and liturgical . . .”).

<sup>19</sup> *See* HEAL, *supra* note 13, at 162–63.

<sup>20</sup> *See id.* at 172–73, 177.

<sup>21</sup> *See* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1059 (1996).

<sup>22</sup> Act of Supremacy 1559, 1 Eliz. c. 1 (Eng.).

<sup>23</sup> Act of Uniformity 1559, 1 Eliz. c. 2 (Eng.).

<sup>24</sup> *See* KERRY O’HALLORAN, THE CHURCH OF ENGLAND—CHARITY LAW AND HUMAN RIGHTS, *in* 36 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 55, 68 (Mortimer Sellers & James Maxeiner eds., 2014); Laycock, *supra* note 21, at 1059–62.

<sup>25</sup> Laycock, *supra* note 21, at 1061.

<sup>26</sup> *See id.* at 1062 (“The English Civil War of the 1640s was partly political and economic, partly religious. . . . The religious causes were inextricably linked with the others; arguably the religious causes dominated.”).

<sup>27</sup> *See* O’HALLORAN, *supra* note 24, at 68; Laycock, *supra* note 21, at 1062–63.

<sup>28</sup> Act of Uniformity of 1662, 14 Car. 2 c. 4 (Eng.).

<sup>29</sup> *Id.*

eligibility for public office to members of the established church.<sup>31</sup> Quakers were imprisoned for engaging in non-conforming religious services, and nearly three dozen Roman Catholics were executed for treason in connection with an alleged assassination plot.<sup>32</sup>

But Charles II was succeeded by his brother King James II, who was himself a Roman Catholic.<sup>33</sup> James II attempted to eliminate test oaths and to allow public worship for all sects—steps that pushed both toleration and royal power further than many Protestants in Parliament were prepared to accept.<sup>34</sup> When James II's wife gave birth to a son who would be raised Catholic and would be next in line to the throne, the possibility of a long-term Catholic monarchy proved to be too much for some leading Englishmen to bear.<sup>35</sup> A group of nobles invited William of Orange (the husband of James II's Protestant daughter, Mary) to invade England and take the throne.<sup>36</sup> This “Glorious Revolution” was completed without any battles actually taking place, and resulted in the crowning of William and Mary in 1689.<sup>37</sup>

The Parliament that welcomed William and Mary as king and queen began to offer greater freedom to most Protestants.<sup>38</sup> However, the same could not be said for the country's Roman Catholics.<sup>39</sup> The Bill of Rights of 1689 specified that the English monarch could neither be a Catholic nor marry a Catholic,<sup>40</sup> while other legislation extended toleration to all Protestants but excluded Catholics and those who denied the doctrine of the Trinity.<sup>41</sup> When it became apparent that the successor to William and Mary, Queen Anne, would die childless, Parliament passed the Act of Settlement of 1700.<sup>42</sup> This Act referred to “the Church of England as by [l]aw established” and helped to ensure a Protestant line of succession by naming Sophia of Hanover and her descendants as heirs to the

---

<sup>30</sup> Test Act 1673, 25 Car. 2 c. 2 (Eng.).

<sup>31</sup> *Id.*

<sup>32</sup> See Laycock, *supra* note 21, at 1064; see also O'HALLORAN, *supra* note 24, at 69 (“[T]he persecution of Protestant by Protestant in England after the Restoration was possibly unequalled anywhere in seventeenth century Europe.”).

<sup>33</sup> See Laycock, *supra* note 21, at 1064.

<sup>34</sup> See *id.* at 1064–65.

<sup>35</sup> See *id.* at 1065.

<sup>36</sup> See *id.*

<sup>37</sup> *Id.*; see O'HALLORAN, *supra* note 24, at 69, 71.

<sup>38</sup> See Laycock, *supra* note 21, at 1065.

<sup>39</sup> See *id.*

<sup>40</sup> See O'HALLORAN, *supra* note 24, at 72; Laycock, *supra* note 21, at 1065.

<sup>41</sup> See Toleration Act 1689, 1 W. & M. c. 17, c. 18 (Eng.); Laycock, *supra* note 21, at 1065.

<sup>42</sup> See Act of Settlement 1700, 12 & 13 Will. 3 c. 2 (Eng.); Laycock, *supra* note 21, at 1066.

throne.<sup>43</sup> It was thus through the Act of Settlement that the Georgian Kings inherited the crown in the 1700s.<sup>44</sup>

Such was the historical and religious background for the American colonists and framers. But if the Pilgrims and other early settlers wished to escape from religious conflicts and persecutions in England, they certainly did not come to America to create a system of religious liberty in the modern sense. “Established religion came to America’s shores with the earliest colonists,”<sup>45</sup> and freedom for dissenters was limited. For instance, while the Massachusetts Bay Colony adopted a “Body of Liberties” that contained the “full libert[y]” to practice religion, this right was restricted to those who did so “in a Christian way” and who were “orthodox in [j]udgement.”<sup>46</sup> And there were plenty of persecutions of the “non-orthodox” in colonial New England. Roger Williams was convicted of religious offenses in Massachusetts in 1636 and sentenced to return to England for punishment, but eluded the authorities and ultimately established the much more religiously-tolerant colony of Rhode Island.<sup>47</sup> Anne Hutchinson was expelled from the Massachusetts Bay Colony on religious grounds in 1638 and was killed by Native Americans shortly afterward.<sup>48</sup> The Quaker Mary Dyer was likewise banished for her religious beliefs; she returned to Massachusetts several times and was eventually executed in 1660.<sup>49</sup> Other penalties—such as fines for missing church and profaning the Sabbath—continued into the 1680s and beyond.<sup>50</sup>

While Puritan establishments prevailed in New England, Anglican establishments were the norm in the southern colonies.<sup>51</sup>

---

<sup>43</sup> Act of Settlement 1700, 12 & 13 Will. 3 c. 2; see O’HALLORAN, *supra* note 24, at 82; Laycock, *supra* note 21, at 1066.

<sup>44</sup> See Laycock, *supra* note 21, at 1066.

<sup>45</sup> Michael W. McConnell, *Establishment at the Founding*, in NO ESTABLISHMENT OF RELIGION, *supra* note 1, at 45, 48.

<sup>46</sup> MASS. BODY OF LIBERTIES § 95 (1641); see David Little, *Roger Williams and the Puritan Background of the Establishment Clause*, in NO ESTABLISHMENT OF RELIGION, *supra* note 1, at 100, 105–06.

<sup>47</sup> See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 40–49 (2008); Little, *supra* note 46, at 107.

<sup>48</sup> See Paul Finkelman, *Toleration and Diversity in New Netherland and the Duke’s Colony: The Roots of America’s First Disestablishment*, in NO ESTABLISHMENT OF RELIGION, *supra* note 1, at 125, 130, 131.

<sup>49</sup> See William E. Nelson, *The Utopian Legal Order of the Massachusetts Bay Colony, 1630-1686*, 47 AM. J. LEGAL HIST. 183, 206–07 (2005).

<sup>50</sup> See *id.* at 206; see also Mark D. McGarvie, *Disestablishing Religion and Protecting Religious Liberty in State Laws and Constitutions (1776-1833)*, in NO ESTABLISHMENT OF RELIGION, *supra* note 1, at 70, 74 (“Laws enforcing religious conformity . . . continued to be passed and enforced well into the eighteenth century.”).

<sup>51</sup> See McConnell, *supra* note 45, at 48–49.

Michael McConnell argues:

[These two types of establishments] were profoundly different in spirit: The New England establishments were based on the intense religious convictions of the people in the teeth of opposition from the mother country, whereas the Anglican establishments enjoyed the support of the mother country and were designed in part to foster loyalty and submission to governmental authorities.<sup>52</sup>

Despite these differences, McConnell also notes that Puritan and Anglican establishments were “equally coercive” during the early colonial era.<sup>53</sup> Common elements included compelled attendance at established religious services; financial support for ministers through taxation and land grants; limitations or prohibitions on worship by dissenters and Catholics; governmental control over doctrine and clergy; and limitations on political participation by non-members of the established religion.<sup>54</sup>

Many of the colonial establishments became less coercive and more tolerant over time. With respect to funding, for example, compulsory tax support for a single church was either abandoned or replaced by a non-preferential system in most colonies by the late 1700s.<sup>55</sup> John Adams described the Massachusetts system—which combined an arguably non-coercive establishment with rights of free exercise—as “the most mild and equitable establishment of religion that was known in the world.”<sup>56</sup> But notwithstanding these movements toward greater religious liberty, it is important to note that some form of religious establishment existed in as many as eleven of the original thirteen colonies on the eve of the American Revolution.<sup>57</sup>

---

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 48.

<sup>54</sup> See *id.* at 49–51, 54; see also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 379–81 (2002) (summarizing features of colonial establishments).

<sup>55</sup> See Feldman, *supra* note 54, at 379, 383; Mark V. Tushnet, *The Origins of the Establishment Clause*, 75 GEO. L.J. 1509, 1511–13 (1987) (reviewing THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986); and WILLIAM LEE MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* (1986)).

<sup>56</sup> MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 17 (3d ed. 2011) (quoting Adams and discussing Massachusetts Constitution of 1780).

<sup>57</sup> See McConnell, *supra* note 45, at 45; McGarvie, *supra* note 50, at 70. Michael McConnell counts nine colonies that had establishments, while Mark McGarvie has the tally at eleven. See McConnell, *supra* note 45, at 45; McGarvie, *supra* note 50, at 70. McGarvie attributes much of the disagreement over numbers to the question of whether only those

Moreover, established religions continued to persist in approximately half of the states when the First Amendment was adopted.<sup>58</sup> As McConnell has argued: “Contrary to popular myth, the First Amendment did not disestablish anything. It prevented the newly formed federal government from establishing religion and from interfering in the religious establishments of the states.”<sup>59</sup> Instead, formal disestablishment proceeded on a state-by-state basis over the course of many decades and did not conclude until Massachusetts abandoned its establishment system in 1833.<sup>60</sup> It was not until a century later in *Everson v. Board of Education* that the First Amendment was applied to the states,<sup>61</sup> thereby prohibiting them not only from establishing an official church but also from enacting laws “respecting an establishment.”<sup>62</sup> In the years since *Everson*, the United States Supreme Court has applied the Establishment Clause in a wide range of contexts, several of which are discussed below.

And what has happened in Britain during the course of America’s evolving approach to religious establishments? The British approach to religious liberty has likewise changed over time. During the era of the American Revolution and the drafting of the U.S. Constitution, Parliament passed the Papists Act of 1778<sup>63</sup> and the Roman Catholic Relief Act of 1791<sup>64</sup> to remove some of the legal disabilities that had previously been imposed on Catholics in

---

colonies with colony-wide (as opposed to county-by-county) establishments should be included. See McGarvie, *supra* note 50, at 94 n.1.

<sup>58</sup> See McConnell, *supra* note 45, at 45.

<sup>59</sup> *Id.* at 46.

<sup>60</sup> See McGarvie, *supra* note 50, at 94.

<sup>61</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947); *supra* note 6 and accompanying text. Although the applicability of the Establishment Clause to state and local governments is now well-settled as a matter of constitutional law, it is not without its critics. Justice Thomas, for example, has argued: “The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring). See also KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 26–39 (2008) (providing further discussion of the Establishment Clause, federalism, and incorporation).

<sup>62</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“[The authors of the Religion Clauses] did not simply prohibit the establishment of a state church or state religion . . . . Instead, they commanded that there should be ‘no law respecting an establishment of religion.’ A law may be one ‘respecting’ the forbidden objective while falling short of its total realization.” (quoting U.S. CONST. amend. I)).

<sup>63</sup> Papists Act 1778, 18 Geo. 3 c. 60 (Eng.).

<sup>64</sup> Roman Catholic Relief Act 1791, 31 Geo. 3 c. 32 (Eng.).



Britain.<sup>65</sup> These acts were followed by the Roman Catholic Relief Act of 1829,<sup>66</sup> which allowed non-members of the Church of England to sit in Parliament.<sup>67</sup> Finally, the Religious Disabilities Act of 1846<sup>68</sup> abolished remaining legal restrictions on Catholics, Protestant dissenters, and Jews.<sup>69</sup> Since then, “British citizens of all denominations have enjoyed religious freedom rivaling that of the United States.”<sup>70</sup>

With respect to establishment as such, the Church of England was disestablished in Ireland in 1869 and in Wales in 1914.<sup>71</sup> In Scotland, the national church has long been distinct from the Church of England and has been free of parliamentary control in spiritual matters since 1921.<sup>72</sup> Hence, the Church of England has been established only in England itself for nearly a hundred years.<sup>73</sup> This limited scope of established status still involves certain privileges: only members of the Church of England may succeed to the British throne;<sup>74</sup> twenty-six senior bishops of the Church of England are automatically entitled to sit in the House of Lords;<sup>75</sup> and clergy of the Church of England alone attend to coronations and serve as chaplains to the House of Commons.<sup>76</sup> However, established status brings surprisingly little in the way of direct financial support. The Church of England itself reports that approximately three-quarters of its current income derives from contributions from worshippers, with most of the remainder coming from investments and fees.<sup>77</sup>

---

<sup>65</sup> See MCCONNELL ET AL., *supra* note 56, at 88 (discussing Papists and Roman Catholic Relief Acts).

<sup>66</sup> Roman Catholic Relief Act 1829, 10 Geo. 4 c. 7 (Eng.).

<sup>67</sup> See *id.*; see also O'HALLORAN, *supra* note 24, at 73 (discussing the relaxation of religious standards for participation in Parliamentary elections); Torke, *supra* note 8, at 409 (discussing the Act and noting that by 1906, a majority of members of Parliament were from outside the Church of England).

<sup>68</sup> Religious Disabilities Act 1846, 9 & 10 Vict. c. 59 (Eng.).

<sup>69</sup> See MCCONNELL ET AL., *supra* note 56, at 88; Torke, *supra* note 8, at 409.

<sup>70</sup> MCCONNELL ET AL., *supra* note 56, at 88.

<sup>71</sup> See Iain McLean & Scot M. Peterson, *Secularity and Secularism in the United Kingdom: On the Way to the First Amendment*, 2011 B.Y.U. L. REV. 637, 648, 649.

<sup>72</sup> Church of Scotland Act 1921, 11 & 12 Geo. 5 c. 29 (Eng.); see McLean & Peterson, *supra* note 71, at 649; Torke, *supra* note 8, at 416 n.59.

<sup>73</sup> See McLean & Peterson, *supra* note 71, at 649.

<sup>74</sup> See O'HALLORAN, *supra* note 24, at 87. However, the British monarch is no longer prohibited from marrying a Roman Catholic thanks to recent parliamentary action. See Succession to the Crown Act 2013, c. 20, § 2 (UK).

<sup>75</sup> See Torke, *supra* note 8, at 412.

<sup>76</sup> O'HALLORAN, *supra* note 24, at 87–88.

<sup>77</sup> See *Funding the Church of England*, CHURCH ENG., <https://www.churchofengland.org/about-us/funding.aspx> (last visited Feb. 7, 2017); see also Torke, *supra* note 8, at 420, 421 (reviewing sources of Church revenue and noting that the Church receives “minimal state

The foregoing review of the history of establishments in Britain and the United States has highlighted some important differences and similarities. In New England, while many Protestant dissenters undoubtedly wished to escape from the oppressive nature of the English establishment of the 1600s, they did not come to the new world to create a land of religious liberty. Rather, they set up their own religious establishments and offered little toleration to non-conformists and conscientious objectors. In the southern colonies, the Anglican Church was established and retained a number of the coercive elements that were part of religious life in the mother country. These establishments survived the ratification of the First Amendment, albeit in a generally milder and more tolerant form. The last state establishment did not end until the 1830s, and the Establishment Clause was not applied to the states until the 1940s. In Britain, establishment likewise became less extensive and less coercive over time. Parliament gradually eliminated legal discrimination against non-members of the established faith during the 1800s, and the Church of England had been disestablished altogether in Ireland, Wales, and Scotland by the 1920s. However, the Church continues to be established in England itself and to enjoy certain privileges not afforded to other religions. The next section will consider the extent to which these approaches to establishment have resulted in separation of church and state in American and British public life today.

### III. ESTABLISHMENTS AND SEPARATION OF CHURCH AND STATE

“Separation of church and state” is often used as a shorthand expression for religious liberty.<sup>78</sup> The phrase does not appear in the Constitution, but was famously used by Thomas Jefferson to describe the effects of the First Amendment’s Free Exercise and Establishment clauses.<sup>79</sup> The meaning of “separation” in the American constitutional tradition is debatable. Philip Hamburger has suggested that its primary meaning has often been associated with hostility to religion in general and toward Catholicism in

---

funds”).

<sup>78</sup> See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 6 (2007) (“[M]ost Americans seem to accept ‘separation of church and state’ as shorthand for the appropriate constitutional treatment of religion . . . .”); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 (2002) (“[S]eparation between church and state[]’ provides the label with which vast numbers of Americans refer to their religious freedom.”).

<sup>79</sup> See Letter from Thomas Jefferson, *supra* note 1.

particular,<sup>80</sup> while Douglas Laycock, Kent Greenawalt, and others have raised questions about Hamburger's analysis.<sup>81</sup> It is not necessary to settle on a single or precise definition for purposes of this article. Rather, it will suffice to note that the term is broad enough to include such elements as institutional separation between churches and governments;<sup>82</sup> influence of government on religion and vice versa;<sup>83</sup> and equality of citizens without regard to religious affiliation or belief.<sup>84</sup> The following discussion of separation proceeds with these elements in mind.

Beginning at the level of institutional autonomy, there is clearly much more separation of church and state in the United States than there is in the United Kingdom. Consider the issue of selection of clergy and other ministers. Just recently, in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*, the U.S. Supreme Court held that religious groups are immune from suit under employment discrimination laws insofar as they cannot be compelled to hire or retain an unwanted minister.<sup>85</sup> The Court cited both Religion Clauses in support of its opinion: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."<sup>86</sup> The Court also cited English history, noting that disputes over royal appointment of bishops were part of the backdrop against which the Religion Clauses were drafted: "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical

---

<sup>80</sup> See HAMBURGER, *supra* note 78, *passim*.

<sup>81</sup> See generally T. Jeremy Gunn, *The Separation of Church and State Versus Religion in the Public Square: The Contested History of the Establishment Clause*, in NO ESTABLISHMENT OF RELIGION, *supra* note 1, at 15, 26–27, 30–32, 34, 38 (critiquing and discussing Hamburger's analysis of separation of church and state); Kent Greenawalt, *History as Ideology: Philip Hamburger's Separation of Church and State*, 93 CALIF. L. REV. 367, 373–75 (2005) (book review) (critiquing and discussing same); Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1669–70, 1686–87 (2003) (reviewing PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002)) (critiquing and discussing same).

<sup>82</sup> See Laycock, *supra* note 81, at 1673–74 (discussing John Locke's arguments in favor of institutional separation of church and state and their connections to religious liberty).

<sup>83</sup> See Greenawalt, *supra* note 81, at 373–74 ("Separation involves a disconnection between the activities of religion and government.").

<sup>84</sup> See NUSSBAUM, *supra* note 47, at 11–12 ("Insofar as it is a good, defensible value, the separation of church and state is, fundamentally, about equality . . .").

<sup>85</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 565 U.S. 171, 188–89, 196 (2012).

<sup>86</sup> *Id.* at 184.

offices.”<sup>87</sup> *Hosanna-Tabor* and other cases dealing with questions of church autonomy have led some scholars to argue that “freedom of the church” is (or ought to be) an important part of First Amendment jurisprudence.<sup>88</sup>

The Church of England enjoys comparatively less freedom with respect to its clergy. The Prime Minister (“PM”) still plays a role in the selection of bishops and forwards names to the Crown for appointment,<sup>89</sup> and members of Parliament have occasionally voiced disapproval on matters relating to the episcopacy. In 2012, for example, the Church narrowly rejected a measure that would have allowed for the appointment of female bishops.<sup>90</sup> PM David Cameron promptly and publicly urged the Church to “get on with it” and reverse its decision, though he did not indicate that direct intervention by the government would be forthcoming.<sup>91</sup> However, at least one Member of Parliament did raise the possibility of introducing legislation that would require the Church to comply with gender equality laws.<sup>92</sup> The Church changed course and consecrated its first female bishop in January 2015.<sup>93</sup>

Parliament also retains some level of authority over liturgical matters, though this authority appears to be rarely used and of limited practical impact. In the 1920s, for instance, the Church of England sought to revise the *Book of Common Prayer*, only to see the proposed revisions rejected by the House of Commons.<sup>94</sup> Various liturgical modifications were nevertheless used within the Church, notwithstanding the absence of formal parliamentary approval.<sup>95</sup> Subsequently, in 1974, Parliament allowed for the adoption of a measure granting broad authority to the Church’s

---

<sup>87</sup> *Id.*

<sup>88</sup> See, e.g., Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 293–94 (2008); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 84–91 (2009); John D. Inazu, *The Freedom of the Church in the Modern Era*, 21 J. CONTEMP. LEGAL ISSUES 335, 336–38 (2013); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 918–21 (2013).

<sup>89</sup> See O’HALLORAN, *supra* note 24, at 88; Torke, *supra* note 8, at 415–16.

<sup>90</sup> See *Women Bishops: Church of England General Synod Votes Against*, BBC NEWS (Nov. 21, 2012), <http://www.bbc.com/news/uk-20415689>.

<sup>91</sup> See Patrick Wintour et al., *David Cameron: Church of England Should ‘Get on with It’ on Female Bishops*, GUARDIAN (Nov. 21, 2012), <https://www.theguardian.com/world/2012/nov/21/david-cameron-church-female-bishops>.

<sup>92</sup> See *id.*

<sup>93</sup> See *Libby Lane: First Female Church of England Bishop Consecrated*, BBC NEWS (Jan. 26, 2015), <http://www.bbc.com/news/uk-politics-30974547>.

<sup>94</sup> See Torke, *supra* note 8, at 414.

<sup>95</sup> See *id.* at 414–15.

General Synod over forms of worship.<sup>96</sup>

Thus, with respect to institutional autonomy and government influence on religion, religious groups benefit from a greater degree of separation of church and state in America than they do in Britain. But what about influence in the opposite direction—i.e., religious influence on government and public life? A number of recent happenings suggest that under this rubric of analysis, the line of separation is not necessarily brighter on this side of the Atlantic.

The role of religion in political campaigns provides an instructive example. In the United States, religious self-identification appears to be a de facto requirement for major political office. Potential candidates for the 2016 Republican presidential nomination began to reach out to evangelical pastors in Iowa well in advance of the first primaries and caucuses, seeking the crucial votes that such religious leaders are thought to be able to help turn out.<sup>97</sup> Several candidates incorporated explicitly religious themes in their rhetoric. Senator Ted Cruz was quoted as claiming that “we have seen religious liberty under assault at an unprecedented level,” while former Governor Mike Huckabee reportedly argued that “we are moving rapidly toward the criminalization of Christianity.”<sup>98</sup> In one debate in which a moderator noted that Senator Marco Rubio had been called “the Republican savior,” Rubio responded: “[T]here’s only one savior and it’s not me. It’s Jesus Christ who came down to earth and died for our sins.”<sup>99</sup> And while President Trump’s candidacy was met with mixed reactions among some evangelical voters,<sup>100</sup> he cited the Bible as his favorite book<sup>101</sup> and highlighted

---

<sup>96</sup> See *Church of England (Worship and Doctrine) Measure 1974*, CHURCH SOC’Y, [http://churchsociety.org/issues\\_new/church/legal/iss\\_church\\_legal\\_worshipdoctrine1974.asp](http://churchsociety.org/issues_new/church/legal/iss_church_legal_worshipdoctrine1974.asp) (last visited Jan. 8, 2017); see also Torke, *supra* note 8, at 415 (discussing the measure).

<sup>97</sup> See Associated Press, *Iowa Pastors Hold Sway in 2016 Presidential Election*, PBS NEWSHOUR (Apr. 5, 2015), <http://www.pbs.org/newhour/rundown/iowa-pastors-hold-sway-2016-presidential-election/>.

<sup>98</sup> See Luciana Lopez, *Republican Presidential Contenders Woo Evangelical Voters*, REUTERS (Apr. 26, 2015), <http://www.reuters.com/article/us-usa-election-faith-id-USKBN0NH0Y820150426>.

<sup>99</sup> See *Transcript of the Main Republican Presidential Debate*, N.Y. TIMES (Jan. 28, 2016), <http://www.nytimes.com/2016/01/29/us/politics/republican-presidential-debate-transcript.html>.

<sup>100</sup> See Laurie Goodstein, *Torn Over Donald Trump and Cut Off by Culture Wars, Evangelicals Despair*, N.Y. TIMES (Sept. 29, 2016), <http://www.nytimes.com/2016/09/30/us/donald-trump-christians-gay-marriage.html>; Jonathan Martin & Alexander Burns, *Abortion and Gay Marriage are Absent from Donald Trump’s Appeal to Evangelicals*, N.Y. TIMES (Sept. 9, 2016), <http://www.nytimes.com/2016/09/10/us/politics/trump-pence-values-voter-summit.html>.

<sup>101</sup> See Eugene Scott, *Trump Says Bible Is His Favorite Book, but Declines to Share*

the support he received from other conservative Christian groups.<sup>102</sup> Some Republican candidates also reportedly declined to respond to questions about subjects like evolution—perhaps out of a desire to avoid alienating religious supporters.<sup>103</sup>

Democratic candidate Hillary Clinton's religious faith was likewise highlighted in a number of articles, speeches, and interviews.<sup>104</sup> During her own campaign appearances, Clinton spoke about her Methodist faith and made reference to the Sermon on the Mount and other religious themes in conversations with potential voters.<sup>105</sup> Leaked emails from the Democratic National Committee indicated that some officials agreed that religious considerations could have had an impact in the primary election season.<sup>106</sup> In a message that many commentators interpreted as implicitly referring to Senator Bernie Sanders, one official wrote: “[C]an we get someone to ask his belief. Does he believe in a God . . . I think I read he is an atheist. This could make several points difference with my peeps.”<sup>107</sup> Such emphasis on religious belief would seem to make sound political sense: no atheist has ever been elected president thus far.<sup>108</sup> Indeed, a recent Gallup poll indicated that only fifty-four percent of Americans would vote for a

---

*Favorite Verse*, CNN (Aug. 27, 2015), <http://www.cnn.com/2015/08/27/politics/donald-trump-favorite-bible-verses/>.

<sup>102</sup> See Jeremy Diamond, *Trump Jokes: 'Raise Your Hand if You're Not a Christian Conservative'*, CNN (Sept. 29, 2016), <http://www.cnn.com/2016/09/28/politics/donald-trump-evangelicals/index.html>.

<sup>103</sup> See Mark Oppenheimer, *Conservative Politicians Abroad Seem More Accepting of Evolution*, N.Y. TIMES (Feb. 13, 2015), <http://www.nytimes.com/2015/02/14/us/conservative-christians-abroad-seem-more-accepting-of-evolution.html>.

<sup>104</sup> See Elizabeth Dias, *Hillary Clinton: Anchored by Faith*, TIME (June 27, 2014), <http://time.com/2927925/hillary-clintons-religion/>; Cathy Lynn Grossman, *5 Faith Facts about Hillary Clinton, Social Gospel Methodist to the Core*, WASH. POST (Apr. 10, 2015), [http://www.washingtonpost.com/national/religion/5-faith-facts-about-hillary-clinton-social-gospel-methodist-to-the-core/2015/04/10/ae430c46-dfb9-11e4-b6d7-b9bc8acf16f7\\_story.html](http://www.washingtonpost.com/national/religion/5-faith-facts-about-hillary-clinton-social-gospel-methodist-to-the-core/2015/04/10/ae430c46-dfb9-11e4-b6d7-b9bc8acf16f7_story.html); Katie Zezima, *Hillary Clinton Is Talking about Her Faith. Again.*, WASH. POST (Apr. 26, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/26/has-hillary-clinton-again-started-to-talk-about-her-faith/>.

<sup>105</sup> See Amy Chozick, *Some in Iowa Surprised by Hillary Clinton's Ease with Faith*, N.Y. TIMES (Jan. 29, 2016), <http://www.nytimes.com/2016/01/30/us/politics/some-in-iowa-surprised-by-hillary-clintons-ease-with-faith.html>.

<sup>106</sup> See Michael D. Shear & Matthew Rosenberg, *Released Emails Suggest the D.N.C. Derided the Sanders Campaign*, N.Y. TIMES (July 22, 2016), <http://www.nytimes.com/2016/07/23/us/politics/dnc-emails-sanders-clinton.html>.

<sup>107</sup> *Id.* The email did not mention Sanders by name, and the author of the message was quoted as saying that it had probably been in reference to “a surrogate.” *See id.*

<sup>108</sup> See Gary Scott Smith, *Americans Are Deeply Religious, So Will We Ever See an Atheist President? Here's What We Know*, WASH. POST (Mar. 23, 2015), <http://www.washingtonpost.com/news/acts-of-faith/wp/2015/03/23/americans-are-deeply-religious-so-will-we-ever-see-an-atheist-president-heres-what-we-know/>.

“generally well-qualified” atheist candidate for president—compared to fifty-eight percent who would vote for a Muslim candidate, sixty-eight percent who would vote for a gay or lesbian candidate, and ninety-five percent who would vote for a female candidate.<sup>109</sup>

Nor is the importance of religious self-identification limited to presidential candidates. Atheists are nominally barred from holding office under the laws of several states,<sup>110</sup> and there are currently no declared atheists serving in either house of Congress (though it has been reported that some two dozen members have privately acknowledged their lack of religious beliefs).<sup>111</sup> Former U.S. Representative Barney Frank, who in 1987 became the first member of Congress to openly identify as gay, has now described himself as a non-theist—but he did not do so until after leaving elected office.<sup>112</sup> Former Representative Pete Stark therefore appears to have been the only member of Congress ever to serve openly as an atheist.<sup>113</sup> Religious considerations even seem to apply to Supreme Court nominees, with one recent poll indicating that a mere forty percent of Americans would support the president nominating an atheist to the high court.<sup>114</sup>

Openly-secular politicians have been more common and have

<sup>109</sup> Jeffrey M. Jones, *Atheists, Muslims See Most Bias as Presidential Candidates*, GALLUP (June 21, 2012), <http://www.gallup.com/poll/155285/atheists-muslims-bias-presidential-candidates.aspx>.

<sup>110</sup> See Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 357–58 (2012) (citing state law provisions). Such barriers to office have been held unconstitutional under the Establishment Clause, and presumably violate the Religious Test Clause as well. See *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961) (holding a state law that required office holders to declare belief in the existence of God unenforceable under the Establishment Clause but declining to reach the Religious Test Clause issue).

<sup>111</sup> See Brian Pellot, *Atheist Politicians May Run the UK, but they Remain Closeted in the U.S.*, WASH. POST (Aug. 22, 2014), [http://www.washingtonpost.com/national/religion/atheist-politicians-may-run-the-uk-but-they-remain-closeted-in-the-us/2014/08/22/bf147a3a-2a12-11e4-8b10-7db129976abb\\_story.html](http://www.washingtonpost.com/national/religion/atheist-politicians-may-run-the-uk-but-they-remain-closeted-in-the-us/2014/08/22/bf147a3a-2a12-11e4-8b10-7db129976abb_story.html).

<sup>112</sup> See Shadee Ashtari, *Barney Frank Explains Why He Hid His Atheism*, HUFFINGTON POST (June 9, 2014), [http://www.huffingtonpost.com/2014/06/09/barney-frank-atheism\\_n\\_5475596.html](http://www.huffingtonpost.com/2014/06/09/barney-frank-atheism_n_5475596.html).

<sup>113</sup> See *id.*; Pellot, *supra* note 111.

<sup>114</sup> Katie Jagel, *Poll Results: Religion*, YOUGOV (Nov. 11, 2013), <https://today.yougov.com/news/2013/11/11/poll-results-religion/>. The religious makeup of the Supreme Court was also the subject of considerable discussion after Justice Samuel Alito’s confirmation in 2006, whereupon the Court had a Roman Catholic majority for the first time. See, e.g., Matthew J. Franck, *The Unbearable Unimportance of the Catholic Moment in Supreme Court History*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 447, 447 (2006); Sheldon Goldman, *Why We Have a Catholic-Majority Court: The Politics of Appointing Catholics to the Federal Courts*, 4 U. ST. THOMAS L.J. 193, 193 (2006); René Reyes, *The Supreme Court’s Catholic Majority: Doctrine, Discretion, and Judicial Decision-Making*, 85 ST. JOHN’S L. REV. 649, 649 (2011).

fares much better in the UK. Among candidates in the 2015 British Parliamentary elections, Labour leader Ed Miliband and Liberal Democratic leader Nick Clegg both described themselves as non-believers or non-religious.<sup>115</sup> Clegg served as Deputy Prime Minister after openly acknowledging his lack of belief in God, and the British Humanist Association has reportedly asserted that at least four other non-believers served as PM during the twentieth century.<sup>116</sup> The Association further notes that there are more than one hundred members of the All Party Parliamentary Humanist Group.<sup>117</sup>

British politicians also appear to feel less of a need to avoid taking a position on issues that may be controversial for religious conservatives in America. With respect to questions about evolution, for instance, Justin Webb of the BBC has remarked that “[a]ny British politician, right or left wing, would laugh and say, ‘Yes, of course evolution is true.’”<sup>118</sup> Moreover, even among politicians who are religious, public invocations of religious language are less common and apparently less politically palatable in Britain than in America. Former PM Tony Blair did not hide his personal faith while in office, but his director of communications is reported to have once interrupted a question about Blair’s religious beliefs by saying: “I’m sorry, we don’t do God.”<sup>119</sup> Blair also is said to have considered the possibility of concluding a speech with the phrase “God bless Great Britain,” but was dissuaded by staffers who advised him: “This isn’t America.”<sup>120</sup> And when PM David Cameron referred to Britain as a “Christian country” in 2014, a group of some fifty public figures published a letter disputing the characterization and arguing that Cameron’s statement “foster[ed] alienation and division in our society.”<sup>121</sup> The potential divisiveness of religion in British public life is apparently so great that several cinema chains

---

<sup>115</sup> See Brian Wheeler, *Politicians, Pulpits and God*, BBC NEWS (Apr. 22, 2014), <http://www.bbc.com/news/uk-politics-27112774>.

<sup>116</sup> See Pellot, *supra* note 111.

<sup>117</sup> See *Humanists in Parliament*, BRITISH HUMANIST ASS’N, <https://humanism.org.uk/about/humanists-in-parliament/> (last visited Jan. 9, 2017).

<sup>118</sup> Oppenheimer, *supra* note 103.

<sup>119</sup> See Colin Brown, *Campbell Interrupted Blair as He Spoke of His Faith: “We Don’t Do God,”* TELEGRAPH (May 4, 2003), <http://www.telegraph.co.uk/news/uknews/1429109/Campbell-interrupted-Blair-as-he-spoke-of-his-faith-We-dont-do-God.html>.

<sup>120</sup> Pellot, *supra* note 111; see Tim Ross, *Tony Blair Wanted to End Speech with: “God Bless Britain,”* TELEGRAPH (May 14, 2012), <http://www.telegraph.co.uk/news/politics/tony-blair/9265571/Tony-Blair-wanted-to-end-speech-with-God-bless-Britain.html>.

<sup>121</sup> Letter from Jim Al-Khalil et al., to Editor, Telegraph (Apr. 20, 2014), <http://www.telegraph.co.uk/comment/letters/10777417/David-Cameron-fosters-division-by-calling-Britain-a-Christian-country.html>.



refused to air an advertisement by the Church of England featuring the Lord's Prayer during the opening weekend of the new Star Wars film, "citing fears that it could offend people."<sup>122</sup>

Different levels of influence of religion in American and British public life can also be seen in debates over same-sex marriage. The U.S. Supreme Court recognized a constitutional right to same-sex marriage in *Obergefell v. Hodges*,<sup>123</sup> but opposition has been strong among many religious voters. A 2015 Pew Research Center poll found that while a majority of Catholics and white mainline Protestants were in favor of same-sex marriage, only twenty-seven percent of white evangelical Protestants were in support of the practice.<sup>124</sup> In states with high concentrations of such voters, some of the immediate reactions to *Obergefell* were hardly welcoming. Texas Governor Greg Abbott issued a press release criticizing the Court's decision and indicating that he would "continue to defend the religious liberties of all Texans—including those whose conscience dictates that marriage is only the union of one man and one woman."<sup>125</sup> Later, Abbot issued a memorandum to state agency heads, warning that:

[T]he law's promise of religious liberty will be tested by some who seek to silence and marginalize those whose conscience will not allow them to participate in or endorse marriages that are incompatible with their religious beliefs. As government officials, we have a constitutional duty to preserve, protect, and defend the religious liberty of every Texan.<sup>126</sup>

For her part, one county clerk in Kentucky was jailed for several days after refusing on religious grounds to comply with a federal court order to issue marriage licenses to same-sex couples.<sup>127</sup>

---

<sup>122</sup> Haroon Siddique & Harriet Sherwood, *Cinemas Refuse to Show Church of England Advert Featuring Lord's Prayer*, GUARDIAN (Nov. 22, 2015), <http://www.theguardian.com/world/2015/nov/22/cinema-chains-ban-advert-featuring-lords-prayer>.

<sup>123</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

<sup>124</sup> *Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed*, PEW RES. CTR. (June 8, 2015), <http://www.people-press.org/2015/06/08/support-for-same-sex-marriage-at-record-high-but-key-segments-remain-opposed/>.

<sup>125</sup> Press Release, Office of Governor Greg Abbott, Governor Abbot Statement on Supreme Court Ruling on Same-Sex Marriage (June 26, 2015), <http://gov.texas.gov/news/press-release/21131>.

<sup>126</sup> Memorandum from Greg Abbott, Tex. Governor, to All State Agency Heads (June 26, 2015), [http://gov.texas.gov/files/press-office/State\\_AgencyHeads\\_SCOTUS\\_Rulin\\_0626\\_2015.pdf](http://gov.texas.gov/files/press-office/State_AgencyHeads_SCOTUS_Rulin_0626_2015.pdf).

<sup>127</sup> See Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), <http://www.nyti.ms/1N5FxTk>. The clerk claimed a religious objection to same-sex marriage and adopted a policy of not issuing marriage licenses

But in Britain, religious resistance appears to have had a much smaller effect on recognition of same-sex unions. Parliament voted to legalize same-sex civil partnerships throughout the UK in 2004<sup>128</sup> and to legalize same-sex marriage in England and Wales in 2013.<sup>129</sup> This legalization of same-sex marriage took place under a Conservative-led government, with PM David Cameron expressing pride over its passage.<sup>130</sup> Notably, this legalization also took place over the objections of the established Church of England. While the issue was being considered, the Church issued a statement indicating that it could not “support the proposal to enable ‘all couples, regardless of their gender, to have a civil marriage ceremony,’” and arguing that “[s]uch a move would alter the intrinsic nature of marriage as the union of a man and a woman, as enshrined in human institutions throughout history.”<sup>131</sup> The Archbishop of Canterbury expressed his reservations about the legalization act in the House of Lords and voted against it.<sup>132</sup> Nevertheless, the act ultimately passed by large margins.<sup>133</sup>

Somewhat surprisingly, the lack of an Establishment Clause in Britain may also occasionally lead to more freedom for those who hold conscientious convictions that are not religious in nature. For

---

to any couples (same-sex or opposite-sex) in order “to avoid issuing licenses to same-sex couples without discriminating against them.” *Miller v. Davis*, 123 F. Supp. 3d 924, 929, 944 (E.D. Ky. 2015) (granting an injunction preventing the clerk from enforcing such a policy and concluding that religious beliefs do not excuse a person from carrying through with his or her oath to perform duties as County Clerk).

<sup>128</sup> See Civil Partnership Act 2004, c. 33, § 1 (UK).

<sup>129</sup> See Marriage (Same Sex Couples) Act 2013, c. 30, § 1 (Eng. & Wales). The Scottish Parliament voted separately to legalize same-sex marriage in Scotland in 2014. See Marriage and Civil Partnership (Scotland) Act 2014, (ASP 5) §§ 4–6.

<sup>130</sup> See *Gay Marriage: I’m Proud Same-Sex Love to Be Equal—PM*, BBC NEWS (Feb. 6, 2013), <http://www.bbc.com/news/uk-politics-21347719> [hereinafter *Gay Marriage*]. Although the Conservatives held the most seats in the Parliament that legalized same-sex marriage, they did not hold an outright majority and were in a coalition government with the Liberal Democrats. See *Election 2010: Q&A: The Conservative-Lib Dem Coalition*, BBC NEWS, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/election\\_2010/8675848.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/election_2010/8675848.stm) (explaining the details of the coalition).

<sup>131</sup> Press Release, Church of Eng., A Response to the Government Equalities Office Consultation—“Equal Civil Marriage,” <https://www.churchofengland.org/media/1475149/s-s%20marriage.pdf> (last visited Jan. 11, 2017).

<sup>132</sup> See 745 Parl Deb HL (5th ser.) (2013) col. 954 (UK); see also John Bingham, *Archbishop of Canterbury Justin Welby Says Gay Marriage Is “Great,”* TELEGRAPH (May 14, 2014), <http://www.telegraph.co.uk/news/religion/10828762/Archbishop-of-Canterbury-Justin-Welby-says-gay-marriage-is-great.html> (reporting that Welby voted against the act but accepted legality of same-sex marriage).

<sup>133</sup> See *Gay Marriage*, *supra* note 130 (indicating that the bill passed second reading in the House of Commons by a vote of 400 to 175); *Gay Marriage Bill: Peers Back Government Plans*, BBC NEWS (June 5, 2013), <http://www.bbc.com/news/uk-politics-22764954> (indicating that the bill was supported in the House of Lords by a vote of 390 to 148).

the First Amendment contains but a single reference to religion: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>134</sup> The word “religion,” then, “governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid ‘an establishment’ and another, much broader, for securing ‘the free exercise thereof.’”<sup>135</sup> The Supreme Court has accordingly held that the Free Exercise Clause applies only to religious beliefs; secular moral convictions are not included.<sup>136</sup> Otherwise, the Establishment Clause might also have to be read to prohibit government from making laws “respecting” various secular moral commitments.<sup>137</sup>

In the absence of an analogue to the Establishment Clause under British law, courts in the United Kingdom may be able to give a broader definition to “religion” than courts in the United States typically have done. The case of *Grainger PLC v. Nicholson*<sup>138</sup> demonstrates the possibilities. *Grainger* involved a challenge brought under UK employment regulations that protected against discrimination on the basis of religious or philosophical belief.<sup>139</sup> The claimant alleged that he had been dismissed from his job because of his beliefs about climate change and the environment.<sup>140</sup> The appellate judge allowed the claim to proceed, and in so doing

<sup>134</sup> U.S. CONST. amend. I.

<sup>135</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting); see also MCCONNELL ET AL., *supra* note 56, at 761–804 (discussing the challenge of defining “religion” for constitutional purposes); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1183, 1179–88 (2d ed. 1988) (discussing the same).

<sup>136</sup> See, e.g., *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 833 (1989) (“Purely secular views do not suffice [under the Free Exercise Clause; courts must therefore distinguish] between religious and secular convictions . . .” (citations omitted)); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 713 (1981) (“Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.” (citations omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”); see also René Reyes, *Common Cause in the Culture Wars?*, 27 J.L. & RELIG. 231 (2012) (providing arguments in favor of extending Free Exercise protections to all claims of conscience—religious and secular alike); René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725 (2011) (discussing the same).

<sup>137</sup> See, e.g., MCCONNELL ET AL., *supra* note 56, at 800 (“To a certain extent, the degree of protection we get from the First Amendment depends on the text, rather than the other way around. . . . [T]he text forces us to use the word ‘religion’ consistently in free exercise and establishment cases regardless of what we might want.”).

<sup>138</sup> *Grainger PLC et al. v. Nicholson* [2009] EAT 219 (UK), [http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UK/EAT/2009/0219\\_09\\_0311.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UK/EAT/2009/0219_09_0311.html).

<sup>139</sup> See *id.* ¶ 9.

<sup>140</sup> See *id.* ¶ 2.

suggested that non-religious beliefs are entitled to protection insofar as they are “genuinely held;” not merely “based on the present state of information available;” applicable to “a weighty and substantial aspect of human life and behaviour;” have a “certain level of cogency, seriousness, cohesion and importance;” and are “worthy of respect in a democratic society” and “not incompatible with human dignity . . . .”<sup>141</sup> Beliefs based in political philosophy, such as socialism or free-market capitalism, might qualify under these criteria, as might beliefs based in science, such as Darwinism.<sup>142</sup>

*Grainger* is but a single case dealing with a single set of regulations, but it stands in illustrative contrast with the preferential treatment that is often given to religious beliefs over secular ones under the First Amendment and other areas of American law.<sup>143</sup> Even statutory provisions tend to favor religion: the Religious Freedom Restoration Act (“RFRA”)<sup>144</sup> and its state counterparts generally speak in terms of religious exercise and religious liberty rather than moral or philosophical beliefs.<sup>145</sup> Title VII of the Civil Rights Act of 1964<sup>146</sup> prohibits religious discrimination in employment, and the Equal Employment Opportunity Commission (“EEOC”) has stated that it will “define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”<sup>147</sup> However, this interpretation is not as broad as the one articulated in *Grainger*—for the EEOC has clarified that “[s]ocial, political, or economic philosophies . . . are not ‘religious’ beliefs protected by Title VII.”<sup>148</sup>

<sup>141</sup> *Id.* ¶ 24.

<sup>142</sup> *See id.* ¶¶ 28, 30.

<sup>143</sup> The Vietnam era military draft cases represent an important exception to this tendency to preference religious beliefs over non-religious ones. There, the Supreme Court adopted an expansive reading of the federal draft statute to include non-theistic conscientious objectors, despite the fact that the statute on its face applied only to those whose objections arose from “religious training and belief,” defined as “belief in a relation to a Supreme Being.” *See United States v. Seeger*, 380 U.S. 163, 165–66 (1965) (affirming an exemption for an individual who professed religious belief but declined to affirm belief in the existence of a “Supreme Being”); *see also Welsh v. United States*, 398 U.S. 333, 344 (1970) (“That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.”).

<sup>144</sup> Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2012).

<sup>145</sup> *See id.*; *see also* Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1, 9–10 (2015) (surveying the current state of religious accommodations).

<sup>146</sup> 42 U.S.C. § 2000e-2.

<sup>147</sup> 29 C.F.R. § 1605.1 (2016).

<sup>148</sup> U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL: SECTION 12:

This section has thus demonstrated that the existence and nature of the British establishment has imposed limits on the institutional autonomy of the Church of England. But this section has also demonstrated that even though England has an established church and the United States does not, the British system is in some ways more hospitable than the American system for non-believers to participate fully and openly in public life. The British system arguably also sees less influence of religion in public debates over some issues that have been part of the “culture wars” in the United States. British law also occasionally takes a broader view of the meaning of “religion” than American constitutional and statutory law have typically done—and may be enabled to do so in part by the absence of an Establishment Clause. The next section concludes by considering some potential explanations for, and implications of, these features of American and British approaches to religious liberty.

#### IV. CONCLUSION

It is not difficult to find suggestions of American exceptionalism with respect to freedom of religion. A recent volume of essays on the Establishment Clause by a distinguished group of scholars bears the subtitle “America’s Original Contribution to Religious Liberty.”<sup>149</sup> Thomas Jefferson described America’s approach to religious freedom as a “novel experiment,”<sup>150</sup> and John Adams thought it “strikingly original.”<sup>151</sup> So how is it that Britain—the nation whose approach to establishments provided the model from which the American framers wished to depart—has come to see greater separation of church and state than America in the areas of law and policy discussed above?

Part of the explanation may lie in the respective levels of religious self-identification in the two countries. According to a WIN/Gallup International poll, fifty-six percent of Americans describe themselves as “religious” compared to only thirty percent of Britons, making Britain the sixth least religious country among the sixty-five surveyed around the world.<sup>152</sup> (A separate survey showed that

---

RELIGIOUS DISCRIMINATION, § 12-I(A)(1) (2008), [www.eeoc.gov/policy/docs/religion.html](http://www.eeoc.gov/policy/docs/religion.html).

<sup>149</sup> See NO ESTABLISHMENT OF RELIGION, *supra* note 1.

<sup>150</sup> Witte, *supra* note 11, at 3.

<sup>151</sup> *Id.* at 5.

<sup>152</sup> *Losing Our Religion? Two Thirds of People Still Claim to Be Religious*, GALLUP INT’L (Apr. 13, 2015), [http://www.wingia.com/en/news/losing\\_our\\_religion\\_two\\_thirds\\_of\\_people](http://www.wingia.com/en/news/losing_our_religion_two_thirds_of_people)

almost eighty percent of Americans identified with a religion, with approximately seventy percent self-identifying as Christian.<sup>153</sup>) It is not surprising that a country with relatively lower levels of religiosity would see a relatively lower level of religious influence in at least some areas of law and public life.

Yet it may be more surprising that such lower levels of religiosity exist in Britain in the first place. After all, religion plays a much greater role in public schooling in the United Kingdom than it does in the United States.<sup>154</sup> Indeed, the Education Act of 2002<sup>155</sup> provides for a basic curriculum in England that includes religious education.<sup>156</sup> Children are thought to be particularly susceptible to religious indoctrination pressures in the school context—a point emphasized by the U.S. Supreme Court in its decisions striking down prayer and other religious exercises in public schools.<sup>157</sup> How is it that a country that has an established church and includes religious education in school curricula has not produced a more religious citizenry?

A comprehensive answer to this question would presumably draw upon a range of historical, cultural, and sociological influences and is well beyond the scope of this article. But it may be worth recalling and reflecting upon some of the arguments advanced against establishments prior to and during the founding era in America. For instance, James Madison's remonstrance against religious assessments for the support of clergy argued that

---

\_still\_claim\_to\_be\_religious/290/; see also Krishnadev Calamur, *New Survey Shows the World's Most and Least Religious Places*, NPR (Apr. 13, 2015), <http://www.npr.org/sections/thetwo-way/2015/04/13/399338834/new-survey-shows-the-worlds-most-and-least-religious-places> (reporting on the Gallup poll's findings); Press Association, *UK One of World's Least Religious Countries, Survey Finds*, GUARDIAN (Apr. 12, 2015), <https://www.theguardian.com/world/2015/apr/12/uk-one-of-worlds-least-religious-countries-survey-finds> (reporting on the Gallup poll's findings).

<sup>153</sup> *America's Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

<sup>154</sup> See Torke, *supra* note 8, at 425–26.

<sup>155</sup> Education Act 2002, c. 32, § 80 (UK).

<sup>156</sup> *Id.*; see also UK DEP'T OF CHILDREN, SCHS. & FAMILIES, RELIGIOUS EDUCATION IN ENGLISH SCHOOLS: NON-STATUTORY GUIDANCE 2010, at 4 (2010), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/190260/DCSF-00114-2010.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190260/DCSF-00114-2010.pdf) (discussing the role of religion in academic curriculum in England).

<sup>157</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 590 (1992) (“The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position.”); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (striking down the practice of reading Bible verses and reciting the Lord's Prayer over an intercom during the school day); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure . . . to conform to the prevailing officially approved religion is plain.”).

establishments were not only bad for government, but also bad for religion: government support “weaken[s] in those who profess this Religion a pious confidence in its innate excellence . . . [and] experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.”<sup>158</sup> Perhaps the long existence of the establishment in England has itself contributed to the waning influence of religion in some aspects of British public life. Nick Clegg suggested during his tenure as Deputy Prime Minister that the Church’s fortunes might indeed improve as a result of disestablishment: “In the long run it would be better for the church and better for people of faith, and better for Anglicans, if the church and the state were over time to stand on their own two separate feet.”<sup>159</sup> The Establishment Clause may thus have helped not only to guarantee more institutional autonomy for churches in America, but also to encourage a more robust level of religious participation in law and government.

The freedom enjoyed by churches in America to select their own clergy and to define their own liturgical practices without government interference is an important component of religious liberty. But as noted above, separation of church and state is not only about protecting churches. It is also about promoting equality for individuals. As U.S. Supreme Court Justice Sandra Day O’Connor emphasized in articulating her endorsement test, the “Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”<sup>160</sup> If recent elections are any indication, then adherence to religion remains much more relevant to a candidate’s standing in the political community in the United States than in the United Kingdom. To be sure, this relevance of religion is not being imposed by government in an official way. Religious tests for office that remain on the books are not enforceable,<sup>161</sup> but voters continue to regard religion as sufficiently important that atheists are practically unelectable. Perhaps this is an example of “popular constitutionalism”—i.e., “the deployment of constitutional arguments by the people themselves, independent of, and

---

<sup>158</sup> Madison, *supra* note 1; *see also* MCCONNELL ET AL., *supra* note 56, at 27–28 (discussing the idea that establishments may injure religion).

<sup>159</sup> Patrick Wintour, *Nick Clegg Restates View on Separation of Church and State*, *GUARDIAN* (Apr. 24, 2014, 8:18 AM), <http://www.theguardian.com/politics/2014/apr/24/nick-clegg-separation-church-state>.

<sup>160</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

<sup>161</sup> *See supra* note 110 and accompanying text.

sometimes in acknowledged conflict with, constitutional interpretations offered and enforced by the courts.”<sup>162</sup> Or perhaps it is simply an enduring feature of American political culture. Either way, the disabilities that non-believers face in American public life—solely on the basis of their lack of religious belief—suggests that religious freedom and religious equality do not always go hand-in-hand.

Thus, the British and American approaches to establishment and religious liberty have each brought mixed blessings. The American approach has resulted in greater institutional autonomy for churches and a more vocal role for religion in political campaigns and debates. The British approach has resulted in greater equality for non-believers and less influence of religion on issues such as legislative recognition of same-sex marriage. Notwithstanding frequent claims of American exceptionalism with respect to religious freedom, no doubt each country can learn and benefit from the experiences of the other.

---

<sup>162</sup> Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991 (2006).