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**“We Who Differ With Regard To Religion Will Keep The Peace With One Another”:
The Intellectual History of European Laws about Religious Toleration Prior to
the Planting of English America**

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“Jurists and scholars often act as if James Madison and Thomas Jefferson are the only Founders who matter when it comes to religious liberty and church-state relations.”
Mark David Hall, *A Nuanced Report Card on Religious Liberty* (2019)

Abstract

Law matters, and laws about religion matter a lot. Both the European laws about religious toleration prior to the planting of English America and the laws about religious toleration enacted by the settlers who founded English American colonies for religious reasons employed law primarily as a means of social control. European monarchs wanted power, and they utilized laws about religion to help them acquire it and maintain it. The leaders of the English American colonies planted for religious reasons used law to effectuate their designs: to foster religious toleration in those colonies committed to that animating principle (Maryland, Rhode Island, and Pennsylvania); to try to create an ideal Bible commonwealth for the colonies dedicated to the idea that religion must be practiced as God had ordained (Connecticut and Massachusetts). In short, the settlers of English America were impacted by the European laws about religious toleration that preceded their voyages to the New World. The planters of religiously tolerant colonies tried to learn from what they regarded as Europe’s mistakes, while those who strove for religious purity rejected the prevailing European notion that divine sovereignty must occupy a decidedly secondary place to the sovereignty of the state.

Keywords

Religion, law, toleration, Europe, colonial America

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1. Introduction

Atlantic History emphasizes the complex interaction between Europe and the New World colonies, and it explores a wide array of demographic, social, economic, political, legal, military, intellectual, and religious topics by examining both sides of the Atlantic.¹ It emerged in the 1980s as an alternative to the discipline of imperial history made famous by historians such as George Louis Beer and Charles McLean Andrews.²

The men and women who came to America for religious reasons during the colonial period were aware of European laws that impacted their religious beliefs and practices adversely. Although an imperial historian would almost certainly discuss English laws about religion to the exclusion of the laws enacted on the European continent writ large, Atlantic History teaches that European laws mattered too. To mention but the most obvious example, the English Pilgrims who planted Plymouth Colony in 1620 in what is now the Commonwealth of Massachusetts tried migrating to the Netherlands first. Why the Netherlands rather than, say, Spain? Because, as this Article will reveal, the Netherlands was known throughout Europe for being religiously tolerant and Spain was in the midst of an Inquisition.³ Moreover, the men and women who voyaged to America were not exclusively English.⁴ That said, the five American colonies founded for religious reasons were English—Massachusetts, Maryland, Connecticut, Rhode Island, and Pennsylvania⁵—and the longest section of this Article is therefore devoted to English laws about religion.

Massachusetts was initially the separate colonies of Plymouth and Massachusetts Bay. Connecticut began as the distinct River and New Haven colonies. Rhode Island originated as four disunited towns (Providence, Portsmouth, Newport, and Warwick). Pennsylvania included what in 1776 were two independent states owned partially (New

¹ See, e.g., Palmer, R. R., *The Age of the Democratic Revolution: A Political History of Europe and America, 1760–1800*, 2 vols., Princeton, NJ: Princeton University Press, 1959 & 1964 (widely regarded as the pioneering study in Atlantic History); Bailyn, B., *Atlantic History: Concept and Contours*, Cambridge, MA: Harvard University Press, 2005 (explaining the historiography and history of Atlantic History).

² See, e.g., Beer, G. L., *The English-Speaking Peoples: Their Future Relations and Joint International Obligations*, New York, NY: Macmillan, 1917; Andrews, C. M., *The Colonial Period of American History*, 4 vols., New Haven, CT, 1934–1937.

³ See, e.g., Ahlstrom, S. E., *A Religious History of the American People*, New Haven, CT: Yale University Press, 2d ed., 2004, p. 17 (an anthropological history of the religion of the American people, from the beginning of European settlement to the date of the book's publication).

⁴ See, e.g., Bailyn, B., with the assistance of Barbara DeWolfe, *Voyagers to the West: A Passage in the Peopling of America on the Eve of the Revolution*, Cambridge, MA: Harvard University Press, 1986 (emphasizing the European ideas that motivated the leaders of the settlements).

⁵ See Gerber, S. D., “Law and Religion in Plymouth Colony,” *British Journal of American Legal Studies* 8(2) (2019), pp. 167-91; Gerber, S. D., “Law and Catholicism in Colonial Maryland,” *Catholic Historical Review* 103(3) (2017), pp. 465-90; Gerber, S. D., “Law and Religion in Colonial Connecticut,” *American Journal of Legal History* 55(2) (2015), pp. 149-93; Gerber, S. D., “Law and the Lively Experiment in Colonial Rhode Island,” *British Journal of American Legal Studies* 2(2) (2013), pp. 453-76; Gerber, S. D., “Law and the Holy Experiment in Colonial Pennsylvania,” *New York University Journal of Law & Liberty* 12(3) (2019), pp. 618-717.

Jersey) or fully (Delaware) by colonial Pennsylvania's proprietor. Maryland was always Maryland, although it had a long-running border dispute with Pennsylvania that was not resolved until the Mason-Dixon Line in 1767 (as finally marked in 1784).

Religious toleration was the “animating principle” of Rhode Island and Pennsylvania (to quote Montesquieu).⁶ Maryland was established as a refuge for Catholics and tried to provide that by promising toleration for all Christian denominations. Massachusetts and Connecticut were founded to create ideal Puritan polities, but by the early-nineteenth century they embraced religious toleration as an ideal.

This Article's principal objective is to provide a concise account of the intellectual history of European laws about religious toleration prior to the planting of English America. Terms such as “toleration,” “tolerance,” “rights of conscience,” and “religious liberty” are often employed interchangeably throughout this Article because they were commonly employed interchangeably during the period covered in the Article. To make this point somewhat differently, although many of America's eighteenth-century founders—Thomas Jefferson included, the author of one of the most celebrated religious liberty laws in American history (the Virginia Statute for Religious Freedom of 1786)—rejected the language of “toleration” in the 1780s and 1790s as too narrow, a great deal of conceptual confusion existed among them and their predecessors about what, exactly, religious liberty entailed.

The second section of the Article sketches the political theory of religious toleration from the Middle Ages through John Locke's *Letter Concerning Toleration*. The third part—the bulk of the Article—chronicles European laws about religious toleration prior to the colonization of English America.⁷ The fourth portion surveys the English American colonies that were planted for religious reasons. The Conclusion ties together the prior material. Of course, I am aware that most intellectual historians concentrate on treatises written by celebrated political theorists such as Aristotle and John Locke, but legal theorists long have understood that legal texts matter too.⁸ Succinctly put, the primary—though not exclusive—dataset explored in this Article is different from that examined by traditional intellectual historians.

⁶ Montesquieu famously argued that each form of government has an animating principle—a set of “human passions that set it in motion”—and that each form can be corrupted if its animating principle is undermined. Montesquieu, C. de, *The Spirit of the Laws* [1748], Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone eds. & trans., Cambridge: Cambridge University Press, 1989, pp. 21, 30.

⁷ **Error! Solo el documento principal.** To make a complex story accessible each country in the third part of this Article will be treated as if it were a continuous entity over time. Needless to say, a tragedy of European history is that neighbors fought, annexed each other's territories, created empires out of each other's countries, started with one religion, got conquered by another one, forcibly converted neighbors, and the neighbors converted them. For a three-minute visual of this complex history, see “Watch 1000 Years of European Borders Change In 3 Minutes,” <https://vimeo.com/147238741>.

⁸ See, e.g., Scalia, A., *A Matter of Interpretation: Federal Courts and the Law*, Amy Gutmann ed., Princeton, NJ: Princeton University Press, 1997.

2. The Political Theory of Religious Toleration

2.1. The Middle Ages

Laws, including laws about religion, frequently trace to ideas that initially were articulated by political theorists.⁹ The history of any idea in Europe, or in Western thought generally, is incomplete without reference to the Middle Ages (476 - 1453 AD). With respect to religious toleration specifically, that idea was bound up with the idea of the ends of the commonwealth or kingdom.¹⁰ The scholastics of the High Middle Ages subscribed to the ends of the commonwealth as articulated by Aristotle (384 - 322 BC): the pursuit of the common good.¹¹ Recognizing as they did Christianity as the means of salvation, Westerners found it necessary to endorse the Catholic Church and to encourage this belief within their lands. Departing from Catholic doctrine was to devolve into heresy, and this was seen as a type of violence on the same level as a violent crime.¹² Although the church and the king operated in different spheres, they both encouraged subjects to work towards the eternal good and they cooperated in this endeavor.¹³

That said, the medieval commonwealth did not necessarily force foreigners to abandon their native faith. While Europe remained mostly Catholic, significant exceptions existed, and not only in border areas like Spain. For example, Frederick II tolerated his Muslim subjects in the Sicilian city of Lucera, which he founded for them.¹⁴ Even during later periods of increasing distrust of certain minority groups—of Jews, particularly—communities of non-Christians found homes in areas such as Provence.¹⁵

Any notion of religious toleration also must consider the origins and meaning of the word “religion,” which derives from the Latin *religio*. For the Romans religion designated a

⁹ For a disquisition about the political theory that eventually gave rise to the constitutional law of an independent judiciary in America, see Gerber, S. D., *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787*, New York, NY: Oxford University Press, 2011, ch. 1.

¹⁰ But see Wilkens, R. L., *Liberty in the Things of God: The Christian Origins of Religious Freedom*, New Haven, CT: Yale University Press, 2019 (arguing that the origins of religious freedom and liberty of conscience are religious, not political).

¹¹ See Aristotle, *Politics*, Stephen Everson ed. & B. Jowett trans., Cambridge: Cambridge University Press, 1984, 1252a 1-6; see also Aquinas, T., *Summa Theologiae*, John Mortensen & Enrique Alarcón eds. & Fr. Laurence Shapcote, O.P., trans., Lander, WY: The Aquinas Institute for the Study of Sacred Doctrine, 2012, 1a 2ae q. 90 a. 2 (citing Aristotle and noting that the pursuit of the common good is the end of politics).

¹² See, e.g., Jones, A. W., *Before Church and State: A Study of Social Order in the Sacramental Kingdom of St. Louis IX*, Steubenville, OH: Emmaus Academic, 2017, pp. 62-63.

¹³ For the development of royal jurisdiction, especially in response to ecclesiastical jurisdiction, see Berman, H., *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA: Harvard University Press, 1983, pp. 404-06.

¹⁴ See, e.g., Kantorowicz, E., *Frederick The Second, 1194-1250*, E. O. Lorimer trans., London: Constable, 1931, pp. 130-31.

¹⁵ See, e.g., Abulafia, D., “Monarchs and Minorities in the Christian western Mediterranean around 1300: Lucera and its analogues,” in *Christendom and Discontents: Exclusion, Persecution, and Rebellion, 1000-1500*, Scott L. Waugh & Peter D. Diehl eds., Cambridge: Cambridge University Press, 1996, pp. 256-57.

class of duties—including the duty to sacrifice—and it did not itself require any sort of faith.¹⁶ This same sense of religion remained throughout the Middle Ages as applied to the church. For example, for Thomas Aquinas (1225 - 1274) *religio* “is just one virtue which presupposes a context of ecclesial practices which are both communal and particular to the Christian Church.”¹⁷

St. Thomas invoked Cicero (106 - 43 BC) in his treatment of the virtue of religion, pointing to a continuity of thought about what “religion” was between the Ancient era and the Medieval.¹⁸ St. Thomas’s explanation of why religion was a virtue, and therefore an action as opposed to a belief, was as follows:

As stated above “a virtue is that which makes its possessor good, and his act good likewise,” wherefore we must say that every good act belongs to a virtue. Now it is evident that to render anyone his due has the aspect of good, since by rendering a person his due, one becomes suitably proportioned to him, though being ordered to him in a becoming manner.

But order comes under the aspect of good, just as mode and species, according to Augustine (De. Nat. Boni Iii). Since then it belongs to religion to pay due honor to someone, namely, to God, it is evident that religion is a virtue.¹⁹

2.2. The Reformation and the Renaissance

The Reformation (1517 - 1648) laid the groundwork for religious tolerance as it is understood today.²⁰ While the Reformation is often credited with the freeing of the individual conscience from Romish tyranny, this characterization misses the mark. The church had acted as an organization that both kept checks on the monarch and served as the largest of the many associations to which an individual might belong. For centuries monarchs were “considered to have a miracle working, sacred power” that they received through the sacrament of their coronation.²¹ The church had fought against this contention, generally with success.²² With the advent of the Reformation, the kings of Europe cast off the check of the church:

This exalting of the king’s sovereignty, of the temporal power, to a mystical height, to a quasi-divine majesty conferred on the sovereign directly by God, is found everywhere: in Spain and

¹⁶ See, e.g., Smith, S. D., *Pagans and Christians in the City: Culture Wars from the Tiber to the Potomac*, Grand Rapids, MI: Wm. B. Eerdmans, 2018.

¹⁷ Cavanaugh, W. T., “‘A Fire Strong Enough to Consume the House:’ The Wars of Religion and the Rise of the State,” *Modern Theology* 11(4) (1995), pp. 397-420, 404.

¹⁸ See Aquinas, *Summa Theologiae*, 2a 2ae q. 81 a. 1.

¹⁹ *Ibid.*

²⁰ See, e.g., Witte, J. Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism*, Cambridge: Cambridge University Press, 2007 (arguing that Reformed Protestantism was the “seedbed” of American constitutionalism).

²¹ Rommen, H. A., *The State in Catholic Thought: A Treatise in Political Philosophy*, St. Louis, MO: B. Herder, 1945, p. 555.

²² See, e.g., Oakley, F. C., *The Mortgage of the Past: Reshaping the Ancient Political Inheritance (1050-1300)*, New Haven, CT: Yale University Press, 2012, pp. 162-66.

England, in France and the many smaller principalities of Germany, when at this time the latter began to thrust off the overlordship of the Emperor in Vienna. This general trend is common to the princes irrespective of their being Catholics or Protestants.²³

This was the case particularly in Germany and England where, despite Martin Luther's (1483 - 1546) teaching of an invisible, spiritual church, the German princes accepted the role of head of the local churches, and the English monarchs established themselves as the supreme heads of the Church of England. Of all the major Reformation sects, the Calvinists alone stood firm in maintaining a spiritual church, all the while arguing against the newly exalted powers of absolutist kings.²⁴

"Religion" as understood by moderns arguably did not exist in Antiquity or the Middle Ages. The idea of religion originated with Marsilio Ficino's (1433 - 1499) work *De Christiana Religione*, "the first to present *religio* as a universal human impulse common to all."²⁵ According to Ficino, who subscribed to Platonic ideas, religions were "all just more or less true (or untrue) representations of the one true *religio* implanted in the human heart."²⁶ The second major shift in the idea of religion was the movement of religion "from a virtue to a set of propositions."²⁷ As Hugo Grotius (1583 - 1645) famously put it, "the Christian religion teaches rather than simply is, the true worship of God."²⁸

This movement occurred slowly—Ficino wrote in the fifteenth century and Grotius in the seventeenth—but the change in European culture was drastic. It also produced a number of distinct difficulties, including *defining* "religion."

Religion is typically described as a belief in the sacred, and it differs from the equally ill-defined "secular" sphere of the state. But once religion received recognition as a phenomenon unto itself, and particularly as a set of beliefs belonging to such-and-such a "church," it fell to the leaders of the newly formed and centralized European states to consider how religion ought to be regulated. As will be seen, many of the Early Modern European states chose a policy of strictly regulated state-supported churches.

Thomas Hobbes (1588 - 1679), who is almost universally regarded as one of the founders of modern political philosophy, was not the first political philosopher to theorize about the idea of a sovereign or the relationship of the sovereign and the religious sphere. Jean Bodin (1530 - 1596) had done it a century earlier by advocating for liberty of conscience, although Bodin also noted that "once a form of religion has been embraced by a people, the sovereign must forbid any public dispute over religious matters to break out

²³ Rommen, *The State in Catholic Thought*, p. 555.

²⁴ See *ibid.*, pp. 555-56.

²⁵ Cavanaugh, "'A Fire Strong Enough to Consume the House:' The Wars of Religion and the Rise of the State," p. 404.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ As quoted in *ibid.*

and thereby threaten his authority.”²⁹ Bluntly put, religion was to be tamed and serve the state.

But Hobbes saw a potential threat in religion, especially in the jurisdiction of the pope, and he sought to coopt religion to the ends of the sovereign. According to Hobbes, subjects of the commonwealth should submit themselves to the sovereign, who had been given the teaching power of the church.³⁰ The sovereign may “make such laws as themselves shall judge fittest for the government of their own subjects, both as they are the commonwealth as they are the Church; for both State and Church are the same men.”³¹ This did not, according to Hobbes, apply merely to Christians living under Christian princes: it applied to anyone living under any sovereign.³² Hobbes exalted the power of the sovereign further still by declaring that the commission of a crime was a sin against the first commandment (“I am the Lord thy God, thou shalt not have any strange gods before Me”) rather than the fourth (“Honor thy father and mother”).³³ Hobbes wrote:

Of these two tables, the first containeth the law of sovereignty: 1. That they should not obey, nor honour, the gods of other nations, in these words, *Non habebis deos alienos coram me*, that is, thou shalt not have for gods the gods that other nations worship, but only me; whereby they were forbidden to obey, or honor, as their king and governor, any other god than him that spake unto them. ... 2. That they should not make any image to represent him; that is to say, they were not to choose to themselves, either in heaven, nor on earth, any representative of their own fancying, but only Moses and Aaron [i.e., their sovereigns] whom he had appointed to that office.³⁴

Hobbes’s idea of the sovereign as the sole source of authority not to be shared with any religious group or personage underlays the formation of the modern state’s view of holding at bay “violence” thought to be perpetrated by religion. Juxtaposing Hobbes’s *Leviathan* to his later book about the English Civil War, *Behemoth*, makes this clear. The leviathan and the behemoth were both creatures from Jewish mythology in combat with one another.³⁵ Hobbes used the leviathan as the image of the state as peacemaker against the behemoth, which he portrayed “as a symbol of the anarchy brought about by the religious fanaticism and sectarianism that destroyed the English commonwealth during the Puritan Revolution.”³⁶ “According to Hobbes,” Carl Schmitt noted, “the quintessential nature of the state of nature, or the behemoth, is none other than civil war, which can only be prevented by the overarching might of the state, or the leviathan.”³⁷

²⁹ *Ibid.*, pp. 404-05.

³⁰ See Hobbes, T., *Leviathan* [1651], Edwin Curley ed., Cambridge, MA: Hackett, 1994, 42.10.

³¹ *Ibid.*, 42.79.

³² See *ibid.*, 43.23.

³³ See *ibid.*, 27.2.

³⁴ *Ibid.*, 42.37.

³⁵ Both are mentioned in the Bible. See, e.g., *Job* 40:15-32.

³⁶ Schmitt, C., *The Leviathan in the State Theory of Thomas Hobbes*, George Schwab & Erna Hilfstein trans., Chicago, IL: University of Chicago Press, 2008, p. 21. Carl Schmitt (1888 - 1985) was a conservative German jurist, political theorist, and prominent member of the Nazi Party. He wrote extensively about the forceful use of political power.

³⁷ *Ibid.* See also Herzog, D., *Sovereignty, RIP*, New Haven, CT: Yale University Press, 2020 (arguing that Hobbes and others who developed the notion of sovereignty thought that the only way to bring religious

John Locke (1632 - 1704) is the political theorist most closely identified with the idea of religious toleration. Locke, who wrote shortly after Hobbes, proposed a state much more open to toleration on the basis that religious faith belonged to the interiority of man and was therefore beyond the authority conferred upon the state. Locke maintained that the care of souls is not committed to the “Magistrate ... because it appears not that God has ever given any such Authority to any one Man over another, as to compell any one to his Religion.”³⁸ The power over religion cannot be vested in the state because “All the Life and Power of true Religion consists in the inwards and full perswasion of the mind: And Faith is not Faith without believing.”³⁹ The power of the magistrate, by contrast, “consists only in outward force,” which cannot change the “inward perswasion of the Mind.”⁴⁰ Clearly, Locke departed from the Ancient and Medieval idea of religion.⁴¹

But when Locke discussed the duties of a citizen under a magistrate, he sounded a lot like Hobbes. In response to the question of what a citizen should do when the magistrate enjoins something that violated the conscience of the citizen, Locke advised as follows:

I say that such a private Person is to abstain from the Action that he judges unlawful; and he is to undergo the Punishment, which is not unlawful for him to bear. For the private Judgment of any Person concerning a Law enacted in Political Matters, for the publick Good, does not take away the Obligation of that Law, nor deserve a Dispensation.⁴²

Should the magistrate enact a law that the citizen believed to be unjust, the citizen may not act on such a belief because “God alone” was the judge.⁴³ In the meantime, the citizen must bide his time: “The principal and chief care of every one ought to be of his own Soul first, and in the next place of the publick Peace: tho’ yet there are very few will think ‘tis Peace there, where they see all laid waste.”⁴⁴ In short, the citizen whose religious beliefs should be tolerated must nevertheless bow to the law of the sovereign magistrate no matter the dictates of private conscience.

Locke placed other limits on religious toleration too. He wrote in one of the most famous passages of his *Letter Concerning Toleration*:

These therefore, and the like, who attribute unto the Faithful, Religious and Orthodox; that is, in plain terms, unto themselves; any peculiar Privilege or Power above other Mortals, in Civil

wars to an end was firmly to establish the state as sovereign, which meant relegating divine sovereignty to a decidedly secondary place).

³⁸ Locke, J., *A Letter Concerning Toleration and Other Writings*, Mark Goldie ed., Indianapolis, IN: Liberty Fund, 2010, p. 13.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Locke defined a church as “a voluntary society of Men, joining themselves together of their own accord, in order to the publick worshipping of God, in such a manner as they judge acceptable to him, and effectual to the salvation of souls.” *Ibid.*, p. 15.

⁴² *Ibid.*, p. 48.

⁴³ Locke, *A Letter Concerning Toleration and Other Writings*, p. 49.

⁴⁴ *Ibid.*

Concernments; or who, upon pretence of Religion, do challenge any manner of Authority over such as are not associated with them in their Ecclesiastical Communion; I say these have no right to be tolerated by the Magistrate; as neither those that will not own and teach the Duty of tolerating All men in manners of meer Religion. For what do all these and the like Doctrines signifie, but that those Men may, and are ready upon any occasion to seise the Government, and possess themselves of the Estates and Fortunes of the Fellow-Subjects; and that they only ask leave to be tolerated by the Magistrate so long, until they find themselves strong enough to effect it?⁴⁵

Although Locke was referring to Catholics in the quoted passage, the same principle of non-toleration applied in Locke's thought to any group that Locke believed owed allegiance to another sovereign. "It is ridiculous for anyone to profess himself to be a Mahumetan only in his Religion," Locke proclaimed, "but in everything else a faithful Subject to a Christian Magistrate, whilst at the same time he acknowledges himself bound to yield blind obedience to the Mufti of Constantinople; who himself is intirely obedient to the Ottoman Emperor, and frames the feigned Oracles of that Religion according to his pleasure."⁴⁶ Locke also insisted that, in addition to Catholics and Muslims, Atheists could not be tolerated because "Promises, Covenants, and Oaths, which are the Bonds of Humane Society, can have no hold upon an Atheist."⁴⁷

3. European Laws about Religious Toleration Prior to the Planting of English America

European monarchs during the Early Modern era took advantage of the Reformation's weakening of the Catholic Church in order to enforce control over the church in their domains. Various princes proclaimed allegiance to certain doctrines not out of devout belief, but for political expediency. Toleration came after persecution of members of the non-favored sect that had threatened the authority of the sovereign and typically did not last long. Only towards the end of this period did some of the most "liberal" nations in Europe begin to grant limited toleration to differing religious groups. This section discusses the most

⁴⁵ *Ibid.*, p. 51.

⁴⁶ *Ibid.*, p. 52.

⁴⁷ *Ibid.*, pp. 52-53. The above discussion focused on political theorists who impacted the idea of religious toleration as it pertains to law. Other scholars who focus less on law might make different choices. See, e.g., Dienst, T. & Strohm, C., "Introduction: Confessional Controversy, Coexistence, and Tolerance: Becanus's *De fide haereticis servanda* in its Literary Context," in *On the Duty to Keep Faith with Heretics: Martinus Becanus*, Wim Decock ed., Grand Rapids, MI: CLP Academic, 2019, pp. ix-xxxiii (suggesting that the concepts of toleration espoused by theologians in the officially religious states of the sixteenth and seventeenth centuries deserve closer examination); *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding*, Daniel L. Dreisbach & Mark David Hall eds., Indianapolis, IN: Liberty Fund, 2009, pt. I (combining primary documents with editorial notes about the history of church-state relations in the American Founding); Gill, A., *The Political Origins of Religious Liberty*, Cambridge: Cambridge University Press, 2008 (proposing "a general deductive theory regarding the political origins of religious liberty that incorporates the role of human agency through the use of rational choice theory"); Cobb, S. H., *The Rise of Religious Liberty in America*, New York, NY: Macmillan, 1902 (arguing that the principle of liberty on which the religious institutions and life in the United States are founded "is peculiarly an American production").

significant of the European laws about religious toleration prior to the planting of English America.

3.1. England

England was the *sine qua non* of post-Reformation politics in that Henry VIII (r. 1509 - 1547) manipulated medieval precedent to declare himself the sovereign of England in both temporal and ecclesial matters. The statutes that established his power illustrate why religious toleration could not receive official approval at that time: where support of a different religion was viewed as undermining the Tudor state's absolute authority, it could not be allowed.

The first attempt to magnify the king's power through law was the 1532 Act of Restraint of Appeals invalidating appeals to courts outside of Henry VIII's own, especially to those of the pope. The statute decreed

that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king having the dignity and royal estate of the imperial crown of the same, unto whom a body politic, compact of sorts and degrees of people divided in terms and by names of spirituality and temporality, be bounden and owe to bear next to God a natural and humble obedience.⁴⁸

With the king's sovereignty established, the Act went on to mandate that all cases

whether they concern the King our sovereign lord, his heirs or successors, or any other subject or resident within the same of what degree soever they be, shall be from henceforth heard, examined, discussed, clearly finally and definitely adjudged and determined, within the King's jurisdiction and authority and not elsewhere.⁴⁹

It mattered not whether judgments came "from the see of Rome or any other foreign courts or potentates of the world"⁵⁰ because even before the formerly-Catholic Henry VIII declared himself head of the Church of England he had outlined the true purpose of his separation from the pope; namely, to have himself recognized as a sovereign who was subject to no overarching authority.⁵¹ Henry VIII and his Parliaments did not just "increase[]

⁴⁸ 24 Henry VIII, c. 12 (1532). The English statutes discussed in this section are available at the searchable <https://archives.parliament.uk/>. For an analysis of the statutes up to and including the Elizabethan Settlement, see Buck, K., *Anti-papist Legislation and Recusancy in Elizabethan England (1558 - 1603)* (2012), <https://core.ac.uk/download/pdf/16690006.pdf>.

⁴⁹ 24 Henry VIII, c. 12.

⁵⁰ *Ibid.* Queen Mary I (r. 1553 - 1558) repealed these laws. Queen Elizabeth I (r. 1558 - 1603) reinstated the laws made "for the utter extinguishment and putting away of all usurped and foreign powers and authorities out of this [her] realm and other [her] Highness' dominions and countries, as also for the restoring and uniting to the imperial crown of this realm the ancient jurisdictions, authorities, superiorities and preeminences to the same of right belonging and ascertaining." 1 Elizabeth I, c. 1 (Act of Supremacy of 1558).

⁵¹ See 26 Henry VIII, c. 1 (Act of Supremacy of 1534). The pope had once issued a papal bull bestowing upon Henry VIII the title of "Defender of the Faith." See, e.g., Morrison, N. B., *The Private Life of*

the patronage and authority of the monarchy by transferring control of the whole ecclesiastical apparatus to it[;] ... they also suppressed the autonomy of seigneurial franchises by depriving them of the power to designate JPs, integrated marcher lordships into the shires, and incorporated Wales legally and administratively into the Kingdom of England.”⁵² The Tudor state would not permit any competitors: toleration of other groups, especially of Catholics, would undermine the entire project.

Parliament passed the Act in Conditional Restraint of Annates of 1533 suspending papal taxes.⁵³ After the pope had excommunicated Henry VIII, papal taxes were abolished pursuant to the Act in Absolute Restraint of Annates of 1534.⁵⁴

During the reign of the Protestant Edward VI (r. 1547 - 1553), the Book of Common Prayer—an English text for communion and church services written by the anti-Catholic Archbishop of Canterbury Thomas Cranmer—was codified as law in the 1548/9 Act of Uniformity and the updated 1551/2 Act of Uniformity.⁵⁵ Failure to employ the Book of Common Prayer in church services could lead to imprisonment for both the preacher and the participants in the service.⁵⁶ Mary I (r. 1553 - 1558), a Catholic, repealed in 1553, via the First Act of Repeal, the Act of Uniformity and all other religious laws that had been enacted while Edward VI was king.⁵⁷ In 1555 the Second Act of Repeal undid the laws against the papacy that were enacted under Henry VIII, thus realigning England with Rome, although Mary I retained the title of Supreme Head of England’s church.⁵⁸ Mary I also reinstated the Heresy Acts that were repealed under Henry VIII, and thereby authorized heretics to be punished in England.⁵⁹

Elizabeth I (r. 1558 - 1603) endeavored to distance England from the Catholic influences preferred by Mary I. Although Elizabeth I did not have fervent religious beliefs, she embraced the principle of *cuius regio, eius religio* (“whose realm, his [her] religion”).⁶⁰

Henry VIII, London: R. Hale, 1964, p. 65. The event that most encouraged England’s break from Rome was Henry VIII’s desire to divorce Catherine of Aragon. See, e.g., Levine, M., *Tudor Dynastic Problems, 1460-1571*, London: Allen & Unwin, 1973, p. 54.

⁵² Anderson, P., *Lineages of the Absolutist State*, London: NLB, 1974 (repr. 2013), p. 120.

⁵³ See 23 Henry VIII, c. 20 (1533).

⁵⁴ See 25 Henry VIII, c. 20 (1534).

⁵⁵ See 2 & 3 Edward VI, c. 1 (1548/9). The revised Act of Uniformity prohibited many traditional ceremonies and rewrote the ideas of baptism, confirmation, and burial services. See 5 & 6 Edward VI, c. 1 (1551/2). Britain and the British Empire did not adopt the Gregorian calendar until 1752, and citations in this Article to pre-1752 Julian calendar dates between January 1 and March 25 reference both the Gregorian and Julian years.

⁵⁶ See *ibid.*

⁵⁷ See 1 Mary I, st. 2, c. 2 (1553).

⁵⁸ See 1 & 2 Philip I & Mary I, c. 8 (1555).

⁵⁹ See 1 & 2 Philip I & Mary I, c. 6 (1554). The Heresy Acts were a series of three statutes. See 5 Richard II, st.2, c. 5 (1382); 2 Henry IV, c. 15 (1401); 2 Henry V, st.1 c. 7 (1414). They had been repealed by Henry VIII and Edward VI. See 25 Henry VIII, c. 14 (1533); 1 Edward VI, c. 12 (1547).

⁶⁰ See, e.g., Jordan, W. K., *The Development of Religious Toleration in England*, Cambridge, MA: Harvard University Press, 1932, p. 88.

The Recusancy Acts were enacted in 1558, which meant that subjects who did not conform to Anglican practices, especially Catholics, could be punished.⁶¹

The Act of Supremacy, passed in 1558, replaced the 1534 Act of the same name that had been enacted by Henry VIII but repealed by Mary I.⁶² The 1558 Act once again recognized the English monarch as the head—in the 1558 Act, renamed “the Supreme Governor”—of the Church of England.⁶³ As the Supreme Governor, the monarch had the power of “the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same and of all manner of errors, heresies, schisms, abuses, offences, contempts and enormities.”⁶⁴ The Act required an oath known as the Oath of Supremacy to be sworn to the Supreme Governor by those persons occupying public or church offices.⁶⁵ The oath read:

I, A. B., do utterly testify and declare in my conscience that the queen’s highness is the only supreme governor of this realm, and of all other her highness’s dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal, and that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority ecclesiastical or spiritual within this realm; and therefore I do utterly renounce and forsake all foreign jurisdictions, powers, superiorities and authorities, and do promise that from henceforth I shall bear faith and true allegiance to the queen’s highness, her heirs and lawful successors, and to my power shall assist and defend all jurisdictions, pre-eminences, privileges and authorities granted or belonging to the queen’s highness, her heirs or successors, or united or annexed to the imperial crown of this realm. So help me God, and by the contents of this Book.⁶⁶

Refusing to take the oath could lead to the forfeiture of public office and death.⁶⁷ The objective of laws such as the Oath of Supremacy was to establish an overall sense of order.⁶⁸ As one celebrated scholar of religious toleration in England put it, the “doctrine set forth by the Elizabethan Settlement was, in essence, that conscience was free, although the public exercise of any but the established religion was not to be tolerated.”⁶⁹

⁶¹ See Elizabethan Recusants and the Recusancy Laws, Elizabethan-Era, <http://www.elizabethan-era.org.uk/elizabethan-recusants-recusancy-laws.htm>.

⁶² See 1 Elizabeth I, c. 1 (1558); Konnert, M., *Early Modern Europe: The Age of Religious War, 1559-1715*, Toronto, Canada: University of Toronto Press, 2006, p. 135.

⁶³ Jordan, *The Development of Religious Toleration in England*, p. 84 (citing 1 Elizabeth I, c. 1, sec. 8 (1558)); Konnert, *Early Modern Europe*, p. 136.

⁶⁴ Jordan, *The Development of Religious Toleration in England*, p. 84.

⁶⁵ See *ibid.* (citing 1 Elizabeth I, c. 1, sec. 9 (1558)).

⁶⁶ Elizabeth’s Supremacy Act, Restoring Ancient Jurisdiction (1559), 1 Elizabeth I, Cap. 1, *Documents Illustrative of English Church History*, Henry Gee & William John Hardy eds., New York, NY: Macmillan, 1896, pp. 442-58, 449, <https://history.hanover.edu/texts/engref/er79.html>.

⁶⁷ See, e.g., Jordan, *The Development of Religious Toleration in England*, p. 84 (citing 1 Elizabeth I, c. 1, sec. 14 (1558)).

⁶⁸ See, e.g., Buck, *Anti-papist Legislation and Recusancy in Elizabethan England (1558 - 1603)*, pp. 12-13; Konnert, *Early Modern Europe*, pp. 136-37.

⁶⁹ Jordan, *The Development of Religious Toleration in England*, p. 85.

Religious intolerance by law in England increased later in Elizabeth I's reign. For example, the Rome Act of 1571 made publishing papal bulls and referring to the monarch of England as a heretic acts of treason.⁷⁰ The pope's excommunication of Elizabeth I in 1570 and the imprisonment of Mary, Queen of Scots inspired this change in religious policy.⁷¹ In 1581 Parliament passed a law fining recusant Catholic priests who entered England as missionaries.⁷² The Jesuits Act of 1584 gave Catholic priests forty days to leave the country or swear the Oath of Supremacy.⁷³ Any Catholic priest who refused to leave or swear the oath could be charged with treason.⁷⁴ Further, "[t]hose who harboured them, and all those who knew of their presence and failed to inform the authorities would be fined and imprisoned for felony, or where the authorities wished to make an example of them, they might be executed."⁷⁵ Beginning in 1587 the failure of a recusant to appear at trial resulted in a guilty verdict.⁷⁶

Additional anti-Catholic legislation was enacted after several Catholic recusants attempted to assassinate Elizabeth I.⁷⁷ In 1593 the Act Against Recusants required recusants to remain within five miles of their homes or their goods would be subject to forfeiture.⁷⁸ Public conversion was the only way to secure relief from the law.⁷⁹ The Act was passed "for the better discovering and avoiding of all such traitorous and most dangerous conspiracies and attempts that are daily devised and practiced against our most gracious sovereign lady" by those who "secretly wander and shift from place to place within this realm, to corrupt and seduce her majesty's subjects, and to stir them to sedition and rebellion."⁸⁰ The 1593 Act amended the 1581 Act "to retain the Queen's subjects in obedience" and "[a]n act against popish recusants."⁸¹ In short, laws were once again enacted for the purpose of political stability rather than for religious reasons.⁸²

Laws against recusants continued to be enacted after the reign of Elizabeth I ended. For example, a law was passed in 1606 when James I (r. 1603 - 1625) was king that "forced recusants to receive Anglican communion once a month and barred them from public office

⁷⁰ See 13 Elizabeth I, c. 2 (1571).

21. ⁷¹ See, e.g., Buck, *Anti-papist Legislation and Recusancy in Elizabethan England (1558 - 1603)*, p.

⁷² See, e.g., *ibid.*, p. 34.

⁷³ See, e.g., *ibid.*

⁷⁴ See *ibid.*

⁷⁵ *Ibid.*

34. ⁷⁶ See, e.g., Buck, *Anti-papist Legislation and Recusancy in Elizabethan England (1558 - 1603)*, p.

⁷⁷ See Jordan, *The Development of Religious Toleration in England*, p. 213.

24-25; 35 Elizabeth I, c. 2 (1593).

25. ⁷⁹ See, e.g., Buck, *Anti-papist Legislation and Recusancy in Elizabethan England (1558 - 1603)*, p.

⁸⁰ *Ibid.*, p. 448 (quoting Gee & Hardy).

⁸¹ Jordan, *The Development of Religious Toleration in England*, p. 213 (quoting 35 Elizabeth I, c. 1 & c. 2 (1581)).

⁸² See *ibid.*, p. 84.

and some professions.”⁸³ The meaning and place of religion in England began to change under the Stuarts. Three of the Stuart monarchs were either married to a Catholic or were Catholic themselves, which put them in a difficult position as head of the English church.⁸⁴ Charles II (r. 1660 - 1685), who reigned after the religiously-divisive English Civil War, mandated in the Corporations Act that anyone holding a public office must swear an oath to support the king and acknowledge the sinfulness of not doing so.⁸⁵ While on its face not a law about religious toleration, the law effectively barred from public office anyone who thought the king or the Church of England was heretical. On the ecclesial side, a similar statute was enacted mandating uniformity and consent to the Book of Common Prayer on the part of all ministers.⁸⁶

Charles II did try to establish at least some measure of toleration for dissenting, Puritan, Quaker, and Catholic groups. His Declaration of Indulgence of 1672 decreed in pertinent part:

And further, we declare that no person shall be capable of holding any benefice, living, or ecclesiastical dignity or preferment of any kind in this kingdom of England, who is not exactly conformable. We do in the next place declare our will and pleasure to be, that the execution of all and all manner of penal laws in matters ecclesiastical, against whatsoever sort of non-conformists, or recusants, be immediately suspended, and they are hereby suspended.⁸⁷

Charles II’s unilateral relaxation of the penal laws was not well received by Parliament, as the Test Act of 1673 reaffirming allegiance to the Church of England made clear. The Test Act reenacted the requirements of the earlier Corporations Act. For example, anyone holding public office was directed to visit a local Church of England parish and receive communion:

⁸³ Buck, *Anti-papist Legislation and Recusancy in Elizabethan England (1558 - 1603)*, p. 25.

⁸⁴ Charles I (r. 1625 - 1649) and Charles II (r. 1660 - 1685) married Catholics. James II (r. 1685 - 1688) married a Catholic and was one himself. Mary II (r. 1689 - 1694) and Anne (r. 1702 - 1714)—daughters of James II—nevertheless saw no problem in excluding their father’s co-religionists from participating in government.

⁸⁵ The oath provided:

I, A. B. do declare and believe, that it is not lawful, upon any pretence whatsoever, to take arms against the King; and that I do abhor that traitorous position of taking arms by his authority against his person, or against those that are commissioned by him. So help me God.

13 Charles II, st. 2, c. 1 (1661). The parallels with Hobbes, and the clear departure from the medieval understanding that one could overthrow a tyrant, are evident.

⁸⁶ The relevant provision read:

And to the end that Uniformity in the public worship of God may be speedily effected, be it further enacted every parson, vicar shall before the feast of St Bartholomew which shall be in the year of our Lord God one thousand six hundred and sixty two, openly, publicly, and solemnly read the Morning and Evening Prayer and after such reading thereof shall openly and publicly before the congregation there assembled, declare his unfeigned assent and consent to the use of all things in the said book contained (14 Charles II, c. 4, 1662).

⁸⁷ The Declaration of Indulgence of Charles II (1672), in Scott, A. F., *The Stuart Age: Commentaries of an Era*, London: White Lion Publishing, 1974, pp. 186-87.

That all and every person or persons that shall bear any office or shall receive any pay, salary, fee or wages, by reason of any patent or grant from his Majesty, or shall have command or place of trust from or under his Majesty take the several oaths of supremacy and allegiance and the said respective officers aforesaid shall also receive the Sacrament of the Lord's Supper, according to the usage of the Church of England, at or before the first day of August in the year of our Lord one thousand six hundred and seventy-three, in some parish church, upon some Lord's day, commonly called Sunday.⁸⁸

To root out "occasional conformers" who might take the mandated communion once a year and nevertheless continue in their papist ways, Parliament added the following oath that all officeholders were required to swear: "I, A. B. do declare, that I do believe that there is not any transubstantiation in the sacrament of the Lord's Supper, or in the elements of Bread and Wine, at or after the consecration thereof of any person whatsoever."⁸⁹

The "Clarendon Code" was the appellation affixed to four laws that targeted nonconformists and dissenters: the Corporation Act (1661), the Act of Uniformity (1662), the Conventicle Act (1662), and the Five-Mile Act (1665).⁹⁰ The Corporation Act permitted only members of the Church of England to hold public office.⁹¹ The Act of Uniformity decreed that the Book of Common Prayer was to be employed during religious worship and that the failure to do so disqualified the offending party or parties from holding public or church office.⁹² The Conventicle Act specified that no more than five members of religions other than the Church of England could meet for religious purposes.⁹³ The Five-Mile Act forbade nonconformist ministers from residing within five miles of a church from which they had been expelled unless they swore an oath to obey the Book of Common Prayer.⁹⁴

Fearing that the new king, James II (r. 1684/5 - 1688), and his son James Francis would establish a Catholic dynasty, a coalition of Anglican and other Protestant sects encouraged William of Orange and James II's daughter Mary (William's wife) to invade England and seize the crown. The Glorious Revolution of 1688 resulted in the enactment of a number of the most famous laws in English history, including the Bill of Rights of 1689, the Crown and Parliament Recognition Act of 1689, the Mutiny Act of 1689, the Quakers Act of 1695/6, the Act of Settlement of 1701, and the Act of Union of 1707.⁹⁵ Most important for present purposes was the Act of Toleration of 1689, which conferred upon "nonconformists" the right to worship in public places, although significant restrictions remained, such as those barring nonconformists from holding public office and requiring

⁸⁸ 25 Charles II, c. 2 (1673).

⁸⁹ *Ibid.* Edward I expelled Jews from England in 1290 but they were permitted to return by Oliver Cromwell in 1657. It is said that William Shakespeare (1564 - 1616), when writing *The Merchant of Venice* (circa 1596), might never have met a Jew.

⁹⁰ See, e.g., Eberle, E. J., *Church and State in Western Society: Established Church, Cooperation and Separation*, Burlington, VT: Ashgate, 2011, p. 9.

⁹¹ See 13 Charles II, st. 2 c. 1 (1661).

⁹² See 14 Charles II, c. 4 (1662).

⁹³ See 16 Charles II, c. 4 (1664).

⁹⁴ See 17 Charles II, c. 2 (1665).

⁹⁵ See, e.g., Pincus, S. C. A., *England's Glorious Revolution, 1688-89: A Brief History with Documents*, New York, NY: Bedford/St. Martin's, 2005.

them to pledge oaths of allegiance and supremacy and to reject the doctrine of transubstantiation.⁹⁶ “Toleration” of even a limited sort was not extended in the Act to Catholics, Unitarians, and Atheists.

In summary, England enacted more laws of consequence about religion than any nation in the Early Modern period in large part because of England’s break from the Catholic Church during the reign of Henry VIII and the inconsistent relationship that Henry’s successors had with that church. Although a young Edward VI maintained Protestant control of England, his reign was short-lived and his successor, Mary I, tried to restore England to the Catholic fold, going so far as to reinstate penalties against non-Catholics that were severe enough to earn her the moniker “Bloody Mary.” Her reign was likewise too brief to accomplish her objective. The ascension of Elizabeth I and her lengthy reign ensured that England would remain Protestant. At the outset of Elizabeth I’s reign, the laws against non-Protestants were scarce as Elizabeth was a relatively tolerant monarch. However, repeated assassination attempts and public disputes with Catholics in the realm led Elizabeth to push for laws that targeted Catholics and punished them for their faith. The Glorious Revolution of 1688 and the Act of Toleration of 1689 enacted during the reign of William III and Mary II cemented England’s anti-Catholic legal heritage prior to the American Revolution.

3.2. Holy Roman Empire

The Holy Roman Empire was a multi-ethnic conglomeration of territories in Western and Central Europe from 800/962 until 1806 presided over by an elective monarchy (although frequently controlled by dynasties).⁹⁷ The patchwork of religion in the Holy Roman Empire revealed that churches during this period “were entirely subordinate and dependent institutions.”⁹⁸ The principle of *cuius regio, eius religio* embraced in the Empire empowered the ruling prince to enforce his chosen brand of Christianity on his subjects.⁹⁹ Agreements about religious toleration were part and parcel of the clashes between nobles and monarchs at the time, and they rendered toleration dependent on social status. Bohemia served as an example. “In Bohemia,” a prominent intellectual historian concluded, “the concession of toleration to a powerful nobility gave the landlords the very prerogatives that were being denied to the King, i.e. the power to impose their own heterodoxies on their own

⁹⁶ 1 William III & Mary II, c. 18 (1689). See generally Coffey, J., *Persecution and Toleration in Protestant England, 1558-1689*, Harlow, NY: Pearson Education, 2000.

⁹⁷ See, e.g., Bryce, J., *The Holy Roman Empire*, New York, NY: Macmillan, 1911 (originally published in 1864). For a revisionist argument that the interaction between law and religion in Early Modern times was influenced by Greek legal culture, see Waelkens, L., “Legal Transplant of Greek Caesaropapism in Early Modern Times,” in *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations*, Wim Decock, Jordan J. Ballor, Micheal Germann, & Laurent Waelkens eds., Göttingen: V & R, 2014, pp. 213-23.

⁹⁸ Gregory, B. S., *Unintended Reformation: How a Religious Revolution Secularized Society*, Cambridge, MA: Harvard University Press, 2012, p. 154.

⁹⁹ See *ibid.*

tenantry.”¹⁰⁰ In the Holy Roman Empire, then, there was “toleration” between the Emperor and his subordinate princes, but a general lack of toleration between princes and their subjects.

The Thirty Years War that engulfed Europe between 1618 and 1648 was another example.¹⁰¹ The conflict started when Ferdinand II, King of Bohemia and future Holy Roman Emperor, tried to impose Catholicism on his territories.¹⁰² Protestant nobles in Bohemia and Austria rebelled, and Sweden, Denmark, and Poland soon were engaged in conflict that ended in 1648 with the Peace of Westphalia.¹⁰³ The Peace of Westphalia reaffirmed the Peace of Augsburg, and it also extended religious protections to Calvinists: the member states of the Holy Roman Empire pledged to allow at least private worship, liberty of conscience, and the right of emigration to all religious minorities and dissidents within their domains. Summarily put, the horrors of the Thirty Years War significantly motivated the move towards religious tolerance in the next two centuries. Additional insight into religious toleration in the Holy Roman Empire is available by examining, albeit briefly, the major kingdoms of the conglomeration.

a) Germany

The Kingdom of Germany was the largest territory in the Holy Roman Empire. The Augsburg Interim of 1548, issued by Emperor Charles V, was an attempt to establish temporary religious unity in Germany until differences could be worked out in a general council of the Catholic Church.¹⁰⁴ In practical effect, the Augsburg Interim forced Catholicism onto Lutherans, with the only concessions being that priests were permitted to marry and lay persons could take communion with both bread and wine.¹⁰⁵ Many Lutherans resisted the Augsburg Interim, which resulted in the passage of the Leipzig Interim in 1549.¹⁰⁶ The Leipzig Interim specified that all persons must adhere to Catholic practices but permitted them to maintain their personal beliefs.¹⁰⁷ The Leipzig Interim also proved unpopular, and that led to the Princes’ Revolt against Charles V.¹⁰⁸

The Peace of Augsburg of 1555 that ended the Princes’ Revolt authorized the princes of the various states within the Holy Roman Empire to choose whether to practice

¹⁰⁰ Butterfield, H., “Toleration in Early Modern Times,” *Journal of the History of Ideas* 38(4) (1977), pp. 573-84, 580.

¹⁰¹ See, e.g., Konnert, *Early Modern Europe*, p. 158.

¹⁰² See, e.g., *ibid.*, p. 145.

¹⁰³ See, e.g., *ibid.*, p. 157.

¹⁰⁴ See, e.g., Kamen, H., “Toleration and Dissent in Sixteenth-Century Spain: The Alternative Tradition,” *Sixteenth Century Journal* 19(1) (1988), pp. 3-23, 11-12.

¹⁰⁵ See, e.g., *ibid.*

¹⁰⁶ See, e.g., *ibid.*

¹⁰⁷ See, e.g., *ibid.*

¹⁰⁸ See, e.g., *ibid.*

Lutheranism or Catholicism in their state.¹⁰⁹ The treaty “also envisaged the parity of Catholics and Protestants in the Imperial cities” but excluded other religions from the compromise.¹¹⁰ If a resident did not like the religion the prince of his state had chosen, the resident’s only recourse was to leave that state.¹¹¹

During the Thirty Years War the Holy Roman Emperor, Ferdinand II, issued the Edict of Restitution (specifically, in 1629), which altered the religious freedoms established by the Peace of Augsburg.¹¹² Secularized church land was restored to the Catholic Church, Protestant worship was declared illegal in towns where it once was allowed, Calvinism was outlawed, and some parts of the Empire were made Catholic without their consent.¹¹³ In 1634 the Edict of Restitution was repealed and the Peace of Augsburg reinstated.¹¹⁴ As a result, the various princes were permitted to return to practicing the religion of their choice.¹¹⁵

b) Bohemia

Although initially meant to be temporary, the 1485 Peace of Kutna Hora in Bohemia ended the Hussite Wars and granted Ultraquist and Catholic religions equal status under the law.¹¹⁶ The agreement was extended in perpetuity in 1512, and it marked the first legal document to provide for the peaceful co-existence of Catholics and non-Catholic Christians in a state.¹¹⁷ Politics was the reason: attempts to establish Catholicism as the only religion in the area failed and had resulted in war.¹¹⁸

Catholicism was nevertheless the dominant religion in the Holy Roman Empire, but several other religions were practiced in Bohemia too, including Calvinism, Lutheranism, and Anabaptism.¹¹⁹ Bohemia was one of the most important economic regions in the Empire and that prompted Emperor Rudolf II to issue the Letter of Majesty in 1609, which granted religious tolerance to the rulers in Bohemia.¹²⁰

¹⁰⁹ See, e.g., Kaplan, B. J., *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe*, Cambridge, MA: Harvard University Press, 2010, pp. 103-04; Konnert, *Early Modern Europe*, p. 147.

¹¹⁰ Zagorin, P., *How the Idea of Religious Toleration Came to the West*, Princeton, NJ: Princeton University Press, 2003, p. 10.

¹¹¹ See *ibid.*

¹¹² See, e.g., Konnert, *Early Modern Europe*, p. 154.

¹¹³ See, e.g., *ibid.*

¹¹⁴ See, e.g., *ibid.*

¹¹⁵ See, e.g., *ibid.*

¹¹⁶ See, e.g., Kaplan, *Divided by Faith*, p. 375.

¹¹⁷ See, e.g., *ibid.*

¹¹⁸ See, e.g., *ibid.*

¹¹⁹ See, e.g., Konnert, *Early Modern Europe*, p. 147.

¹²⁰ See, e.g., *ibid.*

c) Hungary

Hungary, like many kingdoms in the Holy Roman Empire, was deeply divided over the Reformation. On April 24, 1523, for example, the Diet (i.e., the legislative assembly) decreed that Martin Luther's followers be persecuted and executed throughout the kingdom: "Then, the royal majesty, as a Catholic prince, shall deign to punish all Lutherans and their partisans as well as the adherents of their sect as public heretics and enemies of the most holy Virgin Mary by capital punishment and the forfeiture of all their goods."¹²¹

In 1568 King John Sigismund (also known as John Sigismund Zápolya), who had been raised Catholic but possessed profound curiosity about matters of religion, issued the Edict of Torda, which authorized local communities in Hungary to choose their own pastors.¹²² Although the Edict of Torda was not an official declaration of religious freedom, the practical effect was that different Christian religions could be exercised in the region.¹²³ The Edict provided in pertinent part:

His majesty, our Lord, in what manner he—together with his realm—legislated in the matter of religion at the previous Diets, in the same matter now, in this Diet, reaffirms that in every place the preachers shall preach and explain the Gospel each according to his understanding of it, and if the congregation like it, well. If not, no one shall compel them for their souls would not be satisfied, but they shall be permitted to keep a preacher whose teaching they approve. Therefore, none of the superintendents or others shall abuse the preachers, no one shall be reviled for his religion by anyone, according to the previous statutes, and it is not permitted that anyone should threaten anyone else by imprisonment or by removal from his post for his teaching. For faith is the gift of God and this comes from hearing, which hearing is by the word of God.¹²⁴

An historian has described the Edict of Torda as "the first modern articulation of the principle of religious toleration by Europeans at the level of state rule."¹²⁵ People could not believe anything they liked, and the Edict fell short of the present-day idea of religious tolerance. But the co-existence of the four officially recognized denominations—the Roman Catholic, Lutheran, Calvinist, and Unitarian churches—was not questioned, and the Orthodox Church was tolerated.¹²⁶

¹²¹ As quoted in Daniel, D. P., "Hungary," in *The Early Reformation in Europe*, Andrew Pettegree ed., Cambridge: Cambridge University Press, 1992, pp. 49-69, 58.

¹²² See, e.g., Keul, I., *Early Modern Religious Communities in East-Central Europe: Ethnic Diversity, Denominational Plurality, and Corporative Politics in the Principality of Transylvania (1526–1691)*, Leiden/Boston: Brill, 2009, p. 100.

¹²³ See, e.g., *ibid.*

¹²⁴ As quoted in Ritchie, S. J., *Children of the Same God: The Historical Relationship Between Unitarianism, Judaism, and Islam*, Boston, MA: Skinner House Books, 2014, p. 22.

¹²⁵ Ritchie, S., "The Pasha of Buda and the Edict of Torda: Transylvanian Unitarian/Islamic Ottoman Cultural Enmeshment and the Development of Religious Tolerance," *Journal of Unitarian Universalist History* 30 (2005), pp. 36-54, 37.

¹²⁶ The Edict of Torda was issued shortly before Transylvania (eastern Hungary) was incorporated formally into the Ottoman Empire and it remained in existence for the entirety of the Ottoman rule. The Edict was consistent with the Ottoman policy of allowing communities to keep their own religion. It did not officially recognize the Orthodox Church, which was the majority religion in the area.

d) Austria

In Austria, as in Hungary, the threat of war impacted how religion was treated.¹²⁷ Ferdinand I made no real effort to stop the spread of Protestantism in Austria, and Maximilian II awarded nobles to Lower Austria in exchange for money he needed for military purposes.¹²⁸ But Maximilian II's successor, Rudolf II, endeavored to restore Catholic hegemony where he could; specifically, by mandating it in areas such as Vienna that were controlled by the Emperor.¹²⁹ The nobles, however, could not be dictated to in matters of religion in their own territories.¹³⁰

Germany, Bohemia, Hungary, and Austria were the most important kingdoms in the Holy Roman Empire. As the preceding discussion suggested, religious toleration existed between the Emperor and the princes of the various kingdoms, but not between the princes and their subjects.¹³¹

3.3. France

France was a Catholic nation during the period chronicled in this Article, although it did experiment, albeit briefly, with toleration of Calvinists. As was the case with other nations at the time, religious identity in France was largely a matter of political allegiance. The French king and his supporters tended to practice Catholicism, and the king's opponents typically endorsed Calvinism. The siege of the Calvinist fortress-city La Rochelle illustrated the divide: the city sought to keep its independence according to its ancient liberties, while Cardinal Richelieu desired, and succeeded, in bringing the city under centralized royal control.¹³²

Protestantism gained a foothold in France through Calvinism.¹³³ French Calvinists were commonly known as "Huguenots," and by 1555 Calvinism was the most prominent form of Protestantism in France.¹³⁴ By 1560 approximately half of the French nobility were

¹²⁷ See, e.g., Kaplan, *Divided by Faith*, p. 144.

¹²⁸ See, e.g., *ibid.*

¹²⁹ See, e.g., *ibid.*, pp. 145-46.

¹³⁰ See, e.g., *ibid.*, pp. 146-47.

¹³¹The Old Swiss Confederacy was a confederation of independent small states (cantons) within the Holy Roman Empire. It was the precursor of the modern state of Switzerland. The Second Peace of Kappel in 1531 brought peace between Switzerland's Protestant and Catholic cantons by memorializing that each canton would be free to worship as it chose. The Protestant cantons agreed to permit the Catholic cantons to "remain in their true, undoubtedly Christian faith in their own cities, lands, districts, and lordships, now and hereafter without argument [or] dispute," while Catholic cantons agreed to reciprocate in kind with respect to Protestants. But no new places of worship could be established: the treaty limited where religious groups could worship to the places already established. *Ibid.*, pp. 151, 220.

¹³² See, e.g., Belloc, H., *Richelieu*, Philadelphia, PA: Lippincott, 1929, pp. 242-45; Gregory, *Unintended Reformation*, p. 153.

¹³³ See, e.g., Konnert, *Early Modern Europe*, p. 100.

¹³⁴ See, e.g., *ibid.*, p. 99.

Huguenots.¹³⁵ When King Henry II died suddenly in 1559, a fifteen-year-old Francis II became France's new monarch.¹³⁶ A Catholic noble family named Guise became the dominant influence on Francis II, which led to intense persecution of the Huguenots and to religious conflict in France between the Catholics and the Huguenots.¹³⁷

In 1562 King Charles IX, by way of his mother and regent Catherine de' Medici, issued the Edict of Saint-Germain, which attempted to end the persecution of non-Catholic Christians by conferring upon Protestant Huguenots freedom of conscience and private worship.¹³⁸ Although the Edict of Saint-Germain was a step towards religious tolerance in France, the motivation for its issuance was that Protestants were gaining in political strength and the Catholic monarchy needed to try to appease them.¹³⁹ Appeasement was not to be had, however, as France devolved into decades-long civil war between Catholics and Protestants following the massacre of Vassy in 1562.¹⁴⁰

The religious conflict that engulfed France for decades occurred in fits and starts. France's first religious war raged from 1562 until 1563. The Edict of Amboise was issued in 1563 to prevent further fighting by recognizing freedom of conscience (as the Edict of Saint-Germain had done).¹⁴¹ The Edict of Amboise permitted Huguenots to worship in nobles' households and in one suburb of each district in France (other than Paris).¹⁴² France's second religious conflict (1567-68) ended in the 1568 Peace of Longjumeau, which reiterated the Peace of Amboise and once again conferred significant religious freedoms and privileges upon Protestants. The Edict of Saint-Maur later that same year prohibited all religions but Catholicism, which sparked France's third religious war (1568-70).¹⁴³ The Peace of St. Germain of 1570 ended the third religious war, and conferred upon Huguenots the right to hold public office and to possess certain French territories.¹⁴⁴

The Edict of Boulogne ended France's fourth religious war (1572-73).¹⁴⁵ The St. Bartholomew's Day massacre—a targeted group of assassinations and a wave of Catholic mob violence directed against the Huguenots—was the highwater mark of the fourth religious war. The Edict of Boulogne forgave Huguenots' crimes but only allowed them to

¹³⁵ See, e.g., *ibid.*

¹³⁶ See, e.g., *ibid.*, pp. 102-03.

¹³⁷ See, e.g., *ibid.*, p. 103.

¹³⁸ See, e.g., Zagorin, *How the Idea of Religious Toleration Came to the West*, p. 90.

¹³⁹ See, e.g., Grell, O. P., "Introduction," in *Tolerance and Intolerance in the European Reformation*, Ole Peter Grell & Bob Scribner eds., Cambridge: Cambridge University Press, 2002, pp. 1-12, 8.

¹⁴⁰ See, e.g., Zagorin, *How the Idea of Religious Toleration Came to the West*, p. 101.

¹⁴¹ See, e.g., Konnert, *Early Modern Europe*, p. 104; Benedict, P., "Un roi, une loi, deux fois: Parameters for the History of Catholic-Reformed Co-existence in France, 1555–1685," in *Tolerance and Intolerance in the European Reformation*, Ole Peter Grell & Bob Scribner eds., Cambridge: Cambridge University Press, 2002, pp. 65-93, 75-76.

¹⁴² See, e.g., Konnert, *Early Modern Europe*, p. 104.

¹⁴³ See, e.g., *ibid.*, p. 104-05.

¹⁴⁴ See, e.g., *ibid.*

¹⁴⁵ See, e.g., Rickard, J., Edict of Pacification of Boulogne, July 1573, History of War (Feb. 14, 2011), http://www.historyofwar.org/articles/edict_pacification_boulogne.html.

worship in certain towns and in their own homes. Protestant worship was otherwise forbidden.¹⁴⁶ This peace, like earlier ones during the religious wars, was short-lived.¹⁴⁷

King Henry III's Edict of Beaulieu in 1576 ended France's fifth religious war (1574-76).¹⁴⁸ This edict conferred upon the Huguenots freedom to worship however they wished anywhere in France (except, again, in Paris).¹⁴⁹ Peace was short-lived this time too: French Catholics were not pleased with the amount of religious freedom the Huguenots were awarded.¹⁵⁰

The Treaty of Bergerac of 1577, later codified as the Edict of Poitiers, brought France's sixth religious war (1576-77) to a conclusion.¹⁵¹ The treaty permitted Huguenots to worship in the suburbs of one town in every district in France.¹⁵² This peace quickly failed, however, which resulted in France's seventh religious war (1579-80).¹⁵³ The 1580 Treaty of Fleix that ended the seventh religious war culminated in the longest period of peace during France's Wars of Religion to that date.¹⁵⁴ The 1580 treaty recognized all of the previous treaties that had conferred religious freedom upon the Huguenots.¹⁵⁵

The Catholic League in France objected to these concessions and forced King Henry III into the Treaty of Nemours that required the king to purge the Protestant religion from France by voiding all previous edicts and treaties that had conferred upon the Huguenots some semblance of religious freedom as well as the right to hold public office.¹⁵⁶ France's eighth religious war (1585-89) began as a result of the Treaty of Nemours.¹⁵⁷ Henry III also was pressured into signing the Edict of Union of 1588, which affirmed many of the terms in the Treaty of Nemours.¹⁵⁸

France's ninth religious war (1589-98) commenced shortly after the eighth, when Henry IV, a Protestant, ascended to the throne following the death of Henry III.¹⁵⁹ In 1598 Henry IV issued the Edict of Nantes, which entitled both Protestants and Catholics to religious freedom and to equal political and social standing.¹⁶⁰ Huguenots were granted full

¹⁴⁶ See, e.g., *ibid.*

¹⁴⁷ See, e.g., *ibid.*

¹⁴⁸ See, e.g., Konnert, *Early Modern Europe*, p. 107.

¹⁴⁹ See, e.g., *ibid.*

¹⁵⁰ See, e.g., *ibid.*, pp. 107-08.

¹⁵¹ See, e.g., Rickard, J., Peace of Bergerac, 14 September 1577, History of War (Dec. 21, 2017), http://www.historyofwar.org/articles/peace_bergerac.html.

¹⁵² See, e.g., *ibid.*

¹⁵³ See, e.g., *ibid.*

¹⁵⁴ See, e.g., *ibid.*

¹⁵⁵ See, e.g., *ibid.*

¹⁵⁶ See, e.g., Konnert, *Early Modern Europe*, p. 109; Rickard, J., Treaty of Nemours, 7 July 1585, History of War (Jan. 23, 2018), http://www.historyofwar.org/articles/treaty_nemours.html.

¹⁵⁷ See, e.g., Rickard, Treaty of Nemours.

¹⁵⁸ See, e.g., Konnert, *Early Modern Europe*, p. 110.

¹⁵⁹ See, e.g., *ibid.*, p. 111.

¹⁶⁰ See, e.g., *ibid.*

freedom of conscience, and were permitted to worship in private without restriction, and in public on Protestant nobles' lands and in predetermined towns.¹⁶¹ The Edict of Nantes fully satisfied neither Huguenots nor Catholics, but it effectively ended France's Wars of Religion (1562-98) because it was better than the alternative: more war and instability.¹⁶²

The Edict of Nantes established special *Chambres de l'Édit* for cases involving Protestants.¹⁶³ But without the threat of civil war to encourage religious toleration, King Louis XIV revoked the Edict of Nantes in 1685 as part of his program of centralization.¹⁶⁴ He also required that all Protestant churches be destroyed.¹⁶⁵ Brutal raids into Protestant areas ensued that encouraged religious conformity at the point of a sword.¹⁶⁶

The French laws about religious toleration sketched above resulted from a series of religious wars. France was predominantly Catholic and the government restricted the practice of other faiths. Legal change—temporary though it may have been—flowed from treaties and edicts designed to end war and keep the peace.

3.4. The Netherlands

The Netherlands or—during the period chronicled in this Article—the Low Countries, the Northern Provinces, or the Dutch Republic, while outwardly Calvinist, was the first state to model religious toleration of the modern, liberal sort. The Netherlands exceeded John Locke's vision of toleration, which had excluded Catholics in particular from the realm of the tolerable. Rather than have an established state church, as was the situation in every other nation at the time, the Dutch supported the Reformed Church as the “public church.”¹⁶⁷ Unlike state-supported churches in other nations, attendance at the Dutch Reformed Church was not required.¹⁶⁸ The government employed the rituals of the Reformed Church, including for baptisms and marriages, but Catholics, for example, who considered baptism or marriage in a Calvinist church repugnant, were permitted to obtain a secular marriage before an alderman.¹⁶⁹ One noted religious historian regarded the degree of religious toleration in the Dutch Republic as revolutionary: “[The Dutch] broke with more than a millennium of Christianity—as well as with Jesus's commands to his followers, about

¹⁶¹ See, e.g., *ibid.*

¹⁶² See, e.g., *ibid.*

¹⁶³ See, e.g., Belloc, *Richelieu*, pp. 242-45.

¹⁶⁴ See, e.g., *ibid.*, p. 166.

¹⁶⁵ See, e.g., *ibid.*, pp. 166-67.

¹⁶⁶ See, e.g., *ibid.*, p. 167.

¹⁶⁷ See, e.g., Frijhoff, W., “Was the Dutch Republic a Calvinist Community? The State, the Confessions, and Culture in the Early Modern Netherlands,” in *The Republican Alternative: The Netherlands and Switzerland Compared*, André Holenstein, Thomas Maissen, & Maarten Prak eds., Amsterdam: Amsterdam University Press, 2008, pp. 99-122, 105. See also Gregory, *Unintended Reformation*, p. 163.

¹⁶⁸ See, e.g., Gregory, *Unintended Reformation*, p. 164.

¹⁶⁹ See, e.g., Frijhoff, “Was the Dutch Republic a Calvinist Community? The State, the Confessions, and Culture in the Early Modern Netherlands,” pp. 105-06.

which Christians were so consequentially divided—in making faith a private matter of individual preference.”¹⁷⁰

Sir William Temple, the Archbishop of Canterbury in the mid-twentieth century and an acclaimed religious historian, concluded as follows about the profound differences between the Netherlands and the rest of Europe on religious toleration:

The great care of this state has ever been to favor no particular or curious Inquisition into the faith or religious principles of any peaceable man, who came to live under the protection of their laws, and to suffer no violence or oppression upon any man’s conscience whose opinions broke not out into expressions or actions of ill consequence to the state.¹⁷¹

In 1579 several northern Netherlands provinces joined together in a confederation through the Union of Utrecht.¹⁷² Religious freedom was codified for each province, city, and individual in the confederation:

As for the matter of religion, the States of Holland and Zeeland shall act according to their own pleasure, and the other Provinces of this Union shall follow the rules set down in the religious peace drafted by Archduke Matthias, governor and captain-general of these countries, with the advice of the Council of State and the States General, or shall establish such general or special regulations in this matter as they shall find good and most fitting for the repose and welfare of the provinces, cities, and individual Members thereof, and the preservation of the property and rights of each individual, whether churchman or layman, and no other Province shall be permitted to interfere or make difficulties, provided that each person shall remain free in his religion and that no one shall be investigated or persecuted because of his religion, as is provided in the Pacification of Ghent.¹⁷³

A different translation of the Union of Utrecht read: “that the provinces of Holland and Zeeland must ‘act according to their own judgement, ... without any other provinces allowed to hinder or interfere with them in this’—adding to this, ‘that every particular person shall remain free in his religion, and that no one will be pursued or investigated because of his religion.’”¹⁷⁴

The Union of Utrecht served as a *de facto* constitution for the Dutch Republic and it established the region as a safe haven for religious dissenters.¹⁷⁵ Many religions whose

¹⁷⁰ Gregory, *Unintended Reformation*, p. 164.

¹⁷¹ As quoted in Jacobs, J., “Between Repression and Approval: Connivance and Tolerance in the Dutch Republic and in New Netherlands,” *de Halve Maen* 71 (1998), pp. 51-58, 52-53.

¹⁷² See, e.g., The Union of Utrecht, Constitution, https://www.constitution.org/cons/dutch/Union_Utrecht_1579.html.

¹⁷³ As quoted in *ibid.* (utilizing an early-eighteenth century English translation from Gerard Brandt, *Historie der RejiJrmatie*, I [12th book], p. 63).

¹⁷⁴ Bangs, J. D., “Dutch Contributions to Religious Toleration,” *Church History* 79(3) (2010), pp. 585-613, 591-92.

¹⁷⁵ See, e.g., Spaans, J., “Religious Policies in The Seventeenth-Century Dutch Republic,” in *Calvinism and Religious Toleration in the Dutch Golden Age*, R. Po-Chia Hsia & Henk Van Nierop eds., Cambridge: Cambridge University Press, 2002, pp. 72-86, 74. The Union of Utrecht was the basis of religious

adherents were persecuted elsewhere in Europe found refuge in the Netherlands.¹⁷⁶ Although the Netherlands was not perfect as far as religious tolerance was concerned—for example, attendance at the Reformed Church was voluntary but members of other denominations were barred from holding public office—the Reformed Church was not officially recognized by the government and a variety of religious groups lived in relative harmony.¹⁷⁷

The Northern Provinces' conflict with Catholic Spain warned against complete religious tolerance.¹⁷⁸ Beginning in 1581 “penal laws excluded Catholics from full citizens’ rights and hampered their organization as a religious community.”¹⁷⁹ Catholics were prohibited from conducting Mass, and monasteries and convents were closed.¹⁸⁰ Two years later the Northern Provinces agreed to protect the Reformed Church and “the public teaching or practice of any other Religion in the present United Provinces.”¹⁸¹ Dissenters were not allowed to worship publicly, but they were not banished.¹⁸² These policies of limited toleration were justified for purposes of social stability and economic growth, despite objections from the Reformed Church.¹⁸³

A leading historian of the seventeenth-century Netherlands insists that several policies in the Netherlands ran contrary to the generous portrait of religious toleration painted by other scholars.¹⁸⁴ For example, county magistrates endeavored to “divide and rule, to suppress the more disaffected elements in dissident groups and to favour those loyal to the existing regime.”¹⁸⁵ The result, this historian maintains, was the division of “the population into strictly defined religious communities, leaving a surplus category of those who were not members of any community.”¹⁸⁶

In 1576, shortly before the 1579 Union of Utrecht, the provinces that would become the Netherlands signed the Pacification of Ghent, committing each of them to a united effort against Spanish rule.¹⁸⁷ The Pacification of Ghent “protected Catholics from Protestant attacks (including verbal slights) and abolished enforcement of Catholic laws against heresy” for the purposes of defending and preserving “traditional political freedoms, rights, and

toleration in the Netherlands during this period. Apparently, additional laws on the subject were deemed largely unnecessary.

¹⁷⁶ See, e.g., *ibid.*

¹⁷⁷ See, e.g., *ibid.*

¹⁷⁸ See, e.g., *ibid.*, pp. 76-77.

¹⁷⁹ *Ibid.*

¹⁸⁰ See Bangs, “Dutch Contributions to Religious Toleration,” p. 594.

¹⁸¹ *Ibid.*

¹⁸² See *ibid.*

¹⁸³ See *ibid.*

¹⁸⁴ See Spaans, “Religious Policies in The Seventeenth-Century Dutch Republic,” p. 80.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*, p. 12.

¹⁸⁷ See, e.g., Bangs, “Dutch Contributions to Religious Toleration,” p. 592.

privileges of Netherlandish territories.”¹⁸⁸ Calvinists were the sole religious group that objected to religious toleration.¹⁸⁹ They wanted to suppress faiths other than their own.¹⁹⁰

The Dutch Reformed Church convened the Synod of Dort in Dordrecht in the Netherlands from November 13, 1618 until May 29, 1619 to address a divisive controversy initiated by the rise of Arminianism.¹⁹¹ Arminians objected to the Belgic Confession and the teachings of John Calvin and his followers.¹⁹² Arminians subscribed to the religious tenets of election on the basis of foreseen faith, universal atonement, resistible grace, and the possibility of lapse from grace.¹⁹³ The Synod rejected the Arminian’s views, and memorialized in what became known as the Canons of Dort the Reformed doctrine of total depravity, unconditional election, limited atonement, irresistible grace, and the perseverance of the saints.¹⁹⁴

Arminians were banished from the government in 1618 as part of a military coup, and they also were removed from the clergy of the Reformed Church, which effectively ended the religious toleration provision of the Union of Utrecht.¹⁹⁵ After the Synod of Dort adjourned, “the States General published an edict [in 1619] prohibiting holding separate religious gatherings or conventicles outside the official Reformed Church or supporting dissenting clergy.”¹⁹⁶ The 1619 edict remained in force for decades, although some cities chose not to enforce it.¹⁹⁷

The Netherlands had turned away from the generous guarantee of religious freedom memorialized in the Union of Utrecht. However, the rest of Europe remained enamored with perceived Dutch tolerance.¹⁹⁸ Catholic and Remonstrant church services were banned and many of the Remonstrant clergy were exiled from the country, but not all dissenters to the Reformed Church fled the Netherlands.¹⁹⁹ In fact, most stayed and continued to practice their preferred religion despite the absence of official authorization from the government that they could do so.²⁰⁰ Succinctly put, the Netherlands had become a complex nation of “ambivalent semi-tolerance ... a partial toleration seething with tension.”²⁰¹

¹⁸⁸ *Ibid.*

¹⁸⁹ See, e.g., *ibid.*

¹⁹⁰ See, e.g., *ibid.*

¹⁹¹ See, e.g., *ibid.*, p. 598.

¹⁹² See, e.g., Bangs, “Dutch Contributions to Religious Toleration,” p. 598.

¹⁹³ See, e.g., *ibid.* For an introduction to the meaning of these religious concepts, see An Introduction to the Canons of Dort, <https://www.christianstudylibrary.org/article/introduction-canon-dort>.

¹⁹⁴ See, e.g., Bangs, “Dutch Contributions to Religious Toleration,” p. 598.

¹⁹⁵ See, e.g., *ibid.*, p. 599.

¹⁹⁶ *Ibid.*

¹⁹⁷ See, e.g., *ibid.*

¹⁹⁸ See, e.g., *ibid.*, p. 600.

¹⁹⁹ See, e.g., Bangs, “Dutch Contributions to Religious Toleration,” p. 600.

²⁰⁰ See, e.g., *ibid.*

²⁰¹ *Ibid.*, pp. 600-01 (quoting Jonathan Israel).

The law and government of the Netherlands long had drawn a distinction between an individual's freedom to believe as he wished and a group's freedom to worship.²⁰² The Union of Utrecht had provided that "each individual enjoys freedom of religion," which, as mentioned above, codified religious tolerance as a fundamental tenet of the Dutch Republic.²⁰³ But the meaning of religious tolerance changed throughout the Netherlands's history.²⁰⁴ The original intent was to prevent a Catholic monopoly on religion.²⁰⁵ For example, article two of the Union of Utrecht prohibited Catholicism from being recognized as the only religion in the Netherlands and it ingrained in the nation the notion that no one religion would rule.²⁰⁶ The Netherlands had "placed itself under the banner of freedom of conscience."²⁰⁷ Worship could be restricted by the Calvinists but they "did not dare attack the fundamental law of freedom of individual conscience."²⁰⁸ The Dutch truly had a distinctive approach to matters of religious diversity.²⁰⁹

3.5. Spain

The staunchly-Catholic Early Modern Spain epitomized religious intolerance. In 1478 the Spanish Inquisition (officially, the Tribunal of the Holy Office of the Inquisition) was established to preserve Catholic hegemony, including by purging Spain of the adherents of non-conforming religions.²¹⁰ The Spanish Inquisition continued until 1834, and it was "designed to ensure conformity of belief and punish individuals for heretical thoughts as well as deed."²¹¹ Designated inquisitors employed harsh methods during their intense inquiries into people's personal beliefs.²¹²

²⁰² See Haefeli, E., *New Netherland and the Dutch Origins of American Religious Liberty*, Philadelphia, PA: University of Pennsylvania Press, 2012, p. 4.

²⁰³ *Ibid.*, p. 20.

²⁰⁴ See *ibid.*

²⁰⁵ See *ibid.*, p. 21.

²⁰⁶ See *ibid.*

²⁰⁷ Haefeli, *New Netherland and the Dutch Origins of American Religious Liberty*, p. 21.

²⁰⁸ *Ibid.*

²⁰⁹ But see *ibid.*, p. 33 (Contrary to their reputation for religious tolerance, the "Dutch had more or less reaffirmed the pre-Reformation world—where there was officially only one church in town, only one place to get baptized, hear a sermon, participate in public rituals, and pray with one's neighbors—only now it was the local authorities rather than the pope who were in charge and the religion was Reformed Protestant, not Roman Catholic."); and Hage, A. L. H., "The Freedom of Conscience as a Political Message in a Stained Glass-Window of the Late Sixteenth Century in the Saint-John's Church in Gouda," in *Conscience in the Legal Teachings of the Protestant and Catholic Reformations*, Michael Germann & Wim Decock eds., Leipzig: Eva, 2017, pp. 212-25 (arguing that only certain Dutch cities such as Gouda were famous for trying to be as pluralistic as possible, and that those cities received criticism for their open policies from the States of Holland, who systematically discriminated against Catholics).

²¹⁰ See, e.g., Kamen, H., *The Spanish Inquisition: A Historical Revision*, 4th ed., New Haven, CT: Yale University Press, 2014.

²¹¹ Haefeli, *New Netherland and the Dutch Origins of American Religious Liberty*, p. 28.

²¹² See, e.g., *ibid.*

Ferdinand II of Aragon issued the 1492 Alhambra Decree expelling Jews who failed to convert to Catholicism.²¹³ The text of the decree accused Jews of trying “to subvert the holy Catholic faith” by endeavoring to “draw faithful Christians away from their beliefs.”²¹⁴ After Spain conquered the Islamic kingdom of Granada in 1492, a treaty was signed that permitted the inhabitants of Granada to continue practicing their Muslim faith.²¹⁵ Shortly thereafter, the Moors, like the Jews in Spain writ large, were required to choose between converting to Catholicism or leaving Spanish Granada.²¹⁶ However, this mandate went largely unenforced from fear of retaliation by the Moors.²¹⁷

Spanish persecution of Spanish Muslims was revived with the passage of a 1567 edict restricting Muslim religious practices.²¹⁸ Arabic was prohibited, Moriscos were ordered to adopt Castilian dress and to abandon their own customs and ceremonies, and Moorish surnames were banned.²¹⁹ The edict’s purpose remained as before: to establish religious conformity in Spain. Conflicts between Muslims and Catholics ensued, and in 1609 Muslims were expelled from Spain.²²⁰

Censorship flourished during the Spanish Inquisition.²²¹ Books deemed inappropriate were banned, and persons who wished to publish books in Spain were required to first obtain a license from the Inquisition.²²² Bookstores and libraries were searched for prohibited content.²²³ Importing books without a license was punishable by death.²²⁴ Beginning in 1559, students were barred from studying at foreign universities so as to prevent them from learning “unorthodox or undesirable ideas.”²²⁵

Spain controlled the “Low Countries”—modern day Netherlands—from 1556 until 1714, and strict policies enforcing conformity to the Catholic faith were instituted.²²⁶ The Spanish government executed approximately two thousand Netherlanders between 1521 and the end of the sixteenth century.²²⁷ As one historian concisely put it, the “arrests, trials, and public executions” of the Spanish Inquisition “formed the most severe persecution in Europe.”²²⁸ To place the Spanish government’s mind-set about religious intolerance into perspective, consider this: “Philip blamed the people of the Low Countries, not his policies,

²¹³ See, e.g., Konnert, *Early Modern Europe*, p. 118.

²¹⁴ Edict of the Expulsion of the Jews (1492), <http://www.sephardicstudies.org/decreed.html>.

²¹⁵ See, e.g., Konnert, *Early Modern Europe*, p. 119.

²¹⁶ See, e.g., *ibid.*

²¹⁷ See, e.g., *ibid.*

²¹⁸ See, e.g., *ibid.*

²¹⁹ See, e.g., *ibid.*

²²⁰ See, e.g., Konnert, *Early Modern Europe*, p. 202.

²²¹ See, e.g., *ibid.*, p. 119.

²²² See, e.g., *ibid.*, pp. 119-20.

²²³ See, e.g., *ibid.*, p. 120.

²²⁴ See, e.g., *ibid.*

²²⁵ See, e.g., Konnert, *Early Modern Europe*, p. 120.

²²⁶ See, e.g., *ibid.*, pp. 123-31.

²²⁷ See, e.g., Haefeli, *New Netherland and the Dutch Origins of American Religious Liberty*, p. 28.

²²⁸ *Ibid.*

for the troubles. ... [T]he condition of religious affairs in the Netherlands required stricter enforcement of the law, not leniency.”²²⁹

3.6. Poland

Poland was more religiously tolerant than many European nations of the day.²³⁰ Protestants and Catholics were allowed to co-exist. Some members of the Polish nobility practiced Lutheranism, while others were committed Catholics.²³¹ In 1553 the Polish nobility enacted the Warsaw Confederation, which conferred religious freedom upon Polish nobles.²³² The nobles could practice the religion of their choice and impose it in their territory.²³³ They agreed not to disrupt one another’s chosen faith.²³⁴ In language reminiscent of the Peace of Augsburg in Germany, the Warsaw Confederation provided in pertinent part:

for ourselves and our successors forever, under the bond of our oath, faith, honor, and conscience, that we who differ with regard to religion will keep the peace with one another, and will not for a different faith or a change of churches shed blood nor punish one another by confiscation of property, infamy, imprisonment, or banishment, and will not in any way assist any magistrate or office in such an act.²³⁵

As one leading historian of Poland aptly put it, “the wording and substance of the declaration of the Confederation of Warsaw of 28 January 1573 were extraordinary with regards to prevailing conditions elsewhere in Europe; and they governed the principles of religious life in the Republic for over two hundred years.”²³⁶

²²⁹ Konnert, *Early Modern Europe*, p. 120. At least one revisionist European historian contends that, in practice, both ordinary citizens and governments in the Spanish realm were tolerant of other confessions, if only for economic reasons. See, e.g., Thomas, W., “The Inquisition, Trade, and Tolerance in Early Modern Spain, in *Entrepreneurs, Institutions and Government Intervention in Europe [13th - 20th Centuries]: Essays in Honour of Erik Aerts*, Brecht Dewilde & Johan Poukens eds., Brussels: ASP, 2018, pp. 279-91; Thomas, W., “The Treaty of London, the Twelve Years Truce and Religious Toleration in Spain and the Netherlands (1598-1621),” in *The Twelve Years Truce (1609): Peace, Truce, War and Law in the Low Countries at the Turn of the 17th Century*, Randall Lesaffer ed., Leiden/Boston: Brill, 2014, pp. 277-97.

²³⁰ See Kaplan, *Divided by Faith*, p. 146. Prior to 1791 Poland was the Polish-Lithuanian Commonwealth (formally, the Kingdom of Poland and the Grand Duchy of Lithuania).

²³¹ See *ibid.*

²³² See *ibid.*

²³³ See *ibid.*, p. 154.

²³⁴ See *ibid.*

²³⁵ As quoted in Kaplan, *Divided by Faith*, p. 111.

²³⁶ Davies, N., *God’s Playground, Vol. 1: The Origins to 1795*, rev. ed., New York, NY: Columbia University Press, 2005, p. 126. For more about the Eastern European region, see Wijffels, A., “Law and Religion in Early-Modern Europe: Some Tentative Conclusions,” in *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations*, Wim Decock, Jordan J. Ballor, Micheal Germann, & Laurent Waelkens eds., Göttingen: V & R, 2014, pp. 266-75. The Scandinavian countries have interesting legal histories about religious toleration too. For centuries the Evangelical-Lutheran Church of Sweden enjoyed state support and was connected to the Swedish national identity. In 2000, a legal separation of church and state was instituted, making Sweden officially secular. Until 2012 the Evangelical-Lutheran religion also was the public religion of Norway. The Evangelical-Lutheran Church remains the national church of Denmark, Iceland and Finland.

4. Religious Toleration and the Planting of English America

Five English American colonies were planted for religious reasons: Maryland, Rhode Island, Pennsylvania, Connecticut, and Massachusetts. The settlers of those colonies were aware of the European laws that impacted their religious beliefs and practices adversely, and that was why many of them emigrated to the New World.

4.1. Maryland

George Calvert, a devout Catholic and the original Lord Baltimore, was the first proprietor of an English American colony committed to religious toleration.²³⁷ Calvert had a longstanding interest in colonization of the Americas, which was initially manifested in 1609 through financial investments in the second Virginia Company and the East India Company. He joined the New England Company in 1622, and in 1623 he obtained a royal charter for a colony he called Avalon in what is now Newfoundland, Canada. When the newly installed Lord Baltimore traveled to Avalon in 1627, he brought with him two Catholic priests, one of whom remained in the colony through 1629. This marked the first continuous Catholic ministry in English North America. Baltimore secured the right of Catholics to practice their religion unimpeded in the new colony, and he implicitly recognized the principle of religious tolerance for all Christians in Avalon's charter by omitting any requirement that settlers take the Oath of Supremacy acknowledging the monarch as the head of the Church of England. Avalon was thus the initial North American jurisdiction to practice at least some degree of religious toleration. However, the colony failed because Baltimore found the weather too severe and it had become a financial drain on him.

Lord Baltimore was bound and determined not to give up on his dream of colonization. Tragically, he died five weeks before the Charter of Maryland passed the seals. His eldest son Cecilius, who became the second Lord Baltimore, carried on his father's design. The Charter of Maryland did not specifically announce the intention to plant a colony protective of Catholics. That should not be surprising. At the time, the laws of England not only forbade the open practice of Catholicism, King Charles I—although married to a Catholic and suspected of being Catholic himself—was demanding stricter enforcement of those laws. Consequently, if George Calvert desired to create a haven for Catholics in Maryland, it was unlikely that he would have made that known to Charles during the process of obtaining the charter. Calvert's strategy worked: the Virginia Company had accused Calvert of wanting to establish a Catholic colony—calling him a “Catholic colonizer”—but

²³⁷ The discussion about the planting of colonial Maryland draws from Gerber, “Law and Catholicism in Colonial Maryland.”

Charles dismissed the accusation and granted the charter as a reward for Calvert's loyalty to King James I.

While on the voyage to Maryland the leaders of the expedition were supplied with a document entitled "Instructions to the Colonists by Lord Baltimore, 1633" written by Baltimore himself.²³⁸ The instructions provided additional evidence of the Calverts' strategy of keeping the animating principle of the colony under wraps by requiring Catholic planters to practice their religion "as priuately as may be" and "to be silent vpon all occasions of discourse concerning matters of Religion" so that none of the Protestants in the colony would complain to the anti-Catholic forces "in Virginia or in England."²³⁹ The remainder of Maryland's colonial history can be fairly described as the death and resurrection of Maryland's animating principle.²⁴⁰ The death of the animating principle was epitomized by the 1654 replacement to Maryland's celebrated 1649 Toleration Act. Under the 1654 Act, religious freedom was guaranteed to all Christians except those "who profess and exercise the Popish Religion commonly known by the Name of the Roman Catholick Religion."²⁴¹ The resurrection was memorialized in Article XXXIII of the Maryland Constitution of 1776, which read in pertinent part: "That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty."²⁴²

4.2. Rhode Island

The founders of the four original towns in what was to become Rhode Island were all religious dissidents from Massachusetts Bay Colony and sought a refuge in which they could follow their own particular religious ideals.²⁴³ They also were tolerant of persons of other beliefs. Providence was founded in 1636 when Roger Williams and a small group of disciples fled to Narragansett Bay and purchased land from Native Americans. Williams named the settlement "Providence" because he believed that God's providence had brought him to the region. He declared that Providence was to be a haven for those "distressed of

²³⁸ The 1633 Instructions are available at *The Calvert Papers*, vol. 1, John Wesley Murray Lee & Andrew White eds., Baltimore, MD: J. Murphy, 1889, pp. 131-40, <http://www.loc.gov/resource/lhbc3364a/>.

²³⁹ *Ibid.*, p. 132.

²⁴⁰ See Gerber, "Law and Catholicism in Colonial Maryland."

²⁴¹ Archives of Maryland Online, vol. 1, 2003, pp. 340, 341, <http://aomol.msa.maryland.gov/000001/000001/html/index.html>.

²⁴² As reprinted in *The Bill of Rights: A Documentary History*, vol. 1, Bernard Schwartz ed., New York, NY: Chelsea House Publishers, 1971, p. 283. Plainly, discrimination against Jews and other non-Christians continued, and any colony, state, or nation not completely committed to toleration writ large is vulnerable to criticism, especially with the benefit of four centuries of hindsight. That, however, would be an unfair criticism to levy against George and Cecilius Calvert. After all, what the first Lord Baltimore set in motion—decades before John Locke's more celebrated "letter concerning toleration," no less—and what the second Lord Baltimore was committed to defending, was truly impressive: a polity dedicated to the separation of church and state so that Catholics could practice their faith without fear.

²⁴³ The discussion about the planting of colonial Rhode Island draws from Gerber, "Law and the Lively Experiment in Colonial Rhode Island."

conscience,”²⁴⁴ and it soon attracted a host of religious dissenters and other like-minded individuals.

The two main documents that established Providence were the Providence Agreement of 1637 and a 1640 amendment to that original compact. Both documents emphasized freedom of conscience. The Providence Agreement of 1637 was the original compact of the initial settlers. It contained the first expression of the separation of church and state in America, allowing townspeople to decide civil matters only: “all such orders and agreements as shall be made for public good of the body in an orderly way, by the major consent of the present inhabitants, masters of families incorporated together in a Towne fellowship, and others whom they shall admit into them only in civil things.”²⁴⁵

The original compact was amended in 1640 by a report of Providence arbitrators recommending that disputes between townspeople be addressed initially by five men called “disposers.” Persons unhappy with a decision of the disposers remained free to appeal the decision to a “generall towne meeting.” Most important for present purposes, the 1640 report reiterated that “Wee agree, as formerly hath bin the liberties of the town, so still, to hould forth liberty of Conscience.”²⁴⁶

The town of Portsmouth was founded by additional religious exiles from the Massachusetts Bay Colony, chief among whom were Anne Hutchinson, William Coddington, and John Clarke. They settled on Aquidneck Island—then known as “Pocasett” by the Native Americans from whom it was acquired and as “Rhode Island” by the planters—in 1638 at the suggestion of Roger Williams. As Antinomians, the Portsmouth founders believed that Christians were not bound by Biblical prescriptions if God told them to do otherwise. On March 7, 1637/8, before leaving Boston, they signed an agreement now known as the Portsmouth Compact, which was more of a religious than a political charter. Its unmistakable purpose was to establish an independent Christian community. The Portsmouth Compact provided:

We whose names are underwritten do hereby solemnly in the presence of Jehovah incorporate ourselves into a Bodie Politick and as He shall help, will submit our persons, lives and estates unto our Lord Jesus Christ, the King of Kings, and Lord of Lords, and to all those perfect and most absolute laws of His given in His Holy Word of truth, to be guided and judged thereby.

When William Coddington was deposed as “Judge” of Portsmouth, he left the town with John Clarke in 1639 and founded Newport. The two towns were united in 1640, with Coddington elected governor. The animating principle remained religious toleration. For

²⁴⁴ Confirmatory Deed of Roger Williams and his wife, of lands transferred by him to his associates in the year 1638, reprinted in *Records of the Colony of Rhode Island and Providence Plantations, in New England, 1636-1663*, vol. 1, John Russell Bartlett ed., Providence, RI: A. Crawford Green, 1856, p. 22 (hereinafter “*R.I. Records*”).

²⁴⁵ Providence Agreement (Aug. 20, 1637), reprinted in *Colonial Origins of the American Constitution: A Documentary History*, Donald S. Lutz ed., Indianapolis, IN: Liberty Fund, 1998, p. 151.

²⁴⁶ Report of Arbitrators at Providence (Aug. 27, 1640), reprinted in *ibid.*, pp. 157-59, 158.

example, in a 1641 town court session it was “ordered, by the authority of this present Courte, that none bee accounted a Delinquent for Doctrine, Provided it be not directly repugnant to ye Government or Lawes established.”²⁴⁷ In the next session it was decreed that the “law of the last Court, made concerning Libertie of Conscience, in point of Doctrine, is perpetuated.”²⁴⁸

Few records exist detailing the founding of the town of Warwick, primarily because Warwick’s leader, Samuel Gorton, believed that as English subjects the planters had no lawful right to establish a government without formal permission from the Crown. Consequently, no town government was instituted and no officers were elected until 1647, three years after the Patent for Providence Plantations of 1643/4. It is important to note, however, that Gorton rejected organized forms of religion, believed in the divinity of humankind, and had been the object of persecution because of his beliefs. He wrote: “I yearned for a country where I could be free to worship God according to what the Bible taught me, as God enabled me to understand it. I left my native country (England) to enjoy libertie of conscience in respect to faith toward God and for no other end.”²⁴⁹ In short, Gorton’s personal history suggests a commitment to government based on the principle of religious toleration.

4.3. Pennsylvania

What George Calvert was to Maryland and Roger Williams was to Rhode Island, William Penn was to Pennsylvania: a visionary founder committed to religious liberty.²⁵⁰ A significant difference existed between Penn and Calvert and Williams, however. Pennsylvania was planted on a broader conception of religious liberty than were Maryland and Rhode Island. As one historian of colonial Pennsylvania put it:

The concept of toleration, important for the national experience and for many of the other colonies, is of less significance for Pennsylvania. Toleration implies a concession of privileges by a controlling or dominant faction to a minority group, not the unhindered exercise of inherent rights. Pennsylvania was not founded on the principle of toleration, but of tolerance. Tolerance describes liberal attitudes toward other religious, national, or cultural groups, an acceptance of the right not to conform and to hold different beliefs. Although William Penn’s goal was to establish, in almost absolute terms, religious liberty, with the expectation that mutual tolerance would prevail, Penn,

²⁴⁷ The Generall Court of Election began and held at Portsmouth, from the 16th of March, to the 19th of the same mo., 1641, reprinted in *R.I. Records*, vol. 1, pp. 111-16, 113.

²⁴⁸ The Orders and Lawes made at the Generall Courte, held at Newport, the 17th of September, Ano. 1741, reprinted in *ibid.*, pp. 116-19, 118.

²⁴⁹ Bicknell, T. W., *The History of the State of Rhode Island and Providence Plantations*, vol. 1, New York, NY: American Historical Society, 1920, p. 92 (quoting Samuel Gorton).

²⁵⁰ The discussion about the planting of colonial Pennsylvania draws from Gerber, “Law and the Holy Experiment in Colonial Pennsylvania.”

Pennsylvanians, and contemporary observers often described conditions in the colony as “toleration,” for it was the only frame of reference available in the context of eighteenth-century political theory.²⁵¹

Penn converted to Quakerism in his earlier twenties. He quickly became one of the most influential Quaker tract writers of his day and a vocal proponent of liberty of conscience. The Quaker desire for religious tolerance and an end to persecution rested upon the belief that the seat of religion emanated from the conscience. Significantly, Penn’s commitment to religious tolerance in Pennsylvania was a product of his personal experience with religious intolerance in his native England.

In 1680/1 King Charles II granted “Pennsylvania” to Penn in repayment of a debt to Penn’s father, who had died in 1670. Foremost among Penn’s plans for Pennsylvania was to conduct a “holy experiment”: he wished to establish a society that was godly, virtuous, and exemplary for all humanity. And while Penn was particularly concerned about creating a haven in Pennsylvania for the much-persecuted Quakers, he also was committed to religious tolerance in general. As Penn famously put it in a letter to his friend James Harrison shortly after receiving his patent for Pennsylvania:

for my Country [I see?] the lord in the obtaineing of it: & mor[e was] I drawn inward to looke to him, & to o[we it?] to his hand & powr then to any ot[her way.?] I have so obtained it & des[ire] that I may not be unworthy of his love, but do that wech may answer his Kind providence & serve his truth & people; that an example may be Sett up to the nations. There may be room there, tho not here, for such an holy experiment.²⁵²

The only extant draft of the Pennsylvania charter found Penn inserting a long clause guaranteeing religious liberty taken almost verbatim from the Rhode Island charter of 1663. William Blathwayt, the secretary to the Lords of Trade, struck the clause. Penn’s clause had read:

And because it may happen that some of the People and Inhabitants of the said Province may not in their private opinions be able to conforme to the publick exercize of Religion according to the Liturgy Form’d & Ceremonies of the Church of England or take or subscribe the Oaths & Articles made and Established in this Nation in that behalfe; And for that the same by reason of the remote distances of those places will (as Wee hope) be noe breach of the Unity and Uniformity Established

²⁵¹ Schwartz, S., *“A Mixed Multitude”*: *The Struggle for Toleration in Colonial Pennsylvania*, New York, NY: New York University Press, 1989, p. 9. Roger Williams’s legendary harangues against Quakers rendered him, in my judgment, less religiously tolerant than Penn. See Gerber, “Law and the Lively Experiment in Colonial Rhode Island.” George Calvert was unquestionably more concerned about religious toleration than religious tolerance: He wished to found a colony that would provide refuge for Catholics and he tried to do that by promising toleration for all Christian denominations. See Gerber, “Law and Catholicism in Colonial Maryland.”

²⁵² William Penn to James Harrison, Aug. 25, 1681, in *The Papers of William Penn*, vol. 2, Richard S. Dunn & Mary Maples Dunn eds., Philadelphia, PA: University of Pennsylvania Press, 1982, pp. 107-09, 108. Penn had spent more than a decade trying to persuade King Charles II and James, Duke of York, among others, to adopt a policy of religious tolerance in England. He was unsuccessful, as his letter to Harrison suggested.

in [missing folio] Licentiousness nor to the civill injury Nor outward disturbance of others Any Law Statute or Clause contained or to be contained, usage, or Custome of Our Realme of England to the contrary thereof in any wise Notwithstanding[.]²⁵³

Unlike the Rhode Island charter of 1663, the Pennsylvania charter that passed the Great Seal on March 4, 1680/1 did not, therefore, contain a clause committing Pennsylvania to religious liberty.²⁵⁴ However, Pennsylvanians were not required to attend Anglican services. The day after the Pennsylvania charter passed the Great Seal, Penn wrote to his friend Robert Turner that he intended to draft and publish a constitution that would serve as the basis for a virtuous and just government in Pennsylvania: “I shall have a tender care to the Governmt that it be well laid at first.”²⁵⁵ Penn’s initial attempt to do that was the Fundamental Constitutions of Pennsylvania, drafted in or about the summer of 1681 but never implemented. Penn planned in that organic law to transfer as much political power as possible to the colonists “& to leave myselfe & successors noe powr of doeing mischief.”²⁵⁶ With respect to religious liberty, Penn pledged in the opening section of the Fundamental Constitutions what the crown had voided in the Pennsylvania charter of 1680/1:

In reverence to God the Father of lights and Spirits the Author as well as object of all divine knowledge, faith and worship, I do hereby declare for me and myn and establish it for the fi{r}st fundamentall of the Government of my Country, that every Person that does or shall reside therein shall have and enjoy the Free Possession of his or her faith and exercise of worship towards God, in such way and manner As every Person shall in Conscience beleive is most acceptable to God and so long as every such Person useth not this Christian liberty to Lincentiousness, that is to say to speak loosly and prophainly of God Christ or Religion, or to Committ any evill in their Conversation, he or she shall be protected in the enjoyment of the aforesaid Christian liberty by the civill Magistrate[.]²⁵⁷

Penn’s advisors apparently persuaded him that direct popular sovereignty in Pennsylvania would be dangerous for his proprietary rights. Penn and his advisors subsequently prepared at least a dozen drafts of what became known as the “Frame of Government of Pennsylvania.” When Penn arrived in Pennsylvania in 1682 to serve as governor, he brought with him the Frame of Government of 1682 and the Laws Agreed Upon in England, which he wrote.²⁵⁸ The preface to the 1682 Frame of Government expressed Penn’s belief that good government was laid on religious foundations and should be dedicated to moral goals. Law XXVI of the Laws Agreed Upon in England accommodated the Quaker preference for refraining from swearing oaths in judicial and other governmental

²⁵³ William Blathwayt, Draft of the Charter of Pennsylvania, in *ibid.* at 63–77. The quoted passage that Blathwayt struck is at page 71.

²⁵⁴ The Charter for the Province of Pennsylvania of 1680/1 is reprinted in, among other places, *Charter to William Penn, and Laws of the Province of Pennsylvania, Passed Between the Years 1682–1700*, Staughton George, Benjamin M. Nead, & Thomas McCamant eds., Harrisburg, PA: L.S. Hart, 1879, pp. 81–90.

²⁵⁵ William Penn to Robert Turner, Mar. 5, 1680/1, in *The Papers of William Penn*, vol. 2, p. 83.

²⁵⁶ William Penn to Robert Turner, Anthony Sharp, & Roger Roberts, Apr. 1681, in *ibid.*, pp. 88–90, 89.

²⁵⁷ Fundamental Constitutions of Pennsylvania of 1681, in *ibid.*, pp. 140–57, 143.

²⁵⁸ The Frame of Government of Pennsylvania of 1682 and The Laws Agreed Upon in England are reprinted in, among other places, *ibid.*, pp. 211–27.

processes (“solemnly Promising” to tell the truth was sufficient). Law XXXIV required voters and officeholders to be Christians but, unlike in England and other colonies, it did not discriminate against Catholics. Law XXXV guaranteed religious freedom to all inhabitants who believed in God:

That all Persons living in this Province, who confess and acknowledge the One Almighty and Eternal God, to be the Creator, Upholder and Ruler of the World, and that hold themselves obliged in Conscience to live peaceably and justly in *Civil Society*, shall in no wayes be molested or prejudiced for their Religious Perswasion or Practice in matters of *Faith* and *Worship*, nor shall they be compelled at any time to frequent or maintain any Religious Worship, Place or Ministry whatever.²⁵⁹

Pennsylvania considered and/or enacted three more organic laws during the colonial period. The most important was the Charter of Privileges of 1701, which Penn wrote and which served as Pennsylvania’s colonial constitution until the Declaration of Independence in 1776. The Charter of Privileges opened with a reaffirmation of Penn’s famous commitment to liberty of conscience:

Because noe people can be truly happy though under the Greatest Enjoyments of Civil Liberties if Abridged of the Freedom of their Consciences as to their Religious Profession and Worship. And Almighty God being the only Lord of Conscience Father of Lights and Spirits and the Author as well as Object of all divine knowledge Faith and Worship who only {{can}} Enlighten the mind and perswade and Convince the understandings of people I doe hereby Grant and Declare that noe person or persons Inhabiting in this Province or Territories who shall Confesse and Acknowledge one Almighty God the Creator upholder and Ruler of the world and professe him or themselves Obligated to live quietly under the Civill Governement shall be in any case molested or prejudiced in his or their person or Estate because of his or their Conscientious perswasion or practice nor be compelled to frequent or mentaine any Religious Worship place or Ministry contrary to his or their mind or doe or Suffer any other act or thing contrary to their Religious perswasion.²⁶⁰

The Charter of Privileges likewise repeated Penn’s longstanding promise that Christians of any denomination were allowed to hold government office. It also declared “That the first Article of this Charter Relateing to Liberty of Conscience and every part and Clause therein according to the True Intent and meaneing thereof shall be kept and remaine without any Alteration Inviolably for ever.”²⁶¹

Thomas Jefferson—the author of one of the most celebrated religious liberty laws in American history, the Virginia Statute for Religious Freedom of 1786—described William Penn as “the greatest lawgiver the world has produced, the first in either antient or modern times who has laid the foundation of govmt in the pure and unadulterated principles of peace

²⁵⁹ *Ibid.*, p. 225.

²⁶⁰ The Charter of Privileges of Pennsylvania of 1701, in *The Papers of William Penn*, vol. 4, Craig W. Horle, Alison Duncan Hirsch, Marianne S. Wokeck, & Joy Wiltenburg, eds., Philadelphia, PA: University of Pennsylvania Press, 1987, pp. 104-10, 106.

²⁶¹ *Ibid.*, p. 108.

of reason and right.”²⁶² Jefferson was probably correct, at least as far as religious liberty was concerned. After all, the commitment to liberty of conscience that characterized colonial Pennsylvania traced directly to Penn’s vision, example, and determination: Pennsylvania enacted more laws about religious tolerance than any other English American colony, both before and after Penn’s death. Delaware, which Penn also owned and which constituted the “lower counties” of Pennsylvania until it became an independent state in 1776, likewise enacted religiously tolerant laws even when Penn permitted it to govern itself with a separate assembly after 1704.²⁶³

4.4. Connecticut

Connecticut and Massachusetts also were planted for religious reasons.²⁶⁴ However, they were not tolerant of denominations that differed from the state-sponsored church. Connecticut originated as the distinct River and New Haven colonies. Thomas Hooker, John Haynes, and Roger Ludlow are widely regarded as the founders of the River Colony. These three men and a cadre of followers fled Massachusetts Bay Colony during a two-year span in the mid-1630s with the aspiration of acquiring more land, and because of increasing concerns about the leadership of Massachusetts Bay and personal differences between Hooker and John Cotton, the preeminent minister and theologian in Massachusetts Bay at the time. The River Colony’s Fundamental Orders of 1638/9 have been called the world’s first written constitution.²⁶⁵ They were designed to establish a civil government to preserve the Congregational churches. In a common phrase, the state was to be the “nursing father” of the church. Those ideas were traceable to the Old Testament (specifically, Isaiah 49:23) and had been embraced by numerous political philosophers and theologians throughout

²⁶² Thomas Jefferson to Peter Stephen Duponceau (Nov. 16, 1825) (Founders Early Access), archived at <https://perma.cc/GDD3-9EDW>.

²⁶³ The Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New-Jersey of 1676/7 likewise contained a guarantee of liberty of conscience. Penn was one of the proprietors of that colony and is credited with the liberty of conscience provision. See, e.g., Julian P. Boyd, “Introduction,” in *Fundamental Laws and Constitutions of New Jersey, 1664–1964*, Julian P. Boyd ed., Princeton, NJ: Van Nostrand, 1964, pp. 2-50, 11-12. Penn, like Calvert and Williams before him, was not perfect, especially when viewed through a modern lens. For example, the Great Law of 1682 that guaranteed liberty of conscience barred persons from voting or holding public office unless they professed the belief that Jesus Christ was the son of God and the savior of the world. As a result, Unitarians, Jews, and Atheists could not participate in government. Penn also was forced to accept a law propounded by the assembly in 1705/6 that mandated a pledge against Catholic doctrine. Significantly, however, the pledge was required for service in the government only and did not in any way restrict Catholics from practicing their faith. Moreover, after 1692 Pennsylvania was the sole English American colony to permit Catholic Mass to be celebrated in public and, as the above discussion suggested, Pennsylvania enacted many religiously-tolerant laws during Penn’s lifetime, not the least of which were the repeatedly-stated *constitutional* commitments by Penn himself to religious liberty.

²⁶⁴ The discussions about the planting of colonial Connecticut and colonial Massachusetts draw from Gerber, “Law and Religion in Colonial Connecticut” and Gerber, “Law and Religion in Plymouth Colony.”

²⁶⁵ See, e.g., Bates, A. C., “Were the Fundamental Orders a Constitution?,” *Connecticut Bar Journal* 10(1) (1936), pp. 43-50, 50. The Fundamental Orders of 1638/9 are reprinted in, among other places, *The Public Records of the Colony of Connecticut: Prior to the Union with New Haven Colony, May 1665*, vol. 1, J. Hammond Trumbull ed., Hartford, CT: Brown & Parsons, 1850, pp. 20-25 (hereinafter “*Conn. Col. Recs.*”).

history. What was unique about the Fundamental Orders was the absence of any reference to an earthly authority. There were eleven Fundamental Orders, and each was dedicated to delineating the River Colony's form of government. Lest there be any doubt that the River Colony was indeed a Congregational commonwealth, the first Order conferred upon the magistrates "power to administer iustice according to the Lawes here established, and for want thereof according to the rule of the word of God."²⁶⁶

New Haven Colony was founded in 1638 by the Reverend John Davenport, Theophilus Eaton, and five hundred English Puritans. They originally planned to settle in Massachusetts Bay, but quickly decided that the Bay Colony was not sufficiently strict in its religious observations. The late Perry Miller, the most celebrated of the intellectual historians of American Puritanism, characterized New Haven as "the Bible Commonwealth and nothing else," in contrast to Massachusetts Bay, which "contained too many other elements besides Puritanism;" the River Colony, which "grew up in too haphazard a fashion;" and Plymouth, which was "too plebeian."²⁶⁷ New Haven operated under three organic laws during its short life as a separate colony. The colony's commitment to Puritan Congregationalism was evident in all three. For example, it was decreed in New Haven's Fundamental Articles of 1639 that the leaders of the government were conferred "the power of making and repealing lawes according to the worde."²⁶⁸

The River Colony and the New Haven Colony joined in 1665 to form a unified Connecticut Colony. In 1660 the people of Connecticut received word that Cromwell's Protectorate had come to an end and that the English monarchy had been restored. Connecticut's leaders, wishing to eliminate the uncertainties inherent in the Warwick Patent, sent John Winthrop Jr., their popular and talented governor, to England to request a charter from the new king, Charles II. The Charter was conferred in 1662. The land granted to the Connecticut Colony included the entire New Haven Colony. At first, New Haven objected to being annexed by Connecticut, but in 1665 the two colonies were formally united after the leaders of New Haven decided it was better to be absorbed by Connecticut than by New York (previously, New Netherlands). New Haven's formal act of submission to the River Colony was issued on January 5, 1664/5, and it emphasized the animating principle of Puritan Congregationalism shared by the formerly separate colonies: "yt soe brethren in ye fellowship of ye gospell might come to a cordiall & regular closure, & soe to walke together in love & peace to advance Christ his interest among them, which is our designe[.]"²⁶⁹

²⁶⁶ *Conn. Col. Recs.*, vol. 1, p. 20.

²⁶⁷ Miller, P., Book Review, *New England Quarterly* 8(4) (1935), pp. 582-84, 583-84 (reviewing Isabel MacBeath Calder, *The New Haven Colony*, New Haven, CT: Yale University Press, 1934).

²⁶⁸ New Haven's 1639 Fundamental Articles is available at, among other places, http://oll.libertyfund.org/?option=com_staticxt&static?le=show.php%3Ftitle=694&chapter=102639&layout=html&Itemid=27.

²⁶⁹ *Records of the Colony and Plantation of New Haven*, vol. 2, Charles J. Hoadly ed., Hartford, CT: Case, Lockwood, 1858, pp. 555-57, 556.

Scholars of Connecticut's history disagree about what led to the demise of Connecticut's animating principle of Puritan Congregationalism. Richard J. Purcell concluded that a simmering stew of religious, economic, and political ingredients led to it.²⁷⁰ Richard L. Bushman insisted that "law and authority embodied in governing institutions gave way under the impact first of economic ambitions and later of the religious impulses of the Great Awakening."²⁷¹ Unlike Purcell, who had emphasized the years 1775-1818 in explaining Connecticut's transformation from a theocracy to a democracy, Bushman dated the practical end of Connecticut's Puritan polity to the period 1690-1765, during which, he pithily phrased it, "Connecticut Puritans became Yankees."²⁷² Robert J. Taylor echoed Purcell's and Bushman's assessments about the role that economics played in the downfall of the animating principle. But he also appreciated that the "very process of growth—the expansions of old towns and the settlement of new ones, the influx of peoples with different religious ideas and their spread in some sections—all had great impact."²⁷³

The previous explanations underestimate the impact of *law*. Law is, of course, shaped by many factors, and the slow march to religious toleration in Connecticut is a testament to that fact. But law also shapes other concerns—be they economic, political, social, or religious—and no disquisition about Connecticut's colonial history would be complete without acknowledging how large a role the law itself played in the eventual disestablishment of Puritan Congregationalism in the Connecticut Constitution of 1818. It is true that the law in Connecticut only gradually became more tolerant of non-established denominations—for example, a 1708 law permitting sober dissent was unevenly applied and repealed at one point—but once the law sparked religious freedom's flame in colonial Connecticut it could never be truly extinguished.

4.5. Massachusetts

What eventually became Massachusetts was initially the separate colonies of Plymouth and Massachusetts Bay. Plymouth Colony was planted in 1620 by a group of strict Calvinists commonly known as "Pilgrims." The appellation "Pilgrims" traced to an observation by the most famous of their community, William Bradford, who remarked "they knew they were pilgrims."²⁷⁴ Bradford, in turn, was referencing Hebrews 11:13: "These all died in faith, not having received the promises, but having seen them afar off, and were persuaded of them, and embraced them, and confessed that they were strangers and pilgrims on the earth."²⁷⁵

²⁷⁰ See Purcell, R. J., *Connecticut in Transition: 1775-1818*, Washington, D.C.: American Historical Association, 1918 (repr. 1963), p. 4.

²⁷¹ See Bushman, R. L., *From Puritan to Yankee: Character and Social Order in Connecticut, 1690-1765*, Cambridge, MA: Harvard University Press, 1967 (repr. 1970), npn.

²⁷² *Ibid.*

²⁷³ Taylor, R. J., *Colonial Connecticut: A History*, Millwood, NY: KTO Press, 1979, p. 111.

²⁷⁴ As quoted in Philbrick, N., *Mayflower: A Story of Courage, Community, and War*, New York, NY: Viking Press, 2006, p. 7.

²⁷⁵ *Hebrews* 11:13.

The Pilgrims fled England as Separatists: they denied the validity of the Church of England and wished to practice their faith in their own way. The “Puritans,” in contrast, immigrated to Massachusetts Bay in 1630 as members of the Church of England who desired to reform, rather than abandon, that church.

After troubles in England during the reign of King James I—who, upon ascending to the throne in 1603, had pledged to put an end to church reform movements in England and to punish critics of the Church of England—the Pilgrims sojourned among the Dutch beginning in or about 1607. But as merely one tolerated sect among many in the Netherlands, the Pilgrims not only began to fear they would lose their identity, they came to resent “ye great licentiousnes of youth in that countrie and ye manifold temptations of ye place.”²⁷⁶

Theological and ecclesiastical considerations made matters worse. The Pilgrims supported a “Brownist,” or Congregational, ecclesiastical polity of independent congregations, whereas the Dutch church maintained a hierarchical structure with synods, assemblies, and other central governing bodies. John Robinson, one of the founders (along with Robert Browne) of the Congregational Church and the pastor of the Pilgrim church in the Netherlands, criticized the Dutch church for a number of their practices. He thought that ministers in the Dutch church were pretentious and had too much power. He rejected the idea that only ministers could preach because preaching was a lay function and it was the province of the entire eldership to teach as well as govern. According to Robinson, the administration of sacred rites was the pastor’s only distinctive function. He also criticized the Dutch church’s use of set prayers, even the Lord’s Prayer: “Anybody could read a prayer. It was altogether as puerile a performance as for a child ‘to read of a book or a prayer (saying), Father, I pray you give me bread, or fish, or an egg.’”²⁷⁷ The Dutch could not be true Christians, Robinson maintained, so long as they continued “benightedly celebrating Easter and Christmas, for which there was no warrant in Scripture.”²⁷⁸

In addition, the Pilgrims appeared to adhere to millenarian ideas, believing that the end of the world was near and that repentance was needed. Pilgrims, like most Protestants of the day, held Catholics in particular in contempt. William Bradford, who would become the longest-tenured governor of Plymouth Colony and the person whose journal would help to mythologize Plymouth’s history, referred to the Roman Church’s history as a story of “pontifical lasciviousness” where “libidinous beasts” such as John XIII satisfied their “fleshy lusts” by preying upon the youth until Rome was nothing more than “an abominable warehouse of all spiritual and corporal fornications,” where “deflowering, ravishing, incests, and adulteries are but a sport.”²⁷⁹

²⁷⁶ As quoted in Willison, G. F., *Saints and Strangers: Lives of the Pilgrim Fathers and Their Families*, Kingsport, TN: Kingsport Press, 1945, p. 103.

²⁷⁷ *Ibid.*, p. 104.

²⁷⁸ *Ibid.*

²⁷⁹ As quoted in Bailyn, B., *The Barbarous Years: The Peopling of British North America: The Conflict of Civilizations, 1600–1675*, New York, NY: Knopf, 2012, p. 363.

Bradford also complained about the Church of England. Although the English Reformation had released England from Rome's hold, Bradford insisted that, in retaining a hierarchy of bishops with coercive powers, it did not go far enough. Bradford did consider Presbyterian churches to be true churches, but he felt they likewise erred in maintaining a centralized hierarchy. For Bradford, only Congregational churches such as those of the Pilgrims, which had no ecclesiastical hierarchy and which consisted solely of groups of voluntary believers, were entirely in line with the spirit of the Gospel. Bradford wrote in his history of Plymouth Colony that the Pilgrims sought

y^e right worship of God & discipline of Christ established in y^e church, according to y^e simplicitie of the gossell, without the mixture of mens inventions, and to have & to be ruled by y^e laws of Gods word, dispensed in those offices, & by those officers of Pastors, Teachers, & Elders, &c. according to y^e Scripturs.²⁸⁰

No longer comfortable with the situation in the Netherlands, and having begun to irritate the generally amenable Dutch, the Pilgrims prepared for a voyage to the New World. Because the Pilgrims had no legal document authorizing them to settle where they landed, they fashioned the Mayflower Compact, which has been characterized by historians as “the first voluntary constitutional instrument to be framed in North America”²⁸¹ and “a document that ranks with the Declaration of Independence and the United States Constitution as a seminal American text.”²⁸² The Mayflower Compact illuminates that Congregationalism in the “pure” form the Pilgrims envisioned was the animating principle of Plymouth Colony and that the Pilgrims planned to use law to effectuate that animating principle. The Mayflower Compact proclaimed, in pertinent part, that the Pilgrims had “undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of *Virginia*” and “by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony.”²⁸³

In 1636 Plymouth's general court appointed a committee of eight men to prepare, in conjunction with the governor and the assistants, a code of laws for Plymouth. The committee's charge was “to peruse all the laws, orders and constitučons of the plantačons within this government that so those that are still fitting might be established; those that time hath made unnecessary might be rejected; and others that were wanting might be prepared, that so the next court they might be established.”²⁸⁴ Prior to the committee's formation

²⁸⁰ Bradford, W., *History of Plymouth Plantation*, Charles Deane ed., Boston, MA: Massachusetts Historical Society, 1856, p. 4.

²⁸¹ Cushing, J. D., “Introduction,” in *The Laws of the Pilgrims (A Facsimile Edition of the Book of the General Laws of the Inhabitants of the Jurisdiction of New-Plymouth, 1672 & 1685)*, John D. Cushing ed., Wilmington, DE: M. Glazier, 1977, pp. vii-xix, ix.

²⁸² Philbrick, *Mayflower*, p. 42.

²⁸³ The Mayflower Compact of 1620, http://avalon.law.yale.edu/17th_century/mayflower.asp. The Mayflower Compact is reprinted in many places.

²⁸⁴ In *The Compact with the Charter and Laws of the Colony of New Plymouth: Together with the Charter of the Council at Plymouth, and an Appendix, Containing the Articles of Confederation of the United*

Plymouth's laws tended to be improvised: A few scattered enactments had been placed on the books, but for the most part the Pilgrims used the Scriptures, the Mosaic Code in particular, as legal writ.

The rudimentary declaration of rights contained in the code of 1636 was the first enactment of its kind in America. Notably, religious freedom in the modern conception of that ideal was not among the identified liberties because the Pilgrims were committed to the perfection of their religious faith rather than to toleration of different faiths. Concisely put, the Pilgrims believed that the inhabitants of Plymouth Colony should be free to worship *as God ordained*. Numerous laws enacted after the 1636 code went into effect made this fact abundantly clear. For example, a law enacted at the June 10, 1650 general court session demonstrated that the Pilgrims' Separatist orientation was the only acceptable religious perspective in the colony. That law decreed:

That forasmuch as there risen up amongst us many scandalus practices which are likely to prove destructive to our churches and common peace; That whosoever shall heerfter set up any churches or publicke meetings diverse from those allreddy set up and approved, without the consent and approbacon of the government or shall continew any otherwise set up without concent as aforesaid shalbe suspended from having any voyce in towne meetings and presented to the next generall Court to receive such punishment as the Court shall think meet to inflict.²⁸⁵

Massachusetts Bay Colony was planted to be, in John Winthrop's memorable phrase, "a Citty vpon a Hill": a utopia in which Puritan religious beliefs shaped law and society.²⁸⁶ However, the Charter of Massachusetts Bay of 1629 contained important language that constrained the colony's law-making authority: Massachusetts Bay could not enact laws repugnant to the laws of England.²⁸⁷ The leaders of the colony found creative ways around this limitation. Winthrop remarked in 1639 that the "people had long desired a body of laws, and thought their condition very unsafe, while so much power rested in the discretion of the magistrates." He then noted that "it would professedly transgress the limits of our charter, which provide, we shall make no laws repugnant to the laws of England. ... But to raise up laws by practice and custom had been no transgression."²⁸⁸ More important to Winthrop was the constraining Puritan principle that Massachusetts Bay could make no laws repugnant to the laws of God.²⁸⁹

Colonies of New England, and Other Valuable Documents, William Brigham ed., Boston: Dunton & Wentworth, 1836, p. 36.

²⁸⁵ *Ibid.*, p. 92.

²⁸⁶ See Winthrop, J., "A Modell of Christian Charity" (1630), <http://history.hanover.edu/texts/winthmod.html>; see generally Rodgers, D. T., *As a City on a Hill: The Story of America's Most Famous Lay Sermon*, Princeton, NJ: Princeton University Press, 2018 (exploring how Winthrop's sermon became a founding document of American identity and exceptionalism).

²⁸⁷ The Charter of Massachusetts Bay of 1629 is available at, among other places, http://avalon.law.yale.edu/17th_century/mass03.asp.

²⁸⁸ *Transactions*, Albert Matthews ed., Boston, MA: Publications of the Colonial Society of Massachusetts, 1908-1909, pp. 16-17 (quoting John Winthrop).

²⁸⁹ *Original Narratives of Early American History, Winthrop's Journal: History of New England, 1630-1649*, vol. 1, James Hosmer ed., New York, NY: Scribner's, 1908, p. 303.

Eventually, Massachusetts Bay Colony did enact a code of laws: the Body of Liberties of 1641.²⁹⁰ The Body of Liberties codified laws that had been announced previously by the courts, filled in gaps with Puritan Scriptural interpretations, and opened by decreeing that “we do therefore this day religiously and unanimously decree ... these following rites, liberties, and privileges concerning our Churches, and Civil State.”²⁹¹ The capital laws enumerated in the Body of Liberties were copied almost verbatim from the Old Testament. A section styled “A Declaration of the Liberties the Lord Jesus Hath given to the Churches” provided that “all the people of god within this Jurisdiction who are not in a church way, and be orthodox in Judgement, and not scandalous in life, shall have full libertie to gather themselves into a Church Estaite. Provided they do it in a Christian way, with due observation of the rules of Christ revealed in his word.”²⁹² Persons who did not conform to the Puritan way of life and law were punished, often severely ... a practice that continued even after the end of the colonial period. In fact, it was not until 1833 that what had become the Commonwealth of Massachusetts disestablished the Congregational Church, which made Massachusetts the last state in the United States to separate church from state.²⁹³

The Massachusetts Constitution of 1780 replaced the 1691 provincial charter that had submerged Plymouth Colony into the larger Massachusetts Bay Colony. A draft constitution had been rejected by the people of Massachusetts in 1778 in large part because it lacked “conventional and religious freedom provisions.”²⁹⁴ The 1780 constitution walked a tightrope between the Congregationalists’ insistence on religious establishment and the increasingly vocal religious dissenters’ call for disestablishment and the free exercise of religion.²⁹⁵ The struggle between these two differing perspectives continued for half a century. The Eleventh Amendment to the Massachusetts constitution resolved the matter in 1833 in favor of “pure and undefiled religion.”²⁹⁶ Church membership and funding were now voluntary; all religious societies could hire their own clergy, construct their own churches, and manage their own membership lists; and all believers and non-believers were guaranteed the equal protection of the laws.²⁹⁷

²⁹⁰ The Massachusetts Body of Liberties of 1641 is available at, among other places, <https://history.hanover.edu/texts/masslib.html>.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ See, e.g., Witte, J. Jr. & Latterell, J., “The Last American Establishment: Massachusetts, 1780-1833,” in *Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776-1833*, Carl H. Esbeck & Jonathan Den Hartog eds., Columbia, MO: University of Missouri Press, 2019, pp. 399-424.

²⁹⁴ *Ibid.*, p. 400.

²⁹⁵ See, e.g., *ibid.*, p. 403; see generally Witte, J. Jr., “‘A Most Mild and Equitable Establishment of Religion:’ John Adams and the Massachusetts Experiment,” *Journal of Church & State* 41(2) (1999), pp. 213-52. John Adams was the principal author of the Massachusetts Constitution of 1780.

²⁹⁶ McLoughlin, W. C., *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State*, 2 vols., Cambridge, MA: Harvard University Press, 1971, p. 1246

²⁹⁷ See Witte & Latterell, “The Last American Establishment: Massachusetts, 1780-1833,” p. 419.

5. Conclusion

Political theorists have disagreed for centuries about what law is. Most agree that law is more than a collection of rules. Although law is designed to maintain stability and allow courts to resolve disputes, law is not created arbitrarily or merely to function as a point of order for its own sake. A historical examination of law shows that law is a result of the social, political, and economic pressures and circumstances of a particular time and place.

Law matters, and laws about religion matter a lot. Both the European laws about religious toleration prior to the planting of English America and the laws about religious toleration enacted by the settlers who founded English American colonies for religious reasons employed law primarily as a means of social control. European monarchs wanted power, and they utilized laws about religion to help them acquire it and maintain it. The leaders of the English American colonies planted for religious reasons used law to effectuate their designs: to foster religious toleration in those colonies committed to that animating principle (Maryland, Rhode Island, and Pennsylvania); to try to create an ideal Bible commonwealth for the colonies dedicated to the idea that religion must be practiced as God had ordained (Connecticut and Massachusetts). In short, the settlers of English America were impacted by the European laws about religious toleration that preceded their voyages to the New World. The planters of religiously tolerant colonies tried to learn from what they regarded as Europe's mistakes, while those who strove for religious purity rejected the prevailing European notion that divine sovereignty must occupy a decidedly secondary place to the sovereignty of the state.

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