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# Justifying Religious Freedom: The Western Tradition

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# Justifying Religious Freedom: The Western Tradition

E. Gregory Wallace\*

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Religious freedom is a fundamental value in American constitutional law. Thomas Jefferson called it “the most inalienable and sacred of all human rights.”<sup>1</sup> James Madison urged that religion “must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.”<sup>2</sup> The First Amendment contains a separate clause addressing the free exercise and nonestablishment of religion, thus distinguishing religious freedom from freedoms of speech, press, assembly, and petition.<sup>3</sup> The question is, why? Why does the First Amendment single out religion for special protection in our constitutional system? Why is religion treated differently than other beliefs and activities? What, if anything, about religion merits unique constitutional rules?<sup>4</sup>

These questions largely have been ignored in our thinking about the First Amendment’s Religion Clause. Courts and commentators have been preoccupied instead with mechanical tests, misleading metaphors, and simplistic attempts to reduce the Religion Clause guarantees to a

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1. THOMAS JEFFERSON, *Freedom of Religion at the University of Virginia* (Oct. 7, 1822), in *THE COMPLETE JEFFERSON, CONTAINING HIS MAJOR WRITINGS* 957-58 (Saul K. Padover ed., 1969).

2. JAMES MADISON, *A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* ¶ 1 (June 20, 1785), reprinted in 5 *THE FOUNDERS’ CONSTITUTION* 82 (Philip B. Kurland & Ralph Learner eds., 1987).

3. The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

4. See ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 91 (1990) (“The Founders granted religion a special status in the Constitution. This status derived from a conviction that religious exercise, as opposed to other personal and social forces, needed and deserved unique treatment.”).

single principle, such as neutrality, separation, accommodation, or equality. Beyond the understanding that there should be no official state church or single favored religion, few are able to agree on what the Religion Clause means. Some question whether the no-establishment provision should apply to the states at all,<sup>5</sup> others suggest that the Supreme Court has all but eviscerated the free exercise provision,<sup>6</sup> while still others claim that the First Amendment offers no unique protections for religious freedom beyond those inherent in fundamental principles of autonomy and equality.<sup>7</sup> Religion Clause interpretation has become largely a matter of political ideology and personal viewpoint; how the clause is construed often depends on the interpreter's personal reasons for being favorably or unfavorably disposed toward religion itself.<sup>8</sup> We are left with a Religion Clause jurisprudence that lacks the clarity, coherence, and continuity that we normally expect from constitutional standards. Conflicting and confusing precedents also have made it almost impossible to explain the Religion Clause to ordinary citizens. The meaning of this cherished freedom is practically lost to the wide array of people who benefit most from its protections.

To be sure, our constitutional commitment to religious freedom poses questions that cannot easily be answered. The Religion Clause itself is written in broad terms, the meaning of which is not immediately obvious. Religion Clause disputes frequently cross constitutional boundaries and include free speech, equality, and state action issues. Resolving competing interests typically has been left to multi-factor balancing tests, which are inherently subjective, value-laden, and

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5. See, e.g., AKIL AMAR, *THE BILL OF RIGHTS* 246-54 (1998); Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring) (arguing that "while the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest").

6. This is a common reaction to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the free exercise provision does not require exemptions from generally-applicable laws that burden the practice of religion. See, e.g., Kent Greenawalt, *Should the Religion Clauses Be Amended?*, 32 LOY. L.A. L. REV. 9, 17 (1998) (coming "to the disconcerting conclusion that the Supreme Court has nearly written the Free Exercise Clause out of the Constitution").

7. See, e.g., CHRISTOPHER EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007); Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT., Winter 2008 (forthcoming), available at <http://ssrn.com/abstract=1012910>.

8. See Carl Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 375 (arguing that a person's view of church-state relations usually derives that person's own theological or philosophical worldview).

indeterminate. These interpretive issues are made more difficult by the growing religious diversity of our society and by an increasing fixation among legal elites on a concept of formal equality that tends to diminish the unique constitutional status of religious freedom.

Part of the problem is that we are not quite sure what the Religion Clause protects. If religion is nothing more than “transcendental moonshine”<sup>9</sup> or silly superstition—on the same level as fortune telling or believing in ghosts—it makes little sense to constitutionalize its protection.<sup>10</sup> The fact that we have a Religion Clause suggests that religion is something more than foolishness, but what? Until we consider carefully what makes religion distinctive and worth protecting, we will never understand why we protect religious freedom or why we have a Religion Clause.

#### I. THESIS: REDISCOVERING THE RELIGIOUS JUSTIFICATIONS FOR RELIGIOUS FREEDOM

We should not be surprised to learn that the original reasons for singling out religion and placing it beyond government’s power were mostly religious.<sup>11</sup> The First Amendment did not conceive religious freedom; rather, it adopted and incorporated the widely-recognized natural and inalienable right of each person to worship God according to his or her own conviction and conscience.<sup>12</sup> This right to religious

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9. Ellis Sandoz, *Religious Liberty and Religion in the American Founding Revisited*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT 245, 251 (Noel B. Reynolds and W. Cole Durham, Jr. eds., 1996).

10. Michael Paulsen uses the ghost analogy when criticizing modern secular attitudes toward the First Amendment’s special treatment of religion. He writes, “It is embarrassing to the skeptical, rationalist, nonreligious or irreligious mind, to think that the Constitution might single out religion for special protection, and perhaps even preferred treatment . . . and do so because the Framers believed in God. It would be like learning that the Constitution contained a provision providing for the protection of ghosts.” Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1612 (1997) (book review).

11. I am indebted to Michael McConnell for first calling my attention to this fact and stirring my curiosity to investigate it further. Judge McConnell has made the point in several writings. See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 9-12 (2000); Michael W. McConnell, *Why is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243, 1245-57 (2000); Michael W. McConnell, *“God is Dead and We Have Killed Him!": Religious Freedom in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 167-72; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437-41, 1496-99 (1990). Steven Smith’s seminal article discussing the underlying justifications for religious freedom also helped shape my early thinking on this matter. See Steven D. Smith, *The Rise and Fall of Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

12. The New Hampshire Constitution of 1784, for example, declared that “[a]mong the natural rights, some are in their very nature unalienable, because no equivalent can be

freedom rested upon theological foundations, and a proper understanding of these foundations will help define and clarify the contours of the right as it is protected by the First Amendment. John Witte puts it succinctly when he writes that an “acknowledgement of the theological pedigree of the First Amendment is an instance of constitutional correction, not ‘religious correctness.’”<sup>13</sup> He suggests:

We cannot hold up as normative those eighteenth-century texts that happen to anticipate contemporary secular fashions and deprecate others that do not have modern forms. We cannot pretend that the First Amendment is a purely secular trope, or just another category of liberty and autonomy, and expect citizens to believe in it. . . . The First Amendment, in both its formation and its enforcement, is predicated in part on theological visions and values. It has to be. To insist that it is merely a neutral instrument, bleached of all religious qualities, only invites secular prejudices to become constitutional prerogatives.<sup>14</sup>

This is not to deny the influence of nonreligious justifications for the Religion Clause. Some advocates for religious freedom during the founding period made their arguments purely on secular grounds; others, such as James Madison, used both religious and nonreligious arguments. But, as leading church-state historian Thomas Curry emphasizes, “it was the American religious and evangelical background of religious liberty that made the American experience of it unique.”<sup>15</sup>

The colonial and founding generations took seriously the unique character and claims of religion. For the most part, those who participated in constitutional achievement of religious freedom were themselves deeply religious persons: their worldview was Christian and their arguments and audience were almost exclusively Christian.<sup>16</sup> They believed that religion is unique because it entails duties owed to God. Their principal justifications for religious freedom rested upon the

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given or received for them. Of this kind are the rights of conscience.” N.H. CONST. pt. I, art. IV, (1784), reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 2, at 81. Several other state constitutions during the founding period recognized religious freedom as a “natural and unalienable” right. *See id.* at 70-71, 75 (quoting from the Delaware, North Carolina, Pennsylvania, and Vermont constitutions).

13. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT xxiii (2d ed. 2005) (citing ISAAC KRAMNICK AND R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS (1996)).

14. *Id.*

15. THOMAS J. CURRY, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA 73 n.1 (2001).

16. *See* Smith, *supra* note 11, at 157-58 (“[E]ven those Americans like Jefferson, who departed from Protestant orthodoxy under the influence of the Enlightenment and who were accordingly sometimes regarded by their more pious contemporaries as ‘infidels’ or even ‘atheists,’ viewed the world in strongly religious terms.”).

theological premise that God exists and is sovereign over both human government and the individual citizen. The most striking presentation of this argument is found in James Madison's Memorial and Remonstrance Against Religious Assessments:

[The right of religious conscience] is unalienable . . . because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.<sup>17</sup>

For Madison and others, religious obligations were paramount. Defining the proper relation between religion and civil government meant drawing a jurisdictional boundary between two potentially competing authorities, one spiritual and the other political. That line was drawn with the understanding that duty to God, as perceived within the individual conscience, is superior to political, legal, or social obligations. Religion thus posited an ultimate limit on the power of the state. In this sense, the First Amendment was intended to function as a sort of religious "supremacy clause" which presumes that God exists and makes claims on human beings and that those claims are first in both time and importance to the claims of the state.

Also underlying the early commitment to religious freedom was the perception that this higher call of God makes the exercise of religious faith a uniquely transcendent and intimate human activity, distinct from other human interests or pursuits. For religious devotion to be authentic, it must be a voluntary matter between the individual and God. The state neither is competent to define the "correct" relation between that person and God, nor may it legitimately use its power to direct or force individual devotion to God. Thus, religion must be treated differently—it should be let alone, regardless of whether other human activities and institutions are let alone, except when religious exercise obviously

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17. MADISON, *supra* note 2, at 82. The Supreme Court has relied on the Memorial and Remonstrance for insight into the founders' intent for the Religion Clause. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947).

endangers either the state's existence or the basic rights of another person.<sup>18</sup>

Modern Religion Clause jurisprudence lacks the resonance of our eighteenth-century commitment to religious freedom. It reflects instead a growing indifference, incomprehension, and even contempt toward religion. The religious justifications for religious freedom have all but disappeared from the law, leaving only the once-supplementary secular justifications rooted in skepticism and expediency. Religion no longer is seen as a higher duty, but merely a matter of personal autonomy—and the law is increasingly reluctant to distinguish religious choices from secular choices. The task of defining our concept of religious freedom largely has been left to those who doubt the claims of religion or discount the religious commitments of others. Such an impoverished view of religion inevitably distorts our legal and political discourse about religious freedom. It is hard to take religious freedom seriously when you don't take religion seriously.<sup>19</sup> To borrow Mark Tushnet's words from another context, "[t]he jurisprudence of the religion clauses is a mess not because we do not understand the Constitution, but because we do not understand religion."<sup>20</sup>

My thesis is that the First Amendment's protection of religious freedom must rest preeminently on the intrinsic character and claims of religion itself. Religion requires special constitutional treatment precisely because it involves something transcendent, objective, normative, and exclusive. To sustain a vigorous commitment to religious freedom, we must revisit and recover the original religious justifications for religious freedom. (I will refer to these justifications collectively as the theological or religious argument for religious freedom.). The religious justifications provide a powerful yet often ignored explanation for why religious freedom is worth protecting.

That explanation begins with the idea that God exists beyond the state. It provides a rationale for religious freedom that is rooted in the nature of God and of genuine devotion to God. The reality of God, as we

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18. For example, Madison proposed a religion clause to the Virginia Declaration of Rights which said that religion should not be subjected to state control unless "the preservation of equal liberty and the existence of the State be manifestly endangered." 1 THE PAPERS OF JAMES MADISON 177 (William T. Hutchinson & William M.E. Rachal eds., 1962).

19. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 15 (1965) ("Though it would be possible . . . that men who were deeply skeptical in religious matters should demand a constitutional prohibition against abridgments of religious liberty, surely it is more probable that the demand should come from those who themselves were believers.").

20. Mark Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1008-09 (1986).

shall see, was an essential premise underlying the arguments for religious freedom during the colonial and founding periods. Proponents understood what they were protecting, and their arguments were both profound and accessible. Religious freedom only made sense because God exists: God makes claims on human beings; these claims are prior to and superior to the claims of the state; the individual's response to God's claims, to be genuine, must be voluntary and not coerced; the state must not attempt to define or regulate the relationship between God and the individual and ordinarily must yield to the claims of God as articulated by the sincere believer. The theological argument for religious freedom did not depend on the subjective value of religion to the individual or the objective importance of religion as a public good; rather, it ultimately is based on the plausibility of the essential claim of religion, namely, that God exists.<sup>21</sup>

This premise is controversial, of course. The reality of God is what separates religion from rationalism, humanism, skepticism, secularism, postmodernism, or any other way of looking at the world. And it is what at once gives the religious justifications for religious freedom their peculiar force and controversial character. The modern secularist typically is bothered by such "God talk" and insists on deconstructing it before exploring the reasons behind the First Amendment's protection of religious freedom. The modern religionist also may object that the concept of religion no longer requires a belief in the existence of God, but instead has been "broadened" to include nontheistic conceptions of spirituality. It remains to be seen whether constitutional discourse today, infused with such secular and nontheistic notions, still can engage with an earlier discourse which assumed the existence of a Supreme Being. To the extent we perceive religion as irrelevant or indistinct, we distance ourselves from the very reasons that brought us the Religion Clause.

Without a concept of God, it may be impossible to have a concept of religious freedom that singles out religion for special protections not

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21. Some who argue for the special protection of religion because of its unique characteristics emphasize how meaningful religious faith is to the individual or how valuable religion is to society. See, e.g., WITTE, *supra* note 13, at 250 (arguing that religion is special, in part, because it is a "unique source of individual and personal identity" as well as a "unique form of public and social identity"); see generally JOHN GARVEY, *WHAT ARE FREEDOMS FOR?* (1996); Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303 (2001); Laura S. Underkuffler-Freund, *Yoder and the Question of Equality*, 25 CAP. U. L. REV. 789 (1996). Religion is special, in their view, because religion represents a unique human aspiration or endeavor or because religion benefits culture (good works, stability, etc.), irrespective of whether its claims are true. By contrast, my thesis is that religious freedom makes sense because of the plausibility (i.e., apparent warrant) of God's existence. If there is no God, then religious freedom ultimately is incoherent, and religious faith and practice should be treated no differently than other human ideas and activities.

afforded other human endeavors. If the modern liberal state can protect only subjective, inclusive, autonomous religion—i.e., a “godless” or “irreligious” religion—then why protect religion at all? Once God is removed from religion, then religion amounts to nothing more than individual fancies and tastes. Why protect idiosyncrasies? The achievement of religious freedom in the West derived from Christian principles, most notably, the ideas that civil government has no jurisdiction over spiritual matters and that it is not in the nature or will of God to coerce authentic religious belief. If we are incapable of speaking as if God exists and religion is unique, then the meaning and power of the founding generation’s most powerful arguments for religious freedom will remain beyond us. For our constitutional commitment to religious freedom to remain viable, we are going to have to make peace with its theological foundations.<sup>22</sup>

This is the first in a trilogy of articles that examine the justifications on religious grounds for religion’s special status in the First Amendment. My purpose is to clarify something of the theological argument’s theoretical and historical origins, to show its prevalence during America’s colonial and founding periods, and to explain why it must provide the principal intellectual and rhetorical underpinnings of modern Religion Clause jurisprudence. The first article, published here, sketches the emergence, loss, and recovery of the religious justifications for toleration in Western thought.<sup>23</sup> Two future articles will complete the series: the second will trace the influence of the religious justifications in developing America’s constitutional commitment to religious freedom; the third will examine the weaknesses of modern secular justifications

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22. Brian Leiter, for example, argues that there is no credible principled reason for tolerating religion as religion or for according special treatment to religious practices. *See generally* Leiter, *supra* note 7. Leiter’s points are well taken, so long as you agree with his concept of religion, which lacks any meaningful notion of a transcendent God. While Leiter considers the “categoricity of religious commands” and, more briefly, what he calls the “metaphysics of ultimate reality,” his view of religion ultimately is subjective, temporal, and irrational—for him, ultimate reality is not God, but only what is most important in making human lives worthwhile and meaningful. The religion Leiter considers is much closer to the Kantian concept that God is only an apprehension innate to the human mind (Kant: “God is not a being outside me, but merely a thought in me”) than to the religion that historically was thought to deserve special constitutional protection.

23. By identifying religious freedom as a distinctively Western and Christian concept, I am not saying that only those in the Christian West desire and value it, or that only those in the Christian West are capable of achieving it. Religious arguments for toleration can be made from within other religious traditions, but I will leave that to those more familiar with such traditions. Whether other religious traditions are capable of providing cogent justifications for religious freedom is an open question. Christianity may be unique in that it can offer compelling reasons for respecting religious conscience without compromising its essential truth claims.

for religious freedom and argue for recovering the religious justifications as the best defense for a Religion Clause jurisprudence threatened by both religious majoritarianism and skeptical secularism.

The historical narrative that follows seeks to fill critical gaps in our understanding of why religious freedom is a fundamental American value. The events surrounding the struggle for religious freedom in America and the ratification of the First Amendment have been broadly covered by modern legal scholarship. Insufficient attention has been given to the rationales for religious toleration that emerged from sixteenth and seventeenth century England and Europe, which formed the historical context and theoretical foundation for the American achievement of religious freedom. That achievement is the offspring of the bitter struggle against persecution and the fierce intellectual controversies that arose out the divisions created by the Protestant Reformation. Legal scholarship also has overlooked the fact that the ideas which ended the dominance of the persecuting state had their real beginning in the third and fourth centuries, when early Christians produced powerful justifications for religious toleration and freedom that were theological in nature and appeal. Sixteenth and seventeenth century advocates rediscovered these justifications and made them the centerpiece of their intellectual offensive against state-imposed religious uniformity. Revisiting this history will help us better understand the predominant role the theological argument played in freeing spiritual matters from the state's jurisdiction, moving political authority beyond mere toleration to full religious freedom, and overcoming longstanding religious counterarguments.

This article is not intended to provide an inquiry into the institutional details of church-state relations or a chronology of the development of religious freedom from classical antiquity. Rather, it is an historical overview of the emergence and development of the predominant ideas that explain why we have religious freedom. Along the way, I refer the reader to the works of other scholars that provide a comprehensive examination of the historical details and chronology. The account that follows is instrumental to the larger purpose of illuminating these ideas and their political consequences.<sup>24</sup>

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24. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 427-28 (2002) (arguing that any theory of constitutional interpretation must take seriously the lessons of intellectual history, as distinguished from institutional or legal history).

## II. THE ORIGINS OF RELIGIOUS FREEDOM IN EARLY CHRISTIAN THOUGHT

Religious freedom is regarded as one of our basic and most precious rights and an essential attribute of a free society. But how and where did the concept originate? Many Americans would look for the answer to this question in the writings of Thomas Jefferson and James Madison and in the First Amendment's prohibition against religious establishments and protection of free exercise of religion. The founders' ideas on the subject were largely derivative, however, having been influenced by tolerationist thinking in early modern England and Europe. A massive body of writings appeared in the sixteenth and seventeenth centuries that presented an array of arguments favoring religious toleration, liberty of conscience, and disestablishment. These arguments were made mostly by Christian thinkers, who were motivated by their religious beliefs to oppose both Catholic and Protestant regimes of persecution. But even their ideas had deeper roots. The rationale for religious toleration and freedom had its real beginning in the third and fourth centuries, when earlier Christian thinkers opposed state coercion of religious uniformity based on the nature of God and of authentic belief. Their writings provided the first principled justification for religious toleration that went beyond political expediency. While other justifications, both theoretical and pragmatic, have been advanced to support religious freedom, the theological argument has been the dominant principled response to religious intolerance and persecution.

Our constitutional commitment to religious freedom is the culmination of centuries of theological and political controversy about the proper relation between religion and government. Religious freedom advocates sought to protect authentic devotion to God and to distance religious congregations from the corrupting influence of civil power. Those who opposed religious toleration, on the other hand, were deeply concerned about social order and unity. They believed that neither religion nor the state would survive and prosper without a close alliance between the two. For us, the resolution of this conflict was manifest in the adoption of the Religion Clause of the First Amendment. The remarkable feature of the American achievement of religious freedom is that it created a stable system of government in which both religion and religious freedom can flourish.

### A. *Early Christian Views on Religious Toleration and Freedom*

Tension between church and state was inevitable from the very beginnings of the Christian religion. Unlike the Hebrew theocracy, in

which the civil and ecclesiastical were merged into a single institution and God was the constitutional source of all authority over things secular and things religious, early Christianity taught that civil governments, while established by and subject to God, have no jurisdiction over spiritual matters.<sup>25</sup> Unlike Islam, in which religious and political institutions arose interdependently, early Christianity emerged from a culture with its own established government and politics based on non-Christian ideas.<sup>26</sup> From the outset, there was always the possibility that Christian believers would be faced with conflicting obligations as they lived under two sovereigns.

### 1. Early Christian Teaching on Church and State

Early Christian teaching distinguished between the claims of God and the claims of the state. Jesus taught his followers to “give to Caesar what is Caesar’s, and to God what is God’s.”<sup>27</sup> Christian believers thus were to fulfill their obligations, to the fullest extent possible, to both God and the state. But by this Jesus also indicated that there are limits to the jurisdiction of earthly rulers. Caesar’s image is on those things necessary to the proper function of civil society; therefore, civil government legitimately exerts power over this realm. But the state has no right to regulate what God has put his image on—those things which belong to God as Creator, Redeemer, and Sovereign. And since human beings bear the image of Deo, their allegiance to God takes precedence over their allegiance to the state. Jesus also emphasized the deliberate nature of genuine faith. He taught that the “first and greatest commandment” is to “[l]ove the Lord your God with all your heart and with all your soul and with all your mind.”<sup>28</sup> Not only must devotion to God come before all other commitments, but implicit in this command is the idea that such devotion must be voluntary, not coerced. Love for God is not genuine unless it comes willingly and fully from the inner person; forced love is an impossibility.

The apostle Paul taught that civil authorities must be obeyed because they are established by God and are God’s servants.<sup>29</sup>

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25. See SANFORD COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 20-21 (photo. reprint 1968) (1902).

26. BRIAN TIERNEY, *THE CRISIS OF CHURCH & STATE 1050-1300*, at 7 (Medieval Academy of America 1988) (1964).

27. *Luke* 20:25.

28. *Matthew* 22:37-38.

29. *Romans* 13:1-7. The teaching that civil governments are established by God does not mean that civil governments are intrinsically good. Christian doctrine teaches that human beings are naturally corrupt and fallen, all too willing to do wrong. This condition is exacerbated by the possession of civil power. Nevertheless, the early Christians believed that God remains sovereign over human government. Civil rulers

Submission is necessary not just because of the threat of punishment, but also “because of conscience.”<sup>30</sup> While civil authorities are agents of God, they cannot lay claim to the absolute authority that belongs to God. Their power is limited and there are matters beyond their jurisdiction and control.<sup>31</sup> Similarly, the apostle Peter taught that Christians are to “fear God” and “honor the King.”<sup>32</sup> They are to do both, whenever possible. Yet Peter recognized that civil authorities cannot exercise ultimate power over spiritual matters. When faced with conflicting commands from God and earthly leaders, Peter declared: “We must obey God rather than men!”<sup>33</sup>

Early Christian teaching thus drew a rudimentary distinction between religion and the state that is essentially jurisdictional. The starting point is that there are two sovereigns with distinct spheres of authority. God is sovereign over all and the believer owes God his ultimate allegiance. The civil magistrate’s jurisdiction has been established by God and is limited to matters properly delegated to the realm of human government. Believers are to obey both God and civil authorities; when that is not possible, the commands of God take precedence over the commands of the state. The jurisdictional boundaries delineated by Jesus and the apostles were given to help individual believers understand what to do when faced with conflicting commands from God and the state. They were not part of a political model of church-state relations, nor were they given primarily to instruct civil rulers about the limits of their authority over religious believers. They nevertheless provide the basis for future understandings about the proper relationship between religious and civil authority.

Early Christian teaching also emphasized the voluntariness of genuine religious devotion. There was no sanction in early Christian doctrine or example for forced imposition of religious orthodoxy. Christ came to establish a new kingdom—one not spread through force or violence, but rather by persuasion and example.<sup>34</sup> He urged his followers to love their enemies, turn the other cheek, and do unto others as they would have done to themselves.<sup>35</sup> Christians were taught that since they are recipients of God’s kindness, tolerance, and forgiveness, they ought to show patience and mercy toward others.<sup>36</sup> As John Locke later

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may act for evil or selfish reasons of their own, but God’s purposes ultimately will prevail.

30. Romans 13:5.

31. Romans 13:7.

32. *1 Peter* 2:17.

33. *Acts* 5:29; see *Acts* 4:18-20.

34. *Matthew* 28:19-20; *2 Timothy* 2: 24-25.

35. *Matthew* 5-7.

36. *Romans* 2:4; *Matthew* 18:21-35.

observed, “the Gospel frequently declares, that the true disciples of Christ must suffer persecution; but that the church of Christ should persecute others, and force others by fire and sword, to embrace her faith and doctrine, I could never yet find in any of the books of the New Testament.”<sup>37</sup> Although doctrinal unity is valued,<sup>38</sup> the New Testament never sanctions coercion or silencing of those who embrace heresies or cause divisions.<sup>39</sup> The remedy for dealing with heresy and schism is first to admonish the offender and then, if that is unsuccessful, to reject and avoid him, which typically means expulsion from the Christian church and community.<sup>40</sup> Exclusion and avoidance are the harshest penalties authorized; there is no provision for the infliction of physical or civil punishment on religious dissenters.

These teachings provided the elements that might be constructed into a theology of religious freedom. The idea that temporal rulers do not have jurisdiction over spiritual matters was radical. The English historian Lord Acton wrote that “the vice of the classic State was that it was both Church and State in one. Morality was undistinguished from religion and politics from morals; and in religion, morality, and politics there was only one legislator and one authority.”<sup>41</sup> Tierney observes that the most common form of human government has been some form of theocratic absolutism: “The Pharaohs of Egypt, the Incas of Peru, the emperors of Japan were all revered as divine figures. The order of society was seen as a part of the divine order of the cosmos; the ruler provided a necessary link between heaven and earth.”<sup>42</sup> He adds that “[t]ypically, in such societies, religious liberty was neither conceived of nor desired.”<sup>43</sup> By contrast, as John Noonan explains, early Christian teaching contained the fundamental concepts of religious freedom:

By the first century A.D. there is in the Mediterranean world a religion, which will spread widely in the West, that carries the concepts of a God, living, distinct from and superior to any human being, society, or state; of obligations to that God, distinct from and

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37. JOHN LOCKE, A LETTER CONCERNING TOLERATION 25 (Prometheus Books 1990) (1689).

38. See, e.g., *Romans* 16:17; *1 Corinthians* 1:10.

39. For an extended discussion of this point, see PEREZ ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST 17-21 (2003).

40. See, e.g., *Titus* 3:10 (“Warn a divisive person once, and then warn him a second time. After that, have nothing to do with him.”).

41. John Emerich Edward Dalberg-Acton, *An Address to the Members of the Bridgnorth Institution at Agricultural Hall on the History of Freedom in Antiquity* (Feb. 26, 1877), in *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 1, 16-17 (John Neville Figgis & Reginald Vere Laurence eds., 1907).

42. Brian Tierney, *Religious Rights: A Historical Perspective*, in *RELIGIOUS LIBERTY IN WESTERN THOUGHT*, *supra* note 9, at 34.

43. *Id.*

superior to any society or state; of authorized teachers who can voice these obligations and judge any society or state; of an inner voice of reason that is one way God speaks as well as by His authorized teachers. According to these concepts as taught by this religion, each person, individually and not as part of a family, tribe, or nation, will have to account to God as Judge for every thought and deed. Collectively, these concepts are at the core of liberty of conscience and liberty of religion.<sup>44</sup>

That God exists is a necessary premise to the argument for religious freedom. Without God, there is no higher sovereign, no superior duty, and no individual accountability.

## 2. Persecution in the Early Roman Empire

The principles taught by Jesus and the apostles provided clarity for early Christians who at times found themselves persecuted by the Roman state for refusing to engage in state-mandated emperor worship. Such persecution was sporadic in the beginning, became more systematic with the edict of Decius in A.D. 250, and reached its peak during the reign of Diocletian in 284-305. Christians suffered confiscation of property, imprisonment, torture, and even execution. Their immediate concern was dealing with persecution, not constructing a theory of church-state relations—that question does not assume practical importance until the fourth century. As the Jesuit historian John Rohr points out, “[t]he Church of the catacombs was too busy staying out of the way of the government to indulge in the luxury of speculating on the niceties of sacred and secular jurisdiction.”<sup>45</sup>

Although Roman persecution of Christianity and other illegal religions was infrequent in the first two centuries, it was not because official policy required religious toleration. The word for “toleration” comes from the Latin verb *tolerare*, which means “to bear or endure,” and indicates a “grudging and temporary acceptance of an unpleasant necessity.”<sup>46</sup> Richard Vernon suggests that “[t]oleration involves the reluctant acceptance of things that one hates or despises.”<sup>47</sup> Perhaps the

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44. JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 44-45 (1998).

45. John A. Rohr, *Religious Toleration in St. Augustine*, 9 J. OF CHURCH & STATE 51, 66 (1967). For a helpful discussion of persecution and toleration in the first four centuries, see W.H.C. FRENCH, *MARTYRDOM AND PERSECUTION IN THE EARLY CHURCH: A STUDY OF CONFLICT FROM THE MACCABEES TO DONATUS* (1965).

46. Randolph C. Head, *Introduction: The Transformations of the Long Sixteenth Century*, in *BEYOND THE PERSECUTING SOCIETY: RELIGIOUS TOLERATION BEFORE THE ENLIGHTENMENT* 95, 97 (John Christian Laursen & Cary J. Nederman eds., 1998).

47. RICHARD VERNON, *THE CAREER OF TOLERATION: JOHN LOCKE, JONAS PROAST, AND AFTER* 71 (1997).

best definition comes from Peter Garnsey, a leading historian of classical antiquity, who says that toleration is “disapproval or disagreement coupled with an unwillingness to take action against those who are viewed with disfavour in the interest of some moral or political principle. It is an active concept, not to be confused with indifference, apathy or passive acquiescence.”<sup>48</sup> Thus, those who tolerate disagree with what they are tolerating, yet because of some principle choose to exercise restraint towards it. Rome often appeared tolerant either because its polytheism absorbed other gods or because it lacked the will or resources to engage in systematic persecution, but such elasticity or hesitancy is not toleration under Garnsey’s definition.<sup>49</sup> No Roman emperor or jurist in the first two centuries articulated a moral or political principle that accounted for the Roman government’s forbearance during this period.<sup>50</sup> Historian Perez Zagorin explains that

[a]t nearly all stages of their history the Romans were willing to accept foreign cults and practices; this de facto religious pluralism is entirely attributable to the polytheistic character of Roman religion and had nothing to do with principles or values sanctioning religious toleration, a concept unknown to Roman society or law and never debated by Roman philosophers or political writers.<sup>51</sup>

A principled defense for religious toleration did not appear until the writings of Christian thinkers near the end of the second century.

Rome’s religious pluralism no longer extended to Christianity after the second century. The turning point was Caracalla’s edict issued in 212, which granted Roman citizenship to all the empire’s free inhabitants and required them, as part of their obligations of citizenship, to show loyalty to the Roman deities.<sup>52</sup> This resulted in the demise of de facto toleration and religious pluralism that previously existed under various local authorities. Historian Elizabeth Digeser explains that “[i]n the early empire, religious pluralism survived in the interstices between peregrine and Roman law. But after the passage of the Antonine Constitution, Decius, Valerian, and Diocletian were quite willing to use

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48. Peter Garnsey, *Religious Toleration in Classical Antiquity*, in PERSECUTION AND TOLERATION 1 (W.J. Shiels, ed., 1984) (citing B. Crick, *Toleration and Tolerance in Theory and Practice*, in 6 GOVERNMENT AND OPPOSITION: A JOURNAL OF COMPARATIVE POLITICS 143, 144-71 (1971)).

49. ELIZABETH DEPALMA DIGESER, THE MAKING OF A CHRISTIAN EMPIRE: LACTANTIUS AND ROME 119 (2000).

50. *Id.*

51. ZAGORIN, *supra* note 39, at 4. On the absence of a principled concept of toleration in Roman society, *see also* Garnsey, *supra* note 48, at 9-12.

52. DIGESER, *supra* note 49, at 50-51.

force against groups whose refusal to worship the gods called into question their loyalty to the laws.”<sup>53</sup>

Caracalla’s edict had profound consequences for Christians. Very few Christians had been citizens before 212, but Caracalla’s edict made them citizens and therefore obligated them to pay homage to the Roman gods.<sup>54</sup> After the edict, loyalty to the Roman state was demonstrated not merely by denying the Christian faith, but by participation in the Roman imperial cult.<sup>55</sup> Christians were considered treasonous because, following the teachings of Jesus, their first allegiance was to God, not Caesar. Christians thus suffered because they refused to recognize the supremacy of the state over their religious practices. As Peter Garnsey explains: “The claim that theirs was the one true religion, their active proselytism and their obstinate refusal to participate in the imperial cult meant that Christians were always vulnerable to the charge of disloyalty to the emperor and state.”<sup>56</sup>

The appeal to Rome for toleration originated not with secular philosophers, but with Christian thinkers. No arguments for religious toleration or religious freedom appear in the pagan (secular) literature of the first three centuries.<sup>57</sup> Perhaps this was because advocacy of toleration was tantamount to advocacy of treason. Digeser suggests that “[t]he intimate connection between loyalty to the gods and to the laws which was the hallmark of Roman citizenship explains . . . the absence of any theoretical statement endorsing toleration in the extant philosophical or imperial literature of Rome before the fourth century.”<sup>58</sup> Near the end of the second century, Christian advocates for religious toleration first urged that state-enforced religion is incompatible with basic assumptions about God and religious faith. Justin Martyr, for example, wrote that “nothing is more contrary to religion than constraint”<sup>59</sup> and “compulsion is not an attribute of God.”<sup>60</sup> He suggested that God is more interested in the inward purity and sincere obedience than in correct religious ritual.<sup>61</sup>

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53. *Id.* at 119-20.

54. *Id.* at 50-51.

55. J.B. RIVES, RELIGION AND AUTHORITY IN ROMAN CARTHAGE: FROM AUGUSTUS TO CONSTANTINE 252 (1995).

56. Garnsey, *supra* note 48, at 10.

57. *See id.* at 9-12.

58. DIGESER, *supra* note 49, at 52 (footnote omitted).

59. M. SEARLE BATES, RELIGIOUS LIBERTY: AN INQUIRY 137 (1945) (quoting Justin Martyr).

60. Justin Martyr, Letter to Diognetus 7, in FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 14 (Oliver O’Donovan & Joan Lockwood O’Donovan eds. 1999) (translation by Kirsopp Lake, Loeb Classical Library (1913)) [hereinafter SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT].

61. Justin Martyr, Dialogue with Trypho ch. 12, 14, in 6 THE FATHERS OF THE CHURCH 165-66, 168-70 (Thomas B. Falls trans., 1948).

The task of giving these ideas their theoretical underpinnings was taken up by Tertullian and Lactantius.

### 3. Tertullian's Call for Religious Freedom

Tertullian, a rhetorician, lawyer, and leading Christian theologian of the late second and third century, broke new ground in the struggle against Roman persecution. He asserted that it is a "fundamental human right, a privilege of nature, that every man should worship according to his own convictions."<sup>62</sup> He was the first to argue for religious toleration as a general principle and, in so doing, coined the phrase "freedom of religion" (*libertas religionis*).<sup>63</sup> His concept of religious freedom included both relief from state persecution and coercion as well as the right of dissenters to worship when, where, and who they wished, but it did not include the modern idea of disestablishment. Tertullian's religious freedom, as Peter Garnsey points out, is an individual right, not just the right of an ethnos or polis.<sup>64</sup> Garnsey attributes the origin of this idea to the writings of Paul the apostle, who stressed "the tension . . . between the authority of individual conscience and the wisdom of the Christian community."<sup>65</sup> The emphasis on individual conscience, Garnsey explains, is "a breakthrough that only a Christian could make, because the Christian, notoriously, had abandoned his ancestral tradition and embraced a supranational universal religion."<sup>66</sup>

Tertullian offered a theological rationale for religious freedom in his Apology, when he wrote that the basis for religious freedom is found in God's own disposition toward the devotion he seeks:

Look to it, whether this may also form part of the accusation of irreligion—to do away with one's freedom of religion (*libertas religionis*), to forbid a man choice of deity . . . so that I may not worship whom I would, but am forced to worship whom I would not. No one, not even a man, will wish to receive reluctant worship.<sup>67</sup>

Tertullian went on to explain that genuine faith is freely held, not coerced. To be authentic, one's devotion and duty to God must be voluntary:

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62. Tertullian, Ad Scapulam 2, in 3 THE ANTE-NICENE FATHERS 105 (A. Roberts and J. Donaldson eds., 1885), available at <http://www.ccel.org/ccel/schaff/anf03.iv.vii.ii.html>.

63. Garnsey, *supra* note 48, at 16.

64. *Id.*

65. *Id.*

66. *Id.*

67. Tertullian, Apology 24, translated in Garnsey, *supra* note 48, at 14 (for alternate translation, see 3 ANTE-NICENE FATHERS, *supra* note 62, at 39, available at <http://www.ccel.org/ccel/schaff/anf03.iv.iii.xxiv.html>).

[T]he injustice of forcing men of free will to offer sacrifice against their will is readily apparent, for . . . a willing mind is required for discharging one's religious obligations. It certainly would be considered absurd were one man compelled by another to honor gods whom he ought to honor of his own accord and for his own sake. . . .<sup>68</sup>

Tertullian additionally affirmed that the emperor's power is limited by and subject to God's higher authority: "I do subordinate [Caesar] to God; I do not make him His equal. I will not call the emperor God. . . . If he is a man, it is to his interest as a man to yield precedence to God."<sup>69</sup> In Tertullian's view, the state intrudes upon the right to religious freedom and usurps God's authority when it attempts to direct or coerce individual religious decisions.

Tertullian's most powerful and insightful protest against religious intolerance is found in his letter to Scapula, the proconsul of Africa. Besides declaring freedom of worship a "fundamental human right,"<sup>70</sup> he wrote:

[O]ne man's religion neither harms nor helps another man. It is assuredly no part of religion to compel religion—to which free-will and not force should lead us. . . . You will render no real service to your gods by compelling us to sacrifice. For they can have no desire of offerings from the unwilling, unless they are animated by a spirit of contention, which is a thing altogether undivine.<sup>71</sup>

Tertullian thus opposed state coercion of religious faith not because it is ineffective, but because it is contrary to the ways of God and the character of true religion. The state should not coerce because God does not coerce—it is not in God's nature or will to force persons to believe in him.

68. Tertullian, Apology 28, in 10 THE FATHERS OF THE CHURCH 83 (Rudolph Arbesmann, Emily Joseph Daly, & Edwin A. Quain trans., 1950) (for alternate translation, see 3 ANTE-NICENE FATHERS, *supra* note 62, at 41, available at <http://www.ccel.org/ccel/schaff/anf03.iv.iii.xxviii.html>).

69. Tertullian, Apology 33, in *id.* at 89. (for alternate translation, see 3 ANTE-NICENE FATHERS, *supra* note 62, at 43, available at <http://www.ccel.org/ccel/schaff/anf03.iv.iii.xxxiii.html>).

70. See *supra* text accompanying note 62.

71. Tertullian, Ad Scapulam 2, in 3 THE ANTE-NICENE FATHERS, *supra* note 62, at 105, available at <http://www.ccel.org/ccel/schaff/anf03.iv.vii.ii.html>. Jefferson used similar language in his defense of religious freedom: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." Thomas Jefferson, Notes on the State of Virginia, Query 17, 159 (1784), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 2, at 80.

There are two striking features about Tertullian's argument for religious freedom. First, while Tertullian's understanding of God obviously was shaped by Christian theism, his argument here had a much broader appeal: the desire for voluntary worship is a characteristic basic to any deity. The rationale is religious, but not specifically Christian. Tertullian assumed that the concept of God is known at some level to everyone. His justifications for tolerance therefore were accessible to anyone who has even a rudimentary conception of deity. Second, although not explicit, the juxtaposition of Tertullian's claim to worship the one true God with his insistence on religious freedom as a fundamental human right suggests that religious faith can be exclusive and yet tolerant of those who disagree. One can believe that his religion is true and others are false, but still understand that true religion is not served by forcing others to accept it. For Tertullian, these were not incompatible views.

While Tertullian was the first to articulate a general principle of religious freedom, his arguments were not well developed and had a somewhat limited effect, being addressed to his Roman persecutors and not to fellow-Christians who were in disagreement with other Christians. His writings on toleration, however, are the most important Christian source for Lactantius, who "draws on Tertullian for his idea that religion requires liberty"<sup>72</sup> and in so doing provides Constantine with the basis for a remarkably progressive policy of religious freedom.

### *B. Christianity and Religious Freedom in the Constantinian Empire*

The church-state question was profoundly complicated by the conversion of Emperor Constantine in the fourth century and the subsequent adoption of Christianity as the official religion of the Roman empire. Tierney suggests that while Christian believers had found a new champion, "[t]he crucial question that arose at once was whether [they] had found a new master too."<sup>73</sup> The alliance of Christianity with the state and its coercive power posed new questions: Does this alliance somehow re-legitimize the claim of the emperor to supremacy in all things, including matters of religion? To what extent, if any, should the state's coercive power be applied to convert unbelievers and to correct heretics? If the state has a legitimate role in promoting the well-being of the people and the well-being of the people consists of adhering to the true religion, can't the state legitimately promote religion? These questions would vex the church for the next millennium.

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72. DIGESER, *supra* note 49, at 112.

73. TIERNEY, *supra* note 26, at 8.

Once Constantine took the throne, he looked for a different approach to the “Christian problem” within the Roman empire. The efforts of his predecessors to force support for the traditional Roman deities and drive Christianity out of the empire had failed. The strength and resiliency of the Christian movement had been demonstrated conclusively by the failure of the persecutions to compel Christians to give allegiance to any god but their own. Robert Wilken, a leading historian of Christian thought, observes that “[a]t the beginning of the fourth century, the Church was too large, its way of life and institutions too well established, its leaders too resourceful, for Christianity to be halted with the sword.”<sup>74</sup> Constantine realized that it was neither possible nor desirable to eliminate Christianity, so he sought a solution that would reconcile the empire’s need for religious validation with the Christians’ refusal to worship any other deity.<sup>75</sup>

The Constantinian answer was to secure Christian support of the empire by creating a polity in which Christians and pagans could participate on equal terms under an umbrella of general monotheism. Constantine, explains historian Harold Drake, believed

that a viable coalition could be forged by emphasizing the points of agreement between monotheists of whatever persuasion, a vision of a new kind of commonwealth in which stability, peace, and unity could be achieved by officially ignoring sectarian or theological differences—“small, trivial matters,” as Constantine later would call them—and emphasizing the beneficent Providence of a single, Supreme Being, represented on earth by his chosen representative, the Roman emperor.<sup>76</sup>

To say that Constantine desired to find common ground between Christians and pagans, Drake explains, “is not to say that Constantine himself was never converted or that he did not sincerely believe that Christianity was a superior path to personal salvation.”<sup>77</sup> The answer came to Constantine in part because of his own conversion to Christianity and in part because of the political exigencies he faced.<sup>78</sup>

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74. Robert Louis Wilken, In Defense of Constantine, *FIRST THINGS* No. 112, 36-40 (April 2001) (book review), available at <http://www.firstthings.com/article/2007/01/in-defense-of-constantine-47>.

75. H.A. DRAKE, *CONSTANTINE AND THE BISHOPS: THE POLITICS OF INTOLERANCE* 191 (2000).

76. *Id.* at 199 (footnote omitted).

77. *Id.* at 200.

78. Drake provides a fascinating and extensively documented account of the origins, implications, and consequences of Constantine’s religious policy and Christian coercion in the fourth century. He challenges the received historiography, including the widespread assumption that normative Christianity is intolerant. In the following account, I merely shall sketch a picture that Drake paints in vivid detail.

The centerpiece of Constantine's religious policy was the Edict of Milan, issued with his co-emperor Licinius in 313, which proclaimed religious freedom in the Roman Empire. The edict was remarkable in that it recognized that religious devotion should not be coerced. The emperors "grant to the Christians and others full authority to observe that religion which each prefer[s]," because no one should be denied "the opportunity to give his heart to the observance of the Christian religion, [or to] that religion which he should think best for himself."<sup>79</sup> Religious observance may occur "freely and openly, without molestation"<sup>80</sup> so that "each one may have the free opportunity to worship as he pleases."<sup>81</sup> These features, Drake explains, made the edict more radical and far-reaching than a simple grant of toleration to Christians:

Toleration, a return to the status quo ante, was the minimal alternative solution. The Edict of Milan embodied a far more creative and daring solution, defining state security in terms of a general monotheism, thereby opening an umbrella that would cover virtually any form of worship—a policy with no losers, only winners. The edict constitutes a landmark in the evolution of Western thought—not because it gives legal standing to Christianity, which it does, but because it is the first official government document in the Western world to recognize the principle of freedom of belief.<sup>82</sup>

Robert Wilken echoes this point when he writes that "[b]y mentioning not only Christianity (the immediate occasion for the decree) but other forms of worship, the decree sets forth a policy of religious freedom, not simply the toleration of a troublesome sect."<sup>83</sup>

Constantine's grant of religious freedom in the Edict of Milan reflected the influence of Lactantius, a Christian scholar and rhetorician who had fled to the West during the persecution ordered by Diocletian in 303. He subsequently joined the court of Constantine and became tutor to his eldest son, Crispus. Between 305 and 310, Lactantius wrote the *Divine Institutes* to counter the arguments of Porphyry, a Greek philosopher in the court of Diocletian who had provided the philosophical justification for the persecution of Christians and who,

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79. *Edict of Milan*, in Lactantius, *De mortibus persecutorum*, ch. 48, translated in 4 TRANSLATIONS AND REPRINTS FROM THE ORIGINAL SOURCES OF EUROPEAN HISTORY 28-30 (1897?-1907?), available at <http://www.fordham.edu/halsall/source/edict-milan.html> (Internet Medieval Source Book).

80. *Id.*

81. *Id.*

82. DRAKE, *supra* note 75, at 194. Sanford Cobb describes the Edict of Milan "as the ordination of the fullest religious liberty the world has known until the foundation of the American republic. Its enactment is one of the marvels of history, so diverse from all that had preceded and from all that followed." COBB, *supra* note 25, at 26.

83. Wilken, *supra* note 74, at 38.

Wilken suggests, “was the most astute and learned critic of Christianity in the first four centuries of the Church’s history.”<sup>84</sup> The *Divine Institutes* not only provided an answer to Porphyry’s forceful critique of Christianity, but also refuted Porphyry’s justification for persecution by appealing to the Roman authorities’ own secular ideas of toleration, which they had abandoned in dealing with Christians. But Lactantius did not stop there—he “moved beyond the usual apologetic gambits to offer a positive argument for why religion of any sort cannot be coerced.”<sup>85</sup> In so doing, Lactantius provided the theological and philosophical foundations for Constantine’s religious policy.<sup>86</sup>

Few in history have voiced the argument for religious freedom more eloquently than Lactantius. Michel Perrin calls book five of the *Divine Institutes* a “manifesto for the liberty of religion.”<sup>87</sup> Lactantius is the first Western thinker to present a comprehensive argument for religious freedom rooted not in secular notions of toleration but in the nature of God and of authentic religious belief.<sup>88</sup> True religion, he argued, has to do with loving God, which by its very nature is not something that can be coerced.<sup>89</sup> “For nothing is so much a matter of free-will as religion,” he wrote, “in which, if the mind of the worshipper is disinclined to it, religion is at once taken away, and ceases to exist.”<sup>90</sup> Religious sacrifice must not be

extorted from a person against his will. For unless it is offered spontaneously, and from the soul, it is a curse; [this is the case] when men sacrifice, compelled by proscription, by injuries, by prison, by tortures. If they are gods who are worshipped in this manner, if for this reason only, they ought not to be worshipped, because they wish to be worshipped in this manner: they are doubtless worthy of the detestation of men, since libations are made to them with tears, with groaning, and with blood flowing from all the limbs.<sup>91</sup>

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84. *Id.*

85. *Id.*

86. See generally DRAKE, *supra* note 75; DIGESER, *supra* note 49. Digeser provides the most useful insight into the theological and philosophical aspects of Lactantius’ thinking and its influence on Constantine’s policy.

87. MICHEL PERRIN, LA ‘RÉVOLUTION CONSTANTINIENNE’ VUE A TRAVERS L’OEUVRE DE LACTANCE, in L’IDÉE DE RÉVOLUTION 88 (1991), translated in DIGESER, *supra* note 49, at 133.

88. Wilken, *supra* note 74, at 38.

89. Lactantius, *Divine Institutes* 5:20, in 7 THE ANTE-NICENE FATHERS, *supra* note 62, at 157, available at <http://www.ccel.org/ccel/schaff/anf07.iii.ii.v.xx.html>.

90. *Id.*

91. Lactantius, *Divine Institutes* 5:21, in *id.* at 158, available at <http://www.ccel.org/ccel/schaff/anf07.iii.ii.v.xxi.html>.

Lactantius insisted that persuasion be used in place of threats of force or injury. “There is no need of force and injury,” he wrote, “because religion cannot be forced. It is a matter that must be managed by words rather than blows, so that it may be voluntary.”<sup>92</sup> Force and violence only defile religion and produce hypocrisy:

For they are aware that there is nothing among men more excellent than religion, and that this ought to be defended with the whole of our power; but as they are deceived in the matter of religion itself, so also are they in the manner of its defence. For religion is to be defended, not by putting to death, but by dying; not by cruelty, but by patient endurance; not by guilt, but by good faith: for the former; belong to evils, but the latter to goods; and it is necessary for that which is good to have place in religion, and not that which is evil. For if you wish to defend religion by bloodshed, and by tortures, and by guilt, it will no longer be defended, but will be polluted and profaned.<sup>93</sup>

Those who use force, Lactantius wrote, “neither know themselves nor their gods,”<sup>94</sup> and those who strive to defend religion with force make their gods appear weak.<sup>95</sup>

Lactantius specifically urged Christians to abstain from the use of force and leave the matter to God:

But we, on the contrary, do not require that any one should be compelled, whether he is willing or unwilling, to worship our God, who is the God of all men; nor are we angry if any one does not worship Him. For we trust in the majesty of Him who has power to avenge contempt shown towards Himself, as also He has power to avenge the calamities and injuries inflicted on His servants.<sup>96</sup>

His argument was designed to show pagan persecutors that Christianity—not pagan religion—was committed to rational dialogue which had been the hallmark of classical thought. “Let them imitate us in setting forth the system of the whole matter,” Lactantius wrote, “for we do not entice, as they say; but we teach, we prove, we show.”<sup>97</sup>

92. Lactantius, *Divine Institutes* 5:20, in 49 THE FATHERS OF THE CHURCH, *supra* note 61, at 378 (for alternate translation, see 3 ANTE-NICENE FATHERS, *supra* note 62, at 156, available at <http://www.ccel.org/ccel/schaff/anf07.iii.ii.v.xx.html>).

93. Lactantius, *Divine Institutes* 5:20, in 7 THE ANTE-NICENE FATHERS, *supra* note 62, at 157, available at <http://www.ccel.org/ccel/schaff/anf07.iii.ii.v.xx.html>.

94. *Id.*

95. *Id.*

96. Lactantius, *Divine Institutes* 5:21, in 7 THE ANTE-NICENE FATHERS, *supra* note 62, at 158, available at <http://www.ccel.org/ccel/schaff/anf07.iii.ii.v.xxi.html>.

97. Lactantius, *Divine Institutes* 5:20, in 7 THE ANTE-NICENE FATHERS, *supra* note 62, at 156, available at <http://www.ccel.org/ccel/schaff/anf07.iii.ii.v.xx.html>.

Lactantius' argument for religious freedom is strikingly similar to that made by Tertullian, but more thoughtful, far-reaching, and accessible. He maintained that religious freedom is fundamental to all other freedoms, and that authentic religion, by its very nature, is not something that can be forced. Lactantius' views presuppose that God exists, but do not require a rejection of religious exclusivism. Wilken observes that

[h]is argument is not that Christianity should be tolerated because there are many ways to God and no one can know which way is correct (a conventional defense of religious toleration). Rather, Lactantius claims that coercion is inimical to the nature of religion. This is the first theological rationale for religious freedom, because it is the first rationale to be rooted in the nature of God and of devotion to God.<sup>98</sup>

This rationale, Wilken contends, "lays bare the spiritual roots of Western notions of religious liberty. For he saw that religious freedom rests on a quite different philosophical foundation than toleration of religion."<sup>99</sup> Lactantius' concern that compelling religion upon others corrupts religion by fostering pretense and hypocrisy presaged the effects of state-enforced Christianity. While Lactantius undoubtedly drew upon Tertullian for the idea that genuine worship must be freely given, he also cited specifically to Cicero for the idea that the gods must be approached with purity of mind and piety, not ritual, and that godly love and devotion are not typical responses to force.<sup>100</sup> By invoking Cicero, Lactantius appealed to Roman tradition and made his argument broadly comprehensible to Christians and non-Christians alike.

Although in many ways a minor historical character, Lactantius was the first to conceive of a comprehensive and principled theological argument for religious freedom. The immediate influence of his thinking on Constantine's religious policy resulted in a remarkably novel commitment by the state to religious freedom, something heretofore unrealized in his day. We should not be surprised to learn, therefore, that prominent sixteenth and seventeenth century advocates for religious freedom frequently turned to Lactantius as a source for their ideas.<sup>101</sup>

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98. Wilken, *supra* note 74, at 38.

99. *Id.*

100. DIGESER, *supra* note 49, at 109, 111-12.

101. Scholars often overlook Tertullian and Lactantius when considering the origins of the Western concept of religious freedom. See, e.g., Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 597 n.54 (1999) ("The linkage between religion and voluntarism was first introduced in Christian theology by Sebastian Castalion."). For a helpful discussion of Lactantius' influence on the development of

### C. *The Rise of Intolerance in Christendom*

Constantine's policy of toleration gave way to imperial preference for Christianity by the end of the fourth century. That preference was supported by the use of the state's coercive powers to punish Christian dissidents and suppress pagan religions.

#### 1. The Beginnings of Christian Intolerance

Constantine's regard for Christianity became more public after he defeated former co-ruler Licinius in 324 and gained control of the entire empire. His Edict to the Eastern Provincials repudiated Diocletian's persecution policy and called upon all of his subjects to openly profess their allegiance to Christ as their Savior; nevertheless, he rejected the use of force to compel belief. Constantine reiterated the view, articulated by Tertullian and Lactantius, that true faith must be freely held:

What each man has adopted as his persuasion, let him do no harm with this to another. That which the one knows and understands, let him use to assist his neighbor, if that is possible; if it is not, let it be put aside. For it is one thing to undertake the contest for immortality voluntarily, another to compel it with punishment.<sup>102</sup>

Constantine's goal was to unify the empire. He wanted his subjects united together in serving God, not just for their own benefit, but as a means of achieving political unity and peace.<sup>103</sup> He believed, however, that force could not bring about unity; rather, only persuasion and common fellowship would show the way to God: "Let those who delight in error alike with those who believe partake in the advantages of peace and quiet. For this sweetness of common benefit will have strength to correct even these and lead them to the straight road."<sup>104</sup> In Constantine's view, if people were permitted to freely choose to become Christians, given sufficient time and friendly persuasion, the traditional cults would disappear and Christian unity ultimately would be achieved.<sup>105</sup>

Constantine's Edict to the Eastern Provincials also contained a strong message to so-called Christians who wanted aggressive

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Christian ideas about religious freedom and comparing Lactantius' religious understanding of religious freedom with James Madison's, *see* Wilken, *supra* note 73.

102. Edict to the Eastern Provincials, *quoted in* DRAKE, *supra* note 75, at 286.

103. *Id.* at 245.

104. *Id.* at 244-45.

105. For a thoughtful discussion of the themes and motivations behind the Edict to the Eastern Provincials and its seemingly contradictory message urging mutual toleration while condemning pagan rites, *see* DRAKE, *supra* note 75, at 284-308.

suppression of pagan religions.<sup>106</sup> He urged that the “contest for immortality” must be undertaken voluntarily and not with compulsion.<sup>107</sup> Drake sees this reference as pointing the finger toward Christians, for whom the goal of immortality was more readily associated than with the traditional pagan cults.<sup>108</sup> Digeser points out that “in the East there were more Christians, and their spirit of opposition and vengeance had no doubt been cultivated to ripeness by the intermittent series of severe persecutions.”<sup>109</sup> She explains that “with the help of Lactantius, Constantine’s move was to use Christian doctrine against the Christians themselves. By explaining that true Christian piety could not be forced and that consequently the proper way to seek converts was through argument and reasoning, he used Lactantius’s ideas to restrain Christian aggression.”<sup>110</sup> Drake similarly suggests that Constantine “held up to Christian militants a mirror of ideal Christian behavior to show them the flaws in their own agenda.”<sup>111</sup> The arguments for religious toleration and freedom which Lactantius had formulated to curtail persecution against Christians, now were used in an effort to control aggression by Christians.

The emperors who came to power after Constantine’s death in 337 were increasingly willing to use the coercive powers of the state to compel belief and suppress traditional Roman religions. His successors convened and dissolved church councils, interjected themselves into theological controversies, enforced uniformity of religious belief and practice by civil punishments, and gave aid to the organized church.<sup>112</sup> Laws against heresy became increasingly severe beginning in the latter half of the fourth century. Heretics suffered confiscation of their churches and other property, were forbidden from assembling in public or private for religious purposes, and were denied the right to devise or inherit property.<sup>113</sup> The first use of the death penalty for heresy occurred in 385 when two bishops persuaded the imperial usurper Maximus to agree to the execution of Priscillian and six followers in Spain.<sup>114</sup> While the emperors considered Christianity as a means to unifying a vast and

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106. See DIGESER, *supra* note 49, at 137.

107. Edict to the Eastern Provincials, *supra* note 102.

108. DRAKE, *supra* note 75, at 303.

109. DIGESER, *supra* note 49, at 137.

110. *Id.*

111. DRAKE, *supra* note 75, at 304.

112. BATES, *supra* note 59, at 134. For a fuller discussion of the policies of Constantine’s successors toward both heretics and pagans, see 1 JOSEPH LECLER, *TOLERATION AND THE REFORMATION* 39-46 (Westow trans. 1960) (1955).

113. See BATES, *supra* note 59, at 135; LECLER, *supra* note 112, at 46; ZAGORIN, *supra* note 39, at 23.

114. ZAGORIN, *supra* note 39, at 23.

complex empire and consolidating their power over it, their repressive measures were not solely affairs of state. Church leaders sought full partnership with civil authorities in the fight against heresy. Nestorius, for instance, in his sermon to the emperor Theodosius upon his consecration as bishop of Constantinople, proposed: "Give me, my Prince, the earth purged of heretics, and I will give you heaven as a recompense. Assist me in destroying heretics, and I will assist you in vanquishing the Persians."<sup>115</sup> If it were not for the views advocated by Tertullian and Lactantius in the earlier period, the coercive strategy adopted later might be understood as the inevitable product of Christian exclusivism. "As it is," Drake observes, "either the earlier situation must be dismissed as an aberration or the later one explained on the basis of changes that occurred during the half century that separates the reigns of Constantine and Theodosius."<sup>116</sup>

## 2. The Causes of Christian Intolerance

A brief consideration of the causes for the rise of persecution during this period will be helpful in setting the context for what is to come. The most immediate and oppressive application of civil sanction was directed against Christian heretics (those who denied orthodoxy) and schismatics (those who separated from the church). The first step toward coercion was taken near the end of Constantine's reign and, contrary to the accepted view, the object of that coercion was not pagans but other Christians. Drake explains:

Here lies the first and most important key to the coercive turn Christianity took during the course of the fourth century: Christians first used both rhetoric conducive to coercion and the tools of coercion itself not against pagans but against other Christians. Heresy, not paganism, was the first object of Christian intolerance. The pattern, once detected, is very regular: it was heresy that prompted Constantine to become involved in councils of bishops, and heresy was the one exception he ultimately made to his policy of noncoercion. Only subsequently did the rhetorical and political devices first used in the war against other Christians come to be used against non-Christians.<sup>117</sup>

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115. Socrates Scholasticus, *Ecclesiastical History* 7:29, in 2 NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 169 (series II) (Philip Schaff & Henry Wace eds. 1886) (quoting Nestorius), available at <http://www.ccel.org/ccel/schaff/npnf202.ii.x.xxix.html>.

116. DRAKE, *supra* note 75, at 418.

117. *Id.* at 416.

Constantine's most inflammatory rhetoric was directed at dissident Christians. In Eusebius' *vita Constantini*, he describes an "Edict Against the Heretics" in which Constantine attacks heretics and schismatics, orders their meeting places seized, and declares unlawful any future meetings, in public or private.<sup>118</sup> As Garnsey points out, "[f]or Constantine heretics and schismatics were wicked and criminal, pagans merely in error."<sup>119</sup>

The obvious inconsistency between Constantine's edict against heretics and his general policy of toleration can be explained by a strategy of "political horse trading."<sup>120</sup> Constantine sought a *quid pro quo* with the church bishops whereby the bishops accepted the burdens of acting as an alternative judiciary (an agenda Constantine pushed out of despair over corruption among existing judicial officials) and Constantine in turn assisted the bishops in their goal of achieving unity and stability within the Christian community, even to the point of using the coercive power of the state against disruptive dissidents such as the Donatists.<sup>121</sup> Constantine's gesture "would protect his flank against attacks by militant Christians and win the support of the bishops for his social and judicial initiatives."<sup>122</sup> What happened in the later years of Constantine's reign, according to Drake, is that Constantine "lost control of the agenda, and, ultimately, . . . the message."<sup>123</sup>

What explains the acceptance of coercion by the Christian community? How did militant Christians come first to dominate, then to define, the Christian message and movement? Why did coercion begin with heretics and schismatics, rather than with unbelieving pagans? While there is no single answer to such large questions, there also is no evidence that Christian attitudes toward coercion in the late fourth century were the inevitable consequence of Christian theology. Love and forbearance—even loving one's enemies—are at least as central to the Christian message as the concern for unity and doctrinal correctness that presumably leads to intolerance. Tertullian and Lactantius drew upon Christian principles to establish a baseline for religious freedom. Toleration not only was possible within a Christian framework, it had been realized in the Constantinian settlement, with its specific denial of coercion in matters of religion. To explain why militants succeeded in

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118. Eusebius, *De vita Constantini*, 3:64-65, in 1 NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 539-40, *supra* note 115, available at <http://www.ccel.org/ccel/schaff/npnf201.iv.vi.iii.lxiv.html>.

119. Garnsey, *supra* note 48, at 19.

120. Drake, *supra* note 75, at 348.

121. *Id.* at 309-52.

122. *Id.* at 348-49.

123. *Id.* at 272.

gaining control of the Christian message, something other than Christian theology must be invoked.

One possible answer is that internal and external forces threatened the security of the Christian community in the late fourth century. The less secure a community feels, the less likely it is willing to tolerate dissent. Drake suggests that displacement of the “Constantinian consensus” with its emphasis on forbearance and noncoercion by the coercive regimes that followed was an unintended consequence of Constantine’s own policies and two significant developments in the post-Constantinian period: first, destabilization and insecurity within the Christian community caused by internal conflicts; and second, Christian-pagan polarization that resulted from the anti-Christian agenda pursued by the emperor Julian during his brief reign from 361-63.<sup>124</sup>

The Christian community in the fourth century, Drake argues, was destabilized by an influx of newcomers who brought with them “collateral habits and points of view” that clashed with the community’s values and created “a sense of being overwhelmed by ‘foreign’ and ‘subversive’ elements.”<sup>125</sup> The internal conflicts and strains created by absorbing new members was a consequence of both the movement’s own successes and Constantine’s policies: “Constantine not only removed disincentives to conversion, but the favor and attention he showed the Christian community had the effect of making conversion fashionable, particularly among a leadership class whose antennae were always tuned to picking up what would and would not please those whose favors they sought.”<sup>126</sup> Some were drawn to Christianity as much for the prominence and position it might bring them as for the message of redemption. For obvious reasons, Drake says, the commitment of such “converts” was sometimes in doubt, as suggested by complaints voiced by Eusebius of Caesarea after Constantine’s death about “the scandalous hypocrisy of those who crept into the Church, and assumed the name and character of Christians.”<sup>127</sup>

The instability and uncertainty created by these newcomers created a sense among many Christians that they needed to return to the simplicity and purity of earlier times.<sup>128</sup> Within this environment, those who spread overt heresies or disruptive religious messages were more likely to be seen as threats to the community’s survival. Add to this, Drake says, the brief reign of Julian the Apostate which rekindled

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124. *Id.* at 408-09.

125. *Id.* at 423.

126. *Id.* at 424.

127. *Id.* at 424 (quoting Eusebius, *De vita Constantini*, 4.54) (internal quotations omitted).

128. *Id.* at 423.

Christian fears of persecution and polarized relations between Christians and pagans, and the result was that the Christian community became more militant and coercive, largely because it had been destabilized by social and political, rather than theological, dynamics.<sup>129</sup>

While Drake's analysis provides an explanation for why many Christians became more intolerant in the latter part of the fourth century, it does not explain why Christians sought to use the coercive powers of the state against religious dissidents. What turned religious schism or heresy into something more than just an internal doctrinal dispute to be resolved by the church? One obvious reason is the close tie between spiritual and civil authority in Roman tradition. While it is one thing to eliminate individual error by persuasion, it is entirely another when error is widely propagated, drawing whole groups and even entire provinces away from the common faith. If the emperor is friendly with the church, it would not be surprising for church leaders to allow the state to intervene; sometimes, they even might request it. Both hold an overlapping interest in seeing religion as unified and as a unifying force. When such closeness and commonality exist, as it did in the fourth century, it was inevitable that the problem of spiritual unity would become a problem for the civil magistrate. John Noonan observes that "[t]he establishment of Christianity as the official religion of the empire marks an important turn in which the doctrinal unity of Christians was transformed from a religious concern into a political one."<sup>130</sup>

Another reason is the direct and causal link made between heresy or schism and social chaos. It was commonly believed that religious dissent not only dishonors God, but also leads to licentiousness and anarchy. Those who spread overt error or stirred up religious dissension threatened the peace and order of the community as well as its theological identity.<sup>131</sup> I am not suggesting that religious dissent actually led to anarchy and chaos in every instance; sometimes it did, most of the time it did not. My point is that within close-knit Christian communities such claims were entirely plausible. And since the maintenance of public order was within the jurisdiction of the civil magistrate, the state naturally became involved in policing schism and heresy. State coercion was required to enforce unity and community and to keep religious dissent from breaking out into overt acts that threatened civil peace and order.

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129. *See id.* at 421-22.

130. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT* 41 (Robert C. Clark ed., Foundation Press 2001).

131. *See* DRAKE, *supra* note 75, at 422.

The rise of Christian intolerance in the late fourth century highlights the inevitable tension within historic Christianity between conscience and community. The command to love one another is superseded only by the command to love God with one's entire heart, soul, and mind.<sup>132</sup> It is this commitment to love God, Lactantius argued, that cannot be compelled. Choices about individual faith and devotion to God, to be genuine, require the free and voluntary assent of those who make them. Such freedom is contrary to the imposed religious uniformity of a Christian commonwealth, or the relentless attempt to suppress those who do not conform to the established faith. Then again, authentic Christianity is not just about individual conscience, but also about the integrity, solidarity, and witness of the Christian community. The problem posed by religious freedom is what must be sacrificed of one in order to protect the other.<sup>133</sup>

*D. Opposition to State Persecution in Early Christendom*

The staying power of the religious argument for noncoercion is seen in the middle and late fourth century writings of several prominent church fathers who urged restraint in the face of increasing state persecution of religious dissidents. Almost half a century after Lactantius, Gregory of Nazianzen (330-389) wrote:

I do not consider it good practice to coerce people instead of persuading them. . . . Whatever is done against one's will, under the threat of force, is like an arrow artificially tied back, or a river dammed in on every side of its channel. Given the opportunity it rejects the restraining force. What is done willingly, on the other hand, is steadfast for all time. It is made fast by the unbreakable bonds of love.<sup>134</sup>

Hilary of Poitiers (c. 300-368) similarly extolled the free nature of authentic faith in a letter to emperor Constantius:

God has taught us to know him, but did not compel us; he invested his precepts with authority by making us admire his heavenly deeds, but he did not want a command under compulsion. If violence were used to establish the true faith, episcopal teaching would oppose it and would say: God is the Master of the universe, and does not need

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132. *Matthew* 22:34-40.

133. See, e.g., Charles R. Nixon, *Freedom vs. Unity: A Problem in the Theory of Civil Liberty*, 69 *POL. SCI. Q.* 70 (1953) (The tension between freedom and unity also exists in political theory.).

134. GREGORY OF NAZIANZEN, *De vita* 1293-1302, quoted in DRAKE, *supra* note 75, at 406-07.

any forced homage, nor does he ask for a confession of faith extorted by violence.<sup>135</sup>

One unlikely source is Athanasius, a fierce advocate of Nicene orthodoxy, who nevertheless protested that his enemies were using the pagans' weapon of persecution to enforce their views. It is "not the part of men who have confidence in what they believe, to force and compel the unwilling," he wrote, contrasting the force of the devil with the love of Christ, "and if they open to Him, He enters in, but if they delay and will not, He departs from them. For the truth is not preached with swords or with darts, nor by means of soldiers; but by persuasion and counsel."<sup>136</sup> Elsewhere, Athanasius' treatise against Auxentius (364), he contrasted the methods of the early church with those who were directing the church in his time:

[O]n what power the Apostles based themselves to preach Christ and to bring almost all the nations from the idols to God? . . . Was it through royal edicts that Paul gathered the Church for Christ when he was exhibited in the arena? Did he rely on Nero's patronage, or that of Vespasian or Decius? Is it not through those Emperors' hatred of us that the confession of the divine truth has flourished? . . . But now, alas, the divine faith is enjoined by the protection of earthly powers and Christ is accused of impotence because ambition has attached itself to his name. The Church threatens with exile and dungeon; it wants to create belief by constraint, the Church in whom they formerly put their faith when they were in exile and dungeons. . . . The Church, once propagated by hunted priests, now hunts the priests. The contrast between that Church of the past, now lost, and that which we behold today, cries to heaven.<sup>137</sup>

While this passage was directed against the Arians and their protector Constantius, Joseph Lecler, a leading historian of religious toleration, suggests that "it has . . . a more general bearing, because it seems clearly to decline the burdensome protection of the State for the spreading of the Christian truth."<sup>138</sup>

Another example of the religious argument's resiliency during this period is found in the writings of John Chrysostom (349-407), the bishop of Constantinople. Chrysostom emphasized the Christian tradition of love and forbearance in an early homily addressed to worshippers of the

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135. Hilary of Poitiers, *Ad Constantium Augustum*, I, 6, quoted in 1 LECLER, *supra* note 112, at 48.

136. Athanasius, *Second Arian Persecution Under Constantius*, in 4 NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 281, *supra* note 115.

137. Athanasius, *Contra Auxentium*, 3-4, quoted in 1 LECLER, *supra* note 112, at 48-49.

138. 1 LECLER, *supra* note 112, at 49.

old Roman gods: “Such is the character of our doctrine,” he proclaimed. “What about yours? No one ever persecuted it, nor is it right for Christians to eradicate error by constraint and force, but to save humanity by persuasion and reason and gentleness. Hence no emperor of Christian persuasion enacted against you legislation such as was contrived against us by those who served demons.”<sup>139</sup>

When writing to Christians, Chrysostom urged that they show gentleness and constraint when dealing with unbelievers and heretics. In his twenty-ninth Homily on Matthew, he taught that “nothing can so heal [the unbeliever] as gentleness . . . which is mightier than any force[.]” and therefore urged Christians to “use gentleness to eradicate the disease. Since he who is become better through the fear of man, will quickly return to wickedness again.”<sup>140</sup> Chrysostom explained in his tract *On the Priesthood* why coercion likewise should not be used to correct errant Christian believers:

It ill befits Christians of all men to correct the mistakes of the erring by constraint. Judges without the Christian fold may exercise coercion against those who are legally convicted, but in our case such men must be brought to a better fruit, by persuasion rather than compulsion. The laws do not confer upon us authority of this sort for coercing the delinquent, nor if they did could we use it, because God crowns those who refrain from evil by choice and not by necessity. . . . The wanderer cannot be dragged by force or constrained by fear. Only persuasion can restore him to the truth from which he has fallen away.<sup>141</sup>

The writings of Gregory, Hilary, Athanasius, Chrysostom, and others during this period echo the voluntarism justification for religious toleration and freedom introduced by Tertullian and Lactantius. This rationale, however, was met with a strong counterargument for persecution.

#### *E. Augustine's Theory of Persecution*

The most systematic and profound inquiry into the relation of religious and political authority in the post-Constantinian period was undertaken by Augustine (354-430), a philosopher-turned-Christian and

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139. John Chrysostom, *De sancto Babyla* 13, quoted in DRAKE, *supra* note 75, at 407.

140. John Chrysostom, *Homily XXIX*, in 10 NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH, *supra* note 115, at 194 (Series No. 1), available at <http://www.ccel.org/ccel/schaff/npnf110.iii.XXIX.html>.

141. Chrysostom, *De sacerdotio*, II, §§ 3, 4, in 58 PATROLOGIA GRAECA 634-35 (J. P. Migne ed., 1857-66).

“one of the foremost religious minds of any age,”<sup>142</sup> who wrote at the beginning of the fifth century during the Donatist controversy. Augustine gave the church a powerful and coherent justification for coercion. While he initially criticized the church’s use of civil power to persecute, the church’s ongoing problems with heretics, not pagans, convinced him to abandon his view that religious practices should not be coerced. His views had a vast influence on Christian thought in subsequent centuries.<sup>143</sup>

The problem of wayward church members was not new. Early attempts to deal with heresy and schism followed closely the biblical directives of admonishment and expulsion. For early Christians, the spiritual nature of the church excluded all recourse to physical force in favor of only spiritual punishment. Additionally, Jesus’ parable of the tares was used in support of lenient measures toward sinning church members. In the parable, Jesus compares the kingdom of God to a wheat field in which the landowner’s enemies secretly sow tares; both should be allowed to grow until harvest, he says, lest in pulling up tares the wheat also is destroyed.<sup>144</sup> As shown below, Christian leaders argued that by the parable, Jesus meant to warn the church against attempting to remove false Christians from its midst, since the judgment about who is a true believer ultimately must be left to God. This famous parable would be cited often in discussions of toleration and persecution in the centuries that follow, and it would occupy a prominent place in the tolerationist arguments of the sixteenth and seventeenth centuries.

As we have seen, by the early fifth century, the persecution of heretics had become a common practice within the church. Numerous heretical sects had been identified, including Arians, Donatists, Manichaeans, Marcionites, Monophysites, Pelagians, and others.<sup>145</sup> These groups were condemned by the ecclesiastical authorities and subject to punishment by civil authorities. In 407 heresy was made a public crime because, in the words of emperor Arcadius’ edict, “any offence which is committed against divine religion involves an injury to all.”<sup>146</sup> To provide a mandate for the church’s use of civil coercion and persecution to deal with dissenting members, a supporting rationale grounded in Scripture was needed.

Augustine initially opposed civil punishment of Christian dissenters. When he became bishop of Hippo in North Africa in 395, he found the

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142. ZAGORIN, *supra* note 39, at 25.

143. On Augustine’s view of coercion, see Rohr, *supra* note 45.

144. See *Matthew* 13:24-30.

145. ZAGORIN, *supra* note 39, at 25.

146. *Id.* (quoting Arcadius). The edict is available at [http://www.seanmultimedia.com/Pie\\_Arcadius\\_Laws.html](http://www.seanmultimedia.com/Pie_Arcadius_Laws.html).

church in that region bitterly divided between orthodox Christians and dissident Donatists.<sup>147</sup> Civil disturbances were frequent, marked by rioting and street fighting between the two factions. Until about 400, Augustine believed that peaceful conversation and persuasion were the only legitimate means for correcting the Donatists and winning them back to the Catholic faith.<sup>148</sup> Thus he assured Maximinus, a Donatist bishop, that “[o]n our side there shall be no appeal to men’s fear of the civil power,” but rather he would “let our arguments appeal to reason and to the authoritative teaching of the Divine Scriptures.”<sup>149</sup> In a letter to Eusebius, a Donatist churchman, Augustine wrote that it was not his intent “that any one should against his will be coerced into the Catholic communion,” but rather his aim was that the truth may be revealed to all who are in error and that, with the help of God, they may follow and embrace it of their own accord.<sup>150</sup> Consistent with the teachings of Tertullian, Lactantius, Hilary, Athanasius, Chrysostom, and others, Augustine expressed his view in a short formula: “Man cannot believe unless he wants to.”<sup>151</sup>

Augustine eventually embraced the idea that heresy must be stopped even, if necessary, by forceful intervention of the civil authorities. Garnsey points out that the Donatists used the themes introduced by Tertullian and Lactantius to argue that advocating and practicing coercion was inconsistent with traditional Christian doctrine.<sup>152</sup> He suggests that their criticism of the church not only for favoring persecution but also for calling in the coercive arms of the state provoked Augustine to develop a doctrine of “just persecution.”<sup>153</sup>

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147. The Donatist controversy involved certain Christian clergy who had collaborated with hostile Roman officials during the persecution of Diocletian (303-11) by “handing over” copies of Scripture, thereby becoming *traditores*. After the persecution ceased, a group of Christians led by Donatus charged that the bishop of Carthage, Caecilianus, had been consecrated by a *traditor* and therefore his consecration was invalid. When their complaints were ignored, they proceeded to elect their own bishop of Carthage. The controversy continued with charges that any sacraments (e.g., baptism) administered by tainted clergy or by clergy consecrated by tainted clergy were invalid. See generally W.H.C. FRENCH, *THE DONATIST CHURCH: A MOVEMENT OF PROTEST IN ROMAN NORTH AFRICA* (1952); TIMOTHY D. BARNES, *THE NEW EMPIRE OF DIOCLETIAN AND CONSTANTINE* (1982).

148. See Rohr, *supra* note 45, at 54-55.

149. Augustine, *Epist.* 23:7 (to Maximin), in 1 NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH, *supra* note 115, at 244 (series I), available at <http://www.ccel.org/ccel/schaff/npnf101.vii.1.XXIII.html>.

150. Augustine, *Epist.* 34 (to Eusebius), in *id.* at 264, available at <http://www.ccel.org/ccel/schaff/npnf101.vii.1.XXXIV.html>.

151. Augustine, *In Joannem*, XXVI, n.2, in PATROLOGIA LATINA XXXV, col. 1607 (J.-P. Migne ed. 1844-55), available at <http://p1d.chadwyck.co.uk>.

152. Garnsey, *supra* note 48, at 17. Garnsey notes, however, that the Donatists’ main tactic against orthodox coercion was violence rather than argument. *Id.*

153. *Id.*

The first indication of a change in Augustine's thinking came in 400 in his lengthy treatise against Parmenian, successor to Donatus the Great in Carthage. Responding to the Donatist objection to the church's recourse to temporal powers, Augustine noted that the Apostle Paul had included dissensions and heresies along with adulteries, debauchery, and other offenses when listing the "fruits of the flesh" in Scripture.<sup>154</sup> To Augustine, this meant that heretics and schismatics were wicked, not merely in error. By putting schism and heresy on the same level as civil crimes, Augustine suggested that both could be punishable by the secular authority.<sup>155</sup> This went beyond the conventional view that the state should punish heresy and schism only when they actually cause sedition or disorder. Given that the Donatists' antics frequently resulted in civil turmoil, Augustine easily could have justified state intervention on grounds of keeping the peace, but he ignored this narrower rationale in favor of a broader justification for state intervention.<sup>156</sup>

The same treatise contains Augustine's interpretation of Jesus' parable of the tares, which frequently was invoked by tolerationists.<sup>157</sup> Augustine drew a very different lesson from the parable: if the bad seed is known, it should be uprooted.<sup>158</sup> He suggested that the tares ought to be removed if they are easily distinguishable from the wheat (so the wheat will not be uprooted with them)—"when someone's crime is known and appears so foul that he finds no defender . . . , then severe discipline must not remain dormant, for the more diligently charity is preserved, the more efficacious is the correction of perversity."<sup>159</sup>

Augustine's most extended justification for his volte-face regarding state coercion appears in a letter written in 408 to Vincent, a Donatist bishop. Augustine offered both pastoral and theological arguments favoring civil penalties for the Donatists. From the pastoral side, Augustine maintained that constraint was a good thing because it helped erring souls return to the truth:

[T]he thing to be considered when any one is coerced, is not the mere fact of the coercion, but the nature of that to which he is coerced, whether it be good or bad: not that any one can be good in spite of his own will, but that, through fear of suffering what he does not desire, he either renounces his hostile prejudices, or is compelled to examine truth of which he had been contentedly ignorant; and under the

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154. Augustine, *Contra epistolam Parmeniani*, I, X, 16, in PATROLOGIA LATINA, *supra* note 147, at XLIII, 45 (citing *Galatians* 5:19).

155. *Id.*

156. See Rohr, *supra* note 45, at 59-60.

157. See *supra* text accompanying note 144.

158. ZAGORIN, *supra* note 39, at 29.

159. Augustine, *supra* note 154, at XLIII, 92.

influence of this fear repudiates the error which he was wont to defend, or seeks the truth of which he formerly knew nothing, and now willingly holds what he formerly rejected.<sup>160</sup>

Augustine was convinced that it was better for dissidents to be forced from their error by fear or punishment than for their souls to perish eternally. The compulsion was beneficial and remedial, like the forceful restraint of someone about to throw himself over a precipice. Augustine's writings, in fact, are replete with familiar analogies—father-son, physician-patient, educator-student, and shepherd-sheep—to show how constraint in certain contexts is a good thing. Genuine love, he believed, demands it: “It is better with severity to love, than with gentleness to deceive.”<sup>161</sup>

Augustine also saw that constraint worked—at least, he thought so. Roland Bainton, the distinguished American historian of religious liberty, writes that “[t]o persecute, a man must believe that he is right, that the point in question is important, and that coercion is effective.”<sup>162</sup> From the outset, Augustine believed that the church was right and that heresy and schism posed a grave threat, not only to the church, but also to the individual, since outside the church there is no salvation. He initially opposed coercion because he thought that it would lead only to false repentance, but when he saw that many who had returned to the church under legal pressure were happy Catholics once again, he changed his mind:

I have therefore yielded to the evidence afforded by these instances which my colleagues have laid before me. For originally my opinion was, that no one should be coerced into the unity of Christ, that we must act only by words, fight only by arguments, and prevail by force of reason, lest we should have those whom we knew as avowed heretics feigning themselves to be Catholics. But this opinion of mine was overcome not by the words of those who controverted it, but by the conclusive instances to which they could point. . . .

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160. Augustine, *Epist.* 93:5.16 (to Vincentius), in 1 NICENE AND POST-NICENE FATHERS, *supra* note 115, at 388 (series I), available at <http://www.ccel.org/ccel/schaff/npnf101.vii.1.XCIII.html>. In Augustine's letter to Boniface on the correction of the Donatists, he explained that the purpose of constraint was “for that hardness of heart which cannot be softened by words, but yet admits of softening through the agency of some little severity of discipline.” Augustine, *Epist.* 185:7.26 (to Boniface), in 4 *id.* at 643 (series I) (otherwise known as *A Treatise Concerning the Correction of the Donatists*), available at <http://www.ccel.org/ccel/schaff/npnf104.v.vi.ix.html>.

161. Augustine, *Epist.* 93:2.4 (to Vincentius), in 1 *id.* at 382 (series I), available at <http://www.ccel.org/ccel/schaff/npnf101.vii.1.XCIII.html>.

162. Roland H. Bainton, *Introduction to CONCERNING HERETICS: WHETHER THEY ARE TO BE PERSECUTED AND HOW THEY ARE TO BE TREATED: A COLLECTION OF THE OPINIONS OF LEARNED MEN, BOTH ANCIENT AND MODERN* 12 (Sebastian Castellio ed. & Roland H. Bainton trans., 1935) (1554).

[T]here was set over against my opinion my own town, which, although it was once wholly on the side of Donatus, was brought over to the Catholic unity by fear of the imperial edicts. . . .<sup>163</sup>

The former dissidents' apparent joy and gratitude in being delivered from their error confirmed to Augustine that the coercion had been effective.

From the theological side, Augustine relied on several passages from Christian scripture to justify state coercion. In his view, these passages teach that God himself employs coercive means and has authorized the church to do the same. Augustine cited the trials God sent to the patriarchs, the harshness and oppression shown by Abraham's wife, Sarah (as a type for spiritual persons), to Hagar, the bondswoman (as a type for worldly persons), Moses' affliction of the Israelites for their impiety and idolatry, Elijah's slaying of the false prophets, and Paul's conversion and subsequent thorn in the flesh as examples of God's own or approved use of hardship to compel, discipline, or correct his people.<sup>164</sup> Augustine appealed to the very character and ways of God as a basis for such constraint: "Who can love us more than God does? And yet He not only gives us sweet instruction, but also quickens us by salutary fear, and this unceasingly."<sup>165</sup>

The most famous of Augustine's justifications for the repression of error is his exegesis of the parable Jesus told about a rich master who prepared a great banquet. When the master's invited guests did not show up, he told his servants: "Go out into the highways and hedges, and compel them to come in."<sup>166</sup> Those found in the highways and hedges, according to Augustine, are those in "heresies and schisms."<sup>167</sup> For Augustine, the key words were the last ones—"compel them to come in." Such constraint, he maintained, was to be exercised by the civil authority—the church acting "through the faith of kings."<sup>168</sup> This parable apparently was intended to teach that God would include Gentiles as well as Jews in his kingdom, not to sanction the use of coercive means against religious dissenters. John Noonan observes that Augustine "with an arbitrariness of the most fanciful kind . . . identified highways and hedgerows with schisms and heresies" and thereby "turned

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163. Augustine, *Epist.* 93:5.17 (to Vincentius), in 1 NICENE AND POST-NICENE FATHERS, *supra* note 115, at 388 (series I), available at <http://www.ccel.org/ccel/schaff/npnf101.vii.1.XCIII.html>.

164. Augustine, *Epist.* 93:2.3-2.8 in 1 *id.* at 383-85.

165. Augustine, *Epist.* 93:2.4 in 1 *id.* at 383.

166. *Luke* 14:23.

167. Augustine, *Epistle* 185:6.24 (to Boniface), in 4 NICENE AND POST-NICENE FATHERS, *supra* note 115, at 642 (series I) (otherwise known as *A Treatise Concerning the Correction of the Donatists*), available at <http://www.ccel.org/ccel/schaff/npnf104.v.vi.viii.html>.

168. *Id.*

a parable about the nature of the kingdom of God into a prescription for persecution.”<sup>169</sup>

For Augustine, civil constraint was the instrumental but not the efficient cause of religious faith. In formulating his justification for persecuting heretics, Augustine laid great stress on what Perez Zagorin calls “the pedagogy of fear” to effect a change of heart.<sup>170</sup> Zagorin suggests that Augustine “did not see coercion and free will as opposites in religious choice but claimed that fear plays a part in spontaneous acts of the will and may serve a good end.”<sup>171</sup> Augustine never wavered in his belief that religious faith cannot be coerced:

A man can come to Church unwillingly, can approach the altar unwillingly, partake of the sacrament unwillingly: but he cannot believe unless he is willing. If we believed with the body, men might be made to believe against their will. But believing is not a thing done with the body.<sup>172</sup>

He insisted that civil penalties were not aimed at making the Donatists believe, but rather at making them reflect. In his view, God makes use of the law’s severity to get the dissenter’s attention:

[W]hy should not such persons be shaken up in a beneficial way by a law bringing upon them inconvenience in worldly things, in order that they might rise from their lethargic sleep, and awake to the salvation which is to be found in the unity of the Church? How many of them, now rejoicing with us, speak bitterly of the weight with which their ruinous course formerly oppressed them, and confess that it was our duty to inflict annoyance upon them, in order to prevent them from perishing under the disease of lethargic habit, as under a fatal sleep!<sup>173</sup>

“The role of the state,” Rohr suggests, “was to create circumstances so distasteful to the Donatists that they would be led to reconsider their errors and hopefully return to the Church.”<sup>174</sup>

While some commentators have described Augustine as “the first theorist of the Inquisition” or “the prince of persecutors,” others have

169. John T. Noonan, Jr., *Principled or Pragmatic Foundations for the Freedom of Conscience?*, 5 J.L. & RELIGION 203, 205-206 (1987).

170. ZAGORIN, *supra* note 39, at 30.

171. *Id.*

172. Augustine, Tractates on *John*, 26:2, in 7 NICENE AND POST-NICENE FATHERS, *supra* note 113, at 168 (series I), available at <http://www.ccel.org/ccel/schaff/npnf107.iii.xxvii.html>.

173. Augustine, Epistle 93:1.2 (to Vincentius), in 1 NICENE AND POST-NICENE FATHERS, *supra* note 113, at 382-83 (series I), available at <http://www.ccel.org/ccel/schaff/npnf101.vii.1.XCIII.html>.

174. Rohr, *supra* note 45, at 62.

emphasized that Augustine preferred discussion and persuasion in religious controversies and always opposed the death penalty for offenses of a spiritual order.<sup>175</sup> “Christ does not prevent us from repressing heretics, shutting their mouths, depriving them of freedom of speech, reunion or association,” Augustine wrote, “but he forbids us to put them to death.”<sup>176</sup> He embraced intolerance and persecution only as a last resort in the face of a seemingly intractable heresy, after nearly a decade of advocating less extreme measures. For him, the aim of civil coercion was not to punish but to win back the dissident to the true faith and thereby ensure the dissident’s salvation. He defended religious persecution, so long as its ends were redemptive. Nevertheless, Augustine’s arguments provided strong justification for the persecution of schismatics and heretics. Winfred Garrison sums it up nicely when he writes, “It would perhaps be too much to say that Augustine was the father of Christian persecution; but if he was neither its father nor its mother, he was the best nurse it ever had.”<sup>177</sup>

Augustine ended up far from the principles of religious freedom espoused by Tertullian and Lactantius. Had his arguments been made upon purely secular grounds, it is unlikely they would have carried the day against the traditional religious arguments against coercion. It precisely was because Augustine was able to justify by religious authority the persecution of schismatics and heretics that his arguments were so compelling. His blunder was in relying too much on his own experience—that is, his own observations of former Donatists who had returned to the church under constraint—which made him think that compulsion worked, was beneficial, and led to good Christian lives.<sup>178</sup> “He had the parochial experience of seeing coercion work,” John Noonan observes, “but he had not considered its corrosive effects.”<sup>179</sup> Augustine’s views remained enormously influential throughout the middle ages. For a thousand years the church pursued a policy of suppressing religious dissent, with Augustine’s justifications looming large in the background. It was not until the arguments of Tertullian and Lactantius came to prevail once again—only after centuries of struggles and vicissitudes—that true religious freedom was realized.

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175. Tierney, *supra* note 42, at 21, 33. See JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* 36 (1997) (“Augustine all too often has been criticized for positions he never held and blamed for many excesses that others committed later, after passing through the door of coercion that he unfortunately left ajar.”).

176. Augustine, *In Matt. Hom.* 46:2, *quoted in* 1 LECLER, *supra* note 112, at 60.

177. WINFRED E. GARRISON, *INTOLERANCE* 90 (1934).

178. Noonan, *supra* note 169, at 206.

179. *Id.* at 211.

*F. Church-State Boundaries in Early Christendom*

The question of what should be the proper institutional relationship between church and state did not become important until the late fourth century. The Roman emperors had their own political reasons, of course, for joining the church's fight against heresy and schism. In the alliance between church and state that was forged during this period, the state undertook to protect the purity of the church and its doctrine and to work with the church to create a Christian society. Thomas Curry describes the arrangement:

Although Christendom distinguished between and separated the sacred and the secular powers, it conceived of society as an organic whole and envisaged both as cooperating in a joint task, each fulfilling its proper role. Ideally, both would work together for the common good. The Church, as the spiritual authority, would anoint the ruler and bind subjects to his power by an oath of loyalty. In turn, the ruler, as the secular authority, would protect the Church, promote the true religion as defined by it, and punish dissenters. The two powers would work hand in hand to promote a culture, a legal system, and a way of life based on Christian beliefs. Such a system provided little room for dissenters, and non-Christians existed only on its fringes.<sup>180</sup>

Brian Tierney suggests that “[a]fter the conversion of Constantine and the establishment of a Christian empire there was indeed a possibility for a time that the church might become merely a sort of department of religious affairs in an imperial theocratic church-state.”<sup>181</sup> Church leaders were perfectly happy to rely on governmental authorities to fight their battles within the church.

The obvious problem with this arrangement is that civil government now had power over spiritual matters—something not endorsed by original Christian doctrine. Jesus and Paul had taught that God had given the state limited authority which did not include jurisdiction over matters between God and the individual. Although Christian believers were to obey civil authorities to the fullest extent possible, the state was not authorized to direct individual devotion to God or to protect the unity and community of the church. While lacking precedent for state control over Christian religion, the emperors of the late fourth century nevertheless asserted their authority and expected the church leaders to obey them. With the church leaders' blessing, these rulers used their

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180. CURRY, *supra* note 15, at 10.

181. Tierney, *supra* note 42, at 34.

civil powers to enforce religious (and therefore political) uniformity throughout the empire.

Despite the heavy-handedness of the Roman emperors, there was a struggle for freedom of the church (*libertas ecclesiae*) which culminated in the dualism set out in the Gelasian formula of the fifth century.<sup>182</sup> Early Christian leaders had resisted the state's intervention into church affairs. "What has the Emperor to do with the Church?" retorted Donatus, bishop of Carthage, when emperor Constans offered to help feed and clothe the poor in various churches.<sup>183</sup> When Constantius pressed the bishops in 356 to depose Athanasius for his opposition to the Arian heresy, one of those in the council, Hosius of Cordova, wrote:

God gave you the government of the Empire, and us that of the Church. Whoever attacks your authority goes against God's order. Beware, then, in the same way, of making yourself guilty of a great crime by usurping the Church's authority. We are told to render unto Caesar what is Caesar's and unto God what is God's. We are not allowed to usurp the imperial authority. You, equally, have no power at all in the ministry of things that are sacred.<sup>184</sup>

In 385 the emperor Valentinian II told Ambrose, bishop of Milan, that if he did not make one of his churches available to an Arian bishop to celebrate Easter with his congregation, Ambrose and his supporters would be driven out of Milan.<sup>185</sup> Ambrose's defiant reply challenged the emperor's authority with a sweeping reaffirmation of the primacy of the church in spiritual matters.<sup>186</sup> Citing Jesus' words distinguishing what belongs to Caesar from what belongs to God, Ambrose wrote that "the church is God's, and so it ought not to be given over to Caesar, because Caesar's sway cannot extend over the temple of God," and again, "[t]he emperor is within the church, not above it."<sup>187</sup> As Joseph Lecler points out, "Not until the end of the fifth century do we find pontifical letters so categorical on the incompetency of the State in religious matters."<sup>188</sup>

When imperial authority began to disintegrate in the West, the popes finally intervened in an attempt to oust the state from religious matters. Pope Gelasius emphasized the division between church and

182. See Rohr, *supra* note 45, at 67.

183. Optatus, *Against the Donatists*, 3:3 (quoting Donatus), available at [http://www.tertullian.org/fathers/optatus\\_03\\_book3.htm](http://www.tertullian.org/fathers/optatus_03_book3.htm).

184. Athanasius, *History of the Arians* 44 (quoting Hosius), quoted in 1 LECLER, *supra* note 112, at 47-48.

185. SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT, *supra* note 59, at 67-68.

186. *Id.*

187. Ambrose, *Sermon against Auxentius* (Epistle 75a), in *id.* at 75.

188. 1 LECLER, *supra* note 112, at 50.

state when he explained to the emperor Anastasius at the end of the fifth century that

[t]here are two powers, august Emperor, by which this world is chiefly ruled, namely, the sacred authority of the priests and the royal power. Of these that of the priests is the more weighty, since they have to render an account for even the kings of men in the divine judgment. You are also aware, dear son, that while you are permitted honorably to rule over human kind, yet in things divine you bow your head humbly before the leaders of the clergy and await from their hands the means of your salvation. In the reception and proper disposition of the heavenly mysteries you recognize that you should be subordinate rather than superior to the religious order, and that in these matters you depend on their judgment rather than wish to force them to follow your will. If the ministers of religion, recognizing the supremacy granted you from heaven in matters affecting the public order, obey your laws, lest otherwise they might obstruct the course of secular affairs by irrelevant considerations, with what readiness should you not yield them obedience to whom is assigned the dispensing of the sacred mysteries of religion.<sup>189</sup>

The two powers, Gelasius insisted, rule this world—while the church is a power distinct from the state, it has authority not just over purely spiritual matters, but also over how those spiritual matters determine the way people (and their rulers) live morally in the temporal realm; conversely, the state has no power at all over spiritual matters. For Gelasius, the jurisdictional boundary between civil and religious authority was theological, having its origin in the fundamental distinction Jesus drew between that which belongs to Caesar and that which belongs to God. While Gelasius did not settle the boundary between the two jurisdictions, he did settle the question, once for all, that there are two different sets of authorities to which humans owe their allegiance, and not one.<sup>190</sup>

### G. *Emerging Principles of Religious Freedom*

Two developments in the early church period contribute significantly to a nascent theory of religious freedom. The first is the establishment of a principle of noncoercion or voluntarism in matters of individual religious faith and practice. This principle was set forth unambiguously in the writings of Tertullian, Lactantius, and other

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189. Gelasius, *Letter to Emperor Anastasius* (494), in J. H. ROBINSON, READINGS IN EUROPEAN HISTORY 72-73 (J.H. Robinson ed. 1905), available at <http://www.fordham.edu/halsall/source/gelasius1.html> (Internet Medieval Source Book).

190. See GARRISON, *supra* note 177, at 96.

prominent Christian thinkers, and it formed the basis for Constantine's policy of religious toleration. The argument opposing state coercion was based on the idea that true religion is first and foremost a matter of inward devotion to God; mere outward obeisance and formality is not pleasing to God. To be authentic, religious faith and observance must be voluntarily determined by the individual, not part of a program of coerced religious uniformity imposed by the state. This is a religious proposition, not a psychological one. The early Christian writers were not talking about voluntarism or faith in general or about psychological theories regarding noncoercion of the will or differences between persuasion and coercion; rather, their argument goes only to the voluntarism they understood as being essential to exercise of genuine faith in God.

The second important development of this period is the concept of church and state as distinctly separate entities. The distinction between church and state is uniquely Christian. Two authorities are recognized on earth: a temporal authority, with its powers of coercion against those who commit civil and social wrongs; and a spiritual authority, with its powers to lead people toward salvation, spiritual character, and good works. Neither the Hebrew religion nor the Greco-Roman religions had separate institutions corresponding to the church. Civil and religious authorities were one and the same in the Jewish state, and Greco-Roman religious ceremonies and institutions were part of a larger political structure that governed all of society. By contrast, the Christian church arose as an entity completely separate from the state and consisted of a group of people associated by their own choice, whose common identity derived from their religious convictions rather than their civic connections. This church-state dualism was not historically or socially constructed, but reflected an essential ontological difference between these institutions as they were established by God.

The recognition and development of the church-state distinction was essential to the budding concept of religious freedom. The jurisdictional boundaries between church and state had not received much attention from early Christian writers such as Tertullian and Lactantius, who focused more on coercion of individual religious belief and practice. After Christianity became the official religion of the Roman empire, the dividing line was blurred, with both church and state viewed as functional parts of a greater Christendom. Nevertheless, the dualism continued with the church on various occasions strongly asserting its authority and distinctiveness from the state. As Winfred Garrison explains,

The church not only was separate from the state, but for nearly three centuries it was in conflict with it. The conflict strengthened its sense of being a separate entity. It might, thereafter, come to terms with the state or reduce the state to submission; it might locally take over the functions of government or it might aspire to dominate all states; it might be submerged by the state; but it could never be merged in the state. The church remained a permanent testimony to the claim that there is an area of life which the state cannot control. So it became a bulwark of liberty and of human rights as against other tyrants, even when it became a tyrant itself and encroached upon the rights of the individual.<sup>191</sup>

This distinction between church and state had a profound effect on the development of religious freedom. Gary Remer suggests that

[i]t is doubtful that Locke and Jefferson could have developed their arguments for religious liberty without the antecedent Christian assumptions about church and state. The liberal argument that membership in the state is distinct from membership in the church and, therefore, that the state should not persecute its citizens for their religious beliefs, has its roots in the Christian theological tradition."<sup>192</sup>

Church-state dualism does not necessarily resolve the problem of competing demands placed on the individual believer by God and the state. Fuller consideration of this question, along with the refinement of the noncoercion principle, awaited Christian thinkers of a later age.

### III. THE PRESERVATION OF RELIGIOUS FREEDOM IN MEDIEVAL AND REFORMATION EUROPE

The origins of our modern concept of religious freedom are found in the writings of early Christian thinkers who urged that civil persecution of religious dissent is contrary to the nature of God and of genuine religious devotion. Initial acceptance of these rationales led to Rome's adoption of a far reaching policy of religious toleration in the early fourth century, but this policy eventually was displaced by the rise of church-supported civil persecution of heresy and schism. For the next millennium, the church pursued a policy of suppressing religious dissent, made respectable by Augustine's theory of "just persecution" which sought to effect a change of heart through the use of force and the fear of

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191. *Id.* at 95.

192. Gary Remer, *Ha-Me'iri's Theory of Religious Toleration*, in *BEYOND THE PERSECUTING SOCIETY: RELIGIOUS TOLERATION BEFORE THE ENLIGHTENMENT* 74 (John Christian Laursen & Cary J. Nederman, eds. 1998) [hereinafter *BEYOND THE PERSECUTING SOCIETY*].

suffering. The religious justifications for religious toleration and freedom, so eloquently stated by early Christian advocates such as Tertullian and Lactantius, while lost to church and society at large, nevertheless were preserved by a resilient few who continued to oppose persecution of dissenters and state intrusion into religious matters.

A. *Persecution and Opposition in the Medieval Period*

James Mackinnon surely overstated the case when he wrote that “[r]eligious liberty . . . cannot be said to have existed at all in the Middle Ages.”<sup>193</sup> The early medieval period was not an era of relentless persecution, as ably shown by Cary Laursen and John Nederman.<sup>194</sup> Christian society generally tolerated unbelieving groups, including Jews and infidels.<sup>195</sup> These outsiders (to the Christian faith) were marginalized within society, but not imprisoned or executed. Heretics and schismatics, on the other hand, were insiders who had fallen away from the faith and were subject to persecution, which became widespread and systematic after the eleventh century.

After the fall of the Roman empire, persecution of religious dissenters was, for the most part, sporadic and local. Social and political life in Europe in the early middle ages was marked by instability, migration, violence, and disorder. During this period, the church was little concerned with the problem of heresy; older heresies had been eliminated or had died out, and new ones posed few problems.<sup>196</sup> Dealing with heresy and schism generally was left to local powers, civil or ecclesiastical. The result was a wide variety of civil punishments: fines, imprisonment, banishment, and confiscation of property. The usual penalty in church courts was excommunication.<sup>197</sup>

Execution of heretics by civil or religious authorities appears to have been almost nonexistent during the first Christian millennium. As discussed above, Augustine legitimized the use of force in religion by developing a principled defense for persecution of heretics (who denied Catholic orthodoxy) and schismatics (who separated themselves from the

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193. 1 JAMES MACKINNON, A HISTORY OF MODERN LIBERTY x (1906).

194. See, e.g., John C. Laursen & Cary J. Nederman, *General Introduction: Political and Historical Myths in Toleration Literature*, in BEYOND THE PERSECUTING SOCIETY, *supra* note 192, at 1-10; Cary J. Nederman, *Introduction: Discourses and Contexts of Tolerance in Medieval Europe*, in *id.* at 13-24; Cary J. Nederman & John Christian Laursen, *Difference and Dissent: Introduction*, in DIFFERENCE AND DISSENT: THEORIES OF TOLERATION IN MEDIEVAL AND EARLY MODERN EUROPE 1-16 (Cary J. Nederman & John Christian Laursen eds., 1996) [hereinafter DIFFERENCE AND DISSENT].

195. See István Bejczy, “Tolerantia”: A Medieval Concept, 58 J. OF THE HIST. OF IDEAS 365 (1997).

196. ZAGORIN, *supra* note 39, at 34.

197. Tierney, *supra* note 42, at 42.

Catholic church). His theory of persecution was universally accepted during the middle ages and was not widely challenged until the sixteenth and seventeenth centuries.<sup>198</sup> But, as Henry Chadwick observes, “Augustine would have been horrified by the burning of heretics. . . .”<sup>199</sup> He believed that heretics and schismatics could be corrected by milder forms of coercion. “To use early modern terminology,” historian John Coffey explains, “Augustinian persecution was ‘medicinal’ rather than ‘exterminative’; it treated the heretic as a patient to be healed, rather than a cancer to be excised.”<sup>200</sup> Between 383, when the heretic Priscillian and his followers were burned, and 1022, when fourteen people were burned at Orleans, there are no extant accounts of anyone being sentenced to death in western Europe for heresy or schism.<sup>201</sup>

The twelfth century saw the beginnings of a more systematic and severe repression. The definition and criminality of heresy—supported by numerous citations to Augustine—became part of the law of the church when they were included in Gratian’s *Decretum* (ca. 1140), an authoritative legal compilation, which became the first part of the influential great code of canon law.<sup>202</sup> For the next three hundred years, capital punishment of heretics was widespread. Ecclesiastical officials were empowered to investigate charges of heresy, and heretics who were obstinate or had relapsed were turned over to the secular authorities for execution. In 1199 Pope Innocent III declared that heresy was equivalent to treason, with “traitors to God” being just as guilty as traitors to the emperor.<sup>203</sup> The medieval Inquisition was established to counter popular heretical movements like the Waldensians and Cathars, and the Fourth Lateran Council of 1215 codified the theory and practice of persecution.<sup>204</sup> An imperial decree in 1231 established death by burning as the appropriate punishment for heresy.<sup>205</sup>

What brought about this change? Lecler suggests several factors, including the influence of Old Testament texts under which idolaters and blasphemers were punished by death, the need for the church to demonstrate its power and cohesion in the face of external forces (e.g.,

198. See generally Pamela Biel, *Bullinger Against the Donatists: St. Augustine to the Defense of the Zurich Reformed Church*, 16 J. OF RELIGIOUS HIST. 237 (1991).

199. Henry Chadwick, *Augustine*, in FOUNDERS OF THOUGHT: PLATO, ARISTOTLE, AUGUSTINE 264 (Richard M. Hare, Jonathan Barnes & Henry Chadwick eds., 1991).

200. JOHN COFFEY, PERSECUTION AND TOLERATION IN PROTESTANT ENGLAND, 1558-1689, at 23 (2000).

201. *Id.* Coffey suggests that “this may simply be due to the lack of sources for the earlier period.” *Id.*

202. ZAGORIN, *supra* note 39, at 37.

203. Tierney, *supra* note 42, at 42.

204. *Id.* at 42-43.

205. *Id.* at 43.

Islam), and the renewed interest in Roman law which treated heresy as a crime of treason, punishable by death.<sup>206</sup> Perhaps the most important reason was that heresy jeopardized the theological unity which was perceived as necessary for true community and the common good. In the medieval world, heresy was a threat not just to a particular church or denomination, but to the entire social order.<sup>207</sup> There was an almost universal belief that heresy was a defilement that must be removed, even if it meant killing impenitent heretics. Among those who gave authoritative support to this view was Thomas Aquinas (1225-1274), the greatest medieval theologian and philosopher, who wrote that the sin of heretics is so great that

they deserve not only to be separated from the Church by excommunication, but also to be shut off from the world by death. For it is a much more serious matter to corrupt faith, through which comes the soul's life, than to forge money, through which temporal life is supported. Hence if forgers of money or other malefactors are straightway justly put to death by secular princes, with much more justice can heretics, immediately upon conviction, be not only excommunicated but also put to death.<sup>208</sup>

The heretic was guilty of treason against God and a threat to the spiritual welfare of the Christian community. Brian Tierney explains that

[t]o medieval people it seemed that [heretics] had rejected God's truth and God's love out of pride and self-love, the love of their own self-contrived errors. They had set themselves on a path that could lead only to eternal damnation and, unless they were restrained, they would lure countless others to the same terrible fate. Elementary justice and charity, it seemed, required that they be rooted out. The Inquisition that pursued this task with increasingly harsh and cruel measures, including the use of torture to extort confessions, was accepted as a necessary safeguard of Christian society.<sup>209</sup>

Unlike external threats to the community, which often unify the people against a common enemy, heresy rejected the core beliefs and traditions that identified the community as Christian, thereby endangering the very things that held the community together. Unity in matters of faith was considered indispensable to the preservation of political unity and to the maintenance of social stability and order. "When a common religion defined the whole way of life of a society," Tierney observes, "to reject it

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206. 1 LECLER, *supra* note 112, at 84-87.

207. *Id.* at 87.

208. Thomas Aquinas, *Summa Theologica*, II, Q. xi, Art. 3, in DOCUMENTS OF THE CHRISTIAN CHURCH 147-48 (Henry Bettenson & Chris Maunder eds., 3d ed. 1999).

209. Tierney, *supra* note 42, at 45.

was to cut oneself off from the community, to become a sort of outlaw—and a dangerous outlaw from the medieval point of view.”<sup>210</sup>

The connection between religious faith and social order may explain why unbelievers typically were not persecuted like heretics in the medieval period. Infidels and Jews were marginalized and disfavored, but they often were tolerated.<sup>211</sup> Regarding non-Christians, Augustine’s maxim (following Tertullian and Lactantius) remained the rule: no man can believe against his will; saving faith is not produced by compulsion. Alcuin, the leading churchman and scholar in Charlemagne’s court, echoed the Augustinian view when he said “belief is a matter of free will, not compulsion. How can one force a man to believe what he does not believe? You may force him into being baptized, not into believing.”<sup>212</sup> Nicholas I, in a letter to the king of Bulgaria in 866, set out the argument with great force:

With regard to the pagans, “we can only advise you that they should be persuaded of the vanity of their idols by exhortation, counsel, reasoning, rather than by force.” If they will not listen, abstain from relations with them, but “they must not be subjected to any violence in order to bring them to the faith.” One should act as God does, who only wants a willing worship: “if God had wished to use force, indeed, no one would have been able to resist his omnipotence.”<sup>213</sup>

Thomas Aquinas similarly urged a different standard for heretics than for those outside the faith. “[A]cceptance of the faith,” he argued, “is a matter of the will, whereas keeping the faith, when once one has received it, is a matter of obligation. Wherefore heretics should be compelled to keep the faith.”<sup>214</sup> There is no disputing that the medieval crusades against unbelievers were conducted at times as campaigns of forced conversions. But from the perspective of the rulers and theologians, the crusades were aimed, above all, at defending or extending the political sovereignty of the Christian nations, and only indirectly at converting large numbers to Christianity.

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210. *Id.* at 44.

211. COFFEY, *supra* note 200, at 6. See Bejczy, *supra* note 195.

212. *Monumenta Germaniae Historica, Epist. kar. Aevi*, (letter 113 of Alcuin), quoted in 1 LECLER, *supra* note 112, at 73.

213. Nicholas I, *Epist.* 97, n.41, quoted in *id.* at 72.

214. Thomas Aquinas, *Summa Theologica*, II-II, Q. 10, Art. 8, in RELIGIOUS PLURALISM IN THE WEST: AN ANTHOLOGY 60 (David George Mullan ed., 1998) [hereinafter RELIGIOUS PLURALISM].

## B. *Developments toward Religious Freedom*

Despite its various expressions of intolerance, the medieval period saw the preservation of earlier ideas and the emergence of new ideas that were to play a significant role in the development of religious freedom in the centuries that followed.

### 1. Religious Voluntarism

For the most part, the connection between voluntarism and authentic faith in the lives of Christian believers was lost on leading medieval thinkers. One notable exception is Marsilius of Padua (1280-1342), a Catholic lawyer, who maintained that coercion is inconsistent with authentic religion and religious convictions which, by their very nature, cannot be forced. Drawing upon New Testament scripture and the religious arguments made by early Christian thinkers Chrysostom, Hilary of Poitiers, and Ambrose, Marsilius wrote in *Defensor Pacis* (1324) that “God . . . does not want a forced avowal of himself, nor does he want anyone to be dragged thereto by the violent action of compulsion of someone else.”<sup>215</sup> He argued that no clergyman had been given authority by God to coerce anyone—whether infidel or believer—by pain or punishment to comply with religious duties.<sup>216</sup>

### 2. Church-State Relations

The jurisdictional separation between religious and civil authority, which is at the core of the religious argument for religious freedom, began to blur during the medieval period, especially from the ninth century onward. The Gelasian doctrine—which held that while priestly authority and royal power both are necessary for the governance of Christian people, religious doctrine and practice are excluded from control of the political ruler—was obscured when Charlemagne and his successors sought to establish a new theocratic empire. Kings were no longer seen as purely secular leaders, but rather as temporal vicars of Christ who ruled the church conjointly with the clergy. Church and state were merged into one kingdom—Christendom—with the priesthood and empire having distinct functions but interlocked together as a single religious society.<sup>217</sup> This arrangement was condemned by Pope Gregory VII (1073-1085) as contrary to the freedom of the church (*libertas*

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215. Marsilius of Padua, *Defensor Pacis*, dis. 2, ch. 9, in *id.* at 75.

216. *See id.* at 75-76.

217. *See* 1 LECLER, *supra* note 112, at 66-71. For a fuller discussion of church-state relations during the late medieval period, *see* TIERNEY, *supra* note 26, at 33-95. Tierney’s useful book collects key passages from important original documents of this period.

ecclesiae), leading to a conflict with Henry IV, king of Germany and later emperor, over which ruler—pope or king—would have supreme authority within Christendom.<sup>218</sup> Gregory deposed Henry as king and accepted Henry's humble plea for forgiveness, but Henry's armies later drove Gregory into exile; in the end, neither side prevailed.<sup>219</sup>

This struggle for supremacy was repeated again and again in the centuries that followed. The emperors sought to retain power over the church through appointment of bishops and other means. Asserting the intrinsic superiority of the spiritual over the temporal, the popes would claim the higher power for themselves, which included the power to depose emperors. Such claims were backed by the powerful presence of the Catholic church in society. The church had its own laws, courts, and bureaucracy—it was itself very much like a state. National power often was fragmented and the only bond of unity that held society together was its common Catholic religion. Pope Innocent III proclaimed at the beginning of the thirteenth century that “[e]cclesiastical liberty is nowhere better cared for than where the Roman church has full power in both temporal and spiritual affairs”<sup>220</sup> and that it had been left to Peter, the first pope, “not only the universal church but the whole world to govern.”<sup>221</sup> The popes deposed or threatened with deposition at least six kings and excommunicated emperors and kings on more than ten occasions. Papal claims reached a crescendo with Boniface VIII's bull, *Unam Sanctam* (1302), and its bold declarations that “the spiritual power has to institute the earthly power and to judge it” and “it is altogether necessary to salvation for every human creature to be subject to the Roman pontiff.”<sup>222</sup> Because neither side could make good its claim of supremacy over the other, the antagonists eventually settled into an uneasy dualism in which pope and emperor assumed coordinate roles within Christendom.<sup>223</sup>

There are two notable features in the development of church-state relations during the medieval period. First, the early Christian principle that there is a fundamental distinction between church and state survived the constant encroachment of papal and royal powers upon one another. While the medieval popes' demand for *libertas ecclesiae* was about neither individual religious freedom nor a modern “wall of separation,” it

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218. On the so-called “papal revolution,” see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 85-113 (1983).

219. Tierney, *supra* note 42, at 35.

220. Innocent III, *Letter to the Archbishop of Ravenna* (1198), in TIERNEY, *supra* note 26, at 132.

221. Innocent III, *Letter to the Patriarch of Constantinople* (1199), in *id.* at 132.

222. Boniface VIII, *Unam Sanctam*, in *id.* at 189.

223. TIERNEY, *supra* note 42, at 36.

nonetheless reflected a commitment to limiting state power over religious matters and freeing the church as an institution to direct its own affairs.<sup>224</sup> This sphere of religious authority independent of state control is an important prerequisite to the development of the modern concept of religious freedom.

A second important feature, and perhaps an even more significant one at this juncture, is the origin of the concept of an independent civil state. The beginnings of this idea are seen in the work of Thomas Aquinas, who attempted to present the central concepts of Aristotelian philosophy within a framework of thought acceptable to Christian intellectuals.<sup>225</sup> His writings provide a theoretical justification for a concept of the state that was different from the prevailing Augustinian view. Brian Tierney explains that

[f]or Augustine civil government existed only because men had fallen into sin. Coercive authority was necessary, he conceded, but on his theory the prince who wielded it was little more than a highly respectable hangman, a divinely appointed executioner of criminals. According to Augustine true justice was to be found only in the Christian church—and it had seemed but a small step to many medieval propagandists to argue that the ministers of the church were accordingly qualified to direct all the activities of secular rulers.<sup>226</sup>

Following Aristotle, Thomas constructed a theory of civil society that rested not on the corruption of human nature, but rather on the intrinsic needs of human nature. His argument went something like this: Because man is a social creature, there must be community, and where such community exists, there must be government. “The real significance of the argument is this,” writes Tierney, “[o]nce the idea was accepted that man’s intrinsic nature required an organized society, it became possible in principle to determine the best mode of government for that society by rational reflection on human ends and human needs without any necessary recourse to supernatural authorities.”<sup>227</sup> By “supernatural authorities,” Tierney means special or propositional revelation; Thomas was not proposing an autonomous state, disconnected from God’s authority.

Natural law formed the foundation of Thomas’ theory of the state. Thomas defined natural law as “the natural light of reason, by which we discern what is good and what is evil”; it is “nothing other than an

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224. *Id.*

225. TIERNEY, *supra* note 26, at 165.

226. *Id.*

227. *Id.* at 166.

impression in us of the divine light.”<sup>228</sup> The Apostle Paul described essentially the same concept when he wrote that all rational creatures have the law of God written on their hearts.<sup>229</sup> Brian Tierney provides a helpful summary:

According to Thomas, man . . . ha[s] his own proper nature, modes of activity proper to him as man. It was, for instance, natural to man to live in society. But the maintenance of any orderly society required adherence to defined rules of conduct, the fundamental one being that men had to treat their neighbors with due consideration. From this requirement some basic laws could be deduced, such as laws forbidding murder and theft. Such laws did not have to be revealed by divine inspiration. They could be worked out by rational reflection on the human situation. They were natural to man in that both the need for them and the means of devising them were rooted in man’s intrinsic nature.<sup>230</sup>

Natural law, then, provides the basic moral framework necessary for the order and coherence of human societies. Thomas identified two additional types of law: human and divine. Human law is positive law, consisting of detailed regulations that governments make to give practical application to the principles of natural law.<sup>231</sup> Divine law is the commands of God made known to Christians through special revelation in Scripture and in Christ. The intent of divine law is to lead man to God, so that he may love God. Natural law is directed toward our temporal good, but divine law is directed toward our eternal good. On these Thomistic principles, it became possible to construct the theory of a state that functions according to its own laws, independent of ecclesiastical supervision.<sup>232</sup>

Thomas rejected the view advanced by some church leaders that the state derives its power wholly from the church and, therefore, is subordinate to the church; rather, he taught that both church and state derive their power from God. Writing in 1253, Aquinas summed up his view of the relationship between spiritual and civil authority:

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228. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, I-II, Q. 91, Art. 2 (Robert J. Henle trans. & ed. 1993) (1269-70). An online version of *Summa Theologiae* is available at <http://www.newadvent.org/summa>.

229. *Romans* 2:15.

230. TIERNEY, *supra* note 26, at 166.

231. Aquinas recognized that while human law is derived from natural law, not everything forbidden by human law is essentially evil and not everything permitted by human law is good. See AQUINAS, *supra* note 228, Q. 96, Art. 2. Furthermore, not every human law is legitimate. Laws contrary to the common good (which is demanded by natural law) do not have the force of law. See *id.* Q. 90, Art. 2.

232. TIERNEY, *supra* note 26, at 167.

The spiritual and the secular powers are both derived from the divine power; and therefore the secular power is under the spiritual only in so far as it has been subjected to it by God: namely, in those things that pertain to the salvation of the soul; and therefore the spiritual power is, in such matters, to be obeyed rather than the secular. But in those things that pertain to civil good, the secular power is to be obeyed rather than the spiritual, according to the saying in Matthew 22, "Render to Caesar the things that are Caesar's."<sup>233</sup>

Thomas Aquinas thus provided a nascent rationale for the abolition of the confessional state. Political theorists who followed Thomas further developed and refined his theory that civil government has its origin in natural law. While they saw the priesthood as having greater dignity, they argued that secular power was not subordinate to ecclesiastical power within the temporal sphere.<sup>234</sup> This idea also strengthened the perception of a fundamental difference between church and state—a difference that first was articulated at the beginning of Christianity and eventually formed the basis for our constitutional commitment to religious freedom.

### 3. Conscience and Natural Rights

The concept of freedom of individual conscience as a separate limitation on state power over religion had its roots in the writings of medieval canonists and theologians.<sup>235</sup> Most heretics and schismatics took their stances against the church because of religious conscience. Bernard of Parma, canon lawyer and author of the widely-studied Ordinary Gloss to the Decretals of Gregory IX, taught that "no one ought to act against one's conscience. One ought rather to follow one's conscience than the judgment of the Church, where one is certain."<sup>236</sup> The apostle Paul wrote in *Romans* 14:23 that "[e]verything that is not from faith is sin." In the twelfth century, Peter Abelard used this reference as the basis for his argument that it always is a sin to act against one's conscience, even if the conscience erred in discerning what

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233. Thomas Aquinas, *Commentum in IV Libros Sententiarum* (1253-55), in TIERNEY, *supra* note 26, at 171.

234. TIERNEY, *supra* note 26, at 196. For example, the French theologian, John of Paris, wrote in 1302: "The priest is greater than the prince in spiritual affairs, and, on the other hand, the prince is greater in temporal affairs." John of Paris, *On Royal and Papal Power* (1302-03), in *id.* at 209.

235. See generally Michael G. Baylor, *Action and Person: Conscience in Late Scholasticism and the Young Luther*, in 20 *STUDIES IN MEDIEVAL AND REFORMATION THOUGHT* 1, 24 (1977).

236. Bernard of Parma, *Glossa ordinaria*, X.5.39.44, *casus*, quoted in Charles J. Reid, Jr., *The Fundamental Freedom: Judge John T. Noonan, Jr.'s Historiography of Religious Liberty*, 83 *MARQ. L. REV.* 367, 390 (1999).

is right.<sup>237</sup> Abelard understood the classic dilemma of conscience: on the one hand, if conscience is the human faculty or intuition that makes a person aware of what is sinful, then to act against conscience is to sin; on the other hand, if conscience itself is not a perfect guide because of fallen human nature, then conscience can err. “A person with an erroneous conscience was in a perplexing double bind,” writes Noah Feldman, “[i]f he acted against conscience, he would sin, but if he acted in accordance with his erroneous conscience, that, too, would be sin.”<sup>238</sup>

Before the thirteenth century, the question of the obligatory force of the sincere-but-erring conscience had not received much consideration. One exception is found in the writings of Salvianus, a priest in Marseilles, who wrote in 440:

It is true that they are heretics, but they are so unwittingly. From our point of view they are heretics, from theirs they are not. . . . The truth lies with us, but they are convinced that it is with them. The true honour due God is ours, but they think that their belief honours God. . . . So they err, but they err in good faith, not out of hatred but out of love of God since they believe that they love and honour God. Although their faith is not orthodox, they esteem all the same that it holds the perfect love of God. How will they be punished for those erroneous opinions in the day of judgement? No one knows but the Judge. In the meantime God wants us to be patient with them, in my opinion; for he sees that their faith is not orthodox, but that they err believing that their opinion is in accordance with true piety; the more so since he knows that they do not know what they are doing whilst our own people neglect what they believe. . . . That is why by a just judgement God's patience supports them whilst it justly punishes us.<sup>239</sup>

For Salvianus, toleration was a matter of both forbearance and faith—Christians were to leave to God the difficulty of judging individual religious conscience and practice patient toward the unorthodox.

Should conscience be followed if it can be wrong? This question was much debated by thirteenth century theologians and philosophers. Thomas Aquinas acknowledged that because conscience is based on knowledge, which itself is derived from reason, it might fall into error because reason can be flawed.<sup>240</sup> He tried to resolve the dilemma by

237. Tierney, *supra* note 42, at 36-37.

238. Feldman, *supra* note 24, at 357. For an extended historical discussion on the problem of the erring conscience in medieval thought, see 1 LECLER, *supra* note 112, at 93-100.

239. Salvianus, *De Gubernatione Dei*, V, 2, quoted in 1 LECLER, *supra* note 112, at 52.

240. AQUINAS, *supra* note 228, I-II, Q. 19, Art. 5.

saying that a person who is involuntarily ignorant in matters of fact or law does no wrong when he follows his erroneous conscience, but the one who is voluntarily ignorant, either intentionally or by deliberate neglect, sins by failing to inform himself and thereby repair his errant conscience.<sup>241</sup> Everyone must use utmost diligence and every resource to form a correct conscience; if a person fails to do this, his ignorance is culpable.<sup>242</sup>

Thomas' defense of the erring conscience was a significant step toward an expanded concept of freedom of religious conscience.<sup>243</sup> John Noonan observes that "[t]aken seriously, this doctrine carried the seed of religious liberty."<sup>244</sup> The duty to follow one's conscience was not yet linked to voluntarism in religious practice. But the emphasis on the primacy of individual conscience and the duty to follow one's conscience as it is guided by higher law formed the basis for subsequent theories of religious freedom. It posited a superior obligation within the individual—God's authority over the human conscience—that served to limit the external authority of the state.

The idea that all persons possess natural rights also had its beginnings in late medieval Christian thought. The idea of human rights is implicit in the Judeo-Christian tradition, especially in its recognition that each person is created in the image of God and in its fundamental commands to love God supremely and to respect the person and property of our neighbor. This doctrine is important for the development of a regime of religious freedom, which requires a theory of rights that emphasizes the importance of individual freedom, dignity, and conscience. Brian Tierney makes a convincing case that "the origin of the later natural rights theories is to be found in the Christian jurisprudence of the late twelfth century, especially in the works of the canonists of that era."<sup>245</sup> He writes that "[t]he idea of natural rights grew up—perhaps could only have grown up in the first place—in a religious

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241. *Id.* at Q. 19, Art. 6. Thomas would allow for ignorance of divine and ecclesiastical law in cases of the weak-minded and insane. 1 LECLER, *supra* note 112, at 99.

242. AQUINAS, *supra* note 228, I-II, Q. 19, Art. 6.

243. See 1 LECLER, *supra* note 112, at 99-100; Tierney, *supra* note 42, at 37.

244. JOHN T. NOONAN, JR., *THE BELIEVER AND THE POWERS THAT ARE* 41 (1987).

245. Tierney, *supra* note 42, at 39. See generally BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* (1997); see also Tierney, *supra* note 42, at 38-42. Other commentators have reached similar conclusions. See, e.g., Charles J. Reid, *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37 (1991); HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983); JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 64-66 (1943). For a discussion of various views on Christianity as a basis for rights theories, see John A. Henley, *Theology and the Basis of Human Rights*, 39 SCOTTISH JOURNAL OF THEOLOGY 361 (1986).

culture that supplemented rational argumentation about human nature with a faith in which humans were seen as children of a caring God.<sup>246</sup>

Several generations were required before these ideas could be developed and deployed in practical contexts. But the significant point here is that medieval religious thought began to place a new emphasis on the individual. This eventually led to nothing less than a massive reconstruction of what it meant to be a Christian and was another important precursor to the development of individual religious freedom.

### C. *Sixteenth Century Advocates for Religious Freedom*

The sixteenth-century Reformation did little to end the intolerance and persecution of the middle ages.<sup>247</sup> Persecution by Catholic regimes intensified because of the new and more powerful threat to the unity of Christendom.<sup>248</sup> Despite their rejection of Catholic hegemony, the major Protestant reformers often were zealous advocates of persecution.<sup>249</sup> They embraced Augustine's vision of the coercive Christian state and many shared Thomas Aquinas' belief in the legitimacy of the death penalty for heretics.<sup>250</sup> While Luther wrote strongly in favor of toleration in the early 1520s, he later reverted to the view that the Christian magistrate could punish heretics and schismatics.<sup>251</sup> John Calvin, perhaps the most influential reformer, established in Geneva a legalistic regime that did not easily tolerate heresy or immorality.<sup>252</sup> In 1553 Genevan authorities executed the anti-Trinitarian heretic Michael Servetus with Calvin's support, something that earned Calvin the approval of other reformers, including the great Lutheran theologian Philip Melancthon.<sup>253</sup> Calvin's special reputation for intolerance prompted historian Roland Bainton to write: "If Calvin ever wrote anything in favour of religious liberty, it was a typographical error."<sup>254</sup>

246. TIERNEY, *supra* note 245, at 343.

247. COFFEY, *supra* note 200, at 23. The best and most complete modern work on the Reformation and the problem of toleration is JOSEPH LECLER, *TOLERATION AND THE REFORMATION*, cited in note 112. A shorter survey is provided by the collection of essays in *TOLERANCE AND INTOLERANCE IN THE EUROPEAN REFORMATION* (Ole Peter Grell & Bob Scribner eds., 1996).

248. COFFEY, *supra* note 200, at 23. Several Catholic countries established or enhanced state-run inquisitorial systems to investigate the new "heretical" Protestant beliefs. See E. William Monter, *Inquisition*, in 2 *OXFORD ENCYCLOPEDIA OF THE REFORMATION* 317-19 (Hans Hillerbrand ed., 1996).

249. See Lord Acton, *The Protestant Theory of Persecution*, in *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 150-87 (1907).

250. COFFEY, *supra* note 200, at 23.

251. *Id.*

252. *Id.* at 24.

253. *Id.*

254. Bainton, *Preface*, in *CONCERNING HERETICS*, *supra* note 162, at 74.

John Coffey similarly affirms, “If Protestantism was all about religious freedom, no one told the Reformers.”<sup>255</sup>

Yet the contribution of Protestantism to the demise of the confessional state should not be overlooked. As John Witte points out, the Reformation was “at its core, a fight for religious liberty—liberty of the individual conscience from intrusive canon laws and clerical controls, liberty of political officials from ecclesiastical power and privilege, liberty of the local clergy from central papal rule and oppressive princely controls.”<sup>256</sup> Protestantism brought revolt against the authority of a unified Christendom, spawned multiple new religious groups, and helped recover what it meant to be a true Christian by shifting attention away from liturgies and doctrinal uniformity in nonessential matters and back to fundamental Christian virtues such as piety, humility, love, and forbearance.

There were numerous advocates for toleration in the sixteenth century, especially among radical Protestantism in Europe.<sup>257</sup> The Anabaptists, one of the most savagely persecuted Christian minorities of the century, repudiated all religious violence. They were among the first in the sixteenth century to develop a systematic theory of religious freedom based upon their understanding of the nature of faith, the gospel, and the church.<sup>258</sup> Mystical reformers such as Sebastian Franck likewise were uncompromising in their opposition to the use of force against heretics and schismatics. Most influential of all were mainstream Reformed intellectuals like Sebastian Castellio, Jacob Acontius, and Dirk Coornhert. Castellio’s writings were familiar to seventeenth-century English writers and Coornhert was highly influential with Remonstrant theologians like Johannes Uytenbogaert and Simon Episcopius who later established the Arminian tolerationist tradition.<sup>259</sup> Dutch Arminians like Philip van Limborch and Jean LeClerc were close friends with John Locke and Gilbert Burnet.<sup>260</sup> As seen in the short descriptions that follow, religious justifications for toleration were prominent among leading sixteenth century religious thinkers.

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255. COFFEY, *supra* note 200, at 24.

256. John Witte, Jr., *Moderate Religious Liberty in the Theology of John Calvin*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT, *supra* note 9, at 119.

257. The following brief summary borrows generously from the longer discussion in COFFEY, *supra* note 200, at 52-53.

258. WILLIAM R. ESTEP, *REVOLUTION WITHIN THE REVOLUTION: THE FIRST AMENDMENT IN HISTORICAL CONTEXT 1612-1789* 28 (1990).

259. COFFEY, *supra* note 200, at 52. See J. Israel, *Toleration in Seventeenth-century Dutch and English Thought*, in THE EXCHANGE OF IDEAS: RELIGION, SCHOLARSHIP AND ART IN ANGLO-DUTCH RELATIONS IN THE SEVENTEENTH CENTURY 228, 321 (S. Groenvelde and M. Windle eds., 1994).

260. COFFEY, *supra* note 200, at 53.

### 1. Desiderius Erasmus (1466-1536)

Erasmus was the greatest Christian humanist in Europe during the period leading up to the beginning of the Reformation and was acclaimed by his contemporaries as the foremost scholar, writer, and thinker of his era. He sought to revitalize religion and personal piety through the study of the Bible and the humanities. He stressed practical devotion to God rather than external rituals, dogmas, and institutions and worked for concord among Christians who agreed on the essential doctrines of Christianity.

Erasmus argued that state coercion and persecution was inconsistent with both the teaching of Scripture and the character of Christ. He believed it was God's prerogative to deal with religious error, as his gloss on the parable of the tares suggests:

The servants who want to cut out the weeds before the time are those who think that the false apostles and heresiarchs should be suppressed by the sword and by corporal punishment. But the Master of the field does not desire their destruction, but rather that they should be tolerated in case they should amend and turn from tares into wheat. If they did not amend, the task of chastising them one day should be left to their judge.<sup>261</sup>

Like Tertullian and Lactantius, Erasmus urged that coercion is contrary to the nature of authentic religion. In a 1523 letter to Archbishop John Carondelet, he wrote:

When faith is in the mouth rather than in the heart, when the solid knowledge of Sacred Scripture fails us, nevertheless by terrorization we drive men to believe what they do not believe, to love what they do not love, to know what they do not know. That which is forced cannot be sincere, and that which is not voluntary cannot please Christ.<sup>262</sup>

While Erasmus did not advocate religious pluralism, he took a "big tent" approach to doctrinal disagreements within the Catholic church. He believed that medieval scholastic theology had become obscurantist and legalistic, turning every theological theory into an article of faith. He proposed that a group of devout scholars draw up a brief statement of Christian doctrine that would contain only those articles essential to the faith.<sup>263</sup> Matters not included would be left to each person's own

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261. Erasmus, *Paraphr. in Matt.* 13:24-30, quoted in 1 LECLER, *supra* note 112, at 122.

262. Erasmus, *Letter of Erasmus to John Carondelet* (Jan. 5, 1523), quoted in CONCERNING HERETICS, *supra* note 162, at 34.

263. 1 LECLER, *supra* note 112, at 125.

judgment. “A few truths are enough,” he wrote, “and the multitude are more easily persuaded of their truth if they are few. As things are, we make six hundred articles out of one, some of them of such a kind that one can be ignorant of them, or unconvinced, without peril to one’s religion.”<sup>264</sup>

The concept of nonessential or “indifferent” things (adiaphora) often appeared in early modern toleration debates. Andrew Murphy explains that “[i]nitially, the term referred to religious rituals that do not appear in the New Testament; later it was broadened to demarcate fundamental articles of faith from matters that do not reach the essence of salvation.”<sup>265</sup> Tolerationists used this concept to argue against coercion in matters not central or essential to Christian doctrine. Gary Remer points out that the concept can cut both ways:

The concept of adiaphora . . . permits the [Christian] humanist to argue for a more comprehensive Church on the ground that differences between denominations are not essential to faith. But the concept of adiaphora can also be used to argue for a greater state intervention in religious matters. By characterizing a practice as nonessential, it becomes possible to limit that practice while still claiming that no one’s religious freedom has been infringed.<sup>266</sup>

Erasmus sought to blunt harsh treatment of religious dissent by working for concord among those who agreed on Christian fundamentals but disagreed on nonessential matters.<sup>267</sup>

Erasmus contributed to the tolerationist tradition by emphasizing voluntariness of faith and simplicity of doctrine. The common thread running through his writings is his conception of religion as consisting “not merely in ceremonies and articles, but in the heart and the whole life.”<sup>268</sup> His insistence on simple devotion, genuine Christianity, free will, human fallibility, and indifferent things influenced the writings of his contemporary and friend, John Milton, as well as later intellectuals

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264. Erasmus, *Letter to Jan Sclechta, Secretary to the King of Bohemia* (Nov. 1, 1519), in 7 *THE CORRESPONDENCE OF ERASMUS* 126 (1974) (letter 1039).

265. ANDREW R. MURPHY, *CONSCIENCE AND COMMUNITY: REVISITING TOLERATION AND RELIGIOUS DISSENT IN EARLY MODERN ENGLAND AND AMERICA* 49 n.69 (2001).

266. GARY REMER, *HUMANISM AND THE RHETORIC OF TOLERATION* 140 (1996).

267. COFFEY, *supra* note 200, at 51. Perez Zagorin argues that Erasmus never conceived of religious pluralism as a permanent solution to the problems of his time; instead, Erasmus “was a pioneer not of toleration but of the ideal of religious concord within Catholicism based on doctrinal compromise and concurrence on a small number of fundamental articles of faith.” ZAGORIN, *supra* note 39, at 67-68.

268. Erasmus, *Opera omnia* V, 141C (1516), *quoted in* CONCERNING HERETICS, *supra* note 162, at 30.

like Sebastian Franck, Sebastian Castellio, Jacob Acontius, and John Locke.<sup>269</sup>

## 2. Martin Luther (1483-1546)

Luther opposed persecution of heretics in his early years. He advocated for “freedom of conscience” as part of his thinking about Christian liberty. He also drew a sharp distinction between church and state in his famous doctrine of the two kingdoms. Coffey notes that “[t]hrough he eventually retracted his views and returned to the Augustinian position, Luther’s early polemic against religious coercion was to be quoted repeatedly by later tolerationist writers.”<sup>270</sup>

Luther’s theology emphasized the direct relation between man and God, independent of priestly mediation and ecclesiastical authority. Central to his theology are the doctrines of justification by faith alone and priesthood of the believer. These doctrines teach that the Christian is dependent on God for his salvation, answerable to God for his behavior, and called by God to serve others. The Christian is at once subject to no one—no earthly authority can intrude upon that relationship or command superior allegiance—and a servant to everyone. The definitive statement of Luther’s position appears in his tract *Freedom of a Christian* (1520), in which he wrote “[a] Christian man is the most free lord of all, and subject to none; a Christian man is the most dutiful servant of all, and subject to every one.”<sup>271</sup>

Luther invoked freedom of conscience in opposition to the enforcement of Catholic orthodoxy against himself and others who held similar views. For Luther, freedom of conscience meant that Christ’s atonement had freed Christians from the duty to obey certain commands of temporal authorities: “[O]n behalf of liberty and conscience,” Luther wrote in *The Babylonian Captivity of the Church* (1520), “I confidently cry: No law, whether of men or of angels, may rightfully be imposed upon Christians without their consent, for we are free of all laws.”<sup>272</sup>

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269. For discussions of religion and toleration in More’s *Utopia* and other writings, see ZAGORIN, *supra* note 39, at 56-58, 68-72, and 1 LECLER, *supra* note 112, at 134-38.

270. COFFEY, *supra* note 200, at 51.

271. MARTIN LUTHER, *Freedom of a Christian*, in HENRY WACE & C.A. BUCHHEIM, *FIRST PRINCIPLES OF THE REFORMATION* (1883), available at <http://www.fordham.edu/halsall/mod/luther-freedomchristian.html>. For a helpful discussion of this tract and its implications for religious freedom, see John Witte, Jr., *Freedom of a Christian: Martin Luther’s Reformation of Law and Liberty*, *The Alonzo L. McDonald Chair Lecture* (Feb. 9, 2006) (transcript available at <http://www.pitts.emory.edu/collections/lectures/witte-mcdonald1.pdf>).

272. MARTIN LUTHER, *The Babylonian Captivity of the Church* (1520), in 36 LUTHER’S WORKS 3, 72 (Jaroslav Pelikan & Helmut T. Lehmann eds., 1955-1972). For

The conscience “must not be bound by anything except by the Word of God,” Luther wrote in *The Bondage of the Will* (1525).<sup>273</sup> Luther took this position in his famous confrontation with Charles V at the Diet of Worms. When admonished to retract his radical views, Luther refused, explaining:

Unless I am convinced by the testimony of Scripture or by clear reason (for I do not trust either in the pope or in councils alone, since it is well known that they have often erred and contradicted themselves), I am bound by the Scriptures I have quoted and my conscience is captive to the word of God. I cannot and I will not retract anything, since it is neither safe nor right to go against conscience.<sup>274</sup>

Luther thus insisted on the primacy of individual judgment, rather than the authority of the church, regarding the true meaning of Scripture.<sup>275</sup>

From this, Luther concluded that coercion of heretics was improper. “We should overcome heretics with books, not with fire, as the ancient fathers did,” he wrote in 1520, “[I]f it were wisdom to vanquish heretics with fire, then the public hangmen would be the most learned scholars on earth.”<sup>276</sup> That same year, he also wrote that “Christ did not wish to compel men into the faith by force and fire. That is why he gave us the sword of the Spirit [the Word of God], so that those who are sons of the Spirit might use it.”<sup>277</sup> Luther’s freedom of conscience provided a basis for dissent against the church, but it did not include the right to depart from the truth of Scripture; it was a freedom limited in scope, but nevertheless a freedom never before enjoyed.<sup>278</sup> While Luther later acted inconsistently with this view of conscience, the idea that the individual believer is the ultimate judge of religious truth within his own conscience

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further discussion of Luther’s views on Christian freedom and conscience, see Baylor, *supra* note 235, at 245-49.

273. MARTIN LUTHER, *The Bondage of the Will* (1525), in 33 LUTHER’S WORKS, *supra* note 272, at 3, 49 (alt. trans.).

274. MARTIN LUTHER, *Luther at the Diet of Worms* (1521), in 32 LUTHER’S WORKS, *supra* note 272, at 101, 112.

275. See Baylor, *supra* note 235, at 256-62.

276. MARTIN LUTHER, *To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate* (1520), in 32 LUTHER’S WORKS, *supra* note 272, at 115, 196-97.

277. Martin Luther, *Assertio articulorum M. Lutheri per bullam Leonis X notissimam damnatorum* (1520), quoted in 1 LECLER, *supra* note 112, at 150.

278. See Steven Ozment, *Martin Luther on Religious Liberty*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT, *supra* note 9, at 77 (“In Lutheran lands, Christian freedom in the end meant the right to dissent from Rome and to agree with Wittenberg. By comparison with previous practice, that was for the times a new degree of religious freedom, and it brought about real and lasting change in contemporary religious life. On the other hand, it was also a new bondage to a new dogmatic creed.”).

poses a limit on the power of the state. Luther's view of Christian freedom anticipated the argument that linked the idea of the primacy of individual conscience with the inalienable right to practice freely one's own religion without state interference.

Perhaps Luther's most significant contribution to the development of religious freedom is found in his famous doctrine of the two kingdoms, one spiritual and one temporal, and two governments, church and state. Building on the two-kingdoms theology of Augustinian thought,<sup>279</sup> these doctrines are elaborated in Luther's *On Temporal Authority: To What Extent It Should Be Obeyed* (1523), which sharply distinguishes between the secular and spiritual domains.<sup>280</sup>

God has ordained two governments: the spiritual, by which the Holy Spirit produces Christians and righteous people under Christ; and the temporal, which restrains the un-Christian and wicked. . . . [O]ne must carefully distinguish between these two governments. Both must be permitted to remain; the one to produce righteousness, the other to bring about external peace and prevent evil deeds. Neither one is sufficient in the world without the other.<sup>281</sup>

While affirming both the right and necessity of the secular power to use force to maintain civil order, Luther turned to what he considered the main part of his treatise: "how far its arm extends and how widely its hand stretches, lest it extend too far and encroach upon God's kingdom and government."<sup>282</sup>

Luther first explained that the state has no right to intervene in matters of faith because God has confined it to a strictly temporal sphere. Human authorities have power only over bodies, properties, outward things; they legitimately may tax subjects for public services, maintain moral standards, and restrain by threat and force those who injure others.<sup>283</sup> Luther insisted that Christians must obey legitimate political authority acting within its proper sphere or risk defying God. But the state must be careful not to overstep its bounds; only God has authority over the spiritual realm:

The temporal government has laws which extend no further than to life and property and external affairs on earth, for God cannot and will not permit anyone but himself to rule over the soul. Therefore, where the temporal authority presumes to prescribe laws for the soul,

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279. See AUGUSTINE, *THE CITY OF GOD* 376-77 (Marcus Dods trans., 1950).

280. MARTIN LUTHER, *On Temporal Authority*, in 45 LUTHER'S WORKS, *supra* note 272, at 81-129.

281. *Id.* at 92.

282. *Id.* at 104.

283. *Id.* at 110-12.

it encroaches upon God's government and only misleads souls and destroys them. . . . [T]he soul is not under the authority of Caesar; he can neither teach it nor guide it, neither kill it nor give it life, neither bind it nor loose it, neither judge it nor condemn it, neither hold it fast nor release it. . . . [O]ver what is on earth and belongs to the temporal, earthly kingdom, man has authority from God; but whatever belongs to heaven and to the eternal kingdom is exclusively under the Lord of heaven.<sup>284</sup>

Luther thus denied the civil authority any power to direct or punish religious doctrines and practices.

Echoing his earlier thoughts on freedom of conscience, Luther then insisted on an inviolable inward sphere of faith in the Christian's soul: "[F]aith is a free act, to which no one can be forced," he wrote, "[i]ndeed, it is a work of God in the spirit, not something which outward authority should compel or create."<sup>285</sup> The coercive power of the state is ineffective in matters of faith: "But the thoughts and inclinations of the soul can be known to no one but God. Therefore, it is futile and impossible to command or compel anyone by force to believe this or that. The matter must be approached in a different way. Force will not accomplish it."<sup>286</sup> The state therefore must confine itself to matters of worldly concern and must not intrude into the relationship between God and the individual:

How he believes or disbelieves is a matter for the conscience of each individual, and since this takes nothing away from the temporal authority the latter should be content to attend to its own affairs and let men believe this or that as they are able and willing, and constrain no one by force.<sup>287</sup>

Consequently, heresy can be fought only with spiritual weapons: "Heresy is a spiritual matter which you cannot hack to pieces with iron, consume with fire, or drown in water. God's word alone avails here. . . ."<sup>288</sup> For Luther, the distinction between the two kingdoms of church and state had its most significant application in bringing to an end the state's jurisdiction over spiritual matters. Government must no longer be seen as omniscient; it has neither the ability nor prerogative to manage those matters that belong exclusively to the province of the spiritual sovereign.

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284. *Id.* at 105, 111.

285. *Id.* at 108.

286. *Id.* at 107.

287. *Id.* at 108.

288. *Id.* at 114.

Luther's position on persecution of heretics changed after 1525 when he urged that civil authorities should root out false religion with force. Resistance to Luther's doctrinal positions came from both the Catholic church and radical Protestant sects, such as the Anabaptists.<sup>289</sup> To counter this resistance, Luther advocated that the evangelical prince promote the preaching of the gospel, suppress the preaching of false and heretical doctrines, and ensure that all could hear the Word of God, even if it was necessary to compel them to it.<sup>290</sup> Ozment observes that "such behavior was normal for the age; all the reformers at this time, Protestant and Catholic alike, believed faith never to be freer than when their doctrine was being imposed on others."<sup>291</sup> Although Luther ultimately did not act consistently with his two kingdoms theology, the doctrine later was elaborated and refined within both Lutheran and Calvinist traditions<sup>292</sup> and eventually had a profound influence on the development of religious freedom on America.<sup>293</sup>

### 3. The Anabaptists

Neither Catholics nor Protestants in sixteenth century Europe acknowledged any freedom to dissent. Perez Zagorin correctly observes that "[t]he right that the younger Luther had assumed to challenge the spiritual deformities of Catholicism in the name of conscience and Scripture found no home in any of the major Protestant denominations, which in principle remained persecuting institutions."<sup>294</sup> As Zagorin points out, although some political regimes and church authorities were more stringent than others in enforcing religious uniformity, the widely-accepted opinion of the political, religious, and intellectual elites of the period was that "conformity was necessary not only for religion's sake, but also for the preservation of political unity and peace."<sup>295</sup> Among the few to take exception to this view were the Anabaptists, one of the fringe groups of early Protestantism who belonged to what commonly has been described as the Radical Reformation.<sup>296</sup>

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289. 1 LECLER, *supra* note 112, at 155.

290. *Id.*

291. Ozment, *supra* note 278, at 82.

292. *See, e.g.*, 2 JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 184 (Ford L. Battle ed. & trans. 1975).

293. *See generally* ADAMS & EMMERICH, *supra* note 4, at 3, 56-57; ESTEP, *supra* note 258; McConnell, *The Problem of Singling Out Religion*, *supra* note 11, at 16-19.

294. ZAGORIN, *supra* note 39, at 82.

295. *Id.*

296. For extensive discussions of Anabaptism, see the outstanding works by G. H. WILLIAMS, *THE RADICAL REFORMATION* (1962) and WILLIAM ESTEP, *THE ANABAPTIST STORY* (rev. ed. 1975), and the accounts by 1 LECLER, *supra* note 112, at 193-223, and ROLAND H. BAINTON, *THE REFORMATION OF THE SIXTEENTH CENTURY* 95-109 (1952).

Anabaptists were mostly a grassroots movement of disaffected commoners who preferred a simple, personal religious faith free from the control of political or religious hierarchies. They rejected the leadership of prominent reformers such as Luther or Calvin and instead formed numerous loosely-related Christian sects in Switzerland, Germany, and the Netherlands beginning in the 1520s.<sup>297</sup> The great majority of Anabaptists were peaceful, constructive, tolerant, and, in some ways, almost ascetic. They possessed common beliefs about the necessity of the new birth, believer's baptism, the nature of Christian discipleship, the autonomy of the local church, and the limitations of the civil magistrate's authority.<sup>298</sup> They also, as William Estep observes, "were the first in the sixteenth century to develop a thoroughgoing position on religious liberty based upon their understanding of the nature of faith, the gospel, and the church."<sup>299</sup>

Anabaptists were persecuted by both Catholics and Protestants alike for their views on church and state. While their refusal to recognize infant baptism as true baptism brought great opposition, it was their rejection of church-state establishments that resulted in them being branded as extremists and anarchists.<sup>300</sup> Balthasar Hubmaier (1481-1528) stated most clearly the Anabaptist position on religious freedom in a 1524 tract entitled *Concerning Heretics and Those Who Burn Them*.<sup>301</sup> Church historian William Estep writes that Hubmaier's tract "was a closely reasoned treatise arguing not merely for toleration but for complete religious freedom as a universal principle."<sup>302</sup> Hubmaier set forth arguments for religious freedom that were based on the will of God, the nature of authentic faith, and the essential differences between church and state. Though perhaps overstating the case, Estep suggests that "[t]hese are possibly the most revolutionary set of ideas about the subject that the sixteenth century produced."<sup>303</sup>

Hubmaier saw the struggle against unbelief and heresy as a spiritual rather than civil matter. Heretics "should be overcome with holy instruction, not contentiously, but gently,"<sup>304</sup> he argued; if they will not

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297. See ZAGORIN, *supra* note 39, at 83.

298. ESTEP, *supra* note 258, at 27.

299. *Id.* at 28.

300. *Id.*

301. Balthasar Hubmaier, *Concerning Heretics and Those Who Burn Them*, in RELIGIOUS PLURALISM, *supra* note 214, at 94-98. Pipkin and Yoder write that "[o]ne can argue that this is the first text of the Reformation directed specifically at the topic of the liberty of dissent." BALTHASAR HUBMAIER: THEOLOGIAN OF ANABAPTISM 58 (H. Wayne Pipkin and John H. Yoder, trans. 1989).

302. ESTEP, *supra* note 258, at 30.

303. *Id.*

304. HUBMAIER, *supra* note 301, at 59-60 (articles 1-3).

be taught by “words of authority or gospel reasons,” then “avoid them and let them go on to rant and rage.”<sup>305</sup> Heretics and infidels will not be changed by force: “But a Turk or a heretic cannot be overcome by our doing, neither by sword nor by fire, but alone with patience and supplication, whereby we patiently await divine judgment.”<sup>306</sup>

Hubmaier denounced the practice of turning heretics over to secular authorities for punishment. Such was contrary to the will and character of God, and would only result in God’s judgment on the persecutors. While recognizing the right of civil authority to punish and even execute criminals “who cause bodily harm to the defenseless,”<sup>307</sup> Hubmaier denied that the state can do the same to atheists and the ungodly.<sup>308</sup> Estep summarizes Hubmaier’s teaching:

These articles express one of Hubmaier’s basic principles. He believed that the matter of one’s faith, its nature or its total absence, is of no concern to the state. By promoting this belief, Hubmaier was advocating not anarchy but religious liberty. Thus he became a political theoretician for religious reasons, basing his understanding upon the teachings of Christ (found in *Matthew* 13) and *Romans* 13.<sup>309</sup>

The final part of the tract argues against the death penalty for heresy. Burning heretics, Hubmaier argued, supported by ample citation to Scripture, appears to be an act of Christian piety, but in reality it is a denial of Christ by self-deceived hypocrites.<sup>310</sup> Just a few short years after Hubmaier published *Concerning Heretics*, he was burned to death for heresy.<sup>311</sup>

Dirk Philips (1504?-1568), an Anabaptist leader in Danzig, published a tract entitled *The Church of God* around 1560, which sets forth a fairly typical Anabaptist argument against religious persecution.<sup>312</sup> Philips gave four reasons why those who persecute others cannot call themselves true Christians: first, Jesus is the final “judge of the souls and consciences of men”;<sup>313</sup> second, it is the task of the Holy Spirit to convict the world of sin and unbelief, and such reproof is not done with violence, “but by God’s word and power”;<sup>314</sup> third, the only

305. *Id.*

306. *Id.* at 64 (article 16).

307. *Id.* at 63 (article 22).

308. *See id.* at 63-64 (articles 22 and 24).

309. ESTEP, *supra* note 258, at 31.

310. HUBMAIER, *supra* note 301, at 64-66 (articles 25-36)

311. ESTEP, *supra* note 258, at 31.

312. Dirk Philips, *The Church of God*, in RELIGIOUS PLURALISM, *supra* note 214, at 98-100.

313. *Id.* at 99 (citing *John* 5:22).

314. *Id.* (citing *John* 16:8).

remedy authorized by Christ for known heretics is excommunication,<sup>315</sup> and fourth, the parable of the tares<sup>316</sup> shows that Christ does not want heretics systematically rooted out and punished until the final judgment.<sup>317</sup> Philips concluded:

From this it is evident that no congregation of the Lord may exercise dominion over the consciences of men with the outward sword, nor seek by violence, to force unbelievers to believe, nor to kill the false prophets with sword and fire; but that she must with the Lord's Word judge and expel those in the congregation who are found wicked; and what is done over and above this is not Christian, nor evangelical, nor apostolic.<sup>318</sup>

To the argument that the state should wield the sword to purify the church, Philips responded: "The higher power has received the sword from God, not that it shall judge therewith in spiritual matters (for these things must be judged by the spiritual, and only spiritually . . .), but to maintain the subjects in good government and peace, to protect the pious and punish the evil."<sup>319</sup> Because of this fundamental distinction between church and state, religious freedom required limiting the state's power over religion.

Menno Simons (1496-1561), the most effective protagonist of moderate Dutch Anabaptism whose followers later adopted the name Mennonites, also wrote extensively on religious toleration. Menno taught that the church should consist only of Christians who had voluntarily converted and separated themselves from the world.<sup>320</sup> He was strongly committed to the practice of excommunication as an effective but exclusive means of safeguarding the purity of the church.<sup>321</sup> Menno declared that faith cannot be coerced and that the civil magistrate has no authority to force men to believe: "Faith is a gift of God; therefore it cannot be imposed by any temporal authority nor by the sword; it can only be obtained from the Holy Spirit, as a gift of grace, through the means of the pure doctrine of the sacred Word and a fervent and humble prayer."<sup>322</sup> Spiritual matters "are not subject to human authority, but are the exclusive concern of God Almighty."<sup>323</sup> Menno

315. *Id.* (citing *Romans* 16:17; *1 Corinthians* 5:10; *1 Thessalonians* 5:14; *Titus* 3:10).

316. *See Matthew* 13:24-43.

317. Philips, *supra* note 312, at 99 (citing *Matthew* 13:29).

318. *Id.*

319. *Id.*

320. *See* 1 LECLER, *supra* note 112, at 211.

321. *See id.* at 212-13.

322. Menno Simons, *Een troostelycke vermaninge*, W., p. 149; Am. tr., I, 199, *quoted in* 1 LECLER, *supra* note 112, at 214.

323. Menno Simons, *Een korte klaglycke ontschuldignge der ellendige Christenen*, W., 334; Am. tr., II, 118, *quoted in id.*, at 214.

urged civil authorities not to invade Christ's jurisdiction over those matters which he has reserved for himself:

With your earthly and temporal power do not try to make laws for things that belong to the jurisdiction and kingdom of Christ . . . [and] do not judge and strike with your sword of iron what is reserved to the judgment of the Most High, that is, faith and what belongs to faith.<sup>324</sup>

Recognizing that many of Menno's ideas on toleration were not original, Joseph Lecler explains the significance of moderate Anabaptist teachings in the following lengthy but insightful comment:

What stands out among the moderate Anabaptists—and this particularity is most important for the future—is their doctrine on the nature of the Church and on the relations between Church and State. When the humanists protested against the violent persecution of heretics, they did not dream of depriving the princes of their religious privileges. Their irenic inclination was not based on a radical distinction between the spiritual and the temporal. It was different with the Mennonites. Taking for their basic principle that the Church is composed of “saints,” of those that are reborn, they maintained that there is absolutely no link between this community and either the State or the State Church. They built their community on the model of a sect and so were led to affirm for all practical purposes the separation of Church and State; they rejected the State in this sinful world from which they had separated themselves voluntarily, and consequently denied it any jurisdiction in the spiritual order. In such a system freedom of conscience is secured by the very fact of this separation. . . . And so, for the first time, the separatist point of view on the issue of tolerance was given expression by the sects that proclaimed the complete severance of the spiritual and the temporal.<sup>325</sup>

Half a century after Menno's death in 1561, his writings commanded a following among English refugees in the Netherlands, among whom were John Smyth and Thomas Helwys, influential leaders of English Baptists.<sup>326</sup>

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324. Menno Simons, *Een weemoedige ende christelycke ontschuldiginghe ende verantwoordinge*, W., p. 499; Am. tr., II, p. 303, quoted in *id.* at 215.

325. 1 LECLER, *supra* note 112, at 215-16.

326. On the link between continental Anabaptists and the English Baptist movement, see ESTEP, *supra* note 258, at 33-54.

#### 4. Sebastian Castellio (1515-1563)

While leading reformers like John Calvin supported persecution of heretics, there were calls for toleration within mainstream Reformed churches from Christian intellectuals such as Sebastian Castellio in Switzerland and Dirk Coornhert in the Netherlands. Castellio, a Frenchman who was a professor of Greek and linguistics in Basle, strongly criticized the religious intolerance of Calvin, his former mentor, for having agreed to the execution of anti-Trinitarian heretic Michael Servetus in 1553.<sup>327</sup> He stressed that the issue was not Servetus' heresy, but the fact of his execution.<sup>328</sup> "[T]o kill a man is not to defend a doctrine, it is to kill a man," Castellio wrote, "[r]eligious doctrine is not the affair of the magistrate, but of the doctor. What has the sword to do with doctrine?"<sup>329</sup> For Castellio, true Christianity is reflected more in the purity of one's life than in the correctness of his doctrine. While modern scholars often have overlooked Castellio and his influence on the development of religious toleration and freedom, Mario Turchetti describes Castellio as "the lone voice proclaiming the true open-minded and definitive tolerance, which both the Catholics and the Protestants detested."<sup>330</sup> Perez Zagorin calls Castellio "the first champion of religious toleration."<sup>331</sup>

Castellio's work represents the beginnings of a systematic conceptualization of the case for religious freedom. His most effective writing is entitled *Concerning Heretics and Whether They Should Be Persecuted, and How They Should Be Treated*, first published anonymously in 1554, the year after Servetus' death.<sup>332</sup> The book is an anthology of texts from early Christian writers and from contemporary works of the first half of the sixteenth century. Among the early Christians quoted are Lactantius, Hilary, Chrysostom, Jerome, and

327. The best sources on Castellio are HANS R. GUGGISBERG, *SEBASTIAN CASTELLIO, 1515-1563: HUMANIST AND DEFENDER OF RELIGIOUS TOLERATION IN A CONFESSIONAL AGE* (Bruce Gordon tr. & ed., 1st ed. in English, 2003) (1996); ZAGORIN, *supra* note 39, at 93-144; and ROLAND H. BAINTON, *STUDIES ON THE REFORMATION 139-81* (1963) (chapter on "Sebastian Castellio, Champion of Religious Liberty").

328. STEVEN E. OZMENT, *MYSTICISM AND DISSENT: RELIGIOUS IDEOLOGY AND SOCIAL PROTEST IN THE SIXTEENTH CENTURY 173* (1973).

329. Sebastian Castellio, *Against Calvin's Book*, quoted in ZAGORIN, *supra* note 39, at 119.

330. Mario Turchetti, *Religious Concord and Political Tolerance in Sixteenth- and Seventeenth-Century France*, 22 *SIXTEENTH CENTURY J.* 15, 19 (1991).

331. ZAGORIN, *supra* note 39, at 93.

332. CONCERNING HERETICS, *supra* note 162. In the discussion that follows, I use Bainton's English translation. The book's contents are discussed in I LECLER, *supra* note 112, at 336-47; GUGGISBERG, *supra* note 327, at 81-86; and ZAGORIN, *supra* note 39, at 102-14.

Augustine. Sixteenth century sources appear in part under pseudonyms (including some of Castellio's own writing) and in part with the full names of the authors. They include Martin Luther, Sebastian Franck, Erasmus, John Brenz, and Conrad Pellikan. There is even a short excerpt from John Calvin. Leonard Levy calls *Concerning Heretics* "the sixteenth century's first book on religious liberty,"<sup>333</sup> while Brian Tierney says that the tract "provided the first full-scale argument for freedom of conscience."<sup>334</sup>

The most significant text in *Concerning Heretics* is the prefatory dedication to Duke Christophe of Württemberg written by Martin Bellius, Castellio's pseudonym. Castellio lamented that Christians were quarreling with each other over matters that do not "need to be known for salvation by faith" or "make a man better," rather than seeking to draw near to Christ by living more faithful lives.<sup>335</sup> Much of this disagreement, in his view, was not over fundamental truths of the Christian faith, but rather over more obscure questions like baptism, communion, predestination, free will, and invocation of saints. It was senseless and cruel for Christians "to visit daily penalties upon those who differ from the mighty about matters hitherto unknown, for so many centuries disputed, and not yet cleared up."<sup>336</sup> Castellio warned that putting people to death simply because they differ on such secondary matters is horribly wrong: "Satan could not devise anything more repugnant to the nature and will of Christ!"<sup>337</sup>

Castellio did not deny the danger of heresy, but thought the appellation often was misapplied. He understood the New Testament to use the term heretic to describe someone who clearly is guilty of obstinate error.<sup>338</sup> "I hate heretics, too," Castellio wrote,

[but] I speak because I see here two great dangers. And the first is that he be held for a heretic, who is not a heretic. . . . Great care must be exercised to distinguish those who are really seditious from Christians. Outwardly they do the same thing and are adjudged guilty of the same crime by those who do not understand. Christ was crucified among thieves. The other danger is that he who is really a heretic be punished more severely or in a manner other than that required by Christian discipline.<sup>339</sup>

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333. LEONARD LEVY, *BLASPHEMY* 226 (1993).

334. Tierney, *supra* note 42, at 47.

335. Martin Bellius, *Dedication to Duke Christophe*, in *CONCERNING HERETICS*, *supra* note 162, at 122.

336. *Id.* at 123.

337. *Id.*

338. *Id.* at 130.

339. *Id.* at 126.

Having carefully investigated the meaning of the term “heretic” as commonly used in his time, Castello concluded:

I can discover no more than this, that we regard those as heretics with whom we disagree. This is evident from the fact that today there is scarcely one of our innumerable sects that does not look upon the rest as heretics, so that if you are orthodox in one city or region, you are held for a heretic in the next.<sup>340</sup>

Castello’s solution was that Christians must not judge those with whom they disagree, but rather instruct them and win them over through true piety and a just life. Christians must forbear, not to find the truth, but because they have the truth:

[L]et us, who are Christians, not condemn one another, but, if we are wiser than they, let us also be better and more merciful. This is certain that the better a man knows the truth, the less is he inclined to condemn, as appears in the case of Christ and the apostles. . . . He who does not know how to act mercifully and kindly does not know the nature of mercy and kindness, just as he who cannot blush does not know the nature of shame.<sup>341</sup>

Castello urged mercy and kindness when disputing nonessential doctrines: “Even though in some matters we disagreed, yet should we consent together and forbear one another in love, which is the bond of peace, until we arrive at the unity of the faith.”<sup>342</sup>

Writing again under the pseudonym Bellius, Castello included in the French translation of *Concerning Heretics* an additional and much shorter dedication to Count William of Hesse, the son-in-law of Duke Christophe. Castello urged that princes should not kill anyone for holding certain religious beliefs, “which above all else should be free,” because matters of belief are beyond the reach of the civil power.<sup>343</sup> He argued that civil authority has no jurisdiction over spiritual offenses like heresy; heretics should be excommunicated by the church and nothing more. Only if spiritual offenders create civil disturbances are they punishable by the magistrate.<sup>344</sup> Castello also returned to his theme of “ambiguous doctrines” that are secondary to the fundamental truths of Christianity. It is sufficient, he urged, that Christians agree to the latter, while being permitted to differ over the former.

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340. *Id.* at 129.

341. *Id.* at 132-33.

342. *Id.* at 133.

343. ZAGORIN, *supra* note 39, at 109.

344. Martin Bellius, *Dedication to Duke Christophe*, in *CONCERNING HERETICS*, *supra* note 162, at 136-38.

Castellio added a pair of statements at the end of *Concerning Heretics* printed under the names of George Kleinberg and Basil Montfort. Writing as Kleinberg, Castellio exhorted rulers and magistrates to end the persecution of those who disagree about obscure passages of Scripture and have committed no offense worse than ignorance and error. He reminded them of Jesus' parable of the tares, which commands that heretics are to be left until the final judgment of God. Again, he drew a jurisdictional limit on the power of the state. Civil rulers are to wield the sword to protect the good from evildoers, not to enforce and defend theological doctrine. "If a good physician can defend his opinions without the aid of the magistrate, why cannot the theologian do the like? Christ could, the apostles could; surely their disciples can. Defend bodies with the bodily sword. The sword cannot touch the soul."<sup>345</sup> Citing numerous biblical commands and examples opposing persecution, Castellio concluded that "[h]e who suffers persecution for the faith is either correct or mistaken. If he is correct he should not be harmed. If he is mistaken he should be forgiven."<sup>346</sup>

Writing as Montfort, Castellio addressed the scriptural arguments commonly used to support persecution. He rejected appeals to the Old Testament to justify killing for religion and stressed that neither Christ nor the apostles used or sanctioned violence against heretics.<sup>347</sup> Joseph Lecler points out that "[u]ntil then no one had subjected to such searching criticism the Scriptural texts that could be used in support of the spirit of persecution."<sup>348</sup> Castellio also argued that the civil magistrate lacks power to propagate religion by force and, therefore, should not meddle in religious matters. When the state uses its power to coerce religion, error and spiritual tyranny take hold and men are compelled to follow whatever doctrines their persecutors assert. The statement concludes with a series of biblical images and a short biblical argument showing that persecutors belong with the scribes, Pharisees, Herod, Pilate, and other cruel, ungodly men who stood against Christ.<sup>349</sup>

Castellio thus deployed three major arguments against religious persecution in *Concerning Heretics*. The first was that religious persecution is contrary to the nature and will of God. Castellio's desire for toleration was sustained by the deeply-held belief that persecution is cruel and inhumane, and therefore contrary to Christ's character and

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345. George Kleinberg, *On How Persecution Hurts the World*, in *CONCERNING HERETICS*, *supra* note 162, at 221.

346. *Id.* at 223.

347. Basil Montfort, *Refutation of the Reasons Commonly Alleged in Favor of Persecution*, in *CONCERNING HERETICS*, *supra* note 162, at 225-37.

348. 1 LECLER, *supra* note 112, at 346.

349. Montfort, *supra* note 347, at 251.

teachings. Persecutors invariably are acting against the cause of Christ, while among the persecuted are often the most godly and just. There is nothing in sacred Scripture, he argued, that sanctions the use of civil punishments or violence to protect the church from heresy. Such persecution is attributable to evil, not to God.

The second argument was that Christians must practice humility and forbearance regarding the nonessential doctrines of the Bible. Castellio did not doubt the fundamental truths of the Christian faith, but he argued that the arcane theological disputes which divided the Christian churches of his day should be replaced with charity, mercy, and kindness. As Zagorin notes, Castellio “is in no way a skeptic in religion, as he is convinced that the fundamental religious and moral teachings of the Christian faith are easily known and understandable to all believers.”<sup>350</sup> While Castellio believed that Christians can be certain about the essential teachings of the Christian faith, such as the existence of God, the authority of the Bible, and the necessity of faith in Christ for salvation, he acknowledged that differences of opinion regarding the obscure, uncertain, and debatable parts of Scripture were both legitimate and inevitable. Christians disagreed over nonessential or indifferent matters, Castellio insisted, precisely because such matters were not clearly revealed in Scripture. If these matters were indeed of fundamental importance, Castellio reasoned, God would have made their meaning clear. Until that happens, Castellio urged, Christians should be humble, patient, and forbearing with one another in their differences over nonessential doctrines.

The third argument was that the civil magistrate is neither authorized nor competent to judge or punish religion. Spiritual offenses can be judged only by the word of God and are punishable at most by excommunication. Although he did not spell it out, implicit in this is the recognition of a right to conscience as a limit on the power of the state.<sup>351</sup> Castellio believed that force is powerless to change belief or conscience, and that its application corrupts religion and opens the door to error and spiritual tyranny. Each of these three arguments is grounded in Castellio’s theology. As Zagorin observes, “Since the work was very largely a Christian indictment of the persecuting spirit, it is easy to understand why in his own contributions he quoted only the Bible, upon whose authority he relied exclusively.”<sup>352</sup>

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350. ZAGORIN, *supra* note 39, at 113.

351. *See id.* at 113-14.

352. *Id.* at 112.

*Concerning Heretics* was the opening salvo in a long-running battle between Castellio and Calvin over the ideas that led to Servetus' death.<sup>353</sup> In 1554 Castellio wrote *Against Calvin's Book*, an answer to Calvin's *Defense of the Orthodox Faith*, which had set forth a justification for persecution of heretics.<sup>354</sup> Zagorin describes the work as "a direct, unsparring attack on Calvin's ideas and good faith, composed in a tone that is sometimes angry, bitter, and accusing."<sup>355</sup> One striking example is Castellio's description of the prevailing intolerance in Calvin's Geneva: "If Christ himself came to Geneva," he wrote, "he would be crucified. For Geneva is not a place of Christian liberty. It is ruled by a new pope, but one who burns men alive, while the pope at Rome at least strangles them first."<sup>356</sup> A main theme in *Against Calvin's Book* is criticism of Calvin's claim that civil rulers and magistrates have a duty to defend true doctrine with force. To this claim, Castellio offered the famous reply: "To kill a man is not do defend a doctrine, it is to kill a man. When the Genevans killed Servetus, they did not defend a doctrine, they killed a man."<sup>357</sup> The defense of religious doctrine is not the business of the magistrate, Castellio argued, but rather the theologian; the magistrate is obliged to protect those under his jurisdiction from injustice. Zagorin observes that

Castellio strives consistently to demarcate the realm of the spiritual from the secular and to limit civil government's power over religion. He maintains that the magistrate has no jurisdiction in spiritual matters nor any obligation to enforce the Mosaic law, since this law has been superseded by Christ's spiritual law of love and charity. Magistracy exists to prevent men from doing evil, and when the magistrate punishes crimes such as homicide or adultery, he upholds not the law of Moses, but the law of nature and equity.<sup>358</sup>

Castellio's denial of the magistrate's right to punish divergent religious opinions went very much against the prevailing views of his time. Instead, he was convinced that the use of civil force to protect religion does great harm to religion and that religious freedom is impossible without limiting the magistrate's power over religion.

Castellio's third major work on religious toleration, completed in 1555, was written under the pseudonym Basil Montfort and titled *Concerning the Nonpunishment of Heretics by the Civil Magistrate*, a

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353. *Id.* at 114.

354. For a helpful and extended discussion of Castellio's arguments in *Against Calvin's Book*, see *id.* at 114-22. I have drawn on that discussion here.

355. *Id.* at 115.

356. Sebastian Castellio, *Against Calvin's Book*, quoted in *id.* at 116.

357. *Id.* at 119.

358. ZAGORIN, *supra* note 39, at 119.

*Book in Support of the Farrago of Martin Bellius against the Book of Theodore Beza.*<sup>359</sup> It was Castellio's reply to Theodore Beza, Calvin's disciple and confidant, who had published in 1554 a refutation of Castellio's *Concerning Heretics*.<sup>360</sup> Castellio once more explained why the perpetrators of Servetus' execution were wrong to kill heretics and to treat as heretics all who disagree with the church. Castellio again attacked the Calvinist view that the state has the duty to protect the purity of the church by punishing heresy. Beza had argued that the state's duty was derived from the purpose of civil society, which was that men live together peacefully and fulfill their supreme obligation to love and serve God. Heresy is destructive of religion and good order, he urged, and no measure is severe enough to stop the mad heretic from spreading his contagion. Castellio rejected this view and warned that if rulers exercise power over religion, there will be no "freedom of religion."<sup>361</sup> He recognized that the civil magistrate has jurisdiction over civil matters, and, by the command of God, must be obeyed. But religious doctrine is a spiritual matter which the magistrate has no right to judge or enforce. Zagorin summarizes Castellio's argument:

He does concede that the magistrate is authorized to repress offenses like the manifest blasphemy of denial that God exists, because these are contrary to the law of nature known to all nations. But crimes of this kind, which are recognized by the common sense of all nations, do not need to be identified by theologians. The magistrate has no authority, however, to punish heretics, a claim Castellio bases on the fundamental distinction between the spiritual and the secular.<sup>362</sup>

Castellio found unpersuasive Augustine's argument that civil penalties are aimed at making heretics reflect on their error and restraining them from continuing to do what is evil. Constraint in religion is contrary to Scripture, Castellio argued, and "forces people to pretend to believe."<sup>363</sup> We must, he said, "obey God rather than Saint Augustine."<sup>364</sup>

One of Castellio's last literary contributions to the struggle for religious toleration and freedom was *Advice to a Desolate France*,

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359. Zagorin also has an excellent discussion of Castellio's arguments in *Concerning the Nonpunishment of Heretics* in ZAGORIN, *supra* note 39, at 124-32. Zagorin's quotations are taken from the French translation. Again, I have generously drawn on his discussion here.

360. On Theodore Beza and the arguments in his book, see 1 LECLER, *supra* note 112, at 347-50 and GUGGISBERG, *supra* note 327, at 110-14.

361. Sebastian Castellio, *Concerning the Nonpunishment of Heretics by the Civil Magistrate, a Book in Support of the Farrago of Martin Bellius against the Book of Theodore Beza*, quoted in ZAGORIN, *supra* note 39, at 128.

362. ZAGORIN, *supra* note 39, at 128.

363. Castellio, *supra* note 356, at 129.

364. *Id.*

published anonymously in 1562, in which he called for a stop to the religious civil war between the French Catholics and Protestant Calvinists (Huguenots).<sup>365</sup> Zagorin highlights the stark contrast between Castellio and the French *politiques* who sought toleration for political and pragmatic reasons:

Although earlier voices . . . had been raised in France to arrest the drift toward a war of religion, they were all the expressions of Catholics who were politically motivated to advocate a restricted tolerance for Protestant worship to save the kingdom from a destructive civil war. While these writers also stressed that conscience was not subject to compulsion, their primary concern was for the unity and welfare of the state. Castellio was the first author at this juncture to plead for confessional tolerance in France principally on the religious and moral ground of respect for conscience and not only for pragmatic reasons.<sup>366</sup>

Invoking Christ's teaching on reciprocity (the Golden Rule), Castellio blamed both Catholics and Protestants for forcing one another's consciences: "For it would then but be necessary to say to those who force the consciences of others: 'Would you like your own to be forced?'"<sup>367</sup> Unless the persecutors changed their ways and practiced toleration, "you will be unable to say that you have done to others as you would like others to do to you."<sup>368</sup> He challenged the *politiques* to produce a single word or example from Scripture to prove that they must force consciences. Such a practice, Castellio argued, was contrary to God's nature and commands, and cannot be justified by good intentions.

Castellio's writings plainly show that his arguments for religious toleration and freedom are themselves grounded in religion. In his view, religious freedom is necessary because (1) God alone knows the real heretics and he alone has the authority to punish them at the last judgment; (2) coercion and persecution reflect neither the character nor command of Christ; (3) God has not granted the civil magistrate any power over religious matters; (4) religious truth and toleration can co-exist without destroying religion; and (5) intolerance and persecution does great harm to authentic Christianity. His opposition to state persecution of religious dissenters was dictated not by religious skepticism or political expediency, but rather by an abiding concern for the welfare of authentic Christianity. His ideas influenced important

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365. The most accessible copy of this short tract is found in Sebastian Castellio, *Advice to a Desolate France*, in RELIGIOUS PLURALISM, *supra* note 214, at 100-15.

366. ZAGORIN, *supra* note 39, at 134-35 (footnotes omitted).

367. Castellio, *supra* note 365, at 101.

368. *Id.* at 102.

seventeenth-century tolerationists, most notably William Walwyn, Jeremy Taylor, Roger Williams, and John Locke.<sup>369</sup>

#### 5. Dirk Coornhert (1522-1590)

Coornhert, a Reformed theologian from the Netherlands, argued that conscience belongs to God's domain and may not be manipulated or "cured" from outside.<sup>370</sup> The state despises God, in his view, when it usurps his place by exercising power over a person's conscience.<sup>371</sup> He urged in his *Constraint of Conscience* (1579) that "[o]nly God has the right to be master over man's soul and conscience; it is man's right to have freedom of conscience."<sup>372</sup>

Scripture figured prominently in Coornhert's defense of conscience. The crux of his biblical argument for toleration was that the term heretic does not appear in the Old Testament, and that the only punishment for heresy indicated in the New Testament is banishment. If God intended to use the secular arm for eliminating heretics, Coornhert argued, Christ would have made that clear in the New Testament. Coornhert also appealed to Christ as the example: when many left his side, he never tried to force his followers to stay with him. The actions of Christ and his followers show that persecution is not authorized by God:

I also know from the full testimony of H. Scripture, that true followers of the Lamb do not persecute anyone, but that they are persecuted, and that no authorities, be they spiritual or secular, can produce proof that they were commanded by God to persecute or physically kill anyone for their misbelief (I am not speaking of misdeed). . . .<sup>373</sup>

Coornhert further appealed to the example of Gamaliel, the Jewish leader who warned his colleagues against persecuting Christians lest they find themselves fighting against God, and the parable of the wheat and tares to support his defense of conscience.<sup>374</sup> Coornhert also invoked the Golden Rule: "Let everyone follow the law of nature: if you do not like being forced in your conscience, then do not force others either in word or in deed."<sup>375</sup>

369. GUGGISBERG, *supra* note 327, at 247-49; Tierney, *supra* note 42, at 49.

370. GERRIT VOOGT, *CONSTRAINT ON TRIAL: DIRCK VOLCKERTSZ COORNHERT AND RELIGIOUS FREEDOM* 104 (2000) (Sixteenth Century Essays & Studies, v. 52). Voogt's book is the best work in English on Coornhert.

371. *Id.* (citing Coornhert, *Oordeelen van een ghemeen Landts*, in WERCKEN, vol. 1, fol. "643C" (should be 463C)).

372. Dirk Coornhert, *Constraint of Conscience* (1579), *quoted in id.* at 104.

373. *Id.* at 117.

374. *Id.* at 118 (citing *Acts* 5:36-39 and *Matthew* 13:24-43).

375. *Id.* at 119-20 (citing *Matthew* 7:12).

Coornhert appealed to the primacy of the individual conscience. Along with other toleration advocates, Coornhert argued that coercion of religious conscience does not work and may be counterproductive.<sup>376</sup> Gerrit Voogt summarizes Coornhert's views on this point:

God wants to be praised voluntarily. People become godless due to persecution, for they forsake God to save themselves. Persecution, besides killing heretics, also breeds hypocrites, people who only feign that they have abandoned their former opinions. Persecution embitters people, some of whom will be tempted to resort to violence when they see their "highest good" [their freedom of conscience] taken away. . . .<sup>377</sup>

He also maintained that the state has authority over "body and world goods," but not over the hearts of its citizens and that "God reveals the truth through prophets, not through the government."<sup>378</sup> Government does not have the right, Coornhert asserted, to impose its interpretation or choice of religion, since the state typically knows little about matters of faith and has no impartial or infallible criterion for identifying the true religion.<sup>379</sup> As Voogt explains, Coornhert believed that "[t]he political government should act as an impartial referee to ensure that the various religious groups do not try to tyrannize the others and that a new church does not put on the well-worn shoes of the popes of old."<sup>380</sup> Otherwise, the state should leave individuals alone to follow the promptings of their own conscience.

While no exhaustive investigation has been attempted of Coornhert's posthumous influence, Voogt suggests that the Rijnsburger Collegiants were chiefly influenced by his ideas, and perhaps this influence extended indirectly to Wesley and Methodism.<sup>381</sup> Coornhert's impact on the Arminian remonstrants is assumed, as he is widely identified as their forerunner.<sup>382</sup>

The cause of religious freedom in the sixteenth century was sustained by Christian intellectuals like Erasmus, Castellio, and Coornhert, as well as by various sects and groups such as the Anabaptists, Baptists, Mennonites, Socinians, Arminians in Holland, and Latitudinarians in the Church of England. They were moved not by

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376. *Id.* at 150.

377. VOOGT, *supra* note 370, at 150 (citations omitted).

378. Dirck Coornhert, *Brieven-boek*, Letter 99 to Spieghel, *quoted in* VOOGT, *supra* note 370, at 157.

379. *Id.* at 158-59.

380. VOOGT, *supra* note 370, at 160 (citing Coornhert, *Aengheeven dwangh*, in Wercken, vol. 1, fol. 470A).

381. *Id.* at 234.

382. *Id.* at 235.

religious skepticism or political expediency, but by a deep concern for the quality of religious life. Their relentless efforts in challenging the forced imposition of religious uniformity set the stage for the triumph of religious toleration and freedom in seventeenth century England and Europe and in eighteenth century America.

#### IV. SOME CONCLUDING THOUGHTS

The justifications for religious freedom, first proposed by early Christian thinkers such as Tertullian and Lactantius and then rediscovered by sixteenth century tolerationists, are almost wholly religious in nature: God is sovereign over all things spiritual and temporal; duty to God is superior to civil obligations; the state has neither the jurisdiction nor competence to judge spiritual matters; authentic faith must be voluntary, not coerced; the true Christian displays love, humility, and forbearance toward those with differing views. While these were not the only arguments for religious toleration and freedom during these periods, they were at the forefront of opposition to the persecuting state.

The next article in this series will explore the connection between the theological justifications for religious toleration that emerged from sixteenth and seventeenth century England and Europe and the development of America's constitutional commitment to religious freedom. At this point, I want to offer a few brief observations on the historical inquiry so far. That inquiry calls into question certain assumptions that can distort our modern discussion about religious freedom.

##### *A. Origins of Religious Freedom*

One popular view of religious freedom is that it came about primarily through the efforts of skeptical rationalists who sought to avoid civil conflict over religious matters. It treats the emergence of religious freedom as beginning sometime in the seventeenth century and reaching its pinnacle in the Jeffersonian rationalism of the late eighteenth century, which produced our constitutional commitment to religious freedom. The impetus purportedly behind this move was twofold: first, an emerging skepticism toward the truth claims of religion; and second, a desire to put an end to civil strife and persecution brought about by religious conflict. Secular enlightenment rationalists, the argument goes, were skeptical of religious claims and horrified by religious conflict, so

they sought to dislodge religious authority from its close connection with the state.<sup>383</sup>

The conventional view overlooks the fact that the ideas and practices of toleration were available and in use long before the Enlightenment. The struggle for religious freedom originated with persons who were deeply religious and thus had a significant stake in the outcome. The most prominent advocates were not skeptical rationalists; rather, they were thoughtful and committed Christians who were concerned with both the purity of the church and the freedom of individual religious conscience. From Tertullian and Lactantius of late antiquity, to Sebastian Castellio, Dirk Coornhert, and the radical Protestants of sixteenth century, to seventeenth-century tolerationists in England and Europe such as Leonard Busher, William Walwyn, Pierre Bayle, and John Locke, to early American advocates such as Roger Williams, William Penn, Elisha Williams, Isaac Backus, John Leland, and James Madison, the justifications advanced for religious freedom were predominantly, if not exclusively, based on religious principles.

To understand why religious freedom became such an important value—important enough to be enshrined in the First Amendment to the Constitution—we cannot be satisfied with any inquiry that neglects the deeply religious nature of its pre-constitutional rationales. I do not claim that skeptical arguments are irrelevant to the development of religious freedom, nor do I suggest that the subject should be approached exclusively from the religious perspective. What this series of articles will show, however, is that religious freedom has not and cannot be grounded reliably in radical skepticism about religious beliefs.

### *B. Christianity and Religious Freedom*

Modern church-state legal scholarship tends to minimize or reject the theological roots of religious freedom, at least in part, I think, because historic Christianity is viewed as fundamentally intolerant. It often is assumed that the coercion and persecution which came to prevail in the later fourth and fifth centuries was the natural and predictable

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383. For example, Alan Levine, argues that religious skepticism provided the principal foundation for toleration:

In general, ancient and medieval philosophers did not advocate toleration because of their attachments to a notion of fixed truth, whether found in nature or revealed religion. It was only when the crisis of authority became so acute in the sixteenth century that skepticism arose as a leading philosophical stance and toleration emerged as a desirable political idea.

Alan Levine, *Introduction: The Prehistory of Toleration and Varieties of Skepticism, in* EARLY MODERN SKEPTICISM AND THE ORIGINS OF TOLERATION 9 (Alan Levine, ed., 1999).

result of Christian exclusivism and in some sense native to Christianity as a faith system.<sup>384</sup>

Historic Christianity is universalistic and exclusivist: it claims validity for all people in all places at all times and it does not allow for other ways to God. But it is wrong to assume that exclusivism and intolerance go hand in hand, and that exclusive Christianity has little, if anything, important to say about religious freedom. The Christianity envisioned by Lactantius' theories and Constantine's policy was a noncoercive and tolerant one which created a reasonably neutral public square for religion and which encouraged only worship of a single benevolent creator, a notion very much in keeping with elite pagan religious and intellectual trends. The persecution that arose after Constantine's death, Drake explains, was not the inevitable consequence of Christian theology:

Because in the fourth century emperors became increasingly willing not only to support Christians but also to suppress traditional religion, it has been easy to make a *prima facie* case for inherent intolerance as the cause of this coercion. Perhaps too easy. Christians did come to support the use against their enemies of the same force that once had been used against them, but not without reservations and misgivings. The shift in this ground is one of the most important consequences of the fourth century, but it was not inevitable, and "inherent intolerance" cannot fully account for it, for Christians had an equally inherent belief that true faith could not be coerced, as Augustine's need to address this charge shows.<sup>385</sup>

The depiction of Christianity as an inflexible, one-dimensional, persecuting faith is more polemic than historical fact. As Drake suggests, "The coercive Christian as normative is a modern construct—the worst sort of conceptual anachronism, one that has required every ounce of scholarly ingenuity to maintain."<sup>386</sup>

The unfounded assumption that Christian exclusivism invariably leads to intolerance has obscured the fact that the normative Christian view—as articulated by Tertullian, Lactantius, and others—is that religious belief and practice should not be dictated by the state, but should be determined by the individual. Based on their understanding of God and of authentic religious faith, they held that an imposed or coerced faith is no faith at all. This does not mean, of course, that within Christian tradition there is an inevitable and seamless development of

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384. For a fuller discussion of this point, see DRAKE, *supra* note 75, at 20-34, 73-75, 285, 402-05, 451-56 and DIGESER, *supra* note 49, at 117-18.

385. DRAKE, *supra* note 75, at 402.

386. *Id.* at 405.

religious freedom that leads from the teachings of Jesus to the American Constitution. Religion in the Christian West has not always been on the side of religious freedom. Regimes and individuals claiming to be Christian have unleashed some of the most horrible persecutions in history. There is no denying that intolerance in the name of Christianity has caused untold human misery.<sup>387</sup> But intolerance is not endemic to Christianity. While historic Christianity departed from its norm for certain periods, it self-corrected and eventually spawned the modern notion of religious freedom. This is due in no small part to the resonance and resiliency of the religious justifications which underlie the normative view. As I will demonstrate in my next article in this series, these justifications ultimately prevail in the American experiment.

### C. *Disconnecting Civil from Spiritual*

A third misconception involves the modern idea of separation of church and state. There are those who argue that the essential consequence of this separation is that government and politics must be thoroughly secular.<sup>388</sup> But this view largely misapprehends the historic aims for severing the connections between church and state.

As we have seen, the most compelling arguments for religious freedom drew a line of demarcation—a jurisdictional boundary, if you will—between spiritual and civil authority. The state in classic antiquity laid claim to complete control over the order and structure of human society. Religious and civil authority were unified: pagan gods and political rulers were one, church and state were indistinguishable, and the individual's religious allegiance was bound up with his political allegiance. Political rulers asserted authority over the spiritual decisions of their subjects, frequently applying the coercive power of civil government to ensure orthodox belief and practice. Religious toleration, if it existed at all, was a matter of expediency rather than principle.

The coming of Christianity and the fundamental distinction it drew between spiritual and civil power brought recognition of a separate spiritual authority which sought to check the unrestrained power of the

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387. The Christian religion does not have a corner on intolerance. Religious oppression has been characteristic of human societies from the earliest times to the present. Secular regimes also have committed terrible atrocities in seeking to stamp out religion. See John Coffey, *The Myth of Secular Tolerance*, Cambridge Papers, vol. 12, no. 3 (2003), available at <http://www.jubilee-centre.org/document.php?id=40>.

388. See, e.g., ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* (2d. ed. 2005); Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 WM. & MARY L. REV. 2193 (2008); but see Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120 (2008) (arguing that “the agnosticism of the Constitution does not entail that governments operating under the Constitution must be secular”).

state. Christianity severs the individual's religious obligation from his political obligation, as expressed in Jesus' injunction to "give to Caesar what is Caesar's, and give to God what is God's."<sup>389</sup> It proclaims that a person's supreme duty is to God, who transcends all temporal and political orders, thereby placing spiritual matters fundamentally outside the sphere of civil command. As such, government is neither authorized nor competent to judge religious truth. This dualism, as we have seen, reflected an intrinsic difference between these institutions as they were established by God.

The liberal individualist implications of this distinction were slow to be recognized and the jurisdictional lines again blurred. For over a millennium, often with the Christian church's complicity, the state reasserted its power over spiritual matters, maintaining religious unity by force and, in the latter centuries, executing heretics and dissenters when necessary. The horrors of religious persecution provoked Christian thinkers once again to challenge the assumption that there is an essential identity between civil and spiritual authority. From the seemingly endless struggle over who will be the ultimate arbiter of individual and community life, the inalienable right of religious freedom emerged as a limit on the power of civil government over spiritual matters.

The reason for disconnecting civil and spiritual was not so much to confine church and state institutionally to separate spheres of authority—as modern separationism emphasizes—but to end the state's jurisdiction over spiritual matters. While the church's exercise of institutional authority over political matters sometimes was controversial, the predominant concern voiced by advocates of religious toleration and freedom was over the state's use of its coercive power to enforce religious uniformity. This was thought to interfere not just with the church's authority over its own affairs but, more importantly, with God's higher authority over individual conscience. Separating the civil from the spiritual meant limiting the state's power to define or control a person's relationship to God. This was done to protect religion (and genuine religious faith), not the state. The concern for the spiritual welfare of religion weighed more in arguments for religious toleration and freedom than did any concerns for the secular or political welfare of the state.

The essential difference between religious and political authority is the centerpiece of the religious argument for religious freedom. It is "so deeply engrained in our political, constitutional, and theological traditions that it must be accepted as an assumption upon which our

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389. *Luke 20:25.*

constitutional culture rests.”<sup>390</sup> Comprehending the nature (and limits) of the civil-spiritual disconnection is vital to our understanding of what the Religion Clause means. While modern views of church-state separation emphasize keeping both church and state apart, with some urging that religion be excluded altogether from the civil-political sphere, the historical disconnection of civil from spiritual meant something more limited—the state was disempowered from defining, controlling, or enforcing religion. The fuller implications of this disconnection remain a matter for consideration, but at the very least it suggests that our church-state debate should carry a different emphasis.

The protections for religious freedom found in the Religion Clause are rooted in ideas first articulated in the third and fourth centuries and developed over more than a century long struggle to end the persecuting state. Rediscovering the historical justifications for religious freedom can help us gain a renewed appreciation for the importance of religious principle in fostering religious freedom. Separating the Religion Clause’s result from its underlying rationales, however, will leave us with a constitutional discourse incapable of meaningfully connecting with the very ideas that led to nothing less than a massive reordering of the relationship between church and state.

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390. McConnell, *The Problem of Singling Out Religion*, *supra* note 11, at 18.