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Book Review

The Believer's First Amendment

*Separating Church and State: Roger Williams
and Religious Liberty*

by Timothy L. Hall*

University of Illinois Press (1998)

I. INTRODUCTION

The Supreme Court's Religion Clause jurisprudence has never satisfied most Americans. The Court has often appeared too secular and too skeptical to win over the populace at large.¹ Too frequently, the Court seems to have interpreted the First Amendment as if it were the result of cynicism and religious hostility. In reality, the First Amendment was the product of fervent religious enthusiasm.²

In *Separating Church and State: Roger Williams and Religious Liberty*, Timothy Hall gives voice to one of those "relentlessly intolerant" and enthusiastic "religious fanatic[s]"³ responsible for the American tradition of religious liberty: Roger

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1. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (accusing the majority's "view of the Establishment Clause" of "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents"); *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting) (arguing that the majority opinion "manifests not neutrality but hostility toward religion"); George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 21 & n.80, 55, 58 (arguing that because "most Americans remain [] religious" and because the Supreme Court unjustifiably "believe[s] religious people are irrational, . . . need[ing] to be enlightened with secular truth," "[t]he Supreme Court should replace its secularist hostility to religion with a respect consistent with current social circumstances and understanding").

2. See TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 2-3 (1998) (agreeing "emphatically" with the thesis of Mark DeWolfe Howe and Robert Cover that "the First Amendment was the product of religious enthusiasm more than anything else, and that enthusiasm has sometimes been muffled in attempts to construe the religion clauses").

3. *Id.* at 18, 27.

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Williams. Hall argues that because Rhode Island founder Roger Williams stands at the beginning of America's historical struggle with religious liberty, "one cannot trace the genesis of the American commitment to religious freedom without reckoning the values and presuppositions of Williams."⁴

Hall's effort is designed to expand First Amendment jurisprudence beyond the "theoretically impoverished" reliance upon Thomas Jefferson and James Madison.⁵ He writes:

To know what counts as a prohibited establishment of religion, one must have some sense of why establishments were prohibited in the first place. To know when the free exercise of religion has been abridged, one must ponder the reasons why religion was singled out for constitutional protection.⁶

Hall argues that "Roger Williams's writings . . . provide a framework of argument and theory more comprehensive than those set forth by any other writer either before or during the constitutional period."⁷ Hall believes that Williams has something useful and important to contribute to our contemporary understanding of the Establishment Clause and the Free Exercise Clause. As we search for a suitable Establishment Clause foundation, Hall recommends looking into the theoretical bases of Williams's religious separatism.⁸ For the interpretation of the Free Exercise Clause, Hall proposes a new theoretical anchor: Williams's concept of religious liberty as "freedom to be ruled by God."⁹ Hall summarizes his effort by explaining that "[w]e . . . cannot pretend to give historical content to the religion clauses without taking seriously their origin, at least in part, in a *believing* parentage, and Williams is a key theoretician of this parentage."¹⁰

II. MAKING ROGER WILLIAMS RELEVANT AS AN INTELLECTUAL SOURCE

This is not the first time Williams's name has come up in a contemporary legal setting. Beginning in 1940, Hall explains,

4. *Id.* at 3.

5. *See id.* at 5.

6. *Id.* at 5.

7. *Id.* at 5.

8. *See id.* at 11, 157.

9. *Id.* at 11.

10. *Id.* at 117 (emphasis added).

the United States Supreme Court began crafting Roger Williams into a sort of liberal constitutional icon.¹¹ The kind of intellectual scrutiny that one would expect, however, did not accompany the Court's symbolic use of Williams. Different legal scholars responded to the Court's use of Williams, particularly to what they saw as the Court's attempt to pigeon-hole Williams into Jefferson's "wall of separation" metaphor, but their representations suffered the same shortcoming—employing Williams as a "metaphor" or "mute symbol" instead of an actual intellectual resource.¹²

By limiting Williams's contribution to the symbolic, Hall argues, modern jurisprudence is missing out on crucial contextual understanding in the field of religious liberty. Williams's "unique voice . . . deserves a larger place in the current revival of interest in the original historical understanding of the First Amendment's religion clauses."¹³ Hall believes that one of the primary obstacles in making Williams's thought relevant to lawyers today has been the "great gulf that separates Williams's world from that of most contemporary thinkers."¹⁴ Hall's work represents one of the first attempts to bridge that gulf and "make Williams's arguments for religious liberty accessible to legal analysis."¹⁵

A. Roger Williams and the Puritan Establishment

Hall begins his effort to make Williams accessible by reviewing and clarifying the historical situation of Williams and the Massachusetts Bay Colony that banished him. The "godly minister"¹⁶ Williams arrived in Massachusetts in 1631 "among the leading edge of the migration that would deposit thousands

11. See *id.* at 1, 5 (citing *Minersville School District v. Gobitis*, 310 U.S. 586, 594 n.3 (1940), *overruled by*, *West Va. State Bd. Of Educ. v. Barrett*, 319 U.S. 624 (1943)).

12. *Id.* at 2-3 nn.7 & 10 (citing MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN CONSTITUTIONAL HISTORY* 5-31 (1965); Robert Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 19 (1983)).

13. *Id.* at 3.

14. *Id.* at 9.

15. *Id.* at 6.

16. *Id.* at 17 ("John Winthrop, then governor of the colony, noted the arrival [of Roger Williams] in his journal, observing simply that a ship had deposited 'Mr. Williams, a godly minister, with his wife.'" (citing 1 JOHN WINTHROP, *THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649* 41-42 (James Savage ed., Arno Press 1972) (1825)).

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of Puritans in New England over the next two decades.¹⁷ Hall suggests that the almost thirty-year-old Williams, with his Cambridge education and chaplain's experience in England, could have become a respected leader in the Puritan colonial establishment. The Puritan establishment offered Williams a minister's position in the Boston church, but he turned the offer down. Hall suggests that in that "terse rejection by a young man of the chance to preach to the forebears of Boston Brahmins,"¹⁸ we can find not only Williams's separatism, but the Separatist roots of the separation of church and state.

Hall explains, "A seventeenth-century Separatist believed not so much in the separation of church and state as in the separation of true believers and churches from their polluted and false look-a-likes."¹⁹ Williams refused communion with the Boston church because he found the Boston church spiritually flawed; in his words, he "dared not officiate to an unseparated people."²⁰ In Williams's reasoning, he was simply following the teachings of Paul. The apostle Paul had commanded the church of Christ to "come out from among them, and be ye separate, saith the Lord, and touch not the unclean thing; and I will receive you."²¹

Separatism was not unique to Williams. The Puritans as a whole received their name because they believed the Church of England, though Protestant, remained in tradition and practice tainted by the Catholic Church. Yet, Williams followed his Puritan Separatist impulses "to a further level."²² Williams would not minister to the Massachusetts Puritans because they were, in short, not pure enough. Williams believed the Boston church was still coddling the unrighteous and accommodating the unholy.²³ Massachusetts Puritans as a whole seemed unwilling to sever all ties with the Anglican church and to exclude unbelievers from their church services. Hall explains how Williams "branded" this kind of "indiscriminate fellowship[]" with false

17. *Id.* at 17.

18. *Id.* at 18.

19. *Id.* at 19.

20. *Id.* at 18 (citing Letter from Roger Williams to John Cotton, in 2 THE CORRESPONDENCE OF ROGER WILLIAMS 630 (Glen W. LaFantasie ed., 1988)).

21. 2 *Corinthians* 6:17-18; see also HALL, *supra* note 2, at 19.

22. HALL, *supra* note 2, at 20.

23. See *id.* at 31 (reviewing the many "possibilities" by which Williams believed one could "pollute oneself in unholy fellowships").

churches and unbelievers an impermissible accommodation.”²⁴

It was not only the unholy fellowships of the Massachusetts Puritan church that bothered Williams. The more critical prong of Williams’s separatism concerned the Massachusetts alliance of church and state. Contrary to the practice of the Massachusetts Bay Colony establishment, Williams believed that the civil magistrate’s power extended only to the “bodies and goods, and outward state of men, etc.”²⁵ In his teachings, Williams “deliberately excluded the spiritual affairs from civil superintendence.”²⁶ At the same time he denounced the Boston church for its unseparatism, Williams questioned the civil magistrate’s authority to punish Sabbath-breakers.²⁷ For Williams, Hall explains, the matter was simple: “Government had no business superintending purely religious affairs.”²⁸

Williams conceived of civil and ecclesiastical authority in terms of the two “tables” of the Ten Commandments, as recorded in the Book of Exodus.²⁹ The first table contained the “covenant community’s responsibilities toward God, and the second [concerned the] affairs of people with one another.”³⁰ The Puritan establishment believed that it was “the duty of the magistrate, to take care of matters of religion, . . . improv[ing] his civil authority for the observing of the duties commanded in the first, as well as for observing of duties commanded in the second table.”³¹ Williams argued that civil government had “authority only to enforce the commands of the second table—which contained ‘the law of nature, the law moral and civil’—and had no legitimate power to enforce the obligations of the first.”³² In its attempts to enforce those obligations of the first “table” by combining ecclesiastical and civil jurisdiction, Williams believed the civil magistrate extended the “spiritual stain” of the unseparated Puritan church onto every resident of the colony willing or otherwise. It was this “persecution” that

24. *Id.* at 27.

25. *Id.* at 36.

26. *Id.*

27. *See id.* at 33.

28. *Id.*

29. *See Exodus* 20:1-11, 12-17; *see also* HALL, *supra* note 2, at 37 & n.106.

30. HALL, *supra* note 2, at 37.

31. *Id.* (quoting THE CAMBRIDGE PLATFORM (1648), *reprinted in* THE CREEDS AND PLATFORMS OF CONGREGATIONALISM (Williston Walker ed., Pilgrim Press 1960) (1892)).

32. *Id.* (quoting Roger Williams, *The Bloody Tenent, of Persecution, in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 355, 358 (1963)).

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became the subject of Williams's principal work, *The Bloody Tenet, of Persecution*.³³ Williams believed: (1) the Massachusetts Puritan church defiled itself by its continued affiliation with the Anglican church and its fellowshipping of the unbeliever and (2) by its alliance with the state, this Puritan establishment persecuted its individual citizens with "soul or spiritual rape."³⁴ This two-fold belief in separatism led Williams to his conclusions about disestablishment.

B. Banishment

As one may imagine, Williams's protests did not sit well with the Puritan establishment. Hall writes, "Neither civil nor ecclesiastical leaders in New England were inclined to sit idly by while their City upon a Hill went up in smoke."³⁵ The authorities believed Williams's teachings of separatism threatened both the external political viability and the internal social stability of the Massachusetts Bay Colony. Remember, the year was 1634, and the Puritans retained their patent and colony charter at the pleasure of the king. Hall explains, "Massachusetts authorities had ample reason to believe that their political future hinged on pledging at least the appearance of loyalty to the Church of England, and Williams's Separatist rantings threatened the appearance of that loyalty."³⁶ A political future was not their only concern. The Puritans feared internal instability and the displeasure of God more than that of the king. By excluding spiritual matters from the civil magistrate's jurisdiction, Puritan leaders believed that Williams threatened to "open[] the door 'unto a thousand *profanities*' . . . [and] prevent[] authorities from seeing that the land did not become 'such a *sink of abominations*, as would have been the *reproach* and *ruin* of *Christianity* in these parts of the world.'" ³⁷ The Puritans, it seems, believed their new world was a tinderbox ready to implode under the flame of religious liberty. Williams threatened to unravel the social tapestry that Massachusetts

33. *Id.* Hall uses the seven volume set *The Complete Writings of Roger Williams* (Russell and Russell, New York 1963) as the "primary source of Williams's writings," including the work *The Bloody Tenet, of Persecution*. *Id.* at 11 n.1.

34. See HALL, *supra* note 3, at 86-87, 96 n.82.

35. *Id.* at 37.

36. *Id.* at 34.

37. *Id.* at 37 (quoting colonial commentator Cotton Mather in COTTON MATHER, *MAGNALIA CHRISTI AMERICANA* 430 (Arno Press 1972) (1702)).

Bay authorities wove together to contain their precarious socio-political situation.

After rejecting the Boston church ministry, Williams served for a time as the minister of the Salem church. But the natural progression of his separatism consumed him. Williams persisted in contesting the ecclesiastical authority of the civil magistrate. He also eventually renounced his own Salem church after the congregation there failed to oblige him in renouncing the other churches of the Bay Colony.³⁸ Though the Puritan authorities initially tolerated his rantings, they became increasingly impatient with the ever more stubborn Williams.³⁹ In September 1635, the colony's General Court sentenced Williams to the "dry pit of banishment."⁴⁰ Rather than be shipped forcibly back to England, Hall explains, Williams fled to "the wilderness that became Rhode Island."⁴¹

Many today have criticized the banishment of Roger Williams by the Puritan establishment as an exercise in intolerance. It is important to note, however, that neither side of the issue that developed around Williams's presence in New England was very "tolerant" in the modern sense of the word. It has been easy for commentators today to decry to the intolerance of the Massachusetts Puritan establishment. Nobody today likes, for example, the idea of government authorities cutting the ears off a man for having uttered "scandalous speeches" against the government and church of Salem.⁴² Most have not understood, however, the "relentless[] intoleran[ce]" of Roger Williams.⁴³ Hall suggests that this misunderstanding is due to the fact that most theorists today

38. Hall describes this as Williams's "one final display of Separatist zeal." *Id.* at 38.

39. Hall outlines the "four propositions advanced by Williams" that the Massachusetts authorities interpreted as "jeopardizing the fragile social order" of the Bay Colony. *Id.* at 33. Those propositions were (1) Williams's insistence on visible acts of separation from the Anglican church; (2) Williams's objections to the legitimacy of the king's asserted authority over the New World—he believed the "Natives [were] the true owners" of the land; (3) Williams's objections to the colony's "oath of loyalty" as a form of "government-sponsored mockery of God"; and (4) Williams's defining the scope of civil authority so as to exclude spiritual matters. *See id.* at 33-37.

40. *Id.* at 38-39.

41. *Id.* at 39.

42. *See id.* at 48-49 (discussing the corporal punishment meted out to the Puritan dissenter Philip Ratcliff in 1631 and the "similar treatment" given to Quakers thirty years later).

43. *Id.* at 27.

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approach Williams's situation under the belief that "[r]eligious dogmatism . . . [is] incompatible with liberal democratic discourse."⁴⁴ Without realizing the actual compatibility of the two concepts, many wonder how such a fervent advocate of civil toleration in religious matters could, by refusing the offer to minister in the Boston church and objecting to any form of religious pluralism, express such an "unlamblike frame," an "unmovable stiffness," and "headiness" in his dogmatic separatism.⁴⁵ Hall forces us to understand America's religious dogmatism, and he contrasts Williams's harsh separatist attitude with the softer ecumenical approach so often expressed by the Supreme Court today.⁴⁶

Hall suggests that Williams well represented the mindset of the early Americans; he was, in short, "a paragon of obstinacy in an obstinate century."⁴⁷ Many today assume that the origins of the First Amendment lie in a sort of official toleration or ecumenism of times past. Tolerance was really a non-issue in the origin of religious liberty thought, however. By portraying Williams as the unabashed religious fanatic, Hall suggests, quite differently, that the First Amendment roots are to be found in the headiness of a religious dogmatist expressing a decidable intolerance. Hall's characterization of First Amendment beginnings can help us understand why so many remain unsatisfied with many jurists' failure to distinguish between the tolerance the First Amendment mandates and the religious intolerance the First Amendment was designed to protect. Williams understood that one person's tolerance was another's intolerance. In Williams's world both sides showed themselves intolerant, and Williams did not object to intolerance in principle. Williams merely protested the state-sanctioned intolerance of the Massachusetts colony; that position eventually led the established Puritans to banish Williams from their presence.

Over the course of four decades following his banishment, Williams and his followers founded and developed the Providence Colony that eventually became Rhode Island. The settlers established there a compactual civil government with powers limited "only [to] civil things," and crafted a "remark-

44. *Id.* at 161.

45. *Id.* at 18.

46. *See id.* at 162-63 (contrasting Williams's separatism with Justice Scalia's ecumenical "intolerant tolerance" expressed most frequently in school prayer cases).

47. *Id.* at 18.

able” system of disestablishment with regard to church state matters.⁴⁸ The principle focus of Hall’s book during this period of time is not the Rhode Island colonial experiment, however. Most legal scholars of Williams’s day dismissed Rhode Island’s “poly-piety,” and even Williams himself noted the great amount of disorder suffered by his colony.⁴⁹ Colonial Americans believed Rhode Island’s experiment with religious liberty was a dismal failure, the “latrine of New England.”⁵⁰

Hall concentrates his analysis, rather, on Williams’s efforts during his time in Rhode Island to expose the “persecution” of the New England Puritans. Almost immediately upon his arrival in Rhode Island, it seems, and continuing for the next forty years, Williams assaulted the persecution of the New England Puritan establishment with a “stream of letters and books.”⁵¹ Hall explains that these writings “were more than a mere stream of ad hominem arguments” against the Massachusetts authorities.⁵² Williams rose above the emotional level of the struggle and dissected the Puritan persecution at the intellectual level. “Williams located the root of persecution in bad thinking.”⁵³ Hall spends two chapters outlining the particulars of the debate between Williams and the Puritan establishment.

C. The Intellectual Syllogisms of Religious Persecution and Religious Liberty

The New England Puritans regularly exercised civil power to punish religious dissenters. There is a tendency to believe that these public condemnations were the result of irrational primitive fear and animosity. However, Hall bares three social “premises and deductions” of the Puritan institution to demonstrate how religious persecution thrived in the “cool light of reason.”⁵⁴ Roger Williams attacked these intellectual bases of the Puritans’ religious persecution.

First, the Puritans believed the Bible, and they saw themselves as literal heirs of the biblical tradition. They analogized their situation to that of the nation of Israel in the Old Testa-

48. *Id.* at 100.

49. *See id.* at 100-03.

50. *Id.* at 116, 136 n.2.

51. *Id.* at 72.

52. *Id.*

53. *Id.*

54. *Id.* at 48-49.

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ment. As a result, they looked to the Bible as a source of law, literally, and saw heresy in any form of government that was not a theocracy. Puritan magistrates, according to leading colonist John Winthrop, were to dispense justice "by the rules of God's laws and our own."⁵⁵ Their belief about the direct relevance of Old Testament text and its natural applicability to all God's children formed the first premise of their social logic.

The second premise concerns the Puritan vision of liberty. Liberty to the Puritans was liberty to establish a "New Zion" for holy commonwealth.⁵⁶ Because they held this responsibility in such high esteem, the only freedom they guaranteed religious dissenters was, in Nathaniel Ward's words, "freedom 'to keep away from us.'"⁵⁷ They envisioned their power to punish religious transgressors as a power arising out of the social contract. Hall explains, "the ideas of contract and consent . . . formed a second critical premise of [Puritan] establishment logic."⁵⁸

Because the Puritans saw their spiritual efforts as a community effort, it was not difficult to form the third premise of their establishment syllogism: that spiritual error has public consequences. Hall explains, "Puritans likened those who propagated erroneous religious views [and evildoers] not only to a contagion but also to thieves and murderers who stole the purity of true believers and seduced them to follow the way of spiritual death."⁵⁹ Colony authorities, therefore, "made it their business to secure civil peace by securing ecclesiastical peace, . . . and in this business they were largely successful."⁶⁰

In his writings, Roger Williams challenged the three premises of the Puritan's social logic. Williams argued: (1) that the Old Testament was a relevant legal text only at a sufficiently abstract level;⁶¹ (2) that the religious covenant with God was prior to the social contract and, therefore, "God had not invested the people of any civil state with power to rule the

55. *Id.* at 54 (quoting 2 WINTHROP, *supra* note 16, at 238).

56. *Id.* at 56.

57. *Id.* at 55-56 (quoting NATHANIEL WARD, *THE SIMPLE COBLER OF AGGAWAN IN AMERICA* (P.M. Zall ed., Univ. of Neb. Press 1969)).

58. *Id.* at 56. Many note the irony that a religious people fleeing the institutionalized religious persecution of the Anglican church would turn around and institute that very same form of persecution in their own society.

59. *Id.* at 59.

60. *Id.*

61. *See id.* at 73-77.

church or keep it pure”,⁶² and (3) that because “the citizen and the magistrate need not profess and practice true religion to fulfill their roles,” the “agitation occasioned by religious controversy did not threaten the peace of the civil state.”⁶³ Nowhere in Williams’s writings will the legal scholar find the kind of secularism so prevalent in discussions about religious liberty today. “To whatever radicalism he ultimately inclined,” writes Hall, “Williams nevertheless remained steadfastly within the world of faith. . . .”⁶⁴ And according to Hall, Williams’s responses to the Puritan persecution logic eventually formed the theoretical foundation of the First Amendment.⁶⁵

III. ROGER WILLIAMS AND THE CONSTITUTION

A. *Roger Williams as a Constitutional Resource*

Plainly, Hall believes that Roger Williams should have an important role in constitutional discourse today. In his book, however, he does not attempt to make a direct “genealogical” link between Williams’s thought and the constitutional founding. Hall notes that Williams’s thought had begun to make a resurgence around the 1770s but writes, “Even then, influential theorists such as Locke, Madison, and Jefferson proceeded without apparent influence from Williams’s ideas.”⁶⁶ Efforts to demonstrate any sort of “tutelage” from Williams to Madison, Hall admits, are “far from persuasive.”⁶⁷ Nevertheless, Hall asserts that Williams remains significant to contemporary discussions concerning religious liberty because he “exemplifies a voice within [the history of the First Amendment] often drowned out by the Enlightenment resonance of Jefferson and Madison.”⁶⁸

62. *Id.* at 78.

63. *Id.* at 79-81.

64. *Id.* at 147.

65. See *id.* at 3, 116-18 (noting that “[a]ttempts to demonstrate that constitutional architects such as James Madison received tutelage . . . from Williams are far from persuasive,” *id.* at 3, but arguing that because Williams “stands at the beginning,” *id.*, of the American legal tradition of religious liberty and because he “exemplifies a voice within [First Amendment] history,” *id.* at 117, “the significance of Roger Williams does not hinge on any precise genealogical line between his ideas and the constitutional text,” *id.* at 3).

66. *Id.* at 117.

67. *Id.* at 3.

68. *Id.* at 117.

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B. Comparing Roger Williams to Locke, Jefferson, and Madison

Hall spends an entire chapter of *Separating Church and State* comparing the content of Williams's thought with the "humanistic rationalism" of Locke, Jefferson, and Madison. He uses Williams as a "counterpoint" to demonstrate how our First Amendment jurisprudence should reflect its origins in "evangelical passion."⁶⁹ He begins his analytic comparison with Locke.

1. Roger Williams and John Locke

The fundamentals of John Locke's writings, according to Hall, are "strikingly similar to those of the Rhode Island firebrand."⁷⁰ Hall points out that both Locke and Williams "attempted to defend religious liberty by circumscribing the scope of civil government."⁷¹ Locke's writings, however, had a much greater impact on Puritan intolerance than the writings of Williams. Hall explains that it was only after Williams died that the Puritans began moderating their intolerance—a development that came about primarily in response to pressure from England and the proponents of the Toleration Act of 1689, for which Locke was the "intellectual father."⁷² Locke's *Letter Concerning Toleration* likewise became a major influence on constitutional thinking in early America.

Locke and Williams were limited in what they agreed upon, however; their views diverged especially with regard to the scope of religious liberty. These differences seem to indicate a certain incompleteness about Williams's religious liberty. Hall explains, "Williams never faced quite squarely the question of whether religious belief was subject to what now would be termed the neutral laws of general applicability."⁷³ Locke addressed this question, but his answer seems equally unsatisfying and unavailing: Locke resolved all conflicts between religious conscience and general law in favor of government authority. Hall observes, "Locke failed to acknowledge sufficiently the extent to which notions of 'public peace' and 'harm

69. *Id.*

70. *Id.* at 118.

71. *Id.*

72. *Id.* at 116.

73. *Id.* at 119.

to others' could be manipulated to limit religious freedom."⁷⁴ The problem with Locke's "the state wins" rule, according to Hall, is that it achieves its protection of religion only by marginalizing religion.⁷⁵ Hall concludes, "Locke's principal argument for religious liberty . . . yields a stunted concept of that liberty. His argument concerning the ineffectiveness of persecution never forcefully replicates Roger Williams's metaphor of persecution as rape."⁷⁶ Williams, Hall argues, was much more sensitive to the possibility of a government-sponsored-secularist policy burdening religious conscience.

2. *Roger Williams and Thomas Jefferson*

Thomas Jefferson has been a (if not "the") major source of reference for Supreme Court religious liberty jurisprudence. Williams and Jefferson share many of the beliefs reflected in Jefferson's contributions to the Virginia Bill for Establishing Religious Freedom and in his famous Danbury Baptist letter. In contrast with Locke's rule, Williams and Jefferson both extended religious liberty to atheists and Catholics. Jefferson and Williams also both agreed that state support threatened to corrupt religion. But Hall argues that because Jefferson's writings were only "occasional," his theory was ultimately unarticulated and incomplete.

Williams developed an elaborate theory around his separatism and religious dogmatism, whereas Jefferson relied primarily on only one justification for religious liberty: that the "[m]ind 'cannot be restrained,' and attempts to do so 'tend only to beget habits of hypocrisy and meanness.'"⁷⁷ Hall argues that Jefferson's Virginia Bill contained little more than a "freedom not to be required to worship."⁷⁸ He writes, "[T]o say that government may not coerce beliefs is to say very little."⁷⁹ Williams, in contrast, conceived of a religious liberty that included not only the freedom to believe but the freedom to exercise that belief. Hall concludes, "[Jefferson's] views concerning religious liberty were remarkably hospitable to his own brand of reli-

74. *Id.* at 120-21.

75. *See id.* at 122.

76. *Id.* at 124.

77. *Id.* at 125.

78. *Id.* at 126.

79. *Id.* at 128.

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religious experience and far less protective of the religious experiences of others.”⁸⁰ Jefferson’s religious experience was an intellectual affair, far removed from acts and conduct. Williams, according to Hall, “demonstrated a far greater sensitivity than Jefferson to consciences that differed from his own.”⁸¹ In short, Jefferson expounded a doctrine for religious liberty that reflected what Hall calls a “freedom from religion.”⁸² Williams, on the other hand, constructed a religious liberty that included more of a “freedom for religion—what Hall calls an individual’s “freedom to obey God.”⁸³

3. *Roger Williams and James Madison*

Roger Williams and James Madison share many more fundamental beliefs about religious liberty than Williams and Jefferson or Locke. Madison, for example, advocated the same sort of freedom “to embrace, to profess and to observe” religion that Williams did.⁸⁴ And Madison envisioned the same kind of heightened scrutiny review as Williams: that religious liberty would be limited only “by certain specified government interests.”⁸⁵ Like Williams, Madison founded religious liberty in the belief that religious obligations arise prior to the social contract. Madison believed that religious freedom arose out of the recognition that man owed God prior and weightier obligations than he owed the state.⁸⁶

Though their personal faiths differed immensely (Hall describes their differences as coming from “opposite poles of religious understanding”), Williams and Madison developed “a concept of religious toleration of uncanny resemblance.”⁸⁷ Hall writes, “Each could imagine a society in which religious disorder did not inevitably destroy public order. Each saw the world under the dominion of competing sovereigns and sought to

80. *Id.* at 131.

81. *Id.* at 132.

82. *Id.* at 130.

83. *Id.* at 129-30.

84. *Id.* at 135 (citing James Madison’s *A Memorial and Remonstrance*, written to Virginia’s General Assembly to protest the establishment scheme of “A Bill establishing a provision for Teachers of the Christian Religion” that was proposed and ultimately defeated during the later part of the 1780s)

85. *Id.*

86. *See id.* at 134.

87. *Id.* at 136.

fashion bounds by which individuals would not be called upon to betray either.”⁸⁸ Hall argues that Williams and Madison, in contrast to Locke, Jefferson, and the secularist approach of the Supreme Court today, “took religion seriously, seriously enough to deem it worthy of the most vigilant protection.”⁸⁹

C. *Roger Williams’s View and Approach*

Though Hall never specifically says so, Roger Williams would take a decidedly nonpreferential approach to religion clause jurisprudence today. This conclusion will disappoint many who would have hoped otherwise. Nonpreferentialism is the minority, but persistent, view in modern religion clause jurisprudence that the First Amendment requires impartiality as between particular religions and sects but not as between religion and irreligion.⁹⁰ The majority view of the Supreme Court, in contrast, as reflected in opinions as early as *Everson v. Board of Education*,⁹¹ requires strict governmental neutrality.⁹² To meet the standard of constitutionality under *Everson*, a government action must be secular in purpose and secular in primary impact.⁹³ *Everson* requires the government to be absolutely neutral—in other words, “not just among Protestant

88. *Id.*

89. *Id.*

90. See *Rosenberger v. Rector*, 515 U.S. 819, 855 (1995) (Thomas, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting); see also George F. Will, Editorial, June 5, 1985, excerpted in Eastland, *infra* note 93, at 368-69 (criticizing the Court’s *Everson* and *Wallace v. Jaffree* line of decisions—those reasoning that “the Establishment Clause requires government to be punctiliously neutral, not between religious sects but between religion and secularism”—as “contrary to the clear evidence of the Framers’ intentions,” and suggesting “Will’s Generic Opinion [that t]he practice in question does not do what the Establishment Clause was intended to prevent—impose an official creed, or significantly enhance or hinder a sect—so the practice is constitutional and the complaining parties should buzz off”).

91. 330 U.S. 1 (1947).

92. This view has been described by Gerald Gunther and Kathleen Sullivan as one of “voluntarism and separatism.” See, e.g., GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1463 (13th ed. 1997) (quoting Larry Tribe, Gunther and Sullivan explain, “[Voluntarism means] that the advancement of a church would come only from the voluntary support of its followers and not from the political support of the state. [Separatism means] that both religion and government function best if each remains independent of the other”).

93. See Terry Eastland, *Introduction*, in *RELIGIOUS LIBERTY IN THE SUPREME COURT* 2-3 (Terry Eastland ed., 1993) (describing the 1947 *Everson* decision and the three-part *Lemon* test that the Supreme Court developed later pursuant to *Everson*, but acknowledging that the “‘*Lemon* test’ has not always been applied in establishment cases”).

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churches . . . or among all religious groups, but also between religious believers and non-believers."⁹⁴

Nonpreferentialism, best articulated by Justice Rehnquist's dissent in *Wallace v. Jaffree*, requires the Supreme Court to interpret the First Amendment as "designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects," but not "as requiring neutrality on the part of government between religion and irreligion."⁹⁵ A nonpreferentialist interpretation of the religion clauses would permit Congress or a state to "pursu[e] legitimate secular ends through nondiscriminatory sectarian means."⁹⁶

One may question the usefulness of Williams's nonpreferentialism today. Williams would object to any sort of nonpreferentialism that threatened to "stain" citizens, for example, but his conception of "stain" depended primarily on his own feelings about the particular practice of that religion in question.⁹⁷ Hall points out, however, that Williams "would have permitted the civil magistrate to encourage true religion. . . . He often declared that the civil magistrate ought to 'countenance' and 'encourage' the church . . . , to protect believers from would-be persecutors and permit them to exercise their religions freely."⁹⁸ Williams was especially concerned about forcing religious minorities to remove themselves from "the republican discourse concerning the common good."⁹⁹ It is precisely because of this kind of concern and complexity that Hall proposes a reintroduction of Williams as an intellectual resource for our legal discourse today. True democratic processes require the participation of everyone in the community.

94. Eastland, *supra* note 93, at 3 (citing Justice Black's opinion in *Everson* in which he wrote, "Neither a state nor the Federal Government . . . can pass laws which aid . . . all religions").

95. *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) (coming to this conclusion in establishment clause jurisprudence after reviewing Madison's thinking "reflected by actions on the floor of the House in 1789" and contrasting his views with "the Court's opinion in *Everson*"). *But see* *Lee v. Weisman*, 505 U.S. 577, 612 (Souter, J., concurring) ("While a case has been made for [the nonpreferential] position, . . . I find in the history of the [Establishment] Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*.")

96. *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).

97. *See* HALL, *supra* note 2, at 105, 156-58 (reviewing Williams's theory of "religious pretenses" which expresses an overly confident " 'I know it when I see it' attitude" and reviewing Williams's concept of "spiritual stain").

98. *Id.* at 91

99. *Id.* at 158.

IV. THE IMPACT OF ROGER WILLIAMS ON JURISPRUDENCE TODAY

While Roger Williams may be a nonpreferentialist, he is unlikely to satisfy completely either side of any particular question in religious clause jurisprudence today. Hall appears to endorse an originalist interpretative approach for our modern religion clause jurisprudence,¹⁰⁰ but he distances himself somewhat from the particulars of the contemporary debate.¹⁰¹ Hall is merely concerned, he reassures his readers, with “situating [Williams’s] arguments within the broad currents of constitutional tradition relating to the religion clauses.”¹⁰² In this “larger debate about religious freedom and religious establishment,” Hall concludes, “Roger Williams deserves a renewed invitation.”¹⁰³

Williams’s contributions will likely enrich the debate but will not necessarily resolve it. Hall writes, “[Williams] alienates Jeffersonian skeptics by the fervency of his faith and believers by the secularism of his political vision.”¹⁰⁴ It was precisely this kind of complexity, Hall acknowledges, that made early Americans forget about Williams in the first place.¹⁰⁵ Nevertheless, Hall expects that the legal scholar will find his Williams-revitalization effort long overdue. Situated between the debate of skeptics and believers, Williams may just provide the reconciliatory catalyst that our religion clause jurisprudence has been missing.

100. *But see id.* at 5 (allowing a legal thinker to use Williams “whether one is an originalist and believes that the Constitution should be construed to reflect the intent of its Framers or whether one seeks to infuse the words of the First Amendment with some concept of religious liberty not necessarily coextensive with the Framers’ intent”). Perhaps Hall’s assumption reflects the development, acknowledged by Michael Perry, that in constitutional theory “we are all originalists now.” Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 718 (1991) (noting that “we (constitutional theorists, judges, [and] lawyers, etc.) . . . are all originalists now—or should be,” but arguing that “originalists must be nonoriginalists” and that the “originalism/nonoriginalism debate is now largely spent”).

101. *See* HALL, *supra* note 2, at 7-8 (discussing some of the particular issues in the Supreme Court’s “ongoing deliberation concerning religious liberty,” but emphasizing that he is merely “situating [Williams’s] arguments within the broad currents of constitutional tradition relating to the religion clauses”).

102. *Id.* at 7.

103. *Id.* at 8.

104. *Id.* at 166.

105. *See id.* at 116 (“[D]eath finally quenched Roger Williams’s insatiable thirst for debate. New England found itself free at last from the sound of his polemic and, in honor of the event, promptly forgot him.”).

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Hall describes the development of today's debate between skeptics and believers:

[T]he First Amendment religion clauses had their origins in conflicting traditions: the one variously described as Enlightenment or humanistic rationalism, the other as evangelical or Protestant dissent. . . . Subsequently, however, a theoretical posture derived principally from Jefferson, the archetypal American representative of Enlightenment thought, came to dominate First Amendment jurisprudence.¹⁰⁶

Skeptical Enlightenment thought came to dominate religion clause jurisprudence even though it shares the history of the First Amendment with evangelical dissent.¹⁰⁷ That dominance began in *Reynolds v. United States* when the Supreme Court relied upon Jefferson's letter to the Danbury Baptist—in which Jefferson set forth the metaphor of the “wall of separation” to describe the First Amendment religion clause—as “an authoritative declaration of the scope and effect” of the First Amendment's religion clauses.¹⁰⁸ Hall questions and discredits the Supreme Court's “authoritative” reliance upon Jefferson's wall of separation metaphor. He argues, “Th[e] Jeffersonian dominance of First Amendment theory is historically untenable . . . [because] the first amendment owes more to evangelical passions than to Enlightenment skepticism.”¹⁰⁹ Hall concludes *Separating Church and State* by providing an indication of how he expects a return to the thought of evangelical passion and dissent, as expressed by Williams, will affect our modern interpretation of both the Establishment and the Free Exercise Clauses.

A. *Roger Williams and the Establishment Clause*

Hall is not certain how Williams would resolve issues such as civic prayer and other public religious displays that the in-

106. *Id.* at 117.

107. *See id.*

108. *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *see also* HALL, *supra* note 2, at 116-17.

109. HALL, *supra* note 2, at 117; *see also id.* (quoting the observation of William Lee Miller, in *The First Liberty: Religion and the American Republic*, that “dissenting Protestantism ‘had more to do, over all, over time, pound for pound, head for head, with the shaping of the American tradition of religious liberty than did the rational argument”).

terpretation of the Establishment Clause faces today.¹¹⁰ He expects Williams's approach would certainly be refreshing, however. Williams's separatism would lead him to caution against government-sponsored religious exercises, but for different reasons than the secularist Supreme Court. The Court in *Engel v. Vitale* struck down a school prayer statute reasoning that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."¹¹¹ Williams, on the other hand, would proscribe harm inflicted by such an exercise because it would both "force religious minorities to sever civil communion to avoid spiritual pollution" and "wound the civil community by compelling the severance of religious minorities and thus fracturing the community."¹¹² Hall favors Williams's approach because it would move the civic prayer jurisprudence away from the Supreme Court's casting of religious dissenters and nonbelievers "into [the] unflattering role of weakness, as though the establishment clause were a necessary guardian for timid souls."¹¹³

Hall worries that by our modern secularism, we have moved toward an official ecumenism that strips religion of its fervency and meaning and strips liberal democracy of a critical ally. Separatist toleration, writes Hall, can be distinguished from ecumenical toleration, like that advocated primarily by Justice Scalia, in two respects: (1) Separatist toleration is "pre-occupied" with our differences rather than any similarities between our religious traditions, and (2) "[s]eparatist toleration . . . engender[s] . . . simply civil cooperation."¹¹⁴ Separatist toleration, therefore, tolerates religious intolerance. By tolerating intolerance, we move toward democratic reconciliation. The importance of this separatism cannot be overstated; Hall suggests we take a lesson from our history. "Separatists have fre-

110. See *id.* at 6 (summing up current debate over the First Amendment including the question, "Second, does a nation need a common religious foundation and should government be able to foster such commonality?"). Note that Williams did not address an issue that has arisen due to our "modern welfare state": "[T]o what extent should concerns for keeping religion and government separate disqualify religious believers and religious institutions from receiving benefits made generally available . . . ?" *Id.*

111. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

112. HALL, *supra* note 2, at 158.

113. *Id.* at 157.

114. *Id.* at 160.

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quently been on what we would now designate the side of the angels in important disputes, and the more ecumenically spirited have championed causes that now smack of intolerance."¹¹⁵ It was the ecumenics, Hall reminds us, who opposed Jefferson's Bill for Establishing Religious Freedom. The separatists, chiefly Baptists, aligned themselves with Jefferson and Madison to defeat the Bill Establishing a Provision for Teachers of Christian Religion and enact Jefferson's bill in its stead.¹¹⁶

Hall argues that the American tradition of religious liberty "is animated principally by a concern to preserve rather than subdue religious difference."¹¹⁷ Were this separatist toleration to be implemented in modern Establishment Clause jurisprudence, rulings of constitutionality would no longer depend on a law's ecumenism or pristine secularism.¹¹⁸ Perhaps Williams's greatest contribution to United States Supreme Court jurisprudence would be to show that "dogmatism alone does not threaten democracy."¹¹⁹

B. Roger Williams and the Free Exercise Clause

Roger Williams developed a free exercise doctrine that included the right to believe and exercise. But even then, he realized "that the religious conscience was not [completely] exempt from the commands of the law."¹²⁰ Hall sums up the free exercise debate today with the following question: "[U]nder what circumstances should believers be granted exemptions from laws serving legitimate public purposes and not aimed at the suppression of religion when those laws conflict with the claims of religious conscience?"¹²¹ Hall notes that Williams "never faced squarely the question of whether religious belief was subject to what now would be termed the neutral laws of general applicability."¹²² In his writings and in the Rhode Island ex-

115. *Id.* at 161.

116. *See id.*

117. *Id.* at 164.

118. *See, e.g.,* Will, *supra* note 90, at 368-69 (criticizing the Supreme Court's approach in *Wallace v. Jaffree* in which "Justice Stevens, writing for the majority, took twenty-three pages to explain that Alabama's purpose was not pristinely secular and hence the law violates the convoluted misconception with which the Court had replaced the unambiguous concision of the Framers' Establishment Clause").

119. HALL, *supra* note 2, at 162.

120. *See id.*

121. *Id.* at 6.

122. *Id.* at 119.

periment, however, Williams did contemplate the limits of religious liberty.

The religious conscience was not exempt from the commands of law under Williams's religious liberty. He developed a concept of "religious pretenses" or "unadorned meanness masquerading as religious sensibility" to prevent uncivil behavior rationalized under the auspices of religious conscience.¹²³ Williams doubted, according to Hall, "whether acts of incivility could ever be authentically religious."¹²⁴ Hall notes that "Williams's willingness to subject 'religious pretenses' to the general requirements of civil law may have betrayed an overly confident 'I know it when I see it' attitude toward authentic religion."¹²⁵ Williams's primary contribution to this area, however, was the recognition that "both conscience and government ha[ve] limits."¹²⁶

The limits of government included the protection of religious conduct and exercise. In contrast to the Supreme Court's contemporary Free Exercise doctrine, Roger Williams would not "subject[] the claims of conscience to *any* generally applicable law so long as it does not deliberately infringe upon religious belief or act."¹²⁷ In Williams's view, "Liberty of conscience protected the individual from the dilemma of having to choose between sovereigns [i.e., God and Caesar]"¹²⁸ In his writings, Williams developed the concept of "compelled from" worship to compliment the concept of coerced or compelled worship that Jefferson was so concerned about.¹²⁹ Williams turned religious liberty, in short, into a "freedom for religion," instead of the Jeffersonian emphasis on "freedom from religion."¹³⁰ Williams's theory perhaps best exemplifies the special place religion occupies in the Constitution with his conception of religious

123. *Id.* at 105. Williams would probably question and reject Justice Black's definition of religious liberty granting free exercise protection even to those holding "essentially political, sociological, or philosophical views or a merely personal moral code." See *Welsh v. United States*, 398 U.S. 333 (1970) (finding a valid conscientious objector exemption even though the Vietnam era draft law excluded beliefs based on "political, sociological, or philosophical views or a merely personal code" from protection).

124. HALL, *supra* note 2, at 105.

125. *Id.*

126. *Id.* at 109.

127. *Id.*; *cf.* *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

128. HALL, *supra* note 2, at 149.

129. *See id.* at 108.

130. *Id.* at 130.

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liberty as “the right of the individual to respond to the divine command.”¹³¹ Because he envisioned the divine covenant as an obligation prior to the social contract, Williams gives us a First Amendment concerned with the “freedom to obey God.”¹³²

V. CONCLUSION

Abraham Lincoln once noted that a Supreme Court decision is never a “thus saith the Lord.”¹³³ Lincoln believed that Americans, including devout Americans, should work to change Supreme Court rulings they may disagree with. The experience of Roger Williams reinforces Lincoln’s candor in constitutional beginnings. In contrast to that shared democratic vision, however, the Supreme Court’s shift to secularism has effectively excluded the “intellectual vocabularies” of religion from modern jurisprudence.¹³⁴ With this book, Hall proposes we reintroduce the language of that “fundamental vision of life [that] can only be communicated within religious terms” back into the religious liberty discourse and constitutional jurisprudence.¹³⁵ Williams can help in this effort, Hall suggests, because he used “that particular vocabulary” of “believers” to champion religious liberty.¹³⁶

Our Constitution contemplates a participatory society. Hall writes, “The parchment existence of the First Amendment’s religion clauses does not guarantee the security of religious freedom . . . [A] political consensus . . . requires a formative political discourse.”¹³⁷ In the past century, secularist skeptics have dominated First Amendment religion clause jurisprudence. Religious Americans have become understandably frustrated that

131. *Id.* at 149.

132. *Id.* at 129.

133. Eastland, *supra* note 93, at vii.

134. HALL, *supra* note 2, at 147; *see also* Dent, *supra* note 1, at 56 (“[S]ecularist justices [have] sought to banish religion from public life and exile it to the private sphere Because most moral principles widely-held in America stem from religion, however, there is no clear, objective basis for distinguishing secular from religious purposes.”); Frederick Mark Gedicks, *Religion*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 717 (Kermit L. Hall ed., 1992) (“The constitutional doctrines developed by the Court under the free exercise and establishment clauses can best be understood . . . within the context of a secular public culture that considers religion a predominantly private activity of no unique social significance.”).

135. HALL, *supra* note 2, at 147-49.

136. *Id.* at 149.

137. *Id.* at 148.

the “kind of bilingualism” that was once shared by the framers of the First Amendment had become “increasingly rare.”¹³⁸ Without a common baseline rooted in a “believing parentage,” the majority of Americans has been backed into an unflattering position of weakness.¹³⁹ At a time in which some commentators are even questioning the probability of a religion clause theory at all, we need a reconversion to religious liberty, for skeptics and believers alike. As Hall suggests, Roger Williams, the “apostle of religious freedom to the religiously devout,” and the insubordinate radical who for over forty years kicked against the pricks of the Puritan Establishment, might just be the religious and constitutional zealot we are looking for.¹⁴⁰

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138. *Id.* at 149.

139. *See* Dent, *supra* note 1, at 55 (“The Court believe[s] religious people are irrational, try to suppress the truth, and need to be enlightened with secular truth.”).

140. HALL, *supra* note 2, at 147, 149.

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