PEACE, ORDER & GOOD GOVERNMENT:

A FOUNDATIONAL APPROACH TO FAITH-BASED LEGAL EXCEPTIONALISM

IN

ENGLAND, CANADA & THE UNITED STATES

by

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ABSTRACT

This study analyzes the connection between the Peace, Order & Good Government doctrine ('POGG') and responses to requests for faith-based legal exceptionalism in England, Canada, and the United States. By assessing certain aspects of the three nations' imperial/colonial heritage, the study demonstrates that POGG acts as the catalyst for their disparate approaches to constitutionalism (*i.e.,* church-state arrangements). The connection is significant since the concept of multiculturalism has seemingly become the basis for justifying extraordinary accommodation requests that include not only non-democratic political ideologies but also constitutionally-challenging religious choice of law preferences. The prevalence of requests for accommodation has been more recently linked to migrants from nations where religion and government are inextricably bound. As such, this study demonstrates the imprudence of relying on multiculturalism when responding to constitutional inquiries that necessitate a return to foundational principles. By revisiting more recent requests for Islamic law exceptionalism, this study assesses POGG's foundational connection to the national rejoinders of England and Canada. This study then advocates for the United States to return to foundational principles to frame a prudent rejoinder to similar requests, which will likely prevent an unprecedented enlargement of the 1st Amendment to the U.S. Constitution.

DEDICATION

I dedicate this project to Him!

"Lord, turn my heart and my mind toward You
and toward the role You have chosen for me to live out.
Help me to put Your will and Your purpose ahead of my own.
I humbly bow before You and ask for Your direction and guidance,
as well as Your courage to live out the calling I've been given
'*for such a time as this*'.
In Your Son's Mighty Name I Pray, Amen."[1]

[1] Tony Evans, 'Devotional: For Such a Time as This' (*Proverbs 31 Ministries*, 2019) <https://www.proverbs31.org/read/devotions/full-post/2019/01/14/for-such-a-time-as-this>.

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LIST OF ABBREVIATIONS

ABA	American Bar Association (United States)
ACLU	American Civil Liberties Union (United States)
ADR	Alternative Dispute Resolution
ATCA OR ATS	Alien Tort Claims Act or Alien Tort Statute (United States)
BNA	Constitution Act of 1867 or British North America Act (Canada)
FAA	Federal Arbitration Act of 1925 (United States)
FSV	Fundamental Shared Values (United Kingdom)
HCA-65	Hart-Celler Immigration Act of 1965 (United States)
ICCPR	International Covenant on Civil and Political Rights (United Nations)
LLPH	Constitutional Doctrine of 'Life, Liberty & the Pursuit of Happiness' (United States)
MBL	Muslim Banking Law
MFL	Muslim Family Law
POGG or POgG	Constitutional Doctrine of 'Peace, Order & Good Government' or the 'Peace, Order & good Government' Clause
RUAA	Revised Uniform Arbitration Act of 2000 (United States)
RUDs	Reservations, Declarations, and Understandings
SPCK	Society for Promoting Christian Knowledge
SPG	Society for the Propagation of the Gospel in Foreign Parts
TRO	Temporary Restraining Order
UAA	Uniform Arbitration Act of 1955 (United States)
UDHR	Universal Declaration of Human Rights (United Nations)
UFLAA	Uniform Family Law Arbitration Act of 2016 (United States)

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INTRODUCTION

"An idea is like a virus. Resilient. Highly contagious.
And even the smallest seed of an idea can grow. It can grow to define or destroy you."[2]

It is generally understood that history is repetitive. As the axiom goes, "what has been will be again, what has been done will be done again; there is nothing new under the sun."[3] Notwithstanding the scholarly and/or political rebranding of a circumstance, history has shown itself capable of providing archetypical guidance for well-founded resolutions to modern societal issues. As such, it is somewhat perplexing when certain societal issues recur, and the least persuasive modern alternative is the one that involves heeding past lessons to sidestep certain aspects of repetition. This is arguably the present situation with requests for faith-based legal exceptionalism (*i.e.,* sanctioning faith-based choice of law options or ecclesiastical law platforms in place of or as appendages to the national judiciary). In the text, *The Great Emergence*, Phyllis Tickle suggests that throughout history "religion [has been] a social construct as well as an individual or private way of being and understanding."[4] Therefore, theories that suggest that one's soul is inextricably linked to the belief system proliferated by a national government or constitution, or the belief that one's religious ideology defies the laws of man—and should therefore be afforded extraordinary deference—are certainly not novel. Even still, the question of whether to afford extraordinary deference to those who hold one or both of these viewpoints seemingly continues to confound.

Instead of seeking lessons from history, the concept of multiculturalism has become the socio-political prophylactic to justify the Islamization of the social order in England, Canada, and the United States. Islamization as a facet of multiculturalism has resulted in expectations for the accommodation of not only non-democratic political ideologies but also acceptance of the theory that the religious legal precepts that emanate from Islam's religious text and prophet (*i.e.,* the Quran and Sunnah) are compatible with the democratic perspectives and/or the national rule of law in each nation. Accommodation also appears to assume that any encroachments on the religious liberties and/or legal rights of non-Muslims are reasonable, as they are in furtherance of multicultural inclusion. As the last instance of such expansive expectation of exceptionalism was occasioned by the rise of

[2] Nolan, Christopher, *et al. Inception*. 2010.
[3] Ecclesiastes 1:9 (New International Version).
[4] Phyllis Tickle, *The Great Emergence: How Christianity is Changing and Why* (Baker Books 2012) 33.

the British Empire, this study returns to the common colonial heritage of England, Canada, and the United States to seek historical guidance concerning the Islamic law inquiry. As the British Empire employed the doctrine of 'Peace, Order and Good Government' or POGG to effectuate faith-based legal exceptionalism, this study endeavors to reassess the degree to which POGG affected constitutional perspectives on religious plurality in each nation. Reevaluating these effects also evidences that the most prudent guidance concerning the question of faith-based legal exceptionalism is embedded not in modern theories on multiculturalism but in that overlapping history.

In the United States specifically, post-9/11 attitudes toward Muslim immigrants have been (and may remain) an enduring socio-political barrier to formulating a judicious legal response to what can be properly described as a trajectory-altering constitutional conundrum. Instead, rebranding Islamic law exceptionalism as a facet of multiculturalism aids in fostering a theory that utilizing the American judiciary to uphold the legal precepts of Islam is supportable as indispensable to multicultural 'authenticity'.[5] This perspective also makes requests for Islamic law exceptionalism appear to be a matter of first impression, which dissuades making historical comparisons concerning the means by which denominations or religious subgroups attempt to secure superior deference on a nation or international scale. Therefore, the United States appears to have reached an alarming precipice, confronting the issue of allowing the purported demands of multiculturalism to justify unprecedented expansions to the 1st Amendment to the U.S. Constitution for the sake of normalizing the religious guidelines and/or legal precepts associated with the Islamic faith. This is the case despite the wide-reaching implications, which include the likelihood of curtailing the rights and freedoms of citizens who do not espouse Islam.

With this in mind, the general aim of this study is to demonstrate the aforementioned axiom in the socio-legal context, particularly where it pertains the convergence of multiculturalism, religious pluralism, and constitutionalism in the three focus nations. The primary aim of this study is to underscore the problematic consequences of late-stage faith-based legal exceptionalism—particularly as it concerns Islamic law—on denominationalism and religious liberty in nations that have already established a constitutional stance on religion and government disestablishment as a response to religious plurality. Where it

[5] Matthew Wright and others, 'Multiculturalism and Muslim Accommodation: Policy and Predisposition Across Three Political Contexts' (2017) 50 Comparative Political Studies 102, 103.

pertains the juxtaposition of the three nations, this study concentrates predominantly on the foundational history and current circumstances in the United States. Although the nuances of the Islamic law inquiry in each nation will be assessed, the fact that England and Canada have already adopted national policies means that their circumstances are germane where they aid in informing the U.S. experience, or they provide guidance that might be beneficial in light of their common colonial nexus. Particularly relevant is the fact that, despite a protracted imperial/colonial relationship, England and Canada have adopted divergent policies based on the post-colonial effects of British Imperialism, which established the imperatives of POGG as a customary means of colonization. The benefit of returning to the point where the three nations were parts of a larger whole is that it affords a more pristine vantage point from which to evaluate the weight of foundational history and the importance of constituting ideals when addressing faith-based legal exceptionalism.

With this in mind, Chapter 1 establishes the scope and limitations of the research attempted herein by providing a basis for understanding not only the POGG doctrine but also the supporting concepts and theories relied upon in subsequent chapters. The analyses undertaken in Chapters 2 through 4 are historiographic in nature. They reevaluate certain historical occurrences in light of the implications of the POGG doctrine (and where relevant, the POgG clause) for England (Chapter 2), the United States (Chapter 3), and Canada (Chapter 4). They also synopsize specific socio-legal issues created by the question of sanctioning Islamic law tribunals to highlight correlations between historical and modern expectations for faith-based legal exceptionalism. Thereafter, Chapter 5 analyzes the present stance on Islamic law in the U.S. in light of the viewpoints of the Constitutional Framers. This juxtaposition evidences the benefit of heeding the Framers' assessments on religious liberty where they intersect with the constitutionality of national exemptions and/or exceptionalism. Chapter 6 evaluates the potential consequences of the U.S. disregarding the implications of the POGG doctrine, and by extension reinforces the case against disregarding the Framers' guidance concerning denominationalism and religious equilibrium. Finally, Chapter 7 concludes this study by considering future implications or expectations based on present policies adopted in the three focus nations.

CHAPTER 1
METHODOLOGY: RELEVANT CONCEPTS & THEORIES

"The most enduring meaning conveyed by Lady Liberty has nothing to do with immigration, and I say let's go back to that. The statue's original name is "Liberty Enlightening the World," and the tablet the lady holds in her left hand reads "July IV, MDCCLXXVI" to commemorate the signing of the Declaration of Independence."[6]

For the United States, the inevitability of the accommodation of the ideologies of immigrants from non-democratic nations became a more provocative national predicament after 1965.[7] On 3 October 1965, President Lyndon B. Johnson, using the Statue of Liberty (Enlightening the World) as the backdrop, signed into law an immigration reform bill.[8] While Congress wrangled with affording the right to vote to the ancestors of the nation's 'involuntary' immigrant population—*i.e.,* former slaves—the Hart-Celler Immigration Act of 1965 ('HCA-65') moved unassumingly through both Houses.[9] Johnson down-played the impact of the legislation to get it passed; he opined that the bill was neither revolutionary nor bound to affect the lives of the millions of Americans already living in the United States.[10] According to the former President:

> [i]t will not reshape the structure of our daily lives. … Yet it is still one of the most important acts of this Congress and of this administration. For it does repair a very deep and painful flaw in the fabric of American justice. It corrects a cruel and enduring wrong in the conduct of the American nation.[11]

Kammer clarifies that "[t]he wrong that Johnson and Congress sought to correct was codified in legislation passed 41 years earlier, during a post-war era fraught with anxiety about mass immigration, the shadow of European radicalism, and theories of racial superiority."[12] As such, HCA-65 abolished America's national origins quota system, which had been central to U.S. immigration policy since the 1920s.[13] In its place, the U.S.

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[6] Roberto Suro, 'The Statue of Liberty's Real Stand' *Washington Post* (Washington DC, 5 July 2009) <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/02/AR2009070201737.html> accessed 20 November 2018.
[7] *See* Charles B Keely, 'Effects of the Immigration Act of 1965 on Selected Population Characteristics of Immigrants to the United States' (1971) 8 Demography 157, 157-61.
[8] Jerry Kammer, 'The Hart-Celler Immigration Act of 1965: Political Figures and Historic Circumstances Produced Dramatic, Unintended Consequences' (2015) <https://cis.org/Report/HartCeller-Immigration-Act-1965> accessed 19 November 2018.
[9] Kammer (n 8).
[10] Kammer (n 8).
[11] Kammer (n 8).
[12] Kammer (n 8).
[13] Kammer (n 8).

Government adopted "a preference system that focused on immigrants' skills and family relationships with citizens or residents of the U.S."[14] Although Johnson claimed that HCA-65 would not effectuate expansive change, Zeitz notes that the policy modification "opened the floodgates to new immigrants when it went into effect in 1968."[15] Profiling post-Act immigration, Keely illustrates that since becoming law, the Act has substantially affected the migration profile in the United States.[16] Specifically, it has affected the "national origins and professional characteristics of [post-1968] immigrants," which Keely projected would lead to sharper distinctions and fragmentation of the ethnic landscape.[17] His predictions have undoubtedly come to pass.

Enactment of HCA-65 has also brought about a number of unanticipated consequences. These consequences have not only been catalysts for present socio-political divisiveness concerning multiculturalism, but they also buttress the growing number of arguments in favor of reforming the previously reformed immigration laws in the United States.[18] One of the unanticipated consequences is that the legislation led to 'chain immigration practices'.[19] The chain immigration process starts with the naturalization of new or 'principal' immigrants.[20] Thereafter, principal immigrants sponsor as many relatives from their home nations as possible, thereby creating "an ever-lengthening migratory process."[21] Guild notes that this method "is the most common legal form of immigration to the United States."[22] Another unanticipated consequence has been increased illegal immigration.[23] As there has been much consternation in recent years around the use of the term 'illegal' immigrant, as an affront to the humanity of those seeking asylum or refugee status, it is worth offering a proper legal definition. *Black's Law Dictionary* defines 'illegal immigrant' as the term given to a non-national working or living in the a country

[14] Kammer (n 8).
[15] Josh Zeitz, 'The 1965 Law That Gave the Republican Party Its Race Problem' [2016] *POLITICO Magazine* <www.politico.com/magazine/story/2016/08/immigration-1965-law-donald-trump-gop-214179>.
[16] Keely (n 7), 160.
[17] Keely (n 7), 157.
[18] Kammer (n 8).
[19] Kammer (n 8).
[20] Bin Yu, 'The Principal Immigrants: The Initiators of Migration Chains' in Steven J Gold and Rubén G Rumbaut (eds), *Chain Migration Explained : The Power of the Immigration Multiplier* (LFB Scholarly Publishing LLC 2008) 103.
[21] Yu (n 20), 103; *See also*, Blair Guild, 'What Is "Chain Migration"?' *CBS News Report* (Washington DC, 29 January 2018) <https://www.cbsnews.com/news/what-is-chain-migration-definition-visa-trump-administration-family-reunification/>.
[22] Guild (n 21).
[23] Kammer (n 8).

"with no right to stay who has taken no steps to become a citizen."[24] For the purposes of this study, this includes those applicants who take the necessary initial steps to gain entry to the U.S.; but once in country, they discontinue pursuing proper citizenship which leads to overstaying their visas and/or disregarding the immigration hearing process.[25] As a result of HCA-65, Kammer explains that illegal immigration has "experienced a decades-long surge."[26] Illegal immigration flow has resulted in an estimated 12.5 million illegal immigrants residing in the U.S. as of October 2017. As of 2019, the cost of illegal immigration associated with the unexpected consequences of HCA-65 is estimated at $200 billion American tax dollars annually.[27]

1.1 Muslim Immigration & Islamic Law in the Post-9/11 Context

As Keely also predicted, these unanticipated outcomes have brought about changes in ethnic and religious politics in the United States.[28] This is especially the case where recent increases in immigration from Muslim-majority nations are concerned—via chain immigration, refugee/asylum relocation, or illegal migration. This has placed a spotlight on expectations to accommodate the preferences of those espousing Islam, which are religious yet couched as cultural, which appears to have become a focal-point in an already charged environment of immigration-centric tension. The circumstances were worsened by episodic acts of terror perpetrated by Islamic extremists between 1993 and 2006 in the United States, England, and Canada (collectively '9/11'). The 2013 Boston Marathon bombing in the United States reinvigorated feelings of skepticism concerning Islam and the dangers of Muslim immigration.[29] This is partly attributable to the fact that the Muslim

[24] 'What Is Illegal Alien or Immigrant?' (*Black's Law Dictionary Online 2nd Ed.*, 2018) <https://thelaw dictionary.org/illegal-alien/> accessed 20 November 2018.
[25] 'What You Need to Know About Catch and Release' (*Statements from the White House*, 2018) <https://www.whitehouse.gov/briefings-statements/need-know-catch-release/> accessed 2 April 2018. *See also*, Phillip Connor and Jens Manuel Krogstad, 'The Number of Refugees Admitted to the U.S. Has Fallen, Especially among Muslims' (2018) <https://pewrsr.ch/2IclDLK>; Kelly Sadler, 'The Real Cost of Illegal Immigration, and It's Not Avocados' *Washington Post* (Washington DC, 5 June 2019) <https://www.washingtontimes.com/news/2019/jun/5/the-real-cost-of-illegal-immigration-and-its-not-a/>; Michelle Malkin, 'The Post-9/11 Cycle of Cynicism' *National Review* (Washington DC, 12 September 2018) <https://www.nationalreview.com/2018/09/visa-overstayer-problem-continues-17-years-after-9-11/>. Collectively, these articles distinguish between illegal immigrants and refugees and asylum seekers. The U.S. distinguishes between refugees and asylum seekers. Applications for the former are administered overseas, and the applicants later resettle in the U.S., while the latter "claim asylum while in the U.S. or at an airport or land border checkpoint." The definitional distinction is noteworthy as more recent illegal immigration debates focus on migrants at the Mexican border seeking asylum, while the lion's share of those who seek refugee status and/or overstay their temporary visas are from Muslim-majority nations.
[26] Kammer (n 8).
[27] Sadler (n 25).
[28] Keely (n 7), 157.
[29] Jocelyne Cesari, *Why the West Fears Islam: An Exploration of Muslims in Liberal Democracies* (Palgrave Macmillan 2013) 2; *See also*, Rachel R Steele and others, 'Emotion Regulation and Prejudice Reduction

extremists involved in the 9/11 and Boston Marathon bombings misused international goodwill by availing themselves of America's refugee/asylum relocation process to enter the nation.[30]

On a broader scale, the events of 9/11—in conjunction with other acts of terror perpetrated by Islamic extremists throughout the European continent—brought Islam into the national and international spotlight with a new intensity.[31] As such, assessments of the world order have become marked by two postures, pre- and post-9/11. In *Why the West Fears Islam: An Exploration of Muslims in Liberal Democracies*, Jocelyne Cesari points out that in the post-9/11 posture, there has been a primary focus on securitization, which sees Islam "as an existential threat to European and American political and security interests and thereby justifies extraordinary measures against it."[32] Cesari also observes that "the post-9/11 era adds concerns on pluralization of societies and security, therefore, exacerbating and resurrecting the mentality of an 'us versus them' where Muslims are 'them'."[33] Consequently, nations in the West appear to have made national security central to any decisions concerning immigration and multiculturalism in the post-9/11 posture. The sheer weight of post-9/11 trepidation across national and international landscapes has undoubtedly made attempts to evaluate appropriate levels of accommodation of Islamic religious proclivities extremely difficult. However, such an evaluation is necessary to achieve 'reasonable' accommodation for Muslim migrants without discounting the rule of law and/or the rights of those who pre-date them. This is especially relevant as inadequate efforts to scope religious and/or cultural differences appear to be a significant factor in multicultural tension that exists in the three focus nations. The aspects of this excessively-detailed debate are multi-faceted, to say the least.

1.2 Distinguishing between Islamic Law Exceptionalism & Multiculturalism

Seen by some as the proper means to defuse persistent tension between the 'us versus them' dichotomy and the consequences of HCA-65, policies promoting the concept of

Following Acute Terrorist Events: The Impact of Reflection before and after the Boston Marathon Bombings' (2017) 22 Group Processes and Intergroup Relations 43, 43-4.

[30] Malkin (n 25).

[31] Cesari (n 29), xiv-xv; *See also,* Chris Weller, 'Startling Maps Show Every Terrorist Attack Worldwide Over the Last 20 Years' *Business Insider* (New York, 1 November 2017) <https://www.businessinsider.com/global-terrorist-attacks-past-20-years-in-maps-2017-5?r=UK&IR=T>.

[32] Cesari (n 29), xvii-xviii.

[33] Cesari (n 29), 4.

multiculturalism sprang into action like some sort of superhero.[34] For the purposes of this study, 'multiculturalism' is defined as a "feel-good celebration of ethno-cultural diversity, encouraging citizens to acknowledge and embrace the panoply of customs, traditions, music and cuisine that exist in multi-ethnic society."[35] Hence, the general aims of multiculturalism seem to have been to promote aspects of cultural diversity that are 'value-adds' to host nations. Kymlicka notes that, "from the 1970s to the mid-1990s there was a clear trend across Western democracies toward the increased recognition and accommodation of [aspects of] diversity through a range of multiculturalism policies and minority rights."[36] Therefore, the solution to the tension would appear to be as unassuming as utilizing the concept of multiculturalism to "enable minority group members to live an authentic life" within the societal culture of the nation to which they migrate.[37] Where it pertains Muslim immigration, this unassuming celebration of cultural difference has seemingly come to encompass the Islamization of Western culture.[38] For the purposes of this study, 'Islamization' is defined as the "integration of cultural, political, [and/or] legal…systems with Islamic doctrines…or their production from an Islamic perspective."[39]

The primary issue created by the theory of Islamization is that the perspective appears to inconspicuously expand traditional notions of multiculturalism to include the often-non-democratic political ideologies and foreign legal systems of Islamic nations. This outcome manifests itself in the expansive scope of requests for accommodation for certain immigrants to live an authentic life—*i.e.,* the life they would have if they had never migrated. However, the perspective in practice has the effect of infringing on native citizens or those who have migrated with a full appreciation of the subjective nature of the concept of 'authenticity'. As such, it appears that the opposing perspectives on reasonable accommodation have resulted in "a backlash and retreat from multiculturalism, and a re-assertion of ideas of nation building, common values and identity, and unitary citizenship—even a return to assimilation."[40] This would explain more recent analyses, such as those of Kymlicka, Wright *et al.,* and Adida *et al.,* which suggest that multiculturalism as an

[34] *See generally*, Will Kymlicka, 'The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies' (2010) 61 International Social Science Journal 97; Keith Banting and Will Kymlicka, 'Is There Really a Retreat from Multiculturalism Policies? New Evidence from the Multiculturalism Policy Index' (2013) 11 Comparative European Politics 577.
[35] Kymlicka (n 34), 97.
[36] Kymlicka (n 34), 97.
[37] Wright and others (n 5), 103.
[38] Gerhard Bowering and others, 'Islamization', *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2012) 263, 263.
[39] Gerhard Bowering and others (n 38), 263.
[40] Kymlicka (n 34), 97.

approach to more recent mass immigration is not only flawed but waning by suspicion of over-infringement.[41] Thus, leaders as well as native citizens of many nations across Europe and North America have begun to signal "a death warrant for multicultural experiments," as said experiments have 'utterly failed' to achieve their desired aims.[42]

As far as shifts in attitudes are concerned, they appear to be in some remarkable way connected with two noteworthy occurrences. The first is the pitting of multiculturalism against assimilation instead of establishing the two ideologies as symbiotic approaches to immigration, cultural inclusion, and individual accountability. Multiculturalism tends to be viewed as the antithesis to the concept of assimilation.[43] Where it relates to Muslim migration, Adida *et al.* synopsize the 'multiculturalist' versus 'assimilationist' debate in *Why Muslim Integration Fails in Christian-Heritage Societies*. The debate has become integral to approaching the ethnic, cultural, and political differences between "Muslim immigrants and host population[s]."[44] Building on the contributions of multiple scholars, Adida *et al.* explain that, "[t]he assimilationist model is reinforced by a theory in which assimilation is achieved when immigrants "adhere to the common set of values and norms…to guarantee the moral order and coherence of…society."[45] The assimilationist model is perceived to benefit both the 'native majority' and more recent immigrants. This model has its genesis in "the idea of cultural incompatibility that recalls Samuel Huntington's 'clash of civilizations' theory'."[46] Alternatively, the multiculturalist model is predicated on the rejection of the theory of cultural incompatibility in favor of "cultural pluralism based on the coexistence of different cultures and values."[47] Moreover, this perspective stresses the theory that "successful integration of immigrants is best realized if governments celebrate the cultural diversity that is entailed by recent immigration and acknowledge the culture of

[41] Kymlicka (n 34), 97; Wright and others (n 5), 104; Claire L Adida, David D Laitin and Marie-Anne Valefort, *Why Muslim Integration Fails in Christian-Heritage Societies* (Harvard University Press 2016) 4-11.
[42] Adida, Laitin and Valefort (n 41), 13; *See also,* Kymlicka (n 34), 97. Adida and others citing Kymlicka and statements made by former-Prime Minister David Cameron of the U.K. and Chancellor Angela Merkel of Germany.
[43] Adida, Laitin and Valefort (n 41), 13.
[44] Adida, Laitin and Valefort (n 41), 13.
[45] Adida, Laitin and Valefort (n 41), 13.
[46] Adida, Laitin and Valefort (n 41), 13; *See also,* Samuel P Huntington, 'The Clash of Civilizations?' [1993] *Foreign Affairs* <https://www.foreignaffairs.com/articles/united-states/1993-06-01/clash-civilizations>. According to Huntington, "the fundamental source of conflict in this new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural. Nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future. Conflict between civilizations will be the latest phase in the evolution of conflict in the modern world."
[47] Adida, Laitin and Valefort (n 41), 13.

minority groups as having equal value to the mainstream culture."[48] While England, Canada, and the United States have to varying degrees shifted from the assimilation approach to the multicultural approach, the most probative aspects of these national shifts is that reports have continued to evidence that national policies "oriented toward assimilation [have] better returns for integration than do policies that emphasize multiculturalism."[49]

The pitting of the two approaches also appears to be the basis for more recent disillusionment with multicultural practices and immigration policies in Western nations generally. Cesari alludes to the fact that, instead of moving toward integration, this way of thinking feeds into the 'us versus them' dichotomy, which in turn continues to create concerns about mass Muslim immigration.[50] When the concerns of citizens who pre-date 'them' have been labeled irrational and seemingly ignored—despite continued radicalized Muslim attacks—concern appears to have been replaced by disdain and/or disinterestedness in the promotion of multiculturalism in general. Along the same lines, Adida *et al.* demonstrate that this way of thinking produces 'a discriminatory equilibrium'.[51] This is where "host populations discriminate against Muslims even when it does not expect any particular hostility from them," which carries over into perceptions concerning demands for expansive levels of accommodation associated with Islam.[52]

At the same time, "Muslims behave in ways that feed rational Islamophobia" by promoting Islam as an all-encompassing organism that negates immigrants' need to even try to integrate.[53] In both of these circumstances, the promoted and perceived mutual exclusivity of the two approaches prevents any opportunity to endorse the benefits of multiculturalism while simultaneously reinforcing the need for assimilation in some areas. This is especially the case when the practical reality is that there are certain aspects of multiculturalism that cannot supplant societal assimilation and vice versa. Although beyond the scope of this study, recent studies suggest that failing to foster proper integration between immigrant minority groups and the national majority; focusing too heavily on multicultural identity; and undervaluing the importance of core nationalism created the groundswell that has come

[48] Adida, Laitin and Valefort (n 41), 13.
[49] Adida, Laitin and Valefort (n 41), 14.
[50] Cesari (n 29), 4.
[51] Adida, Laitin and Valefort (n 41), 14.
[52] Adida, Laitin and Valefort (n 41), 14.
[53] Adida, Laitin and Valefort (n 41), 14.

to be labelled as the 'retreat from multiculturalism'.[54] Moreover, incongruity in areas of language and literacy, education and employment opportunities, and political engagement have been highlighted as consequences of pitting the benefits of multiculturalism against the inherent need for societal integration.[55]

The second perspective involves apparent attempts to take a 'kitchen-sink' approach to multiculturalism. That is, the celebration of multicultural identity and accommodation demands societal acceptance of everything but the kitchen sink. In the text, *Culture and Equality: An Egalitarian Critique of Multiculturalism,* Barry observes, "[m]ulti-culturalists tend to be intellectual magpies, picking up attractive ideas and incorporating them into their theories without worrying too much about how they might fit together."[56] As long as a practice is even loosely linked as "an element in the culture of the group whose practice it is," it deserves to be placed under the umbrella of multiculturalism while receiving broad promotion and/or protection.[57] Evaluating multiculturalism in this way results in creating claims that justify a practice without the need to "demonstrate that it satisfies some universalistic criterion of value."[58] According to Barry, "[a]ll we need say-and, indeed, all we can say-is that, simply [by] virtue of forming part of a group's culture, it is essential to its well-being."[59] This lends to a problem that, according to Barry, can be defined as the "inconsistency between cultural incommensurability and cultural equality."[60] Specifically, an inconsistency is established by "the notion that there is no common standard by which cultures, and the practices embedded in them, can be evaluated…but at the same time [the perspective demands that cultures are]…presumed or affirmed to be of equal value."[61] Put another way, there are incommensurable aspects of every ethnic group's culture that

[54] *See generally*, Elke Winter, 'Rethinking Multiculturalism After Its "Retreat": Lessons From Canada' (2015) 59 American Behavioral Scientist 637, 637-39; *See also*, Víctor M Muñiz-Fraticelli, 'The Inadequacy of Multiculturalism', *The Structure of Pluralism* (Oxford Scholarship Online 2014); Nasar Meer and others, 'Examining "Postmulticultural" and Civic Turns in the Netherlands, Britain, Germany, and Denmark' (2015) 59 American Behavioral Scientist 702; Scott Poynting and Victoria Mason, 'The New Integrationism, the State and Islamophobia: Retreat from Multiculturalism in Australia' (2008) 36 International Journal of Law, Crime and Justice 230; Siobhán Mullally, 'Retreat from Multiculturalism: Community Cohesion, Civic Integration and the Disciplinary Politics of Gender' (2013) 9 International Journal of Law in Context 411; Laura Reidel, 'Beyond a State-Centric Perspective on Norm Change: A Multilevel Governance Analysis of the Retreat from Multiculturalism' (2015) 21 Global Governance 317; Keith Banting and Will Kymlicka, 'Is There Really a Retreat from Multiculturalism Policies? New Evidence from the Multiculturalism Policy Index' (2013) 11 Comparative European Politics 577.
[55] Kymlicka (n 34), 97-9.
[56] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2007) 252.
[57] Barry (n 56), 252.
[58] Barry (n 56), 252.
[59] Barry (n 56), 253. *See also,* [3], 264-71.
[60] Barry (n 56), 252.
[61] Barry (n 56), 253.

by adoption also allows a nation to become a better version of itself; however, there are undoubtedly some aspects that may not. The point however seems to be that those who promote a kitchen-sink approach to multiculturalism make no attempt to discern those aspects that do or do not foster the specific society's betterment.

It is within this context that multiculturalism will be evaluated for the purpose of determining how England and Canada returned to foundational principles to address the question of statutorily affording faith-based legal exceptionalism to Islam's religious edicts under alternative dispute resolution schemes ('ADR') and/or by deference within the national judiciary. For the purposes of this study, 'faith-based legal exceptionalism' aims to afford extraordinary treatment to religious subgroups or denominations by furthering one of two outcomes. It results adopting extra-constitutional measures that employ contract law as the conduit for the jurisprudential application of religious texts and/or traditions in circumvention of the national juridical framework. Alternatively, it results in national courts' reliance on or affording deference to religious texts and/or traditions, which are invariably the laws of foreign Muslim-majority nations, to guide judicial decisions instead of or in conjunction with the national rule of law.

Assessing the outcomes in England and Canada will also exemplify why it might be prudent for the United States to return to foundational ideals and principles in addressing analogous requests for Islamic law exceptionalism. In other words, the issues produced by post-9/11 perspectives and shielding certain facets of Islamization under the umbrella of multiculturalism make prudent the return to foundational principles to offer a constitutionally sustainable rejoinder to the question of faith-based legal exceptionalism. By returning to foundational principles, national policies avoid claims of Islamophobia as well as possible by-blows of the ebb and flow of multiculturalism, which may come to uniformly affect Western attitudes toward the plethora of idiosyncratic proclivities that have come to be indiscriminately linked with its expanding definition.

1.3 Contextualizing the Question of Islamic Law Exceptionalism

Despite the contentious debates concerning Muslim accommodation, recent legislative and/or Constitutional evaluations concerning Islamic law exceptionalism will figure tangentially in the analyses attempted herein. However, there are several areas that will remain beyond the scope of this study. One such area is the debate over whether 'political-Islam' creates the need for modification to national or international immigration

practices.[62] Instead, this study accepts that it is generally understood that perceptions of threat hamper the ability to address multicultural cohesion for those who are attempting to live as an inclusive democratic community in the aforementioned nations. This is especially the case where multi-lateral xenophobia and religious prejudice continuously resurface as Islamic terrorist activity continues on a national and international scale. Repetition of these instances ostensibly continues to feed the perception of present and future danger.

Another area that is beyond the scope of this study is the intensely fragmented quagmire that encompasses socio-political debates focused on legislative or judicial determinations as to 'public-space' accommodations, such as 'veiling'.[63] This study will focus on clarifying relevant colonial and post-colonial occurrences that buttress constitutional policies, thereby establishing a cogent foundation for divergent approaches to accommodating or not accommodating specific cultural preferences. Although inferences might be possible where it pertains other areas of religious accommodation, they are not the aim of this study. It might seem natural to consider veiling in public spaces and legally sanctioning Islamic law exceptionalism as mutually-inclusive preferences. However, this study distinguishes between them. As similar legal distinctions have been drawn concerning other religious denominations and subgroups co-existing in the aforementioned nations, this study revisits those demarcating lines, especially as they inform national approaches to religion and

[62] Abdullahi Ahmed An-Na'im, 'Islam and Human Rights' in John Witte and M Christian Green (eds), *Religion and Human Rights: An Introduction* (Oxford University Press 2011) 63; *See also*, John M Owen IV, *Confronting Political Islam: Six Lessons from the West's Past* (Princeton University Press 2015). In addressing what is meant by the concept of 'political-Islam', An-Na'im notes that since the 1970s there have been mounting demands for the enforcement of certain principles of Sharia as the official law of the *ummah,* commonly known as the rise of 'political Islam'." Along the same lines, Owen's text considers specifically the question of how more liberal Western nations should respond to the challenges of political-Islam, which includes questions of immigration and to some degree accommodation of the politics and laws emanating from the politicization of Islam.

[63] *See e.g.,* Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press 2012). The entirety of Elver's text is dedicated to comparative legal analysis of the ongoing brouhaha over of Muslim women's headscarf in Western nations from sociological and legal perspectives. Moreover, there are many others, and they seem to be long on discussion but short on conclusions beyond legally enforced 'accommodation'. As such, it is fair to say that a consensus on hijabs (and nicabs) in public space is nowhere in sight. However, the articles, dissertations, and books continue to be published by Muslims and non-Muslims alike in an effort to change the trajectory of general perspectives on women of Islam and/or Islam as a religious dogma…or to maintain the status quo. As it relates to this study, whether wearing either or both items proclaims freedom or suppression is less consequential, unless they are used as a means to suppress the legal and/or religious liberties of non-Muslims. Said another way, unless these items afford Muslim women undue advantage or exceptional treatment under the law or hinder the rights of non-Muslims in some remarkable way, the breadth and scope of the debate is beyond the primary aims of this study.

government entanglement or 'church-state arrangements'.[64] As this study will consider sanctioning Islamic law exceptionalism exclusively, becoming more engaged in the 'public space' debate in this setting would be an exercise in futility in light of the primary aims of this study.

Finally, this study will not attempt to contribute to academic scholarship that has as its objective endorsing the application of Islamic law in Western nations. Much of that scholarship follows the line of reasoning that the ability to further legal claims by nationally sanctioning faith-based legal exceptionalism is the appropriate response because it promotes 'multiculturalism' or demonstrates 'religious tolerance'. However, there appears to be a scarcity of demonstrative evidence that either condition is furthered by the sanctioning of any faith-based legal platform, including those dispensing Islamic law. Moreover, pro-Islamic law scholarship often overlooks ever-growing discourse—including that of female Muslim scholars and activists like Manea, Ali, Murabit, and Bennoune—that not only refutes the aforementioned claims but also demonstrates specific instances of gender disproportionality in Islam generally, which is legally memorialized when Islamic law is applied substantively or procedurally.[65] One might conclude that where it pertains Muslims who make the conscious choice to be treated disproportionately, it is the Government's responsibility to sanction the platform for said treatment. Although this specific supposition will be addressed in the final two substantive chapters of this study, it will not extend beyond analyzing the effects of post-imperial/colonial constitutionalism in England, Canada, and the United States.

Additionally, pro-Islamic law scholarship often fails to address substantive and/or procedural legal issues that are prevalent in liberal democratic nations when claims invoking religious law do not remain confined to the sphere of specific religious law tribunals.[66] In some instances, the tribunals attempt to extend their jurisdictional

[64] WC Durham, Jr., 'Perspectives on Religious Liberty: A Comparative Framework' in Vicki C Jackson and Mark Tushnet (eds), *Comparative Constitutional Law* (3rd edn, Foundation Press 2014) 1412-21.
[65] *See e.g.,* Elham Manea, *Women and Shari'a Law: The Impact of Legal Pluralism in the UK* (IB Tauris & Co Ltd 2016); Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016); Samina Ali, 'TEDx Talks: What Does the Quran Really Say About a Muslim Woman's Hijab?' <https://youtu.be/_ J5bDhMP9lQ>; Karima Bennoune, *Your Fatwa Does Not Apply Here: Untold Stories from the Fight Against Muslim Fundamentalism* (2014); Alaa Murabit, 'What My Religion Really Says About Women' <https://www.ted.com/talks/alaa_murabit_what_my_religion_really_says_about_women?utm_campaign=tedspread&utm_medium=referral&utm_source=tedcomshare>; Yvonne Yazbeck Haddad, 'Setting the Scene', *Muslim Women in America: The Challenge of Islamic Identity Today* (Oxford University Press 2006). *See also,* Footnote 198, which address the research findings of Yüksel Sezgin, which provide yet another example of the issues presented by faith-based legal exceptionalism.
[66] *See e.g.,* Bernard Jackson, '"Transformative Accommodation" and Religious Law' (2009) 11 Ecclesiastical Law Journal 131; Zaleha Kamaruddin, Umar A Oseni and Syed Khalid Rashid,

boundaries (*i.e.,* 'jurisdictional creep').[67] In others, litigants either attempt to forum shop or move their religion-centric claims from religious tribunals to the national court systems.[68] This is the case even though they are aware that forfeiture of national court access is the condition of seeking redress from the religious tribunal.[69] These attempts raise questions about the problematic implications that overstepping these boundaries has on the national juridical framework as well as the repercussions of infringing on the religious and legal rights of non-Muslim citizenry by state-wide or national imposition of Islamic law precepts. As will be demonstrated in subsequent chapters, these are current prevailing issues in England as a result of her 'post-Imperial' attempts at exceptionalism.

Instead of venturing into the fray of any of the aforementioned scholarly debates, this study will focus on Islamic law platforms as the most recent tri-national circumstance of requests to sanction faith-based legal exceptionalism. The circumstances surrounding these requests highlight the question of *whether* faith-based legal choice of law is a constitutionally recognized aspect of 'religious liberty'. Moreover, the circumstances beg the question of whether sanctioning faith-based legal exceptionalism is indispensable to the promotion of multiculturalism or religious tolerance when evaluated in light of furthering post-colonial liberal democratic ideals. To achieve these ends, this study will juxtapose the central points raised in deliberations about Islamic law exceptionalism in the aforementioned nations at varying points between 2005 and 2016. This is done for the purpose of demonstrating how three nations that possess a common colonial heritage could highlight similar themes and raise parallel concerns about a prevalent socio-legal conundrum while yielding dissimilar outcomes. More to the point, this juxtaposition will illustrate how British Imperialism and integration of the concept of Peace, Order & Good Government ('POGG') or the Peace, Order & good Government clause ('POgG') resulted in differing constitutional frameworks (*i.e.,* approaches to liberal democracy); divergent

'"Transformative Accommodation": Towards the Convergence of Sharīah and Common Law in Muslim Minority Jurisdictions' (2016) 30 Arab Law Quarterly 245. Although both articles find 'transformative accommodation' compelling, neither is able to find a definitive means by which to make the theory useful where it pertains to differing religious approaches to judicial proceedings. Where Jackson's analysis is concerned, his conclusions focus specifically on the distinctions between religious and secular marriages, which yields very different outcomes in how transformative accommodation could be uniformly applied to Muslims, Jews, Christians, and the non-religious alike.

[67] Baroness Caroline Cox, 'Arbitration and Mediation Services (Equality) Bill [HL] 2014-15' (*UK Parliament Website*) <https://services.parliament.uk/bills/2014-15/arbitrationandmediationservicesequality.html>.

[68] Cox (n 67).

[69] Cox (n 67).

contemporary church-state arrangements; and disparate rationales for their approaches to faith-based legal exceptionalism.

1.4 The Imperativeness of Constitutionalism in an Era of Human Rights Debate

Although this study will consider the 'international' reach of the POGG doctrine as it informs the constitutional approaches to religious liberty espoused by the three focus nations, it is useful to clarify that this study will sidestep the fray of scholarly discourse focused on international human rights law. It may seem intuitive to evaluate the concept of faith-based legal exceptionalism by the mandates of human rights treaties and/or within the scope of international judicial decisions. This perspective can be attributed to the fact that the topic of human rights has grown in popularity by attracting a following of scholarly researchers whilst also focusing or redirecting the careers of myriad legal practitioners from different parts of the world.[70] This trend notwithstanding, scholarly discourse focused on scoping certain rights or freedoms outside the realm of international human rights law remains quite robust. This is especially the case where it pertains historical and/or constitutional analyses. Moreover, constitutional histories are particularly probative where multi-national perspectives appear to have notable similarities, yet ratification of specific international treaties does not yield corresponding interpretation/implementation. In some instances, the bases for divergent national policies are made explicit by the reservations, understandings, and/or declarations ('RUDs') upon which certain nations condition their ratification. In other instances, it becomes apparent when, despite support for or even ratification of particular treaties, certain articles are simply not adopted nationally, even when the preferred meaning of those articles are reinforced by international judicial decisions.[71]

In either case, the history of a nation's constitutional development is imperative to any evaluation of a nation's response or approach to the preservation of certain rights or freedoms, even those that have come to fit within the purview of international human rights advocacy. In the text *Comparative Human Rights Law*, Sandra Fredman frames this perspective as follows:

> On the one hand, there is a broadly similar common core of human rights both internationally and domestically, and human rights

[70] Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press 2018), 30.
[71] *For example,* the United States has not ratified the Universal Declaration of Human Rights ('UDHR'); however, many of the rights outlined by the treaty are contained in the Bill of Rights of the U.S. Constitution. U.S. citizens are not bound by laws created by any treaty, if they are not analogously outlined in the U.S. Constitution, or until they are implemented by statutory law, whether federal or state.

> guarantees in different jurisdictions have important central affinities, often through conscious adoption or adaption.[72]
>
> ...
>
> On the other hand, human rights are inevitably formulated in open-text terms, requiring interpretation and application in specific contexts. The differences in text, culture, history, and institutions might be [*more important*] than the similarities.[73]

Thus, this study will not explore international treaties or judicial decisions focused on human rights beyond offering this introductory clarification. This study will instead demonstrate by comparative analyses that constitutionalism through a foundational lens provides a more appropriate and compelling basis for analyzing how England and Canada *have* evaluated and how the United States *should* evaluate the accommodation of faith-based legal exceptionalism, which has accompanied more recent immigration from non-democratic nations or from nations where religion and government are indistinguishably entangled.

Despite the importance of constitutional history to this study, offering specific justification for sidestepping international human rights discourse is warranted to allow this study to be evaluated in the proper context. Primarily, this study will remain within the sphere of comparative constitutionalism because the landscape where international human rights and religious liberty intersect is notably fragmented. In the text, *Religion, Human Rights, Equality and the Public Sphere*, Christopher McCrudden opines, "[t]he architecture of human rights and its relationship to religion is in the course of being constructed."[74] Although the concept of human rights is often grounded in principles of human dignity and personal autonomy, neither human rights scholars nor practitioners have reached consensus concerning how to appropriately scope certain public manifestations of religion—*e.g.,* the establishment of faith-based legal tribunals—which may be perceived by some but not others as facets of religious liberty.[75]

The incongruity of meaning appears to be attributable to the fact that the phrase 'human rights' has come to be employed to reference a plethora of perceived rights or freedoms,

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[72] Fredman (n 70), 4.
[73] Fredman (n 70), 4.
[74] Christopher McCrudden, 'Religion, Human Rights, Equality, and the Public Sphere' (2011) 13 Ecclesiastical Law Journal 23, 38.
[75] *See generally*, Fredman (n 70), 29-58. *See also*, Section 1.4 of this chapter, which distinguishes this study from scholarly discourse focused on the ongoing debate over the accommodation of religious veiling in the public sphere.

and by extension certain societal proclivities, practices and/or preferences.[76] Fredman, McCrudden, and other scholars acknowledge that, as a consequence of the myriad vantage points from which human rights are evaluated, there is much disagreement around the meanings attached to the concept.[77] Fredman explains further that, "[] while the notion of fundamental human rights attracts general respect, there is little agreement on how we identify them. This is true for both the general question of what constitutes a fundamental human right, and the more specific question of its substantive content and application."[78] Likewise, McCrudden suggests that the meaning and scope of human rights is 'anything but settled'; therefore, those with a vested interest have an opportunity to shape how religion and human rights engage not only in each nation's public sphere but also their respective juridical spheres.[79] It can therefore be inferred that the debate over what is actually meant by 'human rights' will remain in a state of flux for the foreseeable future. The lack of clarity inherent in the debate makes it prudent for democratic nations to return to their foundational histories and constitutional documents to reinforce and reassert domestic ideologies, and by extension international perspectives, on the engagement of religion and human rights within their sovereign borders.

Along similar lines, human rights scholars and practitioners have yet to conclusively connect the practice of circumventing a national judicial system and the laws thereof, in favor of legal tribunals that dispense a religious subgroup's preferred legal doctrine, with that 'common core of human rights' that all nations espouse. This is the case notwithstanding whether the preference is defined as faith-based legal exceptionalism (as is adopted herein), faith-based legal pluralism, or faith-based legal forum shopping. As will be demonstrated more fully in subsequent chapters, much of the scholarship that supports faith-based legal exceptionalism acknowledges that this type of accommodation often requires 'extra-constitutional' measures to achieve. In other words, certain citizens

[76] *See e.g.,* Fredman (n 70), 29-30. Fredman demonstrates the issue associated with opposing perspectives on the meaning of human rights when she poses the question "[i]s there a human right to holidays with pay?" Although she notes that some might find the idea preposterous, the concept might be less preposterous to others. Fredman then explains that, where it pertains international treaties—in this instance, the Universal Declaration of Human Rights ('UDHR')—general consensus concerning certain rights/freedoms is a beneficial starting point. However, she also acknowledges that general consensus is not a guaranteed means to address foundational disagreements about human rights.
[77] Fredman (n 70); McCrudden (n 74); *See also*, Hurst Hannum, 'The Flexibility of Human Rights Norms: Universality Is Not Uniformity', *Rescuing Human Rights: A Radical Moderate Approach* (Cambridge University Press 2019); Marissa Ooms, 'International Human Rights Law and Its Critics' (2016) 18 International Community Law Review 353.
[78] Fredman (n 70), 29.
[79] McCrudden (n 74), 38.

are given the right to ignore valid law because their immigration narrative implicates the laws of other nations, which may also be inextricably connected with their specific religious proclivities. Evaluation of the issues inherent in this type of accommodation has led a significant number of legal scholars to promote exercising caution in the accommodation of faith-based legal exceptionalism. Therefore, it cannot be assumed that this kind of exceptionalism should or will become an internationally-accepted extension of the architecture to which McCrudden refers or foster a consensus as it relates to the scope of religion in the public sphere.

It is however well established that the aforementioned 'architecture' and/or 'common core' will continue to be scoped by national interpretations of religious liberty that are embedded in constitutional histories and enshrined in national constitutions. Of the three nations that are the subjects of this study, England is the only nation that has accommodated faith-based legal exceptionalism as part of its national ADR scheme. As will be borne out in subsequent chapters, the bases for England's decision appear to have more to do with the nation's legacy of Imperialism, and the constitutional adoption of an established church and religious denomination, than it does to do with adhering to the terms of a specific international treaty. Therefore, sidestepping the fray of human rights discourse allows for a more focused analysis of relevant aspects of the constitutional histories of the three nations. Although not a primary goal of this study, it may also offer necessary insight into readjusting certain expectations concerning not only accommodating exceptionalism but also respecting the disparate polices adopted by sovereign nations where it pertains the engagement between religion and government.

This leads to the final reason for addressing faith-based legal exceptionalism without implicating international human rights treaties or judicial decisions. As will be addressed more fully in Section 1.7 of this chapter, England, Canada, and the United States have demonstratively different church-state arrangements, which are illustrative of Fredman's assertion concerning the significance of national distinctions.[80] Consequently, evaluation of the three nations' divergent post-colonial histories, cultures, and national institutions in light of their common colonial heritage is arguably more probative when seeking a prudent response to faith-based legal exceptionalism than is the fact that each nation has ratified the International Covenant on Civil and Political Rights ('ICCPR').[81] Put another way,

[80] Fredman (n 70).
[81] 'International Covenant on Civil and Political Rights' (1976) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed 27 November 2019.

although the specific articles of the ICCPR have come to be perceived by human rights scholars as part of the international baseline for current assessments pertaining religious liberty, each nation maintains a different constitutional perspective toward religion and governmental entanglement.[82] The divergent constitutional relationships have yielded disparate national responses to requests to accommodate faith-based legal exceptionalism. Moreover, the foundational basis that forms each nation's constitutional attitude toward the entanglement of religion and government appears to serve as the lens through which ratification of the ICCPR and other international treaties has been evaluated.

In light of these points, the aim of this study is to contribute to scholarly discourse that promotes the reliance on a nation's constitution—and where possible, a nation's foundational history—to address certain contemporary legal issues or phenomena. This is especially the case where the question is historically repetitive, so relevant constituting documents provide guidance for addressing the issue or phenomenon. As subsequent chapters will demonstrate, issues that stem from faith-based legal exceptionalism were central to not only British Imperialism and the foundation of the Province of Canada but also the independence of the British-American colonies. This suggests that accommodation of this kind is not a question of first impression. Moreover, the prudence of sanctioning more recent requests for accommodation can be assessed by evaluating constituting documents in light of foundational histories.

1.5 Differentiating Constitutionalism in England, Canada & the United States

It is well understood that England, Canada, and the United States possess a common nucleus of interconnected persons and cultures that came to define three disparate national perspectives. To contextualize the perspectives on constitutionalism that have impacted progression in the three nations, it cannot be concluded that these principles simply facilitate stylistic rules of construction that lead practitioners and legislators to achieve more concise lawmaking.[83] Instead they are engrained philosophies that create

[82] *Specifically*, Article 18.1 of the ICCPR provides: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." Likewise, Article 18.3 provides: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

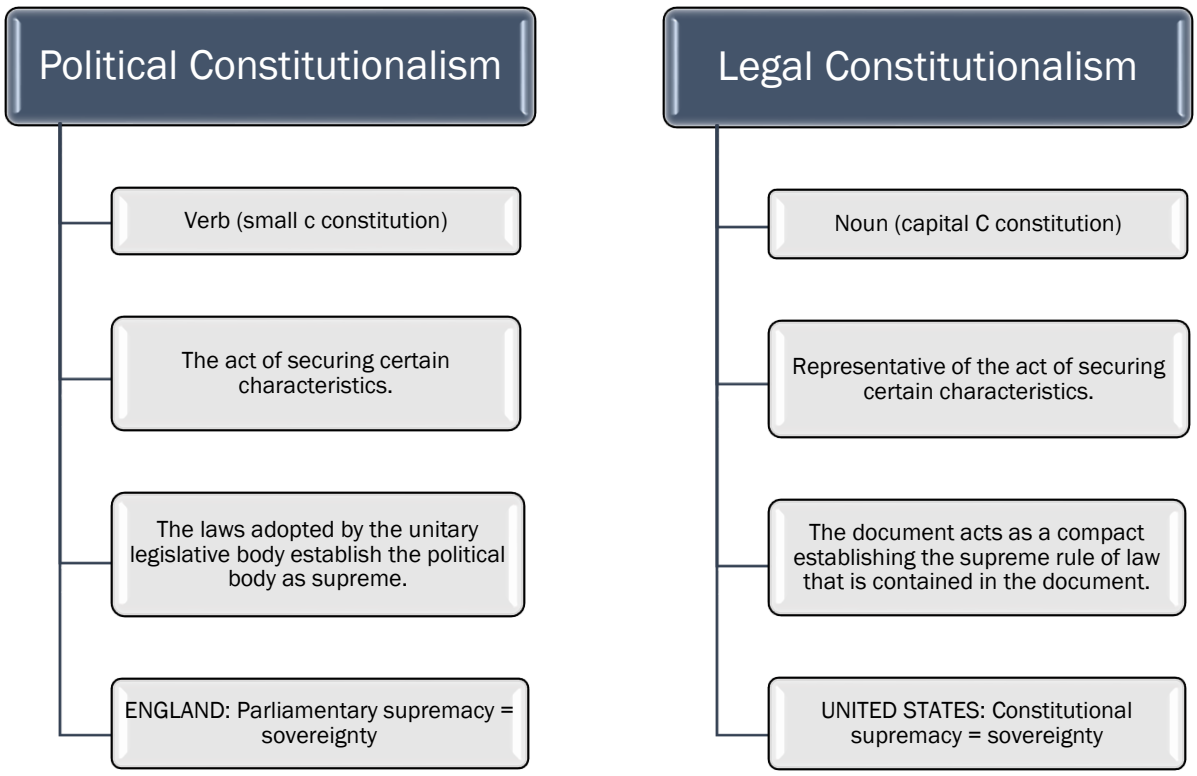
[83] *See generally*, Bora Laskin, *The British Tradition in Canadian Law* (Stevens & Sons 1969). Laskin discusses the stylistic rules of construction that were relinquished as Canada attempted to define a national approach to law instead of continuing to follow the British tradition.

the foundation upon which rules of law are constructed. Preuss observes that, "constitutionalism includes the key tenets of a polity which is based on the idea that the ruled are not merely passive objects of the ruler's willpower but have the status of active members of the political community."[84] As a practical consequence of the dynamic relationship between those who govern and those who accept being governed, Bellamy goes on to deduce that, "constitutionalism encompasses institutional devises and procedures which determine the formation, structure and orderly functioning of government, and it embodies the basic ideas, principles and values of a polity which aspires to give its members a share in the government."[85]

Therefore, it is necessary to understand methods of constitutionalism as more than theoretical terms. Through continual exploration and assessment, they appear to have come to define the historical experiences that led to specific perspectives on the "bonds of mutuality between the rulers and the ruled."[86] When speaking about constitutionalism in England, Canada, and the United States, comparative constitutional scholars denote two notable concepts: political and legal constitutionalism.[87] These concepts have also been labeled capital-C versus lower case-c constitutionalism or traditional versus modern constitutionalism.[88] In the text, *The Place Of Constitutional Law in the Legal System*, Stephen Gardbaum posits that when distinguishing between legal and political constitutionalism, constitutional scholars can agree on several characteristics that speak to the fundamental distinctions between the two philosophies.[89] The following diagram illustrates Gardbaum's analyses:

[84] Ulrich K Preuss, 'The Political Meaning of Constitutionalism' in Richard Bellamy (ed), *Constitutionalism, Democracy, and Sovereignty: American and European Perspectives* (Ashgate Publishing Company 1996) 12.
[85] Preuss (n 84), 12.
[86] Preuss (n 84), 12.
[87] Stephen Gardbaum, 'The Place Of Constitutional Law in the Legal System' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 170.
[88] Gardbaum (n 87), 170.
[89] Gardbaum (n 87), 170-75.

Figure 1: Diagram Contrasting Political & Legal Constitutionalism



As Figure 1 illustrates, the most striking difference is that under legal constitutionalism, constitutional supremacy is realized in a cohesive written constitutional documentation.[90] The written constitution not only acts as an understanding between government and citizens, but also serves as the supreme law of the sovereign nation.[91] It is the four corners of the constitutional document that establishes the breadth and scope of the rule of law. Under political constitutionalism by contrast, supremacy is not realized by any one cohesive written document.[92] Instead, it rests with the political/legislative branch of government, which is in this case Parliament.[93] It is parliamentary supremacy that buttresses the rule of law.[94] In essence, these two principles represent a shift in the balance of rulemaking power from the politicians to the document and the branch of government responsible for adjudicating its interpretation. Inherent in the distinction between political and legal

[90] Gardbaum (n 87), 170-75.
[91] Gardbaum (n 87), 170-75.
[92] Gardbaum (n 87), 170-75.
[93] Gardbaum (n 87), 170-75.
[94] Gardbaum (n 87), 170-75.

constitutionalism appears to be the idea that governance is not a political mechanism, but an outcome of upholding the rule law by remaining true to the document that creates it.

Where Canadian constitutionalism is concerned, her prolonged 'colonial/quasi-colonial' status coupled with her late stage 'patriation' taken in tandem with her proximity to the United States has resulted in what has been labeled, '49th Parallel Constitutionalism'.[95] According to Justice Barry L. Strayer, a key contributor to Canada's patriation process, Canada's attempt to step beyond the shadows of British constitutionalism can be legitimately called her "profound and innovative…constitutional revolution."[96] Some scholars see Canadian constitutionalism as the adoption of the best aspects of not only the British Empire but also her rebellious southern neighbor.[97] Others have argued that Canadian constitutionalism is in fact a reaction against one or both constitutional frameworks.[98] As will be fully explored in Chapter 4, the legacy of POGG on Canadian constitutionalism is well-established. It is discernible not only in Canada's constitutional documents, but also her legislative infrastructure and continued ties to the British monarchy.

However, there is also support for the proposition that Canada's approach to constitutionalism can be attributed to bellicose relations fostered by the British Empire to keep the Canadian and American colonies at odds.[99] In the Harvard Law Review article, *Forty-Ninth Parallel Constitutionalism: How Canadians Invoke American Constitutional Traditions*, the author considers America's influence on Canadian constitutionalism from three perspectives: (1) America as the model; (2) America as the anti-model; and (3) America as dialogical resource—the independence model.[100] Although the intricacies of the three models are beyond the scope of this study, what is essential is the fact that Canada sought and gained patriation in 1982, which included the effectuation of the Canadian Charter of Rights and Freedoms. According to Harvard Law Review, Canada also "grapple[d] with the impact of the Charter of Rights and Freedoms on Canadian political and legal culture—including the increase in active judicial review and individual rights-

[95] *See generally*, Harvard Law Review Association, 'Forty-Ninth Parallel Constitutionalism: How Canadians Invoke American Constitutional Traditions' (2007) 120 Harvard Law Review 1936.
[96] Barry Lee Strayer, *Canada's Constitutional Revolution* (The University of Alberta Press 2013) xvi; *See also,* Barry Lee Strayer, 'The Cronkite Lectures, 1982: Patriation and Legitimacy of the Canadian Constitution' <https://patriationandlegitimacyofthecanadianconstitution.wordpress.com/>.
[97] Harvard Law Review Association (n 95), 1936-37.
[98] Harvard Law Review Association (n 95), 1937-48.
[99] *See generally*, Harvard Law Review Association (n 95).
[100] Harvard Law Review Association (n 95), 1937-48.

based litigation."[101] As such, Canada's Charter—akin to the U.S. Constitution—seemingly took on the role of a compact between the people and the Government, which establishes the rule of law contained in the document as supreme.[102] In this way, it appears that Canada veered toward legal constitutionalism, as it became more evident with full Canadian independence that constitutional supremacy would emanate primarily from the compact document(s) instead of from Canadian Parliament.

1.6 Contextualizing the Concept of Peace, Order & Good Government

To properly juxtapose POGG's influence on England, Canada, and the United States, it is necessary to understand that, beyond an exclusive cluster of Commonwealth scholars, the concept of Peace, Order and Good Government "remains relatively under-theorised and under-researched."[103] Those who have contributed to the discourse have focused mainly on the inclusion of the POgG clause in constituting documents and its effect on legal analyses and judicial outcomes in specific Commonwealth nations.[104] In the text, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government*, Hakeem Yusuf expands the discourse by analyzing the comparative effects of the POgG clause not only on post-colonial constitutionalism but also on specific colonial implications in five nations of the Commonwealth, including England and Canada. Hence, Yusuf's comparative assessment represents an amalgamation of the work of that cluster of scholars and provides the most expansive scholarly research on the concept of POGG. This study relies on and endeavors to expand Yusuf's contributions where it pertains England, Canada, *and* the United States (although it is well understood that the United States is not a Commonwealth nation). Within the Commonwealth context, Yusuf explains that POGG "has played an important role in colonial and post-colonial constitutionalism as

[101] Harvard Law Review Association (n 95), 1938.
[102] Gardbaum (n 87), 170-71.
[103] Hakeem O Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge 2014) 2.
[104] *See e.g.,* Yusuf (n 103); Bora Laskin, 'Peace, Order and Good Government Re-Examined' (1947) 25 Canadian Bar Review 8; Adam Chapnick, 'Peace, Order, and Good Government - The Conservative Tradition in Canadian Foreign Policy' (2005) 60 International Journal 635; Ian D Killey, '"Peace, Order, and Good Government": A Limitation on Legislative Competence' (1989) 17 Melbourne University Law Review; Ian E Wilson, '"Peace, Order and Good Government": Archives in Society' (2012) 12 Archival Science: International Journal on Recorded Information 235; John Ralston Saul, *A Fair Country: Telling Truths About Canada* (Penguin Group 2008); *See also,* A Anne McLellan, Gerald Gall and Daniel Panneton, 'Peace, Order and Good Government' (*The Canadian Encyclopedia*, 2018) <https://www.thecanadianencyclopedia.ca /en/article/peace-order-and-good-government/> accessed 8 August 2018.

it has had not only legal but also [*political and historical*] significance in various jurisdictions in the Commonwealth."[105]

Although Yusuf's work in some instances criticizes POGG's application, the analyses undertaken by this study does not attempt to condemn the imperial policies of the former British Empire. Historian Frank Luttmer advises that "the past must be understood on its own terms; any historical phenomenon -- an event, an idea, a law, or a dogma…must first be understood in its context, as part of a web of interrelated institutions, values, and beliefs that define a particular culture and era."[106] Thus, it is not the objective of this study to argue the injustices of Imperialism, as it is well understood that Imperialism is a worldwide phenomenon that implicates more than the national ideologies of the three focus nations. Instead, this study attempts to approach the rise and decline of the British Empire from a more pragmatic perspective. Specifically, this study considers the British Empire's implementation of POGG by attempting to demonstrate that it is not simply an unexplained constitutional 'clause' that "denote[s] the delegation of large but undefined powers to a nominated rule-maker."[107] Specifically, this study attempts to show that the POGG doctrine was first a set of medieval policies used as a mode of societal ordering for the sake of kingdom building. POGG then became the doctrinal conduit between British Imperialism and post-colonial constitutionalism in England, Canada, and the United States. In other words, POGG will be analyzed not only as the effect of British Imperialism—as Yusuf highlights—but also as the ideological template or doctrine, which implicated specific imperatives that made the rise of the British Empire possible.[108] Taken in tandem, the societal imperatives, and the constituting documents that memorialized them, substantiate each nation's perspective on the entanglement and/or disentanglement of religion and government in their respective constitutional frameworks.

Although it is well understood throughout the Commonwealth that the phrase 'peace, order and good government' has distinguished the relationship of the Crown and the citizenry for countless centuries, the phrase is inherently ambiguous.[109] Therefore, it is important to understand the scope of its historical and modern application. In modern parlance, the

[105] Yusuf (n 103), 1.
[106] Frank Luttmer, 'Why Study History?' (1996) <https://mrbilbrey.files.wordpress.com/2009/01/why-study-history.pdf>.
[107] Yusuf (n 103), 28. Yusuf citing Lord Justice Sedley from the in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, [2007] EWCA Civ 498 at [50].
[108] Yusuf (n 103), 1.
[109] Wilson (n 104), 235.

POgG clause—included in constitutional documents of the Commonwealth—has come to stand for the following proposition:

> [t]he federal government [should possess] comprehensive authority over any matters not immediately pertaining to [colonies, dominions, or provinces]. In practice, federal authority has been interpreted by the courts as pertaining to matters concerning four branches outside of federal and provincial jurisdiction: residual, emergency, national concern and federal paramountcy.[110]

Before the implementation of modern conceptions of a confederation or a national 'federal government', POGG was an imperial reference that characterized the means by which the British Empire conferred rule making authority to its overseas colonial possessions to allow for the development of colonial laws without granting comprehensive autonomy.[111]

As will be demonstrated in subsequent chapters, the ideology behind the doctrine symbolized a specific philosophical perspective on socio-political and legal ordering in Medieval England before the British ever left the British Isles. Once the British set their sights on 'empire', the doctrine came to also further Great Britain's overseas expansion, which then ultimately led to it becoming a residuary clause of the constitutions of British Commonwealth nations.[112] According to Yusuf:

> POGG has been used the *dual* purpose of furthering British imperialism (to facilitate direct or indirect control and governance of its overseas territories) as well as to grant powers of self-rule (and later independence) at some point, to various parts of the British Empire.[113]

In the exploration of this claim, much of the research that has been undertaken by Commonwealth historians and scholars has focused on different facets of British Imperialism and Commonwealth constitutionalism. Taken in aggregate, these scholars demonstrate that political and legal control—whether direct or indirect—was predicated on several key imperatives that appear to mark the realization of the aims of POGG.[114] The implementation of Great Britain's political infrastructure—*i.e.,* a hereditary monarch and

[110] McLellan, Gall and Panneton (n 104).
[111] Yusuf (n 103), 7.
[112] Yusuf (n 103), 7.
[113] Yusuf (n 103), 6.
[114] *See e.g.,* Dara Lithwick, '"Welfare" of a Nation: The Origins of "Peace, Order and Good Government"' (*Canada's Library of Parliament*, 2017) April <https://hillnotes.ca/2017/04/26/welfare-of-a-nation-the-origins-of-peace-order-and-good-government/> accessed 29 July 2018; Laskin, 'Peace, Order and Good Government Re-Examined' (n 104); Saul (n 104); Chapnick (n 104); E Rene Richard, 'Peace, Order and Good Government' (1940) 18 The Canadian Bar Review 243; McLellan, Gall and Panneton (n 104); Killey (n 104); Yusuf (n 103); Wilson (n 104).

parliamentary form of governance—were fundamental to the Empire's colonial establishment.[115] Additionally, law making power was controlled by the British Empire through the incorporation of English colonial law as the legislative and juridical substrates in overseas territories. Incorporation of English colonial law forced colonial assemblies to bend to the legislative and judicial will of the Empire.[116] Last but not least, the proliferation of the Church of England and Anglicanism served as the foremost imperative to colonization under the POGG doctrine. This is the case despite the fact that national indoctrination of religion often receives much less legal or constitutional consideration than the other imperatives. For this reason, subsequent chapters will demonstrate that constitutionally installing Anglicanism as the superior perspective on Christianity in the Canadian and American colonies—as well as other colonies—was central to British colonization.[117] The imperatives resulted in the POGG doctrine functioning as an imperial 'claw-back' option, which was often achieved by the act of 'disallowance,' to revert or retain control under the auspices of the royal prerogative.[118] Swinfen notes that "the right of disallowance had been exercised from the earliest years of the British colonial system."[119] Therefore, POGG as a manifesto for Imperialism was successful—for a while—in furthering what the British Empire understood as 'the Peaceable Kingdom'.[120]

1.7 Distinguishing 'Originalism' & its Connection to Foundational History

It is also useful to justify the reliance on Originalism as the constitutional baseline for the historical analyses attempted in subsequent chapters. In the white paper, *On Originalism in Constitutional Interpretation*, Steve Calabresi defines Originalism as follows:

> A theory of the interpretation of legal texts, including the text of the Constitution. Originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law. The original meaning of constitutional texts can be discerned from dictionaries, grammar books, and from other legal documents from which the text might be borrowed. [*It can also*

[115] John G Reid and Elizabeth Mancke, 'From Global Processes to Continental Strategies: The Emergence of British North America to 1783' in Phillip Buckner (ed), *Canada and the British Empire* (Oxford Scholarship Online 2011) 39-40.
[116] Herbert A Johnson, 'The Rule of Law in the Realm and the Province of New York: Prelude to the American Revolution' (2006) 91 History 3, 4-5.
[117] *See generally*, John Turner, 'Colonial Religion and the True Revolution in Virginia' in J Prud'homme (ed), *Faith and Politics in America: From Jamestown to the Civil War* (Peter Lang U.S. 2011) <https://www.peterlang.com/ view/ 9781453901809/9781453901809.00003.xml>.
[118] Yusuf (n 103), 135.
[119] DB Swinfen, *Imperial Control of Colonial Legislation 1813-1865: A Study of British Policy towards Colonial Legislative Powers* (Clarendon Press 1970) 2.
[120] McLellan, Gall and Panneton (n 104). Note that McLelland and others as well as Saul suggest British Imperialism changed the image of the perfect kingdom to the "myth of the Perfect Kingdom."

> *be inferred from the background legal events and public debate that gave rise to a constitutional provision*].[121]

It is generally accepted that Originalism is an essential feature of constitutional theory. One could argue that notwithstanding how many other interpretative modalities exist, every nation with a constitution—written or otherwise—has an 'originalist' perspective on the nation's constitutional development. This is the case notwithstanding the historical, socio-legal, and/or socio-political catalysts for that perspective—*e.g.,* the rise and/or fall of an empire, a declaration of independence, political and legal unification or division, provincial colonialism, or even the devolution of national legislative and/or judicial powers.

Where the numerous modes of constitutional interpretation are concerned, they have subsequently emerged to resolve differences of perspective on the meaning and/or application of certain constitutional provisions. As such, modes of interpreting constitutional documents have continued to expand to include terms like 'contextualism', 'strict/loose constructionism', 'textualism', 'structuralism', 'living tree doctrinalism', as well as others. This is especially the case in Canada and the United States. The existence of so many interpretations however has also resulted in considerable debate over which is the proper one to follow; which is more intellectually compelling; and/or which has become more legally influential.[122] Although an analysis of the merits and shortcomings of the many modes of constitutional interpretation is beyond the scope of this study, it is worth acknowledging their existence, if only to distinguish them from Originalism.

In the article, *Meaning and Belief in Constitutional Interpretation*, Andrei Marmor simplifies the distinction between those who promote one of many 'dynamic' constitutional interpretations and those who champion Originalism.[123] He frames the perspectives as follows:

> Proponents of a dynamic reading []—espousing interpretation of constitutional concepts according to [] contemporary understandings—typically rely on the idea that the Constitution entrenches only the general concepts it deploys,…without favoring the

[121] Steven Gow Calabresi, 'On Originalism in Constitutional Interpretation' (2018) <https://constitutioncenter.org/interactive-constitution/white-pages/on-originalism-in-constitutional-interpretation> accessed 12 August 2018.
[122] William W Fisher III, 'Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History' (1997) 49 Stanford Law Review 1065, 1065-66.
[123] Andrei Marmor, 'Meaning and Belief in Constitutional Interpretation' (2013) 82 Fordham Law Review 577, 577-96.

> articular conception of the relevant concept that the framers of the Constitution may have had in mind.[124]
>
> Originalists argue, to the contrary, that fidelity to the Constitution requires an understanding of its provisions according to the particular conception of the abstract concepts prevalent at the time of enactment, and not those we may now favor.[125]

Where it pertains the modalities referenced above (as well as others not mentioned), they can be loosely labeled as 'dynamic', as they appear to fit within the aforementioned definition. Specifically, they might encompass contemporary interpretations of past interpretations; interpretations that represent the bifurcation or splintering of broader perspectives on constitutionalism; or interpretations that result from the amalgamation of several overlapping perspectives. To illustrate, William Fisher III contends that contextualism, textualism, structuralism, and new historicism have each evolved into a 'reasonably distinct' method of constitutional interpretation as a result of being debated by intellectual historians since the 1970s.[126] As such, each has had its turn at "influenc[ing] the study of the development of American legal doctrine and legal thought."[127] Similarly, Justice Grant Huscroft and Jeffrey Goldsworthy note that the living tree doctrine has become Canada's preferred approach to constitutionalism, not because it is the only or most persuasive mode of interpretation, but because it is a progressive rejection of America's more conservative standpoint on constitutionalism.[128]

While the influence of the many modes of interpretation has ebbed and flowed, the consistency of Originalism as a means of extrapolating the meaning of American and Canadian constitutional documents does not appear to have waivered in relevance. Justice Huscroft and Bradley Miller have compiled an entire text dedicated to the endurance of Originalism as a preferred mode of constitutional interpretation in the United States.[129] These scholars acknowledge at the outset that "Originalism is a force to be reckoned with in American constitutional theory."[130] Likewise, Richard Albert and David R. Cameron

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[124] Marmor (n 123), 577.
[125] Marmor (n 123), 577.
[126] Fisher III (n 122), 1065.
[127] Fisher III (n 122), 1065.
[128] Jeffrey Goldsworthy and Grant Huscroft, 'Originalism in Australia and Canada' in Richard Albert and David R Cameron (eds), *Canada in the World : Comparative Perspectives on the Canadian Constitution* (Cambridge University Press 2017), 183.
[129] *See generally*, Grant Huscroft and Bradley W Miller, *The Challenge of Originalism: Theories of Constitutional Interpretation* (Grant Huscroft and Bradley W Miller eds, Cambridge University Press 2011).
[130] Grant Huscroft and Bradley W Miller, 'The Challenge of Originalism: Theories of Constitutional Interpretation' in Grant Huscroft and Bradley W Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press 2011) 1.

promote similar assertions in the recently compiled text focused on comparative perspectives on Canadian constitutionalism.[131] Notwithstanding references to Canadian constitutional documents as a collective non-fixed 'living tree', the unmistakable theme that binds the chapters of the text is the significance of Canada's foundational and post-colonial history and their effects on modern evaluations of Canadian constitutionalism.[132] In the chapter, *Originalism in Australia and Canada: Why the Difference?*, Huscroft and Goldsworthy note that, "a moderate version of [O]riginalism was inherent in British principles of statutory interpretation used to interpret [the two constitutions] for many decades following their enactment."[133] Despite Canada's perceived shift to a more progressive perspective, Huscroft and Goldsworthy also observe that Canada's national judiciary continues to rely on Originalism in many cases today.[134] Therefore, it appears that where it pertains the U.S. and Canada, constitutional scholars, practitioners, and judiciaries continue to revert to Originalism as the benchmark.

Returning to Calabresi's definition of Originalism as the baseline for seeking a prudent response for the U.S. concerning faith-based legal exceptionalism, it would appear that Originalism finds its merit in the 'paper-trail' of foundational documents that create and maintain a historical record of the establishment of national sovereignty. Central thereto is the U.S. Constitution itself, which is an articulation of specific rights and freedoms that exist in tandem with national sovereignty. Therefore, it is safe to suggest that Originalism is more than a mode of constitutional interpretation and thus not analogous to those interpretations that have ebbed and flowed over time. In the recent article *Originalism as a Theory of Legal Change*, Stephen Sachs asserts a similar claim.[135] Making distinction between constitutional interpretations and Originalism, he suggests that, "what makes debates over 'constitutional interpretation' so frustrating is that the participants often seem to have different concepts in mind."[136] For some theorists, constitutional interpretation entails considering subsequent extra-textual sources, such as precedent, longstanding traditions, the American ethos, etcetera.[137] For others however, there is little

[131] *See generally*, Richard Albert and David R Cameron, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Richard Albert and David R Cameron eds, Cambridge University Press 2018).
[132] *See generally*, Albert and Cameron (n 131).
[133] Goldsworthy and Huscroft (n 128), 183.
[134] Goldsworthy and Huscroft (n 128), 183.
[135] *See generally*, Stephen E Sachs, 'Originalism as a Theory of Legal Change' (2015) 38 Harvard Journal of Law & Public Policy 817, 817-88.
[136] Sachs (n 135), 829.
[137] Sachs (n 135), 829-32.

to no extra-textual deference afforded when interpreting the U.S. Constitution.[138] In other words, ongoing philosophical debates over what has been or should be factored into constitutional interpretations—like those highlighted by Fisher, Huscroft, and Goldsworthy—contribute to the ebb and flow of the different modalities.

However, philosophical debates cannot and do not claim an authoritative role for the United States as does Originalism and/or the Constitution.[139] Sachs acknowledges that the U.S. Constitution "serves as the ultimate source of our supreme law. And in defense of this premise, the philosophy of language has nothing to say."[140] Where it pertains the importance of returning to Originalism to extrapolate the meaning of the U.S. Constitution, he further clarifies:

> Relying on past law is hardly unusual. What's distinctive about American practice, though, is that it relies on the law of *the Founding*. We date our legal system.... The salient claim, for present purposes, is that the Constitution represents a boundary in time, separating our present legal system from older systems that we've discarded.[141]

Thus, "[e]ven after two hundred years, [Americans share] what some scholars have called 'constitutional continuity' with the Founding."[142] Moreover, the relationship between Americans and 'the Founding' affords the law of the Founders a "certain sort of prima facie validity."[143] Therefore, reliance on Originalism, instead of other 'dynamic' interpretations, when addressing whether it is constitutionally prudent to return to a colonial practice that the Framers had already discarded (*i.e.,* faith-based legal exceptionalism) is not only reasonable but is arguably a preservation of 'constitutional continuity'.

As will be more fully assessed in Chapter 5 of this study, Professor Ellis West makes a similar observation while evaluating the merits of Originalism as a means of assessing the imprudence of religion-based exemptions under the 1st Amendment. In his case against the post-colonial right to religion-based exemptions, West acknowledges the unmistakable significance and persuasiveness of Originalism. Moreover, he opines that historical context—which is evidenced by the documented occurrences leading up to the drafting of the U.S. Constitution—is essential to add precision to the circumstances that lead British-

[138] Sachs (n 135), 829-32.
[139] Sachs (n 135), 833.
[140] Sachs (n 135), 833.
[141] Sachs (n 135), 849.
[142] Sachs (n 135), 839.
[143] Sachs (n 135), 849.

Americans to not only declare independence but also construct the U.S. Constitution.[144] As the historical analyses attempted in subsequent chapters focus extensively on the founding of England, Canada, and the United States, this study adopts the reference to 'foundational' perspectives, commitments, and/or ideals as a more precise descriptor for clarifying the documented historical circumstances surrounding the constituting paper-trail that buttresses the historical analyses attempted by this study. This allows for the question of faith-based legal exceptionalism to be properly linked to the most authentic point of rationally-balanced inquiry for the three nations: where Imperialism, Colonialism, and Constitutionalism converge.

1.8 A Theoretical Framework for Evaluating Religious Plurality & Secularism

Likewise, it is important to make the connection between constitutionalism and each nation's approach to the relationship between religion and government in the furtherance of their respective approaches to liberal democracy. As such, this study will adopt the terminology fashioned by W. Cole Durham Jr. in his analytical framework, which provides a taxonomy for methods in which constitutions address religious plurality in democratic as well as other societies.[145] In the text, *Perspectives on Religious Liberty: A Comparative Framework*, Durham integrates the work of G.R. Ryskamp to establish a basis for conceptualizing the "church-state identification continuum."[146] The continuum is predicated on the existence of four foundational or 'threshold' conditions necessary for religious liberty to exist and flourish. These conditions include: (1) plurality; (2) economic stability; (3) political legitimacy within the society in question; and (4) some willingness on the part of differing religious denominations and/or subgroups and their devotees to live with each other.[147] As each focus nation assessed in this study is specifically highlighted in Durham's taxonomy, it can be inferred that the threshold conditions are met without the

[144] Ellis M West, 'The Case against a Right to Religion-Based Exemptions' (2014) 4 Notre Dame Journal of Law, Ethics, and Public Policy 623, [145]. Specifically, West notes that, "[i]t must be emphasized that the argument set forth in this section is not for an "originalist" interpretation of the Constitution, for it does not assume that the meaning of the Constitution should be determined exclusively or even primarily by the original intent of the framers… [because] a right to religion-based exemptions cannot be justified on the basis of nonhistorical kinds of reasons or factors…".

[145] Vicki C Jackson and Mark Tushnet, 'An Analytical Framework: Religious Pluralism and Constitutional Law' in Robert C Clark and others (eds), *Comparative Constitutional Law* (3rd edn, Foundation Press 2014) 1412.

[146] Durham, Jr. (n 64), 1412; *See also*, George R Ryskamp, 'The Spanish Experience in Church-State Relations : A Comparative Study of the Interrelationship Between Church-State Identification and Religious Liberty' (1980) 1980 Brigham Young University Law Review 616. The general features of the continuum are the focus of Ryskamp's article.

[147] Durham, Jr. (n 64), 1412.

need to make a case for their inclusion in subsequent analyses. With the existence of these conditions, various divergent approaches to religious liberty—*vis-à-vis* church-state arrangements or regimes—have emerged transnationally.[148] Although this study will focus on three arrangements, there is benefit in highlighting Durham's complete taxonomy. It encompasses absolute theocracies; *established-church regimes*; endorsed church regimes; cooperative church-state regimes; *accommodationist regimes*; *separationist regimes*; inadvertently insensitive regimes; and regimes that exhibit hostility toward religious liberty.[149]

Where it pertains absolute theocracies, Durham explains that these are "of the type one associates with stereotypical views of Islamic fundamentalism."[150] For further clarification, "Islamic fundamentalism was basically home-grown in Arab societies, where the masses turned to it as a panacea for society's failings and economic ills."[151] Although not denoted in the continuum, the Holy See seems to take on the characteristics of an absolute theocracy, as it has an ecclesiastical form of government and a purely "religious legal system based entirely on canon (religious) law."[152] Next are the established-church regimes, which Durham contends, "can cover a range of possible church-state configurations."[153] At one end of this pendulum are "regime[s] with an established church that is granted a strictly enforced monopoly in religious affairs…."[154] Italy and Spain are highlighted as the archetypes thereof.[155] The opposite end of the same pendulum

[148] Durham, Jr. (n 64), 1412.
[149] Durham, Jr. (n 64); Ran Hirschl, 'Comparative Constitutional Law and Religion' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 422-38 <https://papers.ssrn.com/ sol3/papers.cfm?abstract_id=1718496>. Like Durham and Ryskamp, Hirschl's continuum highlights eight models for church/state relationships, which include atheism states (People's Republic of China in 1949); assertive secularism (France or Turkey); separation as state neutrality toward religion (the United States); weak religious establishment (Norway, Denmark, Finland, and Iceland); formal separation with de facto pre-eminence of one denomination (Ireland); separation alongside multicultural accommodation (Canada); religious jurisdictional enclaves (Kenya, India, Nigeria, or Israel); and strong establishment (Afghanistan and Iraq). For the sake of consistency, this study relies on Durham's continuum because it effectively addresses commonly accepted regimes and is sufficiently malleable to account for modifications in national and/or international approaches to democracy and/or changing attitudes toward religion. Durham and Hirschl's analytical tools will be referenced in the United States and Canada's church-state arrangements. *See also,* Michael D Driessen, 'Religion, State, and Democracy: Analyzing Two Dimensions of Church-State Arrangements' 3 Politics and Religion 55 (2010).
[150] Durham, Jr. (n 64), 1417.
[151] Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications 2011) 207. Kamali further clarifies that although Islamic fundamentalists are divided into numerous subgroups which subscribe to different views and philosophies, the radical factions among them have embraced controversial views on aspects of law and government, democracy and basic rights.
[152] 'Judicial Governing Bodies of Vatican City State' (2018) <http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/note-generali/origini-e-natura.html> accessed 25 November 2018.
[153] Durham, Jr. (n 64), 1417.
[154] Durham, Jr. (n 64), 1417.
[155] Durham, Jr. (n 64), 1417.

encompasses "countr[ies] that maintain an established church, but guarantee[] equal treatment for other religious believes."[156] Durham identifies Great Britain as the standard.[157] Cooperative regimes "grant[] no special status to dominant churches, but the state continues to cooperate closely with churches in a variety of ways."[158] According to Durham, Germany "provides the prototypical example," although there are others.[159]

Where it pertains accommodationist and separationist church-state arrangements, the two most noteworthy archetypes are Canada and the United States, respectively. Durham explains that accommodationist regimes "insist on separation of church and state, yet retain a posture of benevolent neutrality toward religion;" whilst separationist regimes, "insist on more rigid separation of church and state," and any religion support by the Government is "deemed inappropriate."[160] According to Hirschl's parallel church-state categorization, Canada takes an accommodationist perspective to church-state interaction, which is manifested as "separation alongside multicultural accommodation."[161] The United States by contrast views disestablishment "as state neutrality toward religion."[162] As it concerns the United States' separationist approach, Durham notes that some U.S. scholars contend that interpretations of the religious clause of the 1st Amendment to the U.S. Constitution should be skewed more toward the accommodationist perspective.[163] Debate over the U.S. perspective notwithstanding, three church-state arrangements will be analyzed in relationship to colonial and post-colonial catalysts for their implementation: (1) established-church (England); (2) accommodationist (Canada); and (3) separationist (the United States). Moreover, they will be analyzed from the perspective that the first national arrangement symbolizes the creation of the POGG doctrine, while the latter two represent the adoption and rejection of that doctrine.

This leads to an additional means of limiting the scope of the analysis to be had herein. The analysis concerning religious plurality does not assume that every facet of religiosity is 'inalienable' or that a nation lacks religious liberty when it determines that certain manifestations of religious belief fall outside its constitutional and/or democratic

[156] Durham, Jr. (n 64), 1417.
[157] Durham, Jr. (n 64), 1417.
[158] Durham, Jr. (n 64), 1418.
[159] Durham, Jr. (n 64), 1418.
[160] Durham, Jr. (n 64), 1419.
[161] Hirschl (n 149), 431.
[162] Durham, Jr. (n 64), 1419.
[163] Durham, Jr. (n 64), 1419.

parameters.[164] Gill points out that "constitutional declarations pronouncing a 'right of conscience' enhance the perception that religious freedom is an 'either/or' concept."[165] Relying on this general misconception—especially where a nation espouses democracy—there appears to be a trend toward mistakenly falling back on the premise that all things even remotely alluding to religious freedom should fit in the inalienable category. To the contrary, it has long been recognized that the 'right of conscience or belief' is that which is sacrosanct.[166] The theory that every manifestation associated therewith is an indistinguishable extension of the inalienable right of belief remains provocative and under-supported because the practical outcomes do not support the theoretical assertion.

As a natural extension of considering religion and government, this study is also predicated on the theory that individual or moral secularism and national liberalism are distinguishable concepts. The former is evaluated as a 'form of religion' and the latter is a means to aspire toward 'equilibrium' when furthering religious freedom for all religious denominations and subgroups.[167] Such distinction offers a means to rebut the false assertion that secularists are 'irreligious-religious zealots' who are often the victors when national governments adopt disestablishment.[168] This study approaches this topic from the perspective that where nations have espoused disestablishment as a facet of constitutionalism, the motives for such adoption stand independent of the number of citizens who then find merit or prudence in the adoption. This is especially the case when a nation's adoption of disestablishment predates traditional notions of secularism. Where citizens gravitate toward or see the merit in disentangling religion and government, it does not logically follow that they are indoctrinated into a competing ideology for the sake of bolstering the argument in favor of faith-based legal exceptionalism for certain religious subgroups.[169]

To illustrate, 'irreligion' (or secularism) as a form of individual belief is usually defined as the antithesis to religiosity (or religion).[170] In his text, *Pluralism, Religion, and Secularism*, J. Milton Yinger combines several perspectives to offer a composite of what is meant when secularism is claimed as an individual response to religion:

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[164] Anthony Gill, *The Political Origins of Religious Liberty* (Cambridge University Press 2008) 1-25.
[165] Gill (n 164), 9.
[166] Gill (n 164), 9.
[167] *See e.g.,* J Milton Yinger, 'Pluralism, Religion, and Secularism' (1967) 6 Journal for the Scientific Study of Religion 17, 17-20.
[168] Yinger (n 167), 17-20.
[169] Yinger (n 167), 17-20.
[170] Yinger (n 167), 19.

> [i]t is "a view of life…based on the premise that religion and religious considerations, as of God and a future life, should be ignored or excluded'."…[171]
>
> "Secularism…is the name for an ideology, a new closed world-view which functions very much like a new religion." Herberg notes that when secularism is used in this way, it becomes "something very like a religion." It is not truly, then, the antithesis of religion; it is a form of religion.[172]

Rooted in this theory is also the understanding that some governments are not attempting to engage in the question of 'ultimate truth' or aspiring toward the proverbial 'afterlife', even when many of their citizens are. This is the case whether that afterlife is heaven, paradise, hell, the inferno, transformation, transfiguration, a hole in the ground, or an urn on a fireplace mantle. Moreover, it makes a distinction between nations that include a religious stance in their national constitutions, as is the case in most Muslim-majority nations, and nations whose citizens reinforce the discrete nuances of denominationalism without the nation making any specific national proclamation of one interpretation or another in constitutional documents.

The basis for establishing this point is to highlight the distinction between an individual preference of not being infringed upon by another person's religious views and a national objective that moves toward equilibrium amongst expansive plurality. Where it pertains faith-based legal plurality, this study attempts to further the theory that there should be consideration and concern when plural legal platforms encompass sanctioning religious ideologies that move in the opposite direction of the democratic ideals of a particular nation. Moreover, the national objective should be promoting shared values and protecting the national rule of law in the process of becoming the best democratic version of itself. This does not appear to mean that the nation is devoid of religion or irreligious. Instead, it demands that the Government act as an instrument of democratic progression within the scope of its sovereign reach, notwithstanding how many religious subgroups and denominations take part in the never-ending comparative/superlative fight for religious space or supremacy.

[171] Yinger (n 167), 19.
[172] Yinger (n 167), 19.

CHAPTER 2
THE CONCEPTION OF POGG:
ENGLAND'S ESTABLISHED CHURCH REGIME

"National self-esteem and self-assertion grew stronger, as did that already deep-rooted sense that Britain was specifically favored by Providence. It was a nation which was moving forwards and the inexorable expansion of trade and empire was striking evidence of this progress."[173]

This chapter provides a historiographic analysis of British Imperialism as the catalyst for the POGG doctrine and England's present constitutional relationship between the Church of England, branches of government, and non-Anglican religious subgroups and denominations. Specifically, this chapter explains the amalgamation of the discrete imperatives that became the constitutional roadmap for British imperial expansion. Moreover, this chapter demonstrates that England's longstanding established church-state arrangement compels the accommodation of certain requests for exceptionalism, which are associated with the religious dogmas that prevailed in former British colonies. In recent years, accommodation has come to encompass the legalization of Islamic law tribunals, notwithstanding the legislative and judicial challenges created thereby. This chapter also highlights more recent national efforts to demonstrate a set of values exclusive to the British in promotion of cosmopolitanism. Despite these modern efforts, this chapter illustrates that, akin to colonial practices, the imperial legacy of the POGG doctrine continues to dictate England's approach to religious plurality. Finally, this chapter sets the foundation for subsequent chapters which seek to consider periods during the rise of the British Empire that are germane to the overlapping foundational and post-colonial experiences in the United States and Canada. The juxtaposition of imperial and colonial perspectives will further clarify the divergent church-state arrangements that have developed in each nation as a result of disparate responses to POGG.

2.1 '*The Mea Culpa*': Obligatory Accommodation of Faith-Based Legal Exceptionalism?

It is well understood that the Church of England and Anglicanism have been interwoven fixtures attached to England's hereditary monarchial/parliamentary infrastructure since the time of Henry VIII. In the age of liberal democracy however, the regime appears to wrestle with two distinct but overlapping issues. The first issue is centered on the 'optics' of the infrastructure itself. Unless one hails from a nation with a similarly-situated or more tightly intertwined infrastructure, there is the sense of a carefully orchestrated national

[173] Lawrence James, *The Rise and Fall of the British Empire* (Abacus 1995) 75.

paradox. Moreover, it seems as if the entire nation is taking part by attaching secular labels to all things religious, including the Government's intimate affiliation with the Anglican Church. This is the case despite the obvious contradictions. This situation is made more puzzling because the trend in England is to contend that the nation is 'post-Christianity', although the quintessential constitutional debate over the last decade or so has been how the non-religious, the religious, and hyper-religious should peaceably co-exist.[174] Additionally, the backdrop of this debate encompasses a modern nation that continues to epitomize the concept of government "deriving its title-to-rule from a monarchy linked to church establishment."[175] Therefore, the lack of clarity concerning the necessity and function of the monarchial aspect of England's infrastructure (including the Anglican Church) makes it exceedingly challenging to discern the aims of certain national policies. This is especially the case when the policies appear counterintuitive to the nation's declared values.

Where the details of the paradox are concerned, Abell and Stevenson observe that "[c]onstitutionally…the Head of State [is the] head of the Church of England. Within England the reigning sovereign also has the title and role of Defender of the [Anglican] Faith."[176] Moreover, the broad reach of the British monarch's political and religious powers is supposed to naturally bifurcate to not only champion the liturgical interests of the Church of England but also defend the interests of those who espouse denominations of Christianity that effectively compete with Anglicanism. Moreover, the British monarchy's ecclesiastical reach includes even the secular interests of all British subjects.[177] Adding another layer to the situation is the fact that, unlike other religious denominations or subgroups, the Church of England has an exceptional place in society that includes a parliamentary presence. Specifically, the two highest-ranking members of the Church hold seats in perpetuity within British Parliament.[178] As England's national church signifies that its chief aim is safeguarding the souls of its parishioners, said protection has come to include marketing a democratically expedient endorsement of faith-based legal

[174] British Council, 'Religion and Belief Equality Guide' (2015) <https://www.britishcouncil.org/sites/default/files/religion_and_belief_equality_guide_2015.pdf> accessed 30 March 2018
[175] Council (n 174).
[176] Jackie Abell and Clifford Stevenson, 'Defending the Faith(s)? Democracy and Hereditary Right in England' (2011) 32 Political Psychology 485, 487.
[177] GOV.UK, 'Who Is a British Subject?' (*Types of British Nationality*, 2019) <https://www.gov.uk/types-of-british-nationality/british-subject>.
[178] Mark Hill, 'Voices in the Wilderness: The Established Church of England and the European Union' (2009) 37 Religion, State and Society 167, 169.

exceptionalism.[179] Thus, the contradiction is derived from the fact that no one satisfactorily confronts the central issue. That is, the Church as a religious organization furthering a specific denominational perspective, and the national government, are not typically endeavoring to achieve the same ends.[180] Nevertheless, these confounding nuances buttress England's approach to religion and governmental interaction—*vis-à-vis*—her 'established church-state arrangement'.[181]

The second issue is associated with 'adaptability', or the perceived lack thereof. The ostensible shift from royal to parliamentary supremacy led to the adoption of more liberal ideals, which has occurred over the past few centuries. This evolution has apparently made the paradoxical relationship between the Crown, the Church, and Parliament more unexplainable. This is especially the case because the British monarchy no longer actually 'rules' the nation, but still retains a symbolic crown that encompasses an expansive breadth of discretionary powers under the royal prerogative.[182] According to Bartlett and Everett, "[t]he concept of prerogative powers stems from the medieval King acting as head of the kingdom, but it is by no means a medieval device."[183] Modernity has seen the power reined in considerably, but it still affords Elizabeth II a wealth of latitude concerning national religiosity as well as a plethora of foreign policy responsibilities.[184] These include the ability to "enable[] Ministers,…deploy the armed forces, make and unmake international treaties and to grant honours [amongst *many* other things]."[185]

Instead of responding to modernity by returning religion to the Church; allowing Parliament to govern the nation; and letting the symbolic rulers find other occupations or retire altogether, England holds steadfast to this imperialistic regime. Thus, the present church-state arrangement retains the essential pillars of colonial-era policies under the POGG doctrine. Recall that in the colonial context, POGG entailed the proliferation of the Church of England and Anglicanism, which was tethered to a ruling hereditary monarchy, while

[179] *See generally,* Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective', *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2017).
[180] Augur Pearce, 'Religious Denomination or Public Religion? The Legal Status of the Church of England' in Richard O'Dair and Andrew Lewis (eds), *Law and Religion* (4th edn, Oxford Scholarship Online 2012) 457, 458-90.
[181] Durham, Jr. (n 64), 1417.
[182] Gail Bartlett and Michael Everett, 'The Royal Prerogative' 03861 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03861> accessed 16 November 2018.
[183] Bartlett and Everett (n 182).
[184] Bartlett and Everett (n 182).
[185] Bartlett and Everett (n 182); *See also,* Abell and Stevenson (n 176), 487. Abell and Stevenson clarify that it is within the prerogative of the reigning monarch to completely dissolve Parliament and take a more active role in promoting Anglicanism nationwide, if he/she so desires.

Parliament and the English judiciary cooperatively ensured that the laws of British colonies remained as near as possible to the laws of England. In the modern context, POGG appears to be the basis for maintaining the preeminence of the Church of England, which remains tethered to a symbolic hereditary monarchy, while Parliament and the English judiciary work to foster political constitutionalism for the sake of furthering the democratically-bent social order.

In an effort to promote multiculturalism, England also adopted national social standards, which have been branded Fundamental Shared Values ('FSVs').[186] These values include embracing: (1) democracy—*i.e.,* a culture built on freedom and equality; (2) the rule of law; (3) individual liberty; and (4) respect and tolerance—*i.e.,* a bi-lateral respect for values, ideas and beliefs of others without imposition.[187] The national advancement of said values seems to be meant to promote the United Kingdom as a beacon of cosmopolitanism. These fundamental values are purported to be non-negotiable; that is, they set the floor for immigration and citizenship in the nation as well as establish a threshold for participation in British society.[188] Fundamental values notwithstanding, it appears that certain immigrants have been afforded a remarkable degree of latitude in negotiating their commitment to these shared values. In fact, some have argued that certain immigrants from non-democratic nations have been afforded the choice of simply opting-out of the values all together in favor of the religiously political ideologies and legal precepts entrenched in the nations from which they hail.[189]

The disparity produced by the ability to opt-out becomes more remarkable when the common denominator between England's imperial legacy and sanctioning certain opt-outs is fully appraised. Specifically, the common denominator appears to be associated with the effects of the POGG doctrine as it was applied during the rise and fall of the British Empire. National decisions like sanctioning faith-based legal exceptionalism in England take on new meaning when one considers that most of the migrants afforded the bandwidth to negotiate or opt-out are from former colonial possessions of the British

[186] 'Fundamental British Values' (*Total People: Leaders in Learning*, 2019) <https://www.totalpeople.co.uk/british-values.>.
[187] 'Fundamental British Values' (n 186).
[188] *See e.g.,* '"Fundamental British Values" and Citizenship' (*National Secular Society*, 2017) <https://www.secularism.org.uk/fundamental-values-citizenship/> accessed 30 March 2018; Lottie Moore, '"British Values": A Source of Unity in Polarised Times' [2017] *National Secular Society* <https://www.secularism.org.uk/opinion/2017/10/british-values-a-source-of-unity-in-polarised-times>.
[189] '"Fundamental British Values" and Citizenship' (n 188).

Empire.[190] This is the case despite the free movement of people occasioned by EU membership.[191] As such, the imperial/colonial correlation appears to buttress expansive degrees of accommodation of non-Christian religious ideologies. Although this outcome might appear to be in keeping with England's imperial history, it is questionable whether the situation furthers the nation's shared values. As England's history includes subjugating divergent non-Anglican Christian denominations, it is also reasonable to question whether those colonial-era commitments to non-Christian dogmas have created a national condition that infringes on the legal rights of adherents of Christian denominations not associated with Anglicanism.

Undervaluing the significance of the infringement seemingly results from the presumption that all Christian denominations are indistinguishable, and the Anglican Church—as the national church—expresses the collective views of them all. As this study will demonstrate, this is the fallacy that buttressed American colonial rebellion as well as constitutional disestablishment in Canada and the United States. Therefore, England's decision to 'accommodate' faith-based legal exceptionalism seems to have all the trappings of an obligation—*i.e.,* a mea culpa—instead of the appearance of the promotion of the aforementioned values. For the sake of illustration, British Parliament most recently decided to sanction the creation of Islamic law tribunals—*i.e.,* faith-based legal exceptionalism—and afford legal effect to the judgments of those tribunals, even though the decision raises significant questions concerning the partiality and general application of Islam's religion-centric legal precepts.[192] It is well understood that England has a history of maintaining religious law courts that is as long as the existence of her present church-state arrangement. The first official Ecclesiastical court in England was established in tandem with the Church of England for the express purpose of annulling Henry VIII's marriage to Catherine of Aragon. When its jurisdictional reach was at its broadest, England's Ecclesiastical judiciary dispensed with legal matters concerning probate, marriage, divorce, child legitimacy, distribution of personal property, defamation, certain

[190] Council (n 174).
[191] Council (n 174).
[192] *See e.g.,* Denis MacEoin, 'Sharia Law or "One Law For All"?' (David G Green ed, Civitas: Institute for the Study of Civil Society 2009); Maryam Namazie, 'Sharia Law in Britain: A Threat to One Law for All & Equal Rights' (2010); Catherine Shelley, 'English, Christian or Muslim Law: Deconstructing Some Myths' (2015) 26 Islam and Christian-Muslim Relations 307 <http://dx.doi.org/10.1080/09596410.2015.1040239>. Shelley highlights the "relationship between English law, religious laws, Islam and other faiths." The analysis focuses on several questions and concerns about how accommodation will affect Judeo-Christian values in England.

torts that were considered a breach of the King's peace, as well as issues associated with the conduct of the clergy.[193]

Modernity and religious plurality resulted in Parliament curtailing the jurisdiction of England's religious courts such that they could only adjudicate legal issues concerning the Anglican clergy and other matters associated with the national church.[194] In the text, *The Ecclesiastical Courts*, John Baker observes that by the 19th century, "what still remained of the Church's [adjudicative] jurisdiction was becoming indefensible."[195] He further explains that it had come to be considered 'absurd' in a plural society that non-Anglicans (*i.e.,* Dissenters, Catholics, Jews, etc.) should be subject to the Ecclesiastical laws of Anglicanism instead of the laws of an impartial Common Council.[196] Therefore, England's recent recognition of Islamic law courts as a feasible alternative for the settlement of the same kinds of legal disputes that were formerly covered by England's Ecclesiastical courts—in addition to matters that 'creep' in, like certain domestic torts, crimes or contracts—appears to be a societal and juridical relapse.[197] Moreover, it seems implausible to suggest that returning to faith-based legal exceptionalism is a natural extension of the fundamental values shared by the entire nation. This claim becomes more compelling when one considers that Parliament has also attempted to erect the same jurisdictional limitations around Islamic law tribunals that modernity and religious plurality placed on Anglican Ecclesiastical courts. That is, Parliament has attempted to curtail the encroachment of Islamic law by precluding tribunal decisions from being carried over into the national judicial system.[198]

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[193] 'Ecclesiastical Court', *ENCYCLOPÆDIA BRITANNICA* (Encyclopaedia Britannica, Inc 2018) <https://www.britannica.com/topic/ecclesiastical-court>; *See also*, John Baker, 'The Ecclesiastical Courts' in John Baker (ed), Introduction to English Legal History (Oxford University Press 2019) 139. *See generally*, 136-143 in which Baker details the jurisdictional issues that prevailed after England's break with Rome and the preceding events that led to common lawyers advocating for "the abolition of the Church courts….". According to Baker, steps to abolish the Church courts included amongst other measures editing and abridging Ecclesiastical laws: suppressing the study of canon law at Oxford and Cambridge; as well as introducig new courts to replace Ecclesiastical ones.

[194] William Epstein, *Issues of Principle and Expediency in the Controversy over Prohibitions to Ecclesiastical Courts in England*, vol 1 (1980) 251-53. According to Epstein, Anglican archbishops began understanding the issues associated with the scope and effect of ecclesiastical law and courts by the end of the 16th century, as they were labeled, "a carcass without a soul." *See also*, Baker (n 193), 139-43.

[195] Baker (n 193), 142.

[196] Baker (n 193), 142.

[197] Cox (n 67).

[198] Maria Reiss, 'The Materialization of Legal Pluralism in Britain: Why Sharia Council Decisions Should Be Non-Binding' (2009) 26 Arizona Journal of International & Comparative Law 739, 741. In addition to outlining the British Government's attempt to accommodate Islamic law tribunals, she also validates a position that is tangential to the aims of this study where it pertains the contradiction between shared values and sanctioning exceptionalism. Specifically, Reiss contends: "[b]y using another culture's laws and norms, "bad faith" relates to the laws being applied. Although a judgment might be considered biased or

Parliament's attempts at curtailment suggest that there is an acute awareness of the likelihood of burdening religious liberty for non-Muslims and other legal rights associated with imposing the religious laws of one religious subgroup or denomination upon the whole of society. This is the case notwithstanding whether the laws are designated religious guidelines or foreign precepts imported from other nations…or whether they are imposed from the bottom up instead of from the top down. In the text, *The Reconstruction of the English Church*, Roland Usher clarifies that historically Anglican Ecclesiastical courts utilized the *Corpus Juris Canonici*, which was supplemented by certain regional ecclesiastical canons, to address the aforementioned types of legal matters.[199] After Elizabeth I assumed the throne (and Imperialism became a domestic probability), the British Empire was eventually forced to confront the fact that its religion-centric sources of law and faith-based legal infrastructure was no longer appropriate to address the aforementioned types of legal matters.[200] Although the jurisdictional shift away from Anglican religious law was not complete until the Victorian era, recognition of issue was the

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sexist under traditional British law, the decision could still be considered fair under the alternative body of law being used. Unless the British legislature amends the Arbitration Act to prevent its use in matters involving religious law, Britain will be inadvertently sanctioning a parallel legal system which no longer embodies the values of British law regarding equal judicial treatment of men and women….[therefore] it is not wise to incorporate Shari'a Councils as tribunal bodies under the Arbitration Act or to allow their decisions to become legally binding."

For another perspective, see also, Yüksel Sezgin, 'Reforming Muslim Family Laws in Non-Muslim Democracies' in Jocelyne Cesari and Jose Casanova (eds), Islam, Gender, and Democracy in Comparative Perspective (Oxford University Press 2017) 160-85. Sezgin's analysis considers what happens when non-Muslim democracies—*i.e.,* Israel and Greece—do not erect a jurisdictional fence around Islamic law tribunals/MFLs and instead employs the national judiciary as a reformation center to make Islamic law more democratically-inclined. It is worth noting that both Israel and Greece are epicenters for a particular religious ideology; both have also had a long relationship with Ecclesiastical courts. Israel is the official democratic Jewish state, while Greece's national constitution upholds the supremacy of Greek Orthodoxy. Thus, they appear to share constitutional similarities with England and are illustrative of how England might fair if she eventually removed the jurisdictional fence from around Islamic law tribunals. According to Sezgin, neither Israel's nor Greece's Civil courts have been able to effectuate any substantive or procedural modifications to MFLs, even after being "increasingly asked by plaintiffs, governments, and women's and human rights groups to intervene in the jurisdiction of [Islamic law] courts in order to uphold constitutional rights such as gender equality, fairness of trials, freedom of religion, the rights of children, and so forth" (160). Sezgin's findings are also noteworthy for the U.S. and Canada, as they are yet another cautionary tale of the problematic outcomes associated with Muslim-minority democratic nations attempting to accommodate authoritarianism and faith-based legal exceptionalism under the guise of multiculturalism. Sezgin's findings do not address how non-Muslims' constitutional rights are affected when Civil courts in non-Muslim democracies integrate Islamic law in a failed attempt to play the role of reformer. This may be attributable to the fact that the existence of other Ecclesiastical courts in Israel and Greece means that integration of MFLs or Islamic law tribunals does not create 'an exceptional circumstance' in the same way it does in Canada and the U.S. Nevertheless, Sezgin's findings provide support for the theory that England's decision to sanction faith-based legal exceptionalism sets the stage for a host of issues related to constitutional rights as the Government assumes the risks of Islamic law infringing upon the rights of non-Muslims if Islam's religious precepts find their way to the national judiciary.

[199] Roland G Usher, 'The Reconstruction of the English Church, Vol. 1' in Joseph H Smith (ed), *American Casebook Series: Development of Legal Institutions* (West Publishing Company 1965) 367.

[200] Usher (n 199), 370-71.

catalyst for moving beyond the "ancient system of [E]cclesiastical courts," that existed before the split with Rome.[201] Instead, impartial national councils or judiciaries usurped the legal landscape thereby precluding the continuation of faith-based legal platforms as appendages to the countrywide infrastructure. It also prevented the reversion to Catholic or Anglican religious law and/or canon to create or expand the national rule of law.[202] Moreover, jurisdictional conflicts resulting from Anglican Ecclesiastical courts' attempts to retain their preeminence (akin to the manner in which the Empire attempted to retain preeminence of Anglicanism) played a significant role in the expansion of English Common law as the codex for legal decision-making for the whole of society.[203]

As such, the recognition of a rule of law that is common to all made the imposition of religious law not only problematic but legally impermissible.[204] Whether recognition was furthered by enlightenment or reformation; unresolvable conflicts in judicial jurisdiction; or the loss of the colonial possessions that rebelled against it, the British Empire seemed to eventually comprehend that it is insupportable to enforce Anglican exceptionalism through a faith-based juridical model.[205] As the renewed attempt at faith-based legal exceptionalism implicates Islamic law, it is unlikely that the modern British Government has failed to realize that it is just as insupportable to enforce Islamic law exceptionalism on the whole of society. This is the case notwithstanding whether it is initiated at one degree of separation from the national judiciary and purported to be a policy in promotion of multiculturalism. Therefore, sanctioning Islamic law exceptionalism in England may create a socio-legal quagmire by reinstituting a legal alternative that had already been

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[201] Usher (n 199), 370-71; *See also,* RB Outhwaite, 'The Eccliesiastical Courts: Structures and Procedures', *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge University Press 2007). *See also*, Baker (n 193), 135. Baker notes that out that, "[English] ecclesiastical courts…continued to deal with matrimonial questions, probate, and intestate succession to personalty, until Victorian times."

[202] Usher (n 199), 354-58.

[203] Usher (n 199), 371-72; *See also,* Timothy Oyen, 'Stare Decisis', *Legal Information Institute* (Cornell Law School 2017) <https://www.law.cornell.edu/wex/stare_decisis>. Latin for "to stand by things decided." In the United States, Canada, and the United Kingdom, the term has generally come to mean the doctrine of precedent. "According to the U.S. Supreme Court, stare decisis '*promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process*.'…Moreover, proponents argue that the predictability afforded by the doctrine helps clarify constitutional rights for the public. Other commentators point out that courts and society only realize these benefits when decisions are published and made available."

[204] Eugene V. Rostow, 'The Realist Tradition in American Law' in Arthur M Schlesinger Jr. and Morton White (eds), *Paths to American Thought* (Chatto & Windus 1964) 205.

[205] Usher (n 199), 354-58; Joseph H Smith, *American Casebook Series: Cases and Materials on the Development of Legal Institutions* (Joseph H Smith ed, West Publishing Company 1965) 353-54. Smith outlines the jurisdictional issues presented by what can be labelled jurisdictional creep. Specifically, the split with Rome left the ecclesiastical courts in tact but did not account for the effects of religious schisms on conflict of laws where religion-centric precepts (*i.e.,* Canon law) continue to creep into the area that would become English Common law.

tested and found wanting in a society with expansive religious plurality. This reality affords more weight to the suggestion that England's approach to Islamic law exceptionalism contains a perceived obligatory element that is a byproduct of her imperial legacy under the POGG doctrine, instead of being motivated by furthering England's more modern shared values.

2.2 *The King's Peace* & the Genesis of the POGG Doctrine

To fully understand how a 'mea culpa' might manifest itself in the accommodation of Islamic law exceptionalism, it is necessary to recall how POGG was created, adapted, and integrated for the purpose of societal and religious 'Anglicization'. It is also necessary to correct the misconception that POGG is not applicable in the United Kingdom and/or the Commonwealth of Nations. According to Yusuf:

> [t]he common supposition is that peace, order and good government (POGG) does not apply in the United Kingdom, at least not in this most common phrasing of it. [*However*,]…POGG has its origins in the British Isles and at least historical application through the Justices Act 1489 [as well as] very important Tudor era legislation made for facilitating better governance in England (and Wales from 1543).[206]

Notwithstanding theories to the contrary, the POGG doctrine appears to be alive and well in the United Kingdom. It is well understood that the United Kingdom is a constitutional continuation of the former British Empire, the former Great Britain, as well as the former Britannia. Thus, it is implausible to suggest that the imperatives of POGG, which were legally imposed during the United Kingdom's imperial rise, are not applicable to the United Kingdom. To do so is to suggest that the concept of POGG is not applicable in the nation where it was created, adapted, and integrated as a conduit for colonizing territories that were not Anglicized and thus not adequately civilized.

A more accurate supposition might be that the POgG clause is not implicated in the Commonwealth-era devolution of powers in Wales and Scotland, which were territorially usurped and legislatively subjugated by England but not 'officially' colonized. However, it is integral to the constitutional nature of Northern Ireland and other British colonial holdings that subsequently became members of the British Commonwealth.[207] As has been previously noted, evaluating POGG as a vague legal clause suggests that there is no history, basis, or impetus for its existence, which also fosters a misconception about the

[206] Yusuf (n 103), 371.
[207] Yusuf (n 103), 371.

constitutional nature of the United Kingdom. However, if the POgG clause is appropriately linked with the discrete set of imperatives that sustained its centuries-long employment, then it becomes clear that POGG was not just an ideology established on the British Isles. Its continued employment established a template or doctrine that offers an explanation for how the United Kingdom might be obliged in a more modern era to accommodate the religious legal precepts of the previously 'distant' inhabitants of former colonial holdings, notwithstanding how illiberal the application of those precepts might be.

Where England's legacy of Anglicization is concerned, it is generally understood that Roman occupation and Constantine I brought Christianity to the British Isles. However, it is what occurred after the Romans left which set the British Isles on the course toward constituting the imperatives of POGG as a means of colonial societal management. By the 7th century, Christianity had eclipsed paganism as the domestic religion of the kingdoms of post-Roman Britain.[208] Scagg observes that, "[o]ne by one, these kingdoms were converted to Christianity, initially by missionaries sent by Pope Gregory the Great to Kent at the end of the sixth century and by Irish monks from Iona in western Scotland during the early seventh."[209] As Constantine I protected Christianity during the Roman Era, Alfred the Great is credited with forming the archetype for the Christian English kingdom that exists today. Abbott observes that Alfred the Great "spent his life…laying broad and deep the foundations on which the enormous superstructure of the British [E]mpire has since been reared."[210] In his self-proclaimed role of 'defender of the Christian faith,' Alfred the Great promoted education, the rule of law, and a more sophisticated model of government in England by mingling religion with all three areas.[211] He also made the church the hub for literacy, which took on a fundamental role in the education of English society.[212] As a result of Alfred's promotion of the Christian faith, it became the religious substrate for the new social order of 'English' citizenry. Like polytheism's role in the Roman Empire, Christianity became the religious, linguistic, legal, and political bonding agent in the single unified Christian nation.

[208] Peter Salway, *Roman Britain: A Very Short History* (2nd edn, Oxford University Press 2015) 11-12.
[209] D Scagg, 'Introduction. The Anglo-Saxons: Fact and Fiction' in Carole Weinberg and Donald Scragg (eds), *Literary Appropriations of the Anglo-Saxons from the Thirteenth to the Twentieth Century* (Cambridge University Press 2000) 2.
[210] Jacob Abbott, *History of King Alfred of England* (Project Gutenberg ed, Harper & Brothers 1877) 13-14 <http://www.gutenberg.org/files/16545/16545-h/16545-h.htm>.
[211] Justin Pollard, *Alfred the Great: The Man Who Made England* (John Murray Pubs Ltd 2007) 1-10.
[212] Pollard (n 211), 1-10.

These circumstances offer a historical basis for the inference that Alfred the Great was also responsible for promulgating the earliest iteration of the POGG doctrine. That is, he laid the groundwork for the amalgamation of the imperatives that came to underpin England's particular approach to colonial societal management. Recall from the previous chapter that POGG is more than a legal clause that resides in the constitutional documents of Commonwealth nations. In fact, the concept of 'Peace, Order and Good Government' represents an ideology that is not exclusively associated with colonialism. In Great Britain's case, desires for territorial expansion resulted in POGG becoming the conduit for colonization, which accounts for its modern parlance.[213] However, the amalgamation of the imperatives as an approach to social ordering can be found in Medieval England before the English ever left the British Isles.

In the text, *The Empire of the Bretaignes—The Foundations of a Colonial System of Government*, Frederick Madden and David Fieldhouse theorize that the English medieval empire was the 'seedbed' of British constitutional forms later implemented by the British Government.[214] Yusuf builds on this theory by suggesting that the seedbed of POGG can be found "somewhere in English constitutional history or at least in its socio-political ordering."[215] Yusuf explains that archivists date "the earliest references to what came to be recast as 'peace, welfare, and good government,' and then 'peace, order and good government' to the Justices Act of 1489."[216] As it relates to both the constitutional history and the socio-political ordering, POGG seems to predate the Justices Act of 1489 since the imperatives are collectively prevalent in Alfred the Great's earlier Law-Code. According to Dammery and Pratt, Alfred took great effort to construct his legal codex, which came to be known as *sea domboc* (*i.e.,* the law or judgment book).[217] Pratt also acknowledges that the domboc is an often overlooked aspect "within the broader structures of royal thought[;]…[although] in scale and structure…[it] had high ambitions."[218] This would explain why the Law-Code was relied upon by Alfred's successors from the tenth-century onward, yet it has not been definitively linked with the imperatives or genesis of the POGG

[213] Frederick Madden and David Fieldhouse, *The Empire of the Bretaignes—The Foundations of a Colonial System of Government* (Greenwood Press 1985) 1.
[214] Madden and Fieldhouse (n 213), 1.
[215] Yusuf (n 103), 7.
[216] Yusuf (n 103), 7.
[217] Richard JE Dammery, 'The Law-Code of King Alfred the Great, Vol 1 (Doctoral Thesis)' (University of Cambridge 1991) i <https://www.repository.cam.ac.uk/handle/1810/251507>; *See also*, David Pratt, 'The Domboc as a Reorientation of Royal Law', *The Political Thought of King Alfred the Great* (Cambridge University Press 2009) 214.
[218] Pratt (n 217), 214.

doctrine.[219] The Law-Code was divided into four distinct sections, the most notable are the Biblical introduction, which set out moral responsibilities of English subjects, and the separate collection of written legislation or the rule of law.[220] The rule of law established not only the rules of court but also statutory provisions, which were relied upon by the Court to pronounce judgments.[221]

During this time in British history, establishing and maintaining civil order and the rule of law meant balancing the actions of Anglo-Saxons seeking private vengeance and/or public retribution amongst warring factions for the commission of major crimes.[222] In the article, *The King's Peace in the Middle Ages*, Frederick Pollock suggests that during this period, it was impossible to discern "where private vengeance ended and public retribution for offences began."[223] After the Peace treaty of Wedmore, the Law-Code was a response to the civil disobedience that had been widespread throughout the territory.[224] Most notably, the Law-Code established the doctrine of the 'King's Peace', which came to be understood as a common right of protection by the law administered by the authority of the British monarch.[225] According to the Law-Code:

> [t]his is the peace that king Alfred and king Guthrum and the witan of all the English nation and all the people that are in East Anglia have all ordained and with oaths confirmed for themselves and for their descendants as well for born as for unborn who reck of God's mercy or of our's.[226]

There is limited historical and legal scholarship devoted to the doctrine of the King's Peace; however, the work that does exist clarifies that the King's Peace signified the social and political peace of the country, in perpetuity, under God.[227] Specifically, the King's Peace extended protection to persons and property within the British monarch's jurisdiction, which encompassed not only protection against criminal acts but also the promotion of

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[219] Richard JE Dammery, 'The Law-Code of King Alfred the Great Vol 2 (Doctoral Thesis)' (University of Cambridge 1991) 1 <https://www.repository.cam.ac.uk/handle/1810/251507>.
[220] Dammery (n 217), 1; Pratt (n 217), 214-220.
[221] John Hudson, *The Oxford History of the Laws of England: 871-1216* (Oxford University Press 2012) 17-21.
[222] Frederick Pollock, 'The King's Peace in the Middle Ages' (1899) 13 Harvard Law Review 177, 177.
[223] Pollock (n 222), 177.
[224] John Richard Green, *History of the English People, Volume I* (The Project Gutenberg Editors ed, MacMillan and Co 2008) 106-07 <http://www.gutenberg.org/files/17037/17037-h/17037-h.htm>.
[225] Green (n 224), 106-07; *See also,* 'Anglo-Saxon Law-Extracts From Early Laws of the English: A. D. 879. Alfred and Guthrum's Peace' <http://avalon.law.yale.edu/medieval/saxlaw.asp>.
[226] 'Anglo-Saxon Law-Extracts From Early Laws of the English: A. D. 879. Alfred and Guthrum's Peace' (n 225).
[227] *See e.g.,* Green (n 224), 106-07; David Feldman, 'The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers' (1988) 47 The Cambridge Law Journal 101, 103-05; Pollock (n 222), 179; *See also*, Dammery (n 219), 1.

morality and civil order.[228] Sayles explains that in Anglo-Saxon England, "when kings refer to trespasses against their peace (*frith*), it denotes a political conception of public order, a general state of peacefulness,…"[229] Therefore, it is unlikely that references to the King's Peace were limited to protection against delinquency; it undoubtedly implicated the individual wellbeing that a lack of crime evokes. By the very nature of the king's rule, the King's Peace signaled the establishment of civil order, around which Alfred and his successors constructed a juridical infrastructure to maintain that establishment. In addition to 'protecting the peace' or 'promoting civil order', Feldman alludes to the existence of a symbiotic relationship between the King's Peace and his 'royal prerogative'.[230] That is, employment of the royal prerogative and royal writs were the means by which the King's Peace was bestowed.[231] Both undoubtedly emanate from the Law-Code to promote peace and civil order for public wellbeing, for which the king—by the nature of his role as 'ruler'—was morally and constitutionally responsible.

After the Norman era, the King's Peace was employed to "consciously extend[] the jurisdiction of royal law."[232] As such, knights were "assigned in each county to take an oath…for the maintenance of the King's Peace and the effectual pursuit of evil-doers."[233] These were the "predecessors of the conservators of the peace first appointed under the authority of Parliament in 1327, and known as justices of [the] peace from that time."[234] Therefore, it would appear that societal circumstances dictated the political and legal responsibilities related to the King's Peace, which ultimately gave way to references to 'peace, welfare, and good government' under the Justices Act of 1489. Pollock, Feldman, and Yusuf suggest that it was the 1489 Act that conferred on the conservators of peace—or justices of the peace—their distinct judicial functions and specific territorial jurisdictions.[235] By accepting the 1489 Act as an early iteration of POGG, the 'seedbed' to which Madden, Fieldhouse, and Yusuf refer becomes historically and linguistically connected to the imperatives of the King's Peace and his use of the royal prerogative to effectuate those imperatives. Therefore, it is reasonable to conclude that ideological remnants of the King's Peace are synonymous with the genesis of the POGG doctrine.

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[228] Pollock (n 222), 179-80; Feldman (n 227), 107.
[229] GO Sayles, *The Medieval Foundations of England* (1948) 170.
[230] Feldman (n 227), 107.
[231] Feldman (n 227), 107.
[232] Feldman (n 227), 107.
[233] Pollock (n 222), 184.
[234] Pollock (n 222), 184.
[235] Pollock (n 222), 183-84; *See also,* Feldman (n 227), 112; Yusuf (n 103), 8.

The collection of imperatives subsequently became the constitutional ideology by which the British Empire attempted to ascribe its understanding of social ordering beyond the British Isles to its overseas territories. Analogous to its modern parlance in relation to federalism, POGG initially established the Crown (and later Parliament) as the constitutional 'provider of last resort' or residual guarantor of peace and civil order throughout the kingdom. As an ideology for overseas colonization however, Great Britain's imperial aspirations seemingly frustrated the spirit of POGG's medieval predecessor. James notes that "Britain's colonies and the new transatlantic commerce they were generating were a vital national asset to be coveted, protected and extended, if necessary by aggression."[236] Historians and legal scholars suggest that this is where, for the American and Canadian colonies specifically, colonial 'welfare' was exchanged with colonial 'order', resulting in conquest, dominance, and subjugation.[237] This also seems to be where the fundamental aims of the King's Peace and the aims of POGG officially deviate.

After Alfred the Great, the idea that the reigning monarch commandeered the royal prerogative to ensure peace and civil order, while possessing the moral authority as the defender of the Christian faith on earth under God, remained a strong lasting perspective on effective leadership in England. As is demonstrated in the next section, Henry VIII expanded the role to establish the sovereign as the 'supreme head' of the Church of England. The only notable alteration to this designation occurred during the reign of Elizabeth I. Ephesians 5:23 of the Holy Bible establishes that, "the husband is the head of the wife as Christ is the head of the church, his body, of which he is the Savior."[238] To acknowledge Christ's role as the Head of the Church, the Act of Supremacy of 1559 was modified to avoid the perception that any monarch was elevated to the same level as Christ.[239] Hence, Elizabeth I discontinued the title of 'Defender of the Faith and Supreme *Head* of the Church of England'. Instead, she (as well as subsequent sovereigns in England) adopted the title of 'Defender of the Faith and Supreme *Governor* of the Church of England'.[240]

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[236] James (n 173), 75.
[237] *See e.g.,* John R Alden, *A History of the American Revolution: Britain and the Loss of Thirteen Colonies* (MacDonald and Co Ltd 1969) 3-16; James (n 173), 74-75; Saul (n 104), 111-16.
[238] 'Ephesians 5:23 (NIV)' <https://holybible.com/eph.5.23>.
[239] Claire Cross, 'The Political Enforcement of Liturgical Continuity in the Church of England 1558-1662' (2017) XXII–1 Revue Française de Civilisation Britannique: French Journal of British Studies 1, 1-2.
[240] Cross (n 239), 1-2; *See also,* John Arthur Strype, 'Chapter 2', *Annals of the Reformation and Establishment of Religion: Volume 1: And Other Various Occurrences in the Church of England, during Queen Elizabeth's Happy Reign* (Cambridge, Cambridge University Press 2012) 101.

Despite the rise of democracy in England, the nation's established-church regime has remained essentially as it has been since the 7th century. The established religion that emerged is a variation on Roman Catholicism, but at the same time claims a liturgical connection with the schism that brought about the Protestant Reformation.[241] Thus, the Anglican Church claims to be "an ancient Church, catholic and reformed" with "roots [that] go back to the time of the Roman Empire when Christianity entered the Roman province of Britain."[242] The Church further clarifies:

> … [it] developed, acknowledging the authority of the Pope until the Reformation in the 16th century. The religious settlement that eventually emerged in the reign of Elizabeth I gave the Church of England the distinctive identity that it has retained to this day. It resulted in a Church that consciously retained a large amount of continuity with the Church of the Patristic and Medieval periods in terms of its use of the catholic creeds, its pattern of ministry, its buildings and aspects of its liturgy, but which also embodied Protestant insights in its theology and in the overall shape of its liturgical practice….[243]

This means that Elizabeth II as the present sovereign—and her offspring as future sovereigns—not only personally embody the tenets of Anglicanism, but she is the 'Supreme Governor' of the Anglican Church and assumes responsibility for preserving the tenets of that faith.[244] Therefore, England's present church-state arrangement has been firmly engrained in the nation's psyche for the entirety of her existence as a unified national presence. Although unforeseeable at the time, buttressing the supremacy of this national image serves as the basis for the somewhat problematic perception of fluidity and lack of transparency between church and government that exists in England today.[245]

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[241] David Mcclean, 'The Changing Legal Framework of Establishment' [2003] Ecclesiastical Law Journal 292, 292-303.

[242] Church of England, 'History of the Church of England' <https://churchofengland.org/about-us/history.aspx>.

[243] Church of England (n 242).

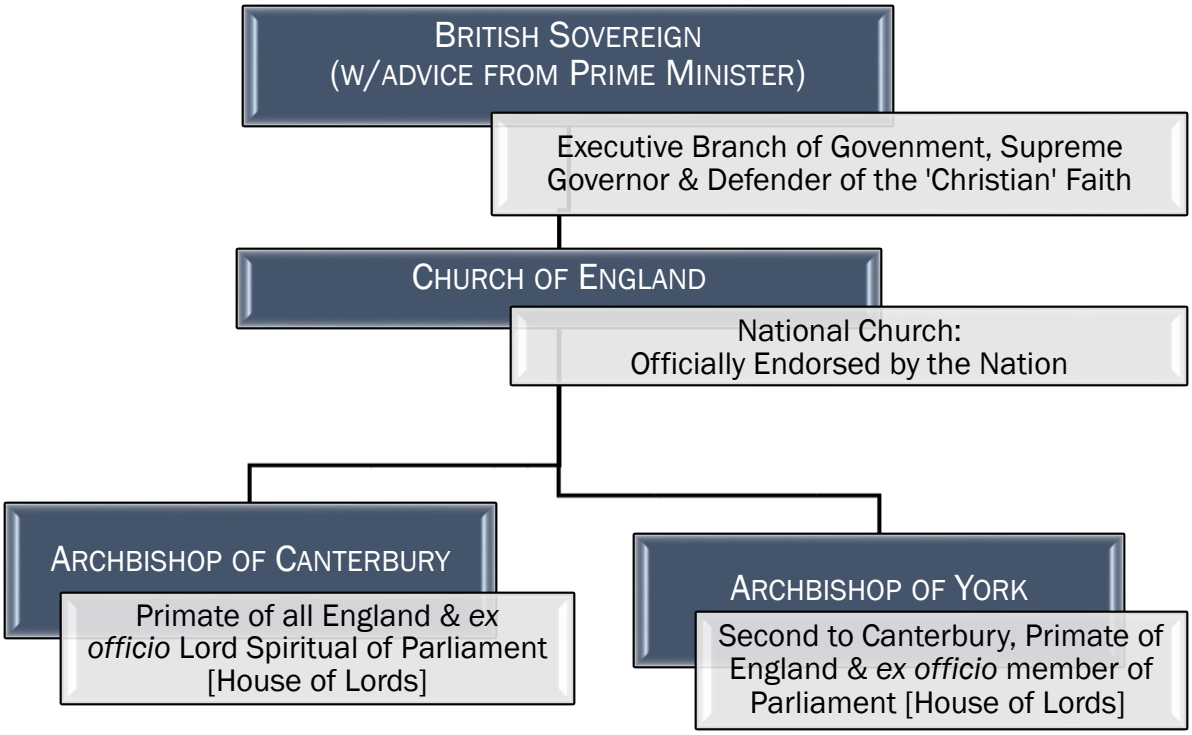
[244] *See* Joanna Bogle, 'The Mystery of Meghan Markle's Baptism' *The National Catholic Register* (Colorado, 12 March 2018) <http://www.ncregister.com/blog/joannabogle/the-mystery-of-meghan-markles-baptism>. Notwithstanding the 2013 law abolishing the precondition that those marrying into the British monarchal infrastructure renounce their faith (or lack thereof) to espouse Anglicanism, Bogle notes that there is a unmistakable pressure to do so in respect to Elizabeth II, the supreme governor of the Anglican Church. Moreover, the deeply religious liturgical steps of espousing Anglicanism make the act more than simply a benign exercise associated with the business of sustaining a monarchy.

[245] Andrew Lynch, 'The Constitutional Significance of the Church of England' in Peter Radan, Denise Meyerson and Rosalind F Atherton (eds), *Law and Religion* (Routledge 2018) 155. According to Lynch, "the Church of England always occupied—and continues to do so—a position of political privilege through its connections with the Crown and Parliament. But it is this aspect, so necessarily intertwined with the Church's origins, which provides current questions about its future. The United Kingdom's increasing engagement with the European Community has led to fresh reflection upon much of what has previously been unquestioned. This includes, but is not limited to, an express commitment to the protection of

2.3 The 'Henrician' Reformation: Framing England's Approach to Establishment

In the text, *Dissolving Royal Marriages: A Documentary History*, D.L. D'Avray observes that marriage historically played a significant role in kingdom building, which included monarchial foreign affairs.[246] As such, the link between Henry VIII's marital affairs mark a turning point for the imperatives of POGG as well as England's modern established church-state arrangement. In the modern sense, England's church-state arrangement is structured such that democracy is furthered within the context of a constitutional monarchy buttressing a national or preferred church.[247] The following diagram attempts to illustrate Matthew Purvis's detailed analysis of the structure of religious and governmental responsibilities occupied by the sovereign as well as the highest positions of the Church:[248]

Figure 2.1: Diagram of England's Present Church-State Arrangement



individual rights, including those of religious practice, and democratic reform of the upper house. These matters pose challenges to the accepted position of the Church of England at the heart of the nation's constitutional settlement."

[246] DL D'Avray, 'Henry VIII and Catherine of Aragon', *Dissolving Royal Marriages: A Documentary History, 860–1600* (Cambridge University Press 2014) 227-28.

[247] Adam Tomkins, *Public Law* (Oxford University Press 2003) 15.

[248] Matthew Purvis, 'House of Lords: Religious Representation' (2011) <http://www.parliament.uk/briefing-papers/LLN-2011-036.pdf>.

In practice, this means that the reigning monarch with the advice of the leader of his/her government (*i.e.,* the Prime Minister) seats the highest positions of the Church.[249] Those positions in turn control the operations and maintenance of the collective Anglican congregations, including to some degree managing the subordinate roles within.[250] As a facet of the Crown's prerogative as executive, the Church is directly controlled by the executive branch. For all intents and purposes, the Church of England has all the trappings of being an integral part of the English government. Some legal scholars have argued that where religion and politics are concerned in England, it is difficult to distinguish the end of one from the beginning of the other.[251] Therefore, it appears that the Church is not only answerable to God but also subject to the interpretations of democracy that are inherent in England's constitutional documents, even when these two responsibilities are not aligned. This appears to be the case even though those who contribute to the complexity make a concerted effort to rebut the presumption by claiming something less convoluted. This also appears to explain why political and legal scholars continue to question whether there can be true separation between church and government in England.[252] As is demonstrated in the next section, even the English courts struggle with demarcation.

During the reign of Henry VIII, the church-state arrangement was equally convoluted. Although Rome had discontinued occupation of Britain in 410 A.D., the Catholic Church continued to have a role as religious arbiter for the souls of English citizenry.[253] Unlike today however, the Church in England was an extension of the Church in Rome. Church hierarchy was solely a religious one based on Canon law that developed in Western churches after the Schism of 1054.[254] Secular monarchs protected the country and ruled the populace, but the spiritual wellbeing of the English fell within the purview of the Church.[255] When corruption became rampant throughout the catholic or universal Church, parishioners began to question its ability to secure their spiritual welfare. Wooding notes that church bishops had "exalted their status to the point of declaring themselves the

[249] Tomkins (n 247), 15.
[250] Church of England (n 242).
[251] *See e.g.,* Adrian Harvey, 'Monarchy and Democracy: A Progressive Agenda' (2004) 75 The Political Quarterly 34; Mcclean (n 241); Church of England (n 242); 'The Church of England: A Survey of the Present State and Problems of England Established Church' [1961] *The Economist* 209; David Cannadine, 'The Context, Performance, and Meaning of Ritual: The British Monarchy and the "Invention of Tradition." c. 1820-1977', *The Invention of Tradition* (Hobsbawn, E and Ranger, T 1983).
[252] Abell and Stevenson (n 176), 487; Lynch (n 245), 155.
[253] Salway (n 208), 11-12.
[254] A Edward Siecienski, 'The Age of the Great Schism and the Gregorian Reform', *The Papacy and the Orthodox: Sources and History of a Debate* (Oxford University Press (Online) 2017) 243-44.
[255] Lucy EC Wooding, *Henry VIII* (2nd edn, Routledge 2015) 137; *See also*, Siecienski (n 254), 245.

Vicars of Christ, the representatives of God on earth."[256] Antipapal sentiment resulted in religious viewpoints becoming more divergent as countless political, legal, and social issues simultaneously emerged.[257] Since the three were integrally connected, an issue affecting one area of English life unavoidably became an issue in the other two. By the time the Catholic priest Martin Luther took the first overt step to dispute church practices in 1517—*i.e.,* publicly posting of his 95 Theses at Wittenberg Castle church—Catholic discontent had become a festering abscess affecting all of England.[258] This led to the emergence of Christian factions or denominations demanding a reevaluation and modification of church liturgy.[259]

The pivotal event that altered the status of England's church-state arrangement was branded 'the King's Great Matter'.[260] Henry's petition for annulment from Catherine of Aragon, instead of divorce, required the Church in Rome to avoid a 21-year marriage and bastardize the daughter born to it for the sake of kingdom building. When the Church refused, Henry publicly challenged the Church's legitimacy to control his decisions as royal sovereign. The schism that resulted officially constituted the established church-state arrangement in England.[261] The subsequent restructuring between 'church and state'—*i.e.,* the Henrician Reformation—nullified any political or religious power that the Church in Rome retained over England.[262] Henry's new role gave him—and every monarch that has succeeded him—the statutory wherewithal to exert power over religious conviction.[263] From a functional perspective, the English Crown—*i.e.,* the executive—came to control the reins of the Church of England and the ecclesiastical legal framework associated therewith. By establishing himself as the Supreme Head of the Church however, Henry's intent was to elevate himself over the belief system within his realm—and theoretically any additional belief systems that have since been established within the nation.[264] According to Elton,

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[256] Wooding (n 255), 137.
[257] Wooding (n 255), 137.
[258] Martin Luther, *Disputation of Doctor Martin Luther on the Power and Efficacy of Indulgences* (Taylor Anderson ed, CreateSpace Independent Publishing Platform 2018); *See also,* Wooding (n 255), 153.
[259] Wooding (n 255), 137.
[260] D'Avray (n 246), 227-28; Wooding (n 255), 128-29.
[261] GR Elton, 'King Or Minister?' in Arthur J Slavin (ed), *Problems in European Civilization: Henry VIII and the English Reformation* (Heath and Company 1953) 57.
[262] Elton (n 261), 57.
[263] Lynch (n 245), 156.
[264] Cathy Caridi, 'Blog: Church Never Permitted Henry VIII Divorce' (*Making Martyrs East and West: Canonization in the Catholic and Russian Orthodox Churches*, 2016) <http://canonlawmadeeasy.com/> accessed 28 March 2018. Caridi analyzes Henry's motives for asking the Pope to grant him a divorce, while actually expecting to receive it. She also outlines the legal assertions that Henry put forth as well as the Pope's responses and explains that Canon law today has at least one provision that is a direct result of Henry VIII's case.

the Henrician Reformation had several significant political and religious outcomes: "[T]he break with Rome—the withdrawal from the papal obedience—the creation of a schismatic English church—the setting up of the royal supremacy. All of these are different, and in part tendentious, descriptions of one thing: the definition of independent national sovereignty achieved by the destruction of the papal jurisdiction in England."[265] The schism is a watershed event in England's history because Henry effectively established secular oversight for the management of religious affairs. As will be demonstrated in subsequent chapters, this audacious 'power-grab' opened the door for the monarchy and later Parliament to use the societal manifestations of religious conviction as negotiable instruments during the rise of the British Empire, which was a maneuver with effects that are still resonating in England today. Specifically, the effects of the shift in church oversight from religious to secular leadership continues to be evidenced by the interaction between Elizabeth II and the national government based on Constitutional law in England.[266]

When considered prospectively, the magnitude of Henry's marital and political transgressions might have germinated the ideal national crisis to facilitate a discontinuation of the church-state arrangement of 16th century England. Alternatively, it could have served as the impetus to shift the religious tides toward the development of a more significantly defined veil of separation. This is especially the case when the basis for restructuring the church-state arrangement was to further nonreligious ends. However, Henry's behavior was not fueled by a distaste for Catholicism.[267] He continued to espouse 'Henrician-era Catholicism' after he issued England's antipapal statutes.[268] It was fueled by a desire to discontinue the control that the Church had on how he attempted to exert power over the people of England.[269] It seemingly had little effect on severing religious and monarchial ties, despite the difficulties caused by the union. Although the break itself was a turning point, it did not lead to the establishment of a reformed, 'independent' Church in England. However, an independent Church of England during the 16th century may have separated Christianity from the Crown. Henry's schism more fully highlighted the implications of the Protestant Reformation, which was literally the making of Anglicanism. If viewed providentially, it also benefited Christianity as a belief system. It would come to

[265] Elton (n 261), 61.
[266] Lynch (n 245), 173 [16].
[267] Elton (n 261), 62.
[268] Elton (n 261), 62.
[269] Elton (n 261), 62. As Henry saw it, "as far as the law of Christ allows" was the scope of his power, which of course it gave him "the one thing that matter to him, the divorce."

allow individuals to follow their consciences without fear of being labeled apostates and/or being charged with treason. However, the same may not have been the outcome for England as a kingdom. An independent Church may have altered Britain's imperial trajectory. Therefore, England needed Christianity, as its interpretation of the belief system became a part of the basis for its existence. That necessity would subsequently manifest itself as the first legally-enforceable imperative of the POGG doctrine—*i.e.,* the proliferation of Anglicanism—when Great Britain extended her footprint beyond the British Isles.

2.4 The Crown & the Anglican Church in '*Post-Christian*' England

Although England claims that Christianity is no longer essential to the lives of Britons, the accoutrements associated with constituting a nation on Anglican exceptionalism appears to remain a substantial facet of England's enduring legacy, economic viability, and modern reputation on the world stage. The British Council described the situation in the United Kingdom's 2015 *Religion and Belief Equality Guide.* Specifically, "[t]he UK has a complex relationship with religion. There is still a link between the Head of State and the established Church. The Queen is Head of Church and State and this can lead to confusion about the extent to which the UK is 'a Christian country' whilst some hold that the UK is in fact a 'post-Christian' country."[270] Despite the cross-functional roles that are clarified by the previous diagram, the English Government continues to dispute the Church of England's involvement in politics or non-religious legal matters. Instead the Government contends that the Church performs several official regulatory functions that are within its own sphere of activity.[271] However, it is not considered to be a part of government. This precise issue continues to be the focus of the aforementioned political and legal debate, which is likely attributable to the fact that the relationship does not appear to be what it is purported to be. When the Church was implicated as an emanation of the state in a 2003 lawsuit, the precedent for England's confounding church-state arrangement was continued as Parliament struggled in its attempt to address the nature of England's church-state arrangement.

Specifically, the Appellate Committee of the House of Lords attempted to clarify the limits of the intersection between the Church and Parliament when dispensing judgments in the series of cases known as *Aston Cantlow and Wilmcote with Billesley Parochial Church*

[270] Council (n 174).
[271] Edward Nugee, 'The Consequences of Aston Cantlow' (2004) 7 Ecclesiastical Law Journal 452, 453.

Council v Wallbank.[272] Specifically, the Wallbanks inherited glebe land at Aston Cantlow in 1970, which they sublet.[273] In 1994, the couple was billed in excess of £95,000 by the Parochial Church Council (PCC) of Aston Cantlow for repairs made to the chancel of the appurtenant parish church.[274] The central issue was whether the Wallbanks were responsible for the repairs. The statute in question, *The Chancel Repairs Act of 1932*, imposes liability upon lay rectors or impropriators for repairs made to the chancel of the church.[275] While the PCC sought compensatory relief, the Wallbanks attempted to shift the burden back to the PCC and possibly the Church of England. The Wallbanks claimed that the 'overt act' by PCC of imposing liability on glebe land holders is an official role of a public authority and a violation of the Human Rights Act of 1998.[276] In its opinion, the Committee attempted to deal with the relationship between the Church and the English Government based on English Constitutional law. Lord Nicholls of Birkenhead explains:

> As the established church the [Church of England] still has special links with central government. But the Church of England remains essentially a religious organisation. This is so even though some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances. The legislative powers of the General Synod of the Church of England are another. This should not be regarded as infecting the Church of England as a whole, or its emanations in general, with the character of a governmental organisation.[277]

In a previous case, Lord Hope of Craighead has also made clear that, "the Church of England as a whole has no legal status or personality;" instead, "[t]he relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government."[278] These distinctions notwithstanding, the longstanding preservation of a national church has admittedly resulted in convolution. Lord Rodger of Earlsferry refers to the situation as the 'notoriously amorphous' juridical nature of the Church of England.[279] Therefore, it is fair to say that it is so engrained that

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[272] *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire (Appellants) v Wallbank and Another (Respondents)'* [2003] UKHL 37; *Wallbank v Parochial Church Council of Aston Cantlow* [2001] EWCA Civ 713 <https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd030626/aston-1.htm>.
[273] [2001] EWCA Civ 713 (n 272), [21].
[274] [2001] EWCA Civ 713 (n 272), [3].
[275] [2001] EWCA Civ 713 (n 272), [4].
[276] [2001] EWCA Civ 713 (n 272), [4] and [28]. Section 6 of the Human Rights Act of 1998 provides that it "is unlawful for a public authority to act in a way which is incompatible with a Convention right."
[277] [2003] UKHL 37 (n 272), [13].
[278] Nugee (n 271), 453-54.
[279] Nugee (n 271), 453.

to suggest that it no longer exists makes it even more paradoxical when questioning how the Government can continue to support a national church and/or faith or the monarchy that personifies it.

If dismantling England's church-state arrangement is not the answer—and it appears that it is not—then the other end of the pendulum seemingly requires affording the Crown, with the advice of the Prime Minister, control over the highest religious leaders in mosques, synagogues, and temples in England. Then any future monarch could accurately style himself or herself as 'defender of faiths' in England.[280] At first blush, this may appear somewhat incomprehensible. However, the prospect of the British Crown exerting control over the religious beliefs of non-Anglican and/or non-Christian subjects is not without precedent. As will be analyzed more fully in subsequent chapters, this is precisely how the British Empire used POGG to ensure the proliferation of the Church of England as the national church of the North American colonies. This was the case even though migration to those colonies was an effort for non-Anglican denominations to liberate themselves from the Anglican Church, the imperial regime, and the regime's vendetta against Catholicism.

Although some might find the monarchial relationship incomprehensible, this was the practical reality for non-Christian religious subgroups during the reign of Victoria once her royal title was augmented to include her role as Empress of India.[281] Cohn notes that "in conceptual terms, the British, who started their rule as 'outsiders', became 'insiders' by vesting in their monarch the sovereignty of India through the Government of India Act of 2 August 1858."[282] Despite the prospect of being labeled an absolutist government, Victoria not only assumed the role, but also proclaimed for Britain's Indian subjects "the same obligations of duty" afforded all British subjects.[283] Both Cohn and Yusuf submit that the

[280] *See e.g.,* Mira Bar-Hillel, 'Will Prince Charles, the "Defender of Faiths", Stand up for Christians in Israel?' *Independent* (London, 19 December 2013) <https://www.independent.co.uk/voices/comment/will-prince-charles-the-defender-of-faiths-stand-up-for-christians-in-israel-9016192.html>; 'Defender of the Faith: At Least in Spiritual Matters, the Heir to the Throne Is Anything but Russophobe' [2014] *The Economist*. The collection of articles address the brazenness in which Charles of Wales has proclaimed that when he becomes King, he will not designate himself, 'defender of the faith,' but will instead adopt 'defender of faiths,' which implies that he will expand his reach beyond the Anglican Church to control or 'defend' the faiths of those beyond the national church's sphere of influence.
[281] Bernard S Cohn, 'Representing Authority in Victorian India' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 2014) 165-170; *See also,* Columbia University, 'Benjamin Disraeli Papers, 1805-1896' <http://www.columbia.edu/cu/lweb/archival/collections/ldpd_4078702/>.
[282] Cohn (n 281), 165.
[283] Cohn (n 281), 165.

means by which to achieve the obligation was through some of the imperatives of POGG.[284] Cohn goes on to note that Victoria's proclamation was based on two main assumptions. As it pertained to 'peace and order', "there was an indigenous diversity in culture, society, and religion in India."[285] In order to maintain the balance thereof, the indigenous social order could not be dismantled or discarded as had been attempted in earlier British colonies. Where it concerned 'order and good government', the British Crown believed that "foreign rulers had a responsibility for the maintenance of an equitable form of government which would be directed not only to protecting the integrity inherent in this diversity, but also to social and material progress which would benefit the ruled."[286] In essence, Victoria's proclamation appears to have constituted a church-state arrangement between the British/Indian Crown and the national government to be established in India under British rule, which also implicated the religious subgroups co-existing in the region. The Crown recognized the practical realities inherent in the religious diversity of the indigenous inhabitants, but also anticipated a future India that adapted to the progressive national image of the British Commonwealth.[287] This gamble in furtherance of progression also included the expansion of Anglicanism in the region. If the church-state arrangement on the British mainland entailed defending the Anglican faith and governing the national church, why would the arrangement signify an alternative relationship in India?

The answer to this question can be found in the proclamation itself. If Victoria had meant to establish a different arrangement, it would not have been necessary to make assurances that "her Indian subjects were to be secure in the practice of their religions."[288] If Victoria had not believed religion fell within her purview as the sovereign of Britain and India, such assurances would have been superfluous. Likewise, it would not have been necessary to ensure "equal and impartial protection of the law, and in the framing and administration of this law: 'due regard…to the ancient rights, usage and customs of India'."[289] The detailed evolution of India and Pakistan in conjunction with British Imperialism is beyond the scope of this study; however, British occupation of the territory seems to have

[284] Cohn (n 281), 165; Yusuf (n 103), 13. Neither Cohn nor Yusuf place as much emphasis on Anglicanism as an indispensable aspect of POGG as a doctrinal approach to colonization. However, subsequent chapters of this study will bear the connection out more fully.
[285] Cohn (n 281), 166.
[286] Cohn (n 281), 166.
[287] Cohn (n 281), 209.
[288] Cohn (n 281), 165.
[289] Cohn (n 281), 165.

established in theory a church-state arrangement that implicated the largest religious belief systems in the region, including Islam, Hinduism, Buddhism, and Sikhism.[290]

Therefore, the idea that equal religious treatment in England might also encompass a theoretical extension of the relationship that exists between the Crown and the Church of England when similarly applied to other religious subgroups based on commitments of former monarchs may not be so incomprehensible after all. If the goal is to promote equilibrium, then there appears to be historical basis for suggesting that the relationships between the Crown and the disparate faiths must be indistinguishable, although the aforementioned arrangement means for achieving this outcome may not be what non-Christian religious subgroups envisioned. Considering these circumstances, it is conceivable that the nuances of England's imperial history and the deeply entrenched established church-state arrangement was central to the decision to sanction faith-based legal exceptionalism in the name of Islam. Put another way, England's inability to rectify the optics and adaptability of her own national church-state arrangement coupled with colonial commitments made by past monarchs in the preservation of POGG support the inference that sanctioning faith-based legal exceptionalism is England's modern approach to promoting religious equilibrium in light of her past treatment of 'non-conformists'. This is the case notwithstanding how many societal, legislative, and judicial issues are a consequence of the policy decision.

2.5 A Theory on the Illusion of Religious Equilibrium in England

Those who make the decision to migrate to England, or nations with similarly-situated church-state regimes, do so fully aware of the prominent place that the established church has in the social order. This is the case regardless of whether immigration occurs for the purposes of education, employment, marriage, sanctuary, or simply a different quality of life. This enduring reality demonstrates that not only is England not post-Christianity, but it appears to be just as committed to Anglicanism as it was during the rise of the British Empire. Jonathan Fox observes that, where nations have official religions, it is understood that "religions do not compete on a level playing field, [as] one or more religions receiv[e] benefits that are not shared by all."[291] Those advantages can include funding, other forms of governmental support, enforcement of elements of the religion, and even government

[290] Cohn (n 281), 165.
[291] Jonathan Fox, *The Unfree Exercise of Religion A World Survey of Discrimination against Religious Minorities* (Cambridge University Press 2016) 17.

restrictions on competing religions."[292] Scholars who challenge the appropriateness of an established church in England generally come to similar conclusions, even as they rebuke the nation's imperial past while contending that the nation's church-state arrangement must be amended to provide equal treatment for all other religious dogmas.[293] As is the case with every nation with a constitutionally mandated religion, the intricacies associated with England's monarchial history and church-state arrangement seem to make scholarly discourse focused on achieving equilibrium a futile debate, that is, without changing the course of history. England's foundational history and imperial era demonstrate that religious equilibrium has never been a facet of the nation's political, legal, or religious agenda. Likewise, more recent efforts to promote equilibrium may become a substantial stumbling block moving forward.

Specifically, the British Government seems to be proactively extending a wide berth in the accommodation of certain religious subgroups. On closer inspection however, one gets the impression that the Government realizes that the maneuver will not actually establish equilibrium. However, it seems necessary to take some action, short of dismantling England's church-state arrangement, to give the impression of attempting to level the playing field. That being said, it does not appear that the Government has fully assessed accommodating religious accommodation that includes the political ideologies and choice of law preferences associated with migration from non-democratic nations. Instead of proactively and consistently promoting the shared values that collectively act as a national leveling agent for all who immigrate to England—not just those from former colonies—the Government appears to have reverted to the colonial-era practice of demonstrating tolerance by sanctioning exceptionalism for specific groups with the expectation that in time integration will eventually rectify the issues of incompatibility. In so doing, exceptionalism gives the appearance that religious plurality can reach a point of equilibrium in a democratic nation that has a national church, even if in actuality it cannot.

Considering these circumstances, there appears to be a fallacy in the theory of exceptionalism as a means to establish equilibrium or impartiality in nations that declare an official religion—or in the case of the United Kingdom, two related religions (Catholicism and Anglicanism).[294] In England's case, there appears to be an added layer to the fallacy. Specifically, requests for exceptional treatment within a national infrastructure that has as

[292] Fox (n 291), 17.
[293] Jackson (n 66), 151; Kamaruddin, Oseni and Rashid (n 66), 245-61.
[294] Fox (n 291), 17.

a matter of course commandeered exceptional treatment throughout her imperial history seems to exacerbate the fallacy. In the case of Islamic law exceptionalism, the circumstances that have unfolded seem to create a dichotomy between 'Imperial Privilege' and 'Exceptionalism'. As has been demonstrated herein and will be discussed more fully in subsequent chapters, England's imperial history has been predicated on a comparative/ superlative relationship between the national church and other religious subgroups and denominations. However, the extraordinary deference afforded Islam does not appear to yield the customary outcome where religious equilibrium is attempted by other religious subgroups and/or denominations, while Anglicanism retains exceptional or privileged status as the national church.

Instead, the practical effect of the British Government affording Islam such expansive religious accommodation has seemingly resulted in the Islamization of English society being imposed upon other religious subgroups and/or denominations. That is, instead of being subject to the circumstances associated with an established-church regime, the remaining subgroups and/or denominations are sandwiched between the historical and modern implications of imperial-Anglicanism attempting to accommodate political-Islam. Meanwhile, the Church of England has become the advocate for Islamic law exceptionalism by acting as a benevolent bully pulpit to coax Britons into being at ease with the political ideologies and religious laws espoused by Muslim transplants.[295] According to former-Archbishop Williams, such acceptance is the proper 'Christian' response to multiculturalism and religious plurality.[296] Therefore, the 'Imperial Privilege/ Exceptionalism' dichotomy between England's imperial past and her present responses to the demands of Islam are seemingly inescapable, even if one does not espouse either religious ideology.

Long before Fox and others analyzed the disproportionate treatment of religious subgroups throughout the world, Adam Smith discussed the futility in attempting to artificially impose equilibrium as England appears to be doing. In his seminal work in economic theory *Inquiry into the Nature and Causes of the Wealth of Nations,* he alludes to this situation when he juxtaposes religious denominationalism—as it existed at the point of America's declaration

[295] Rowan Williams, 'The Archbishop of Canterbury and Shari'a Law' in Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013) 7; *See also*, Mark D Chapman, 'Rowan Williams's Political Theology: Multiculturalism and Interactive Pluralism' (2010) 9 Journal of Anglican Studies 61.
[296] Williams (n 295), 7; *See also*, Robin Griffith-Jones and Rowan Williams, 'The "unavoidable" Adoption of Sharia Law – the Generation of a Media Storm', *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (2013).

of independence—with the laws of supply and demand to evaluate the societal benefits of religious plurality.[297] Smith contends that there is an insurmountable incongruence between more and less dominant religious subgroups in a society. In *Book V, Chapter 1 paragraph 197*, Smith summarizes:

> …if politics had never called in the aid of religion, had the conquering party never adopted the tenets of one sect more than those of another when it had gained the victory, it would probably have dealt equally and impartially with all the different [religious] sects, and have allowed every man to choose his own priest and his own religion as he thought proper.[298]

When Smith describes the possibility of achieving a state of equilibrium, he offers a universally demonstrative caveat: "…had the conquering party never adopted the tenets of one sect more than those of another when it had gained the victory."[299] This level of inequality is inherent because the victor determines the religious direction.[300] As a precursor to Fox's contention, Smith's 'if/then' proposition demonstrates the fundamental obstruction to the ability to achieve equilibrium. In other words, the adoption of a religious denomination to serve as the constitutional figurehead for the national government fundamentally obstructs equilibrium and renders attempts to artificially impose it little more than the exacerbation of the incongruence.

Along the same lines, religious and legal theorists alike have come to acknowledge that religious leveling in religiously plural societies is challenging enough when a nations' church-state arrangement is *by design* focused on 'not' espousing a particular religious dogma as the basis for constitutionalism.[301] It is fair to say then that equilibrium is unachievable when a nation has and continues to promote an established church while also affording extraordinary accommodation to one religious dogma over the others that remain. Consequently, there appears to be an absence of research in England that gauges how the Imperial Privilege/Exceptionalism dichotomy affects non-Anglican Christians. Instead, the Anglican Church seems to continue to speak for the whole of Christendom.

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[297] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations, Books IV-V* (Edwin Cannan ed, Methuen 1904) <https://oll.libertyfund.org/titles/237> accessed 28 March 2018.
[298] Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations, Books IV-V* (n 297), [197].
[299] Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations, Books IV-V* (n 297), [197].
[300] Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations, Books IV-V* (n 297), [197]; *See also*, Fox (n 291), 17.
[301] *See e.g.,* Stephen Monsma and Christopher J Soper, 'Chapter 1: Introduction', *The Challenge of Pluralism: Church and State in Five Democracies* (Rowman & Littlefield Publishers, Inc 1997) 10-13. Monsma and Soper allude to the difficulty in the outlining of three models of religious pluralism for the sake of juxtaposing approaches to pluralism in the United States, the Netherlands, Australia, England, and Germany.

Therefore, a reasonable question is whether England's decision to sanction faith-based legal exceptionalism in the name of Islam is the most judicious alternative for achieving religious equilibrium amongst the many religious subgroups and/or denominations co-existing throughout the nation.

The indictment that nations embracing more liberal democratic ideals are obliged to turn the nation inside out to defuse their historical legacies for the sake of accommodating newcomers appears to create a need to foster the fallacy in the first instance. Exceptionalism then becomes an acceptable measure for curing the imbalance created by the sheer weight of history. To contextualize this assertion, one need only ask whether England is amenable to the legalization of faith-based legal tribunals for every subgroup and/or denomination co-existing in the nation. This might implicate not only returning to Ecclesiastical courts for the integration of interpretations of the Holy Bible, but also the Hebrew Bible (which contains additional books), the Book of Mormons, the Book of the Maccabees, the Guru Granth Sahib, the Vedas, *etc*. It might also come to include legalizing tribunals for religious outliers like Jehovah's Witnesses, the Church of Scientology (and the wealth of literature published by its prophet, L. Ron Hubbard), or even LaVey's Satanic Bible, which is the religious text for the Church of Satan. Along the same lines, could the 200,000 or so members of the Temple of the Jedi Order living in England request the same treatment as the 4% percent of the population that espouses Islam? At present, the Jedi are denied religious protection in the United Kingdom.[302] If this particular belief system was to be recognized however (as it is in Canada and the U.S.), are the adherents of it—or any of the others listed herein—free to rely on the 1996 Arbitration Act to integrate the laws of the Jedi Order under ADR *and* fully expect the English judiciary to afford legal deference to those judgments? If not, then it is highly unlikely that the promotion of religious equality is the motivation behind Islamic law exceptionalism in England.

Somewhat like the ramifications in Canada or the United States (if either were to legalize faith-based legal exceptionalism), the repercussions of affording deference to interpretations of religious legal precepts—whether of smaller denominations, outliers, or former colonial holdings—has the propensity to subject Britons to more than the

[302] *See e.g.,* Troy McEachren, 'The Temple of the Jedi Order - Is It a Religious Charity? Depends on Where You Live' [2017] Lexology <https://www.lexology.com/library/detail.aspx?g=fe19a550-d772-4e64-a4ea-92f9524a2fc2>; 'The International Church of Jediism' <https://www.templeofthejediorder.org/>; 'The Temple of the Jedi Order-Decision of the Commission' (2016) <https://www.gov.uk/government/publications/the-temple-of-the-jedi-order>. While Jedi'ism is considered a proper belief system in Canada and the United States, England has claimed that it lacks the necessary attributes to be considered a religion under the laws of the United Kingdom.

idiosyncrasies associated with those religions. In the case of Islam, this includes not only sharia guidelines, but also legally binding opinions on Islamic law transplanted from Muslim-majority nations. The practical outcome of the latter is the imposition of foreign legal judgments upon British subjects. The implications of these probabilities appear to be the rationale for large scale scholarly efforts to inquire into Islamic law's compatibility with liberal democracy and/or promote its ability to be harmonized with traditional codified rules of law for the purpose of dispensing judgment.[303] One such example is the text, *Islam and English Law*, in which the works of Baderin, Edge, McGoldrick, and others attempt to address the question of whether there is a future where Islamic law supplements English law; and if so, what conditions should be placed on the areas and degrees of integration.[304] These specific questions of compatibility however appear to promote a response to a misallocated legal inquiry. That is, they seem to be more appropriate for Muslim-majority nations seeking to move to more secular, democratically-inclined legislative/juridical infrastructures. Therefore, the questions appear to fit more effectively in the analyses proffered by Islamic scholars like An-Na'im and Manea, who promote the transition to secular legal frameworks to disentangle religion and law within Islam.[305]

Where it pertains nations that already possess neutral or even quasi-neutral juridical infrastructures—like the three considered herein—the more relevant question appears to be whether engaging with Islamic law results in imputing the legal precepts of the Quran and the Sunnah—*i.e.,* the law's primary sources—to non-Muslims in violation of their

[303] *See e.g.,* Dominic McGoldrick, 'The Compatibility of an Islamic/Shari'a Law System or Shari'a Rules with the European Convention on Human Rights', *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2017) 42-71; Sydney Kentridge, 'Where to Draw the Line, and How to Draw It' in Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013) 208-10; Mashood A Baderin, 'An Analysis of the Relationship between Shari'a and Secular Democracy and the Compatibility of Islamic Law with the European Convention on Human Rights', *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Oxford University Press 2017) 72-93; Rex Ahdar and Nicholas Aroney, 'The Topography of Shari'a in the Western Political Landscape' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press 2010)1-31; Jeremy Waldron, 'Questions about the Reasonable Accommodation of Minorities' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press 2010) 103-114. As immigration from Muslim-majority nations has increased, the question of Islamic law co-existing with liberal democracy has continued. Selections from two noteworthy texts focused on the question as it relates to England are included herein; but to be sure, there are many others.

[304] *See generally,* Baderin (n 303); Ian Edge, 'Islamic Finance, Alternative Dispute Resolution and Family Law: Developments toward Legal Pluralism?', *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013); Mcgoldrick (n 303); Shaheen Sardar Ali, 'From Muslim Migrants to Muslim Citizens' in Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013); Elizabeth Butler-Sloss and Mark Hill, 'Family Law: Current Conflicts and Their Resolution', *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013).

[305] *See generally,* AA An-Na'im, *Islam and the Secular State: Negotiation the Future of Sharia* (Harvard University Press 2008); Manea (n 65).

religious liberties and/or frustrating their equal access to an impartial judiciary. Although the discussion of primary source material will be more fully explicated in subsequent chapters, it is worth clarifying at this point that the Quran is generally believed by Muslims to be the exact words of God revealed by Muhammad, while the Sunnah is believed by Muslims to be their prophet Muhammad's lifetime sayings, deeds and tacit approvals on different aspects of life.[306] In light of the religious nature of the sources, England's imperial legacy, which includes Anglican Ecclesiastical courts and faith-based legal exceptionalism, offers relevant context for not only contemplating these inquiries in relation to Muslims and non-Muslims but having definitive answers thereto before affording nationwide legal deference to Islamic law judgments. Therefore, it seems inconceivable that England would sanction the creation of a body of religious law—without being compelled by obligation or by social contract—even if it is expected to simply remain in the adjudicatory realm of ADR.

These issues notwithstanding, England established a separate legal jurisdiction for the purpose of dispensing religious law for those who espouse Islam, with a notable caveat. Ironically enough, the caveat is that the judgments remain in the adjudicatory realm of ADR.[307] That is, pursuing redress under religious law results in claimants forfeiting their right to have their issues addressed by the national judiciary. However, the limitations placed on Islamic law tribunals have not prevented Muslim claimants from attempting to transfer matters into the national court system when they are dissatisfied with the outcomes under Islamic law.[308] Therefore, it might become necessary for England to reevaluate the theory of sanctioning Islamic law exceptionalism before decisions come to affect the legal rights of those who may become bound by the rules of the Quran and/or Sunnah without their consent. For the time being, the English judiciary has taken the position that it will not adjudicate 'religious matters'.[309] Specifically, Lord Justice Mummery proclaims in the 2012 case, *Khaira & Ors v Shergill & Ors* [2012] EWCA Civ 983:

> A secular court will not adjudicate on the truth of disputed tenets of religious belief and faith, or on the correctness of religious practices: those questions are non-justiciable, because they are neither questions of law nor are they factual issues capable of proof in court by admissible evidence. Judicial method is equipped to deal in hard facts objectively ascertainable, directly or by inference, from

[306] Cynthia Brougher, 'Application of Religious Law in U.S. Courts: Selected Legal Issues' (2011).
[307] Cox (n 67).
[308] Frank Cranmer, 'Issues of Law and Religion in the United Kingdom – with Occasional Forays Further Afield' <http://www.lawandreligionuk.com/2013/04/13/religious-tribunals-in-the-united-kingdom-and-the-united-states/>.
[309] Cranmer (n 308).

> probative evidence: it is not equipped to determine the truth, accuracy or sincerity of subjective religious beliefs about doctrine and practice.[310]

Proclamation notwithstanding, the promotion of Islamic law as a 'cultural' component of societal interaction has seemingly encouraged encompassing Islamic law exceptionalism as necessary to the furtherance of multiculturalism without evaluating whether this perspective sidesteps the 'religious matters' stance. To put this another way, if Islamization means the imposition of religion, and religion and law are inseparable within Islamic culture, then a reasonable question is whether there is anything concerning Islam (when further shielded by a broad interpretation of multiculturalism) that isn't a religious matter?

There is apparent expediency in not focusing on the fact that Islamic law is the reiteration of foreign interpretations of the Quran and Sunnah. Specifically, it facilitates directing national attention toward the preservation of culture, instead of minding the effects of how integrating Islamic law at any level might restrain the rights of those who do not espouse the religion. For the sake of illustration, there appears to be a dearth of evidence demonstrating that the national judiciary in England has purposefully relied upon and/or cited to the judgments of the courts of Muslim-majority nations when addressing legal claims of British citizens, even those who espouse Islam. This is the case even when said claimants are immigrants from one of those nations. Thus, Lord Justice Mummery's assertion that England's national courts will not rely on Islamic law to adjudicate cases involving Muslim claimants suggests that individuals who live in or are citizens of the United Kingdom should expect to be bound by national law. At the same time, it has been established that the national courts "will give effect to the decisions of a religious tribunal where the parties have appointed it as arbitrator under the terms of the Arbitration Act."[311] Arbitrators can be Islamic religious leaders who may not be licensed to practice law in England or anywhere else.[312] Does that not mean that the national court is relying on religious arbitrators' interpretations of the Quran and Sunnah, which then have the force and effect of national law? Once it becomes national law, it is binding on Muslims and non-Muslims alike. Therefore, it appears that the practical outcome is Islamic law becomes a

[310] *Khaira & Ors v Shergill & Ors* [2012] EWCA Civ 983 [5]; *See also,* Cranmer (n 308).
[311] Cranmer (n 308).
[312] Cranmer (n 308).

part of England's impartial rule of law, even if one does not believe in the authenticity of the Islamic text or espouse the views of the prophetic figure.

2.6 The Islamic Law Inquiry & Recurring Imperial Commitments

As Figure 2.2 illustrates, the rise and decline of the British Empire has not been without consequences. At its height, POGG was the instrument for colonizing and propagating Anglicanism to more than half the world. As the post-imperial era has forced the United Kingdom to relinquish her many holdings, it appears that residual imperial responsibilities have remained. England's migration profile, despite membership in the European Union, mostly encompasses transplants from her former colonies.[313] As such, it is reasonable to believe that England's perception of herself continues to be through the lens of Imperialism. How could it not? This is especially the case as it appears that the relationships did not really come to an end; they simply moved from colonial soil to mainland Britain.

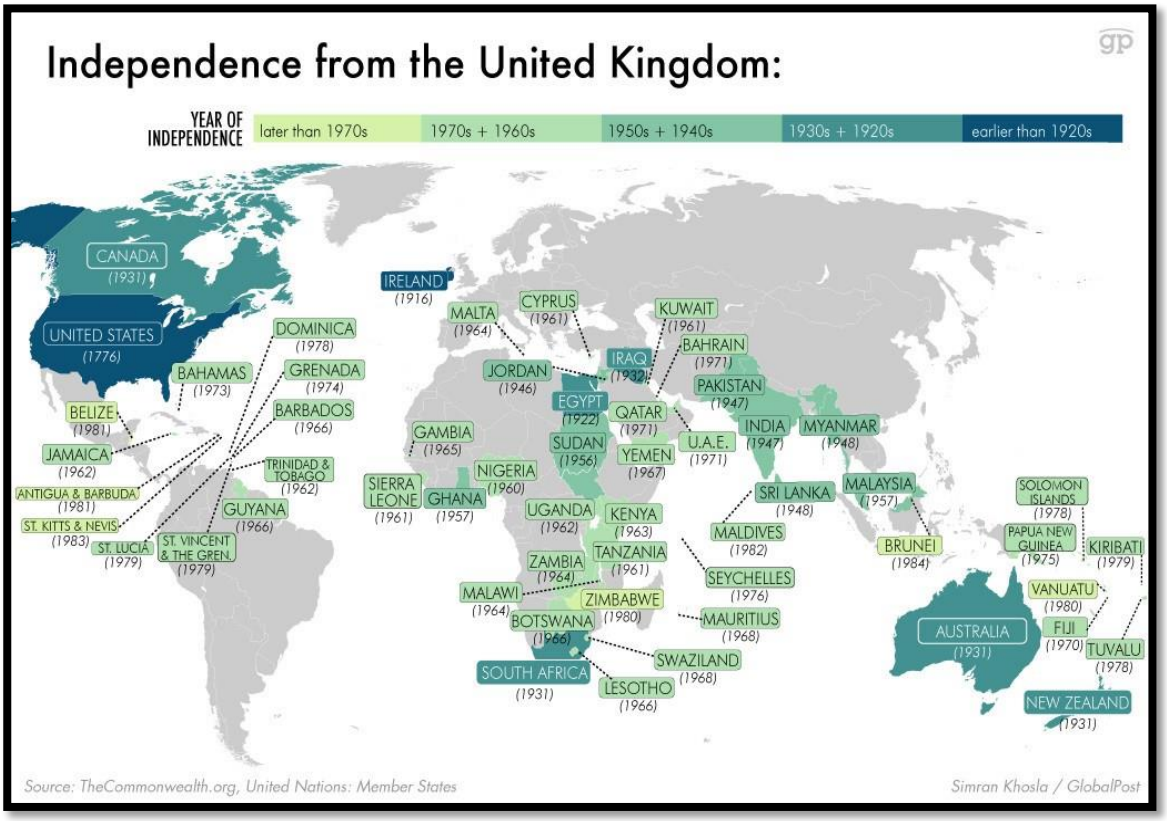

Figure 2.2: British Commonwealth Independence by Year
© TheCommonwealth.org

[313] Council (n 174).

Returning to the Imperial Privilege/Exceptionalism dichotomy, it is worth evaluating where Great Britain's imperial legacy leaves England as it relates to its church-state arrangement and Muslims' request for faith-based legal exceptionalism. Maret explains, "the United Kingdom (UK) has experienced a steady growth of Muslim communities within its borders, and with it, a surge of faith-based arbitration services for Muslims."[314] As such, accommodating the political ideologies and religion-centric legal preferences of immigrants from Muslim-majority nations has not been without controversy, especially over the past decade.[315] The former Archbishop of Canterbury's lecture at the Royal Courts of Justice in February 2008 entitled, 'Civil and Religious Law in England,' exemplifies the continuing controversy.[316]

The lecture attempted to promote exceptionalism as the democratically expedient solution to Islamic law in English courts from the perspective of the national church. When the Archbishop was presented with the question of whether the application of sharia is 'unavoidable' in certain circumstances, especially if England seeks to achieve cohesion and take Muslim's religion seriously, he responded affirmatively.[317] Many British citizens were incensed as they interpreted his words to suggest that it is just a matter of time before Islamic law would be a recognized phenomenon in England.[318] Williams later addressed the societal discontent raised by his statement. He explained that, "even when some of the more dramatic fears are set aside, there remains a great deal of uncertainty about what degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes."[319] He also acknowledged that the issue "spills over into…questions about the right of religious believers in general to opt out of certain legal provisions…"[320] Williams seemed to at least tacitly embrace the reality that although the right of conscience is sacrosanct, the judicial system may not uphold every manifestation of faith that religious subgroups deem compulsory. He also seemed to recognize that the obvious answer may not be creating bifurcated legal systems to appease religious subgroups and/or denominations.

[314] Rebecca E Maret, 'Mind the Gap: The Equality Bill and Shari'a Arbitration in the United Kingdom' (2013) 36 Boston College International & Comparative Law Review 255, 255; MacEoin (n 192), 47-9.
[315] MacEoin (n 192), 47-9.
[316] Griffith-Jones and Williams (n 296).
[317] Griffith-Jones and Williams (n 296), 12.
[318] Griffith-Jones and Williams (n 296), 13.
[319] Williams (n 295), 32.
[320] Williams (n 295), 21.

Societal responses to the Archbishop's comments also contributed to the afore-mentioned scholarly assessments of the prudence of Islamic law exceptionalism in England. In aggregate, these legal scholars suggest that before affirmative steps are taken, it is essential to understand whether Islamic law can or will evolve to meet liberal democracy. As is discussed in detail in subsequent chapters, *Wright et al*. observe that the question of Islamic law in Western nations is rarely assessed from the perspective of non-Muslims.[321] Although some address possible human rights violations associated with imposing Islamic law, none of the scholars who contributed to this text address the question of whether the primary sources of Islamic law make the judgments of Islamic law tribunals unenforceable in creating legal precedent without infringing on the legal rights of non-Muslims. Therefore, how will Parliament and/or the English judiciary ensure that the religious laws of Muslims do not unwittingly bind non-Muslims when they petition for redress before the court? When this same question applied to the Anglican Ecclesiastical courts, history evidences that the jurisdictional reach of the courts was curtailed to ensure that Anglican religious law was not enforced upon the growing number of adherents of other denominations and/or belief systems. Thus, a reasonable question is to what degree will history have to repeat itself before the same conclusion is reached concerning Islamic law? Based on England's approach to curtailing Islamic jurisprudence, it would appear that this conclusion has already been reached, and the only remaining question is what needs to happen now?

Notwithstanding the availability of historically demonstrative guidance centered in her own imperial rise and fall, it appears that England based the adoption of faith-based legal platforms on one of myriad theories associated with legal pluralism as an accommodated appendage to the national judiciary.[322] One such theory is that branded by legal theorist, Ayelet Shachar, as the concept of 'transformative accommodation'. According to Shachar, is a "scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters, so that power-holders are forced to compete for the loyalty of their shared constituents."[323] Those who point to extra-constitutional measures like transformative accommodation as a solution for requests to accommodate Islamic law propose restructuring the rule of law in Muslim-minority

[321] Wright and others (n 5), 102-03.
[322] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press 2011) 117-45; *See also*, Bryan S Turner and Berna Zengin Arslan, 'Shari'a and Legal Pluralism in the West' 14 European Journal of Social Theory 139; Brian Z Tamanaha, 'The Rule of Law and Legal Pluralism in Development' (2011) 3 Hague Journal on the Rule of Law 1; Kamaruddin, Oseni and Rashid (n 66).
[323] Williams (n 295), 32; *See also,* Ayelet Shachar (n 322), 117-45.

countries to allow Muslims to establish a legal system that is exclusive and separate from the national framework.[324] This alternative is proposed as a means of 'foster[ing] peaceful co-existence based on tolerance'.[325] From a practical perspective, this undertaking seems to provide a means to forum shop for advantageous legal judgments depending on secular or religious partiality.

In the commoditization of not only religion but also the rule of law, the description conjures images of shopping for favorable mortgage or credit card rates instead of exercising one's religious liberty. Even Williams acknowledges that there is a 'market' element to Shachar's definition, which is uncomfortable to consider.[326] Although not fully confident of the correct answer for England, Williams noted that "if what [the British] want socially is a pattern of relations in which a plurality of diverse and overlapping affiliations work for a common good, and in which groups of serious and profound conviction are not systematically faced with the stark alternatives of cultural loyalty or state loyalty, it seems unavoidable."[327] Moreover, Williams suggests that this level of accommodation emanates from Christians obligation to love their Muslim neighbors.[328] He noted that this obligation does not mean lessening the furtherance of their own Christian faith, but instead working to "live together constructively" in a plural society instead of coexisting "tensely or suspiciously."[329] However, Williams failed to address how legally curtailing one's own right to pursue one's faith by giving legal deference to the religious guidelines and legal precepts of someone else's faith actually achieves that objective.

2.7 The Socio-Legal Consequences of Attempting to Regulate Exceptionalism

Returning to the employment of ADR to achieve faith-based legal exceptionalism, arbitration affords claimants the ability to settle their legal disputes without having to endure the litigatory process. English courts have determined that the primary aim of arbitration in the U.K. "is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense [when]…the parties [are] free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."[330] Therefore, the 1996 Arbitration Act is the statutory means that allows parties

[324] *See e.g.,* Kamaruddin, Oseni and Rashid (n 66); Jackson (n 66).
[325] Kamaruddin, Oseni and Rashid (n 66), 246.
[326] Williams (n 295), 32.
[327] Williams (n 295), 33; Griffith-Jones and Williams (n 296), 13.
[328] Williams (n 295), 7.
[329] Williams (n 295), 7.
[330] Arbitration Act 1996, s (1) (a)-(b).

to agree to have legal issues determined by arbitration rather than by the national judiciary.[331] England began accommodating faith-based legal exceptionalism in August 2007, which allowed Islamic law tribunals to begin settling disputes under the Act.[332]

Analogous to Canada and the U.S., there are several preliminary requirements in England that accompany arbitration agreements and/or the tribunals that adjudicate them. Specifically, there is the preliminary requirement that the parties who agree to arbitration are of equal bargaining power—*i.e.,* it is evident that there is a lack of pressure, coercion, or undue influence. As it concerns those who serve as arbitrators in England, there are no specifically required qualifications or characteristics.[333] However, they must be able to show objectivity or impartiality where it pertains the parties and disputes being arbitrated.[334] Lastly, it appears to be presumed that arbitrators will be licensed to practice law, although they do not have to be British citizens/subjects or even licensed to practice in England. With this in mind, Islamic law tribunals were afforded the bandwidth to address certain familial disputes between claimants on a voluntary non-binding basis.[335] Although judgments of Islamic law tribunals were granted binding legal effect in September 2008, they have not been designated as fully integrated aspects of the English judicial system.[336] As it presently stands, Islamic law tribunals continue to make enforceable rulings under the Arbitration Act with little regulatory oversight to ensure that the preliminary requirements of English arbitration are upheld.[337]

England's history with religious courts notwithstanding, the question of the constitutionality of Islamic law exceptionalism and where religious decisions might fit within the English judicial system have also created considerable debate.[338] Specifically, there was also very little examination of how the tribunals actually furthered multiculturalism in England. As such, the tribunals began to be scrutinized because of the lack of governmental oversight almost immediately after implementation. A crucial question that continues to challenge the appropriateness of Islamic law exceptionalism in England is whether it is possible for them to overcome the obvious incongruence between legal protections afforded under

[331] Arbitration Act 1996, s (1) (c).
[332] Reiss (n 198), 271.
[333] Frank Cranmer, 'Sharia Law, the Arbitration Act 1996 and the Arbitration and Mediation Services (Equality) Bill' <http://www.lawandreligionuk.com/2012/10/24/sharia-law-the-arbitration-act-1996-and-the-arbitration-and-mediation-services-equality-bill/%0A>.
[334] Cranmer (n 333).
[335] Reiss (n 198), 271.
[336] Williams (n 295), 13; Cranmer (n 333).
[337] Maret (n 314), 263.
[338] Griffith-Jones and Williams (n 296), 13; Maret (n 314), 255.

Islamic law versus under English law.[339] This speaks to the ability or willingness of tribunal adjudicators to assure equal bargaining power between the parties when the primary and secondary sources of law relied upon do not have gender equality as a principal objective.

There has also been concern about particular tribunals inconspicuously addressing disputes that extend beyond the types of legal matters they purport to address—*vis-à-vis* jurisdictional creep.[340] Advocates for the establishment of the tribunals originally claimed that they would adjudicate familial matters only.[341] However, they have been found to address non-familial contract disputes and criminal matters, including those dealing with domestic violence.[342] As there are no stipulations on who the arbitrators are and general views on physical contact between spouses differ under Islamic law and English law, advocacy groups have suggested that Islamic law tribunals might condone spousal interaction that is illegal under English law.[343] As will be demonstrated more fully in subsequent chapters, these concerns are not without merit. Moreover, there have been concerns about conscious attempts to impede Muslim communities' reliance on English law, in that the tribunals discourage clients from seeking other viable legal alternatives.[344] This has resulted in the English legislature attempting to address the questions that appear to have been overlooked when Islamic law exceptionalism was being considered and sanctioned.[345]

To illustrate, the Arbitration and Mediation Services (Equality) Bill was introduced in the House of Lords by Baroness Caroline Cox in 2012.[346] The Baroness argued that "some sharia tribunals operated in ways that were unproblematic but…others gave cause for concern."[347] To mitigate concerns, the Equality Bill requires Islamic law tribunals to acknowledge the primacy of English law to all clients that they serve. Cox claimed that this acknowledgement would achieve two objectives. First, the acknowledgement of the primacy of English law would effectively prevent jurisdictional creep by Islamic law tribunals.[348] By forcing Islamic law tribunals to make clear where their jurisdiction ends, and English courts begin, it would ensure that claimants were advised on the full extent of

[339] Maret (n 314), 255-56.
[340] Maret (n 314), 268.
[341] Maret (n 314), 268-69.
[342] Maret (n 314), 268-69.
[343] *See e.g.*, Namazie (n 192), 19-20; MacEoin (n 192), 47-9; Maret (n 314), 268-69.
[344] Cox (n 67); *See also,* Maret (n 314), 268-69.
[345] Cox (n 67).
[346] Cox (n 67); *See also,* Maret (n 314), 268-69.
[347] Cox (n 67).
[348] Cox (n 67).

their legal rights. It would also combat "unequal treatment of women by tribunals operating under sharia."[349] When the bill was challenged as an interference with Muslims' religious liberty, Cox noted that if after being informed of the full breadth of rights available, an individual desires to voluntary submit to the "rulings of any body, religious or otherwise, even if that means surrendering their rights under English law, they were free to do so."[350] The Equality Bill also established an offense that would carry a five-year jail sentence for anyone involved in misleading claimants to believe that Islamic law tribunals have legal jurisdiction over family or criminal law.[351] Although the Bill was unsuccessful, the legislative objectives outlined therein illustrate the problems inherent in promoting faith-based legal exceptionalism in general, and Islamic law tribunals in particular.

England's inheritance of the British Empire's church-state arrangement is also at the center of both concerns that Cox's legislation was drafted to mitigate. This lends more support to the inference that England's decision to sanction exceptionalism springs from the nation's perception of imperial responsibility. The British Council suggests that a significant trend in England is that there is "an increase in faiths associated with post-war and postcolonial immigration, especially Islam."[352] Although this study is not in itself a feminist critique of Islamic law or the associated tribunals, an ancillary facet of the Islamic law inquiry is focused on how integration of Islamic law in Muslim-minority nations affects Muslim women. Ali, Bennoune, Manea, and others have each to varying degrees considered the effect of Islamic law on the privileges and responsibilities of Muslim women as members of religious subgroups in Western nations.[353] Central to their discourse is the problem that results when some attempts to promote multiculturalism—*vis-à-vis* Islamic law exceptionalism—has the practical effect of fostering gender inequality.

In the text, *Women and Shari'a Law*, Elham Manea alludes to the fact that not only does England assume an obligation of its imperial history, but misguided approaches to that obligation facilitate gender inequality by sanctioning Islamic law exceptionalism.[354] In her

[349] Cox (n 67).
[350] Cox (n 67).
[351] Cox (n 67).
[352] Council (n 174).
[353] *See e.g.,* Ali, *Modern Challenges to Islamic Law* (n 65); Manea (n 65); Lynn Welchman, *Women's Rights and Islamic Family Law: Perspectives on Reform* (Zed Books 2004); Tariq Ramadan and Saïd Amghar, 'Islam, the West and the Challenges of Modernity' (2001) 21 Transnat'l L. & Contemp. Probs. 119; Bennoune (n 65). Each text has as its focus the way in which Islam and/or Islamic law affects women and/or the need for reconsideration of how Islam and/or Islamic law has been perceived to effect women's rights. Even Bennoune's personal narratives exemplifies the profound effects of Islamic fundamentalism on the female life.
[354] Manea (n 65), 27-35.

effort to oppose accommodating Islamic law in Britain, Manea revisits the concept of the 'the white man's burden' as the impetus for England's continued perception of imperial supremacy, which manifests itself in the legalization of Islamic law tribunals.[355] Manea contends:

> [t]he desire to protect the rights of minorities or people in former colonies, and the strong sense of shame and guilt over the Western colonial and imperial past and its conduct of politics—yields an assumption that…human rights is a Western enterprise and an imposition of the powerful.[356]

She continues by arguing that this assumption leads to efforts to repair past damage by taking heavy-handed steps to protect multiculturalism, especially where minority groups are concerned.[357] She also contends that integration of Islamic law without determining whether it's what Muslims—women in particular—desire or need is illustrative of England's heavy-handedness.[358]

Based on the vastness of Great Britain's reach under POGG—as is illustrated at Figure 2.2—and the criticisms levelled at the nation—as are discussed herein—it is plausible that England deems it appropriate to continue treating immigrants as if they were still colonial subjects. According to Manea, this might include arbitrary attempts to promote the perception of equality amongst divergent religious denominations and subgroups by affording some of them extraordinary exception.[359] In the case of Islamic law however, the outcome may result in England weakening the shared values that the nation purports to embrace by affording exception to political ideologies and religious tribunals that do not actively seek to promote those shared values, especially as it relates to democracy and gender equality. Likewise, the continued attempt by claimants to move claims from Islamic law tribunals to national courts could possibly set the stage for nationwide if the move results in the specific religious edicts being used to dispense decisions for those outside that specific religious subgroup.

2.8 Conclusion

This chapter establishes a chain of cause-and-effect that explains how England's accommodation of Islamic law exceptionalism carries the weight of historically comingling

[355] Manea (n 65), 27-35.
[356] Manea (n 65), 28.
[357] Manea (n 65), 28.
[358] Manea (n 65), 28.
[359] Manea (n 65), 45.

religion and government in the spreading of Anglicanism in expansion of 'Peace, Order and Good Government'. As POGG has a history that extends back to the Law-Code of Alfred the Great and the creation of the English kingdom, the imperatives that buttress the doctrine became the archetype for colonial societal management during the rise of the British Empire. Consequently, commitments were made to preserve the religious beliefs and societal norms of the territories that the Empire colonized, which has come to include the political ideologies and religion-centric laws associated with Islam. This is the case even though issues created by religious law exceptionalism appear to far outweigh the benefits gained. Specifically, the decision to encroach upon the legal rights of adherents of other religious dogmas and the non-religious will likely weaken England's FSVs. Because of migration from former British colonies to mainland Britain however, the preservation of POGG—which includes England's established church-state arrangement—has seemingly become the catalyst for expansive degrees of latitude concerning not only worship but also the entire mode of societal interaction. As this chapter has demonstrated, Muslim claimants have already taken steps to breach the wall that the British Government has seemingly erected around Islamic law tribunals. Specifically, they have begun attempting to move their claims from Islamic law tribunals to English courts, all the while relying on the religious texts and prophetic perspectives of the Islamic belief system. Hence, there may be something to the former archbishop's assertion after all.[360] It may become 'unavoidable' that the legacy of the POGG doctrine, which includes a history of Anglican exceptionalism, results in the national judiciary imposing Islamic law on non-Muslim claimants. In other words, it may be only a matter of time before non-Muslim claimants become bound by Islamic law as a result of comingling claims decided by imams or other arbitrators originating in Islamic law tribunals, where Islamic law is applied, with those decided by non-religious arbitration panels or the national judiciary, where the national rule of law is supposed to prevail.

[360] Griffith-Jones and Williams (n 296), 7; *See also*, Harriet Sherwood, 'Muslims Place Greater Importance on National Identity, Finds UK Study' *The Guardian* (London, 21 March 2018) <https://www.theguardian.com/world/2018/mar/21/muslims-british-national-identity-uk-report>. Referencing Williams' statement concerning the unavoidability of sharia law being imposed upon the remainder of British society.

CHAPTER 3
THE REJECTION OF POGG:
AMERICA'S APPROACH TO DISESTABLISHMENT

"Great Britain lost the military struggle for the thirteen rebellious colonies in 1781…
[t]he combination of the Treaty of Paris and [British] Loyalist resettlement
[in Canada]…completely transformed British America."[361]

This next two chapters provide historiographic analyses of British Imperialism as the provocation for constitutional responses to the POGG doctrine in the United States and Canada. By first expanding the scope of POGG as not only a Canadian constitutional mainstay, but also a facet of the American colonial experience, the chapters demonstrate how the doctrine shaped the relationship between the British Empire and her North American colonies. These chapters then examine how the implementation of POGG incited divergent and sometimes oppositional perspectives between the American and Canadian colonies. The difference in perspectives contributed to the colonies' divergent reactions to Great Britain's approach to colonial societal management, which included the imposition of the Church of England, the monarchial/parliamentary governmental framework, and English colonial law. As such, POGG prompted the adoption of the disparate constitutional approaches and governmental frameworks that have emerged in each nation, including each nation's church-state arrangement.

This chapter focuses on aspects of the American colonial experience that demonstrate that POGG was not only instrumental to Canadian constitutionalism but also an American colonial paradigm. Although Canada adopted POGG as an ideology that has been integrated into her constitutional documents, the doctrinal imperatives were also catalysts for steering the British-American colonies toward independence. Therefore, this chapter demonstrates the significance of the POGG doctrine in the history of American constitutionalism and why the United States should not discard the effects of POGG when drawing upon foundational ideals and perspectives to address modern constitutional issues, such as faith-based legal exceptionalism.

3.1 Mainland Britain: Foreshadowing the Effects of POGG in North America

Recall from the previous chapter that POGG's constitutional reach encompasses what is present-day Northern Ireland—*vis-à-vis* the former Province of Ulster. Specifically, POGG

[361] JM Bumsted, 'The Consolidation of British North America, 1783–1860' in Phillip Buckner (ed), *Canada and the British Empire* (Oxford Scholarship Online 2011) 44.

was essential to Northern Ireland's transition from plantation colonies to semi-autonomous nation of the United Kingdom. Likewise, the occurrences that transpired on the British Isles between Great Britain's establishment of the Ulster plantation in 1609 and the issuance of the 1689 British Act of Toleration are significant as they offer insight into the role that POGG played in refining Great Britain's imperial ideology. The occurrences not only illustrate a prior imposition of the imperatives associated with POGG, but they also foreshadow the conflicts that were on the horizon in the North American colonies between the 17th and 18th centuries. During those crucial years, the British kingdoms were in a continual state of civil war caused in large part by religious conflicts that emerged after the Protestant Reformation.

As a result of the Reformation, Scotland emerged as a faction of Protestantism while Catholicism remained entrenched in Ireland. England emerged as a 'reformed' variation of Catholicism—*i.e.,* Anglicanism.[362] The notable exception was the plantation of Ulster, which was established by the British in an effort to colonize the more rural northerly parts of Ireland. This once recalcitrant Gaelic-speaking society of Catholics was subjugated by a society of British loyalists committed to Anglican supremacy.[363] An assessment of the many moving parts that contributed to Great Britain's plans to colonize Ulster is beyond the scope of this study. What is relevant is the fact that the imperatives of POGG were integral to the transformation of Ireland's "demographic, socio-economic, political,…religious, and cultural landscapes."[364] Moreover, the precedent setting imposition of POGG in Ulster provided Great Britain with an imperial template or doctrine to be replicated in "future colonial expansion in the Americas, the Caribbean and the Indian sub-continent."[365] The imposition of POGG in Ulster also establishes support for the supposition that POGG was not just a Canadian right of constitutional passage but also an American colonial phenomenon.

According to Jonathan Bardon, the colonization of Ulster was a grandiose scheme focused on isolating, civilizing and Anglicizing one of the most 'remote and benighted' Catholic regions under British rule.[366] Long before Henry VIII established the Church of England,

[362] Linda Colley, *Britons: Forging the Nation, 1707-1837* (Yale University Press 2009) 11-2.
[363] Sean Connolly, 'Religion and Society, 1600-1914' in Liam Kennedy and Philip Ollerenshaw (eds), *Ulster Since 1600: Politics, Economy, and Society* (Oxford University Press (Online) 2013) 74-8.
[364] Éamonn Ó Ciardha and Micheál Ó Siochrú, 'Introduction' in Éamonn Ó Ciardha and Micheál Ó Siochrú (eds), *The Plantation of Ulster: Ideology and Practice* (Manchester University Press 2012) 1.
[365] Ciardha and Siochrú (n 364), 1.
[366] Jonathan Bardon, *The Plantation of Ulster: The British Colonization of the North of Ireland in the 17th Century* (Gill Books 2013) 214.

Catholicism was fully entrenched amongst the inhabitants of the Ulster counties.[367] Furthermore, the remoteness of the counties made them somewhat impervious to British rule and the imperatives that were meant to ensure peace, order, and good government in the territories within Great Britain's locus of control.[368] English-speaking British planters were incentivized to establish plantations to exert dominion and ensure the civilization of the Irish natives.[369] Padraig Lenihan acknowledges that the aim of Ulster's colonization was to "separate the Irish by themselves [to ensure they would]…in heart, in tongue and every way else become English."[370] As would be the case in the North American colonies, an important precondition was that Anglicanism expunged or at least subjugated any other religious dogmas that prevailed. In Ulster's case, this translated into "preventing the further growth of popery."[371] Civilizing Ulster also encompassed the other imperatives of POGG, which included supplanting the Irish governmental infrastructure with that of the British and replacing prevailing Irish (Brehon) law with English colonial/penal law.[372] By 1641 when the Irish finally rebelled against the British, the imperatives of POGG had shifted the balance of political, legal, and economic power. According Jim Smyth and Emrys Jones, "the native Irish were disadvantaged and displaced [and became] tenants of the new [British] owners."[373] Similarly, G.A. Hayes-Mccoy observes that life in Ireland was effectively " 'dismembered on account of religion' and further upset by the political, administrative, and social changes that culminated in the overthrow of local authority in Ulster… ."[374] Consequently, the colonization of Ulster territory—and the rebellion and war that followed—made the colonization of the North American territories a relevant exercise in reiteration and repetition, which would also culminate in rebellion and war.

Another noteworthy indication of future expectations in the North American colonies centered on the exacerbation of political conflicts that had existed between the Crown and

[367] Bardon (n 366), 214.
[368] Connolly (n 363), 74; *See also*, Hiram Morgan, '"Never Any Realm Worse Governed": Queen Elizabeth and Ireland' (2004) 14 Transactions of the Royal Historical Society 295.
[369] Connolly (n 363), 74.
[370] Padraig Lenihan, *Consolidating Conquest, Ireland, 1603–1727* (Harlow : Pearson Longman 2008) 43.
[371] Jonathan Bardon, *A History of Ulster* (Blackstaff 1992) 168.
[372] Bardon (n 371), 168. *See also,* the terms of the Treaty of Mellifont of 1603, which ended the Nine Years' War that took place across Ireland from 1594 to 1603 between England and Ireland. The treaty legally memorialized the political and legal imperatives of POGG. As the counties of Ulster rejected English rule, colonization of the territory was means of securing compliance and loyalty by force.
[373] Jim Smyth and Emrys Jones, 'Early Modern Ulster', *Encyclopædia Britannica* (Encyclopædia Britannica, inc 2019) <https://www.britannica.com/place/Northern-Ireland/Early-modern-Ulster>.
[374] GA Hayes-Mccoy, 'The Completion of The Tudor Conquest and the Advance of the Counter-Reformation, 1571–1603' in T. W. Moody, FX Martin and FJ Byrne (eds), *A New History of Ireland: Early Modern Ireland 1534-1691* (Oxford University Press 2011) 139.

Parliament. From approximately 1630 to 1689, attempts to suppress religious denominationalism coupled with the governmental power struggle between the reigning monarch and Parliament seemingly assured another civil war on the British Isles.[375] In response to Parliament's attempts to assert power, Charles I dissolved Parliament and instituted England's period of Personal Rule.[376] Circumstances were worsened by Charles' attempts to exert further control over Scotland and Ireland's religious and political practices.[377] Thus, civil war again engulfed the British Isles from 1642 to 1651. By 1678, the British kingdoms were consumed by the fear of an international adversary, the French, and the possibility of a Catholic monarch.[378] Colley observes that, "England, Wales and Scotland had been caught up in a succession of major wars with the foremost Catholic power in Europe, France."[379] This common adversary "made it possible for the different countries, social classes, and ethnic groups…to have something in common—whether it be fear, or aggression, or a powerful sense of embattled Protestantism."[380] After spending 1688 through 1689 circumventing the return of a Catholic king to the thrones in England and Scotland, a political union appeared to be the solution to fortify each kingdom against France and the possibility of alignment between France and another Catholic pretender.[381] Scotland and England (and Wales) opted for official unification despite the extreme divides attributed to denominationalism and territorial autonomy.[382]

To aid in achieving the union, the British Act of Toleration was issued in 1689 to make official the practical realities of the religious schisms in Great Britain (and the North American colonies).[383] The Act essentially assured that Anglicanism emerged as the superlative 'established' religion, but freedom of religious worship was officially afforded to any Protestant religious subgroup that did not follow the doctrines and practices of the Church of England.[384] The Act afforded religious deference to Scotland, which was

[375] Connolly (n 363), 74-5; *See also,* Colley (n 362), 11-2.
[376] LJ Reeve, 'The Death of a Parliament', *Charles I and the Road to Personal Rule* (Cambridge University Press 2009) 58-9.
[377] David R Como, *Radical Parliamentarians and the English Civil War* (Oxford University Press (Online) 2018) 23-4.
[378] Colley (n 362), 322.
[379] Colley (n 362), 322.
[380] Colley (n 362), 322.
[381] Hilary M Carey, *God's Empire: Religion and Colonialism in the British World, c.1801-1908* (Cambridge University Press 2011) 11.
[382] Carey, *God's Emp. Relig. Colon. Br. World, c.1801-1908* (n 381), 11.
[383] Gill (n 164), 81-2.
[384] David Brown, 'Scotland: Religion, Culture and National Identity' (204AD) 14 International Journal for the Study of the Christian Church 88; *See also*, Rowan Strong, *Anglicanism and the British Empire, c.1700-1850* (Oxford University Press 2007) 1-9.

Protestant but not Anglican, as well as other non-Anglican denominations that were folded into Great Britain as a result of unification.[385] The Act also allowed non-Catholics to build their own houses of worship but required them to pledge allegiance to England and to the supremacy of the reigning monarch.[386] The purported aims of the Act were three-fold: (1) to create a climate of tolerance for religious plurality; (2) to eliminate obligatory religious conformity; and (3) to safeguard against religious plurality being the justification for disloyalty to the supremacy of the monarchy and national sovereignty.[387] Although the British Empire did more to frustrate than promote the spirit of the Act, affording religious tolerance during this time of territorial discord and upheaval was nothing short of an effective stratagem. It lessened the likelihood of rebellion while the nation faced international opposition. Likewise, the ends achieved by the Act appear to demonstrate Great Britain's establishment of a political policy concerning the recognition of religious plurality without frustrating the continuity and supremacy of the 'established' church.

The Acts of Union of 1707 officially united the Kingdoms of England (and Wales) and Scotland to form the Kingdom of Great Britain.[388] Eventually, the kingdoms of Great Britain and Ireland would achieve political unification in 1800. However, obstruction of religious denominational growth became the largest contributing factor to Great Britain's subsequent loss of Ireland (except the province of Ulster) after 1916.[389] England's deliberate attempts to prevent Catholics from holding parliamentary seats in Ireland coupled with attempts to proliferate the Church of England throughout the region are illustrative of the incongruence between the promulgation of legislation furthering religious tolerance and competing efforts to ensure supremacy of the Church of England, the British monarchy, Parliament, and the English rule of law. Comparable to the breach that established the Republic of Ireland, the breach that resulted in the creation of the United States is indicative of how POGG, as an often-repeated colonial doctrine, continued to facilitate Great Britain's political and religious objectives.

As early as 1620, those most disenchanted with the religious and political discord on the British Isles—including those who opted to exit or forego settling in Ulster—could leave

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[385] Carey, *God's Emp. Relig. Colon. Br. World, c.1801-1908* (n 381), 14-9. *See specifically* Table 1.1 at page 19, where Carey highlights the religious dynamics associated with immigration within the British Empire.
[386] Gill (n 164), 82-3.
[387] Gill (n 164), 82-3.
[388] Linda Colley, *Acts of Union and Disunion: What Has Held the UK Together-and What Is Dividing It?* (Profile Books 2015) 5.
[389] *See* Figure 2.2 in Chapter 2.

altogether in favor of the American colonies.[390] Whether labeled Puritans, Pilgrims, Protestants, or Separatists, these groups dissented against the Church of England and the Government and were subsequently branded non-Anglican dissenters.[391] They believed their interests were better served away from the national Church, so they sought religious autonomy in the British-American colonies. Religious labels notwithstanding, those who emigrated from the British Isles to the American colonies were originally from the same nucleus of common demography and intersecting ancestry. Since the largest numbers of migrants to the American colonies were of English, Welsh, Scotch-Irish, and Scottish descent, they saw themselves as equals in ethnicity, character, and religiosity to those who remained on the mainland.[392] Despite the diversity, the imperial politics of establishing the Church of England and Anglicanism as superlative found its way to the American colonies.

Although the persistent conflict on the mainland ultimately led to legislation concerning religious tolerance, England's commitment to the Church of England demonstrates that the conflict neither demoted Anglicanism nor attempted to establish denominational equilibrium. Moreover, the practical implications of the legislation resulted in the national government supporting the suppression of every denomination or religious subgroup that was not Anglican. Therefore, it is unlikely that denominational equilibrium was plausible on the British Isles, even when every denomination was under the Christian banner. If religious equilibrium was unachievable amongst denominations of Christians where one takes a superlative stance over the others, then how much less feasible is equilibrium where non-Christian subgroups are added to the equation? This is especially the case where one is afforded exceptional societal and legal deference based on its superlative stance that is akin to that which resulted in the fracturing of the British religious landscape.

As it relates to colonialism in America and Canada however, the conflict on mainland Britain ultimately aided in the North American colonies becoming some of the most religiously diverse territories of the era.[393] This was the case despite the episodic rise of the Church of England as the established church. Some might conclude that the denominations were not as robust as religious plurality today, especially since most were outgrowths of Christianity. Therefore, it might seem that little can be gleaned from them to address the

[390] Strong (n 384), 1.
[391] John A Ragosta, *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution and Secured Religious Liberty* (Oxford University Press 2010) 3.
[392] Alden (n 237), 227.
[393] DL Holmes, *Faiths of the Founding Fathers* (Oxford University Press 2006) 1-29.

sheer breadth of religious diversity of modern multicultural societies. To the contrary, this assumption is often predicated on labeling as indistinguishable every Christian denomination because they believe in the divinity of Jesus Christ. This is no more compelling than suggesting that the denominations of Islam are the same because they may all espouse the notion that Muhammad was the last Abrahamic prophet. Belief in Muhammad's prophetic claims has not prevented notable distinctions between Sunnis, Shiites, and Sufis (not to mention the subgroups within the denominations). Where the experiences of the American colonies are concerned, the central issues of religion and government entanglement have gone unchanged. Moreover, the insight of circumspection as to alternative forms of government and approaches to religious plurality was trajectory-altering and is a necessary starting point for any contemporary assessment of how to respond appropriately to religious requests for exceptionalism in England, Canada, or the United States.

3.2 POGG in British-America: The Impetus for Disestablishment in the U.S.

The theory that the POGG doctrine played a role in the establishment of the United States has not only been under-evaluated, it has hardly been given worthwhile consideration. Yusuf alludes to the probability of POGG's influence in the U.S. He even suggests that there are one or two scholars who have espoused a similar viewpoint; nevertheless, he goes no further than allusion.[394] As has been established in the previous section, there is precedent for the POGG doctrine's imposition in America. There is also demonstrative evidence that supports a connection between the imperatives associated with POGG and the establishment of the British-American colonies as well as a legacy that buttresses the evolution of colonial America and the approach to constitutionalism adopted by the United States. This is particularly noteworthy as it pertains perspectives on the 1st Amendment. Anthony Gill appropriately frames the analysis in the text, *The Political Origins of Religious Liberty*, when he asks: "[i]f religious freedom was hard to come by and a lack of religious tolerance common, what factors eventually led the United States to be the first modern nation to firmly enshrine liberty of conscience in its principle document of governance?"[395] As if attempting a syllogism, he also notes that in the U.S., "restrictions on various denominations and outright persecution existed for nearly two centuries prior to the

[394] Yusuf (n 103), 9-10.
[395] Gill (n 164), 61. Although Gill's question fits within the scope of this study, he was not posing this question in specific reference to POGG. Instead, he was addressing the politics associated with religious liberty, which conveniently aids in promoting the analysis attempted herein.

drafting of the U.S. Constitution's First Amendment."[396] To address the question categorically, it is necessary to consider not only the American colonial and post-colonial experiences but also the more modern American quandary created by myriad theories on the meaning of the phrase 'separation of church and state'.

Where it pertains the colonial and post-colonial eras, the establishment of the United States cannot be evaluated as a single uninterrupted narrative. Instead, it should be evaluated as an analysis of cause and effect. Specifically, generations of American colonists co-existed for nearly two centuries under a certain set of conditions that became progressively more undesirable before their descendants opted for a different course. This suggests the presence of a catalyst or change agent. As will be borne out in the remainder of this chapter, the terms of America's colonial charters evidence that the POGG doctrine served as that change agent. The specific imperatives of the doctrine were not only present but essential to the regulation of the American colonial infrastructure from 1603 to 1775. Moreover, the effects thereof established the foundational perspective upon which disestablishment in the United States is predicated.

During most of this colonial period, the United Kingdom, Canada, and the United States were a single domain that encompassed a mother country and two colonial regions. At the beginning of the period, what was then a loose interpretation of the Kingdom of Great Britain successfully established its first colony on North American soil on its way to becoming an imperial power. By the end of it, Great Britain had achieved 'Empire' status, while the 1783 Treaty of Paris relegated British-Canada to perpetual colonial status within that empire.[397] Alternatively, the treaty memorialized the sovereignty of the American states and prompted the Constitutional Framers' toward articulating the meaning of 'life, liberty, and the pursuit of happiness' ('LLPH') in the 1789 U.S. Constitution.[398] Between those years however, Great Britain employed the POgG clause to sustain her imperial hold over her territories on the North American continent. In the American colonies however, references were linguistic derivatives of those to which Yusuf alludes. Instead of being designated, 'peace, welfare, and good government' or 'peace, order, and good government,' the terms implicating the doctrine in the American colonies were, 'civil order' and 'settled & quiet government'. Terminology notwithstanding, the imperatives and

[396] Gill (n 164), 61.
[397] Reid and Mancke (n 115), 23.
[398] Alexander Tsesis and others, 'The Declaration of Independence and Constitutional Interpretation' (2016) 89 Southern California Law Review 369, 369.

application were analogous to those in the Ulster colonies, British-Canada, and later-acquired British colonial holdings.

Where America's modern 1st Amendment quandary is concerned, it is necessary to comprehend the degree to which the principle of disestablishment or separation of church and state has become a constitutional wall of pride and/or censure, depending on who's commenting about it. Disestablishment has arguably been blamed for almost every ill that plagues any part of American life where religion and/or government are required to interact.[399] Criticisms encompass everything from education, employment, corporate practices, voting rights, to whether individuals can smoke plant-based hallucinogens while 'worshiping' and remain employed.[400] It seems as if disestablishment can't catch a break! When religion remained in public schools, the 1st Amendment was the basis for claiming the disenfranchisement of those who do not believe, or those whose beliefs reflect one of many insular denominations that may or may not claim a connection with Christianity.[401] Once religion was removed, the 1st Amendment was responsible for not only the removal but the demoralization of American youth and the creation of an unprincipled American society.[402] With more recent efforts to include foreign political ideologies and religious laws within the meaning of multiculturalism, these kinds of circumstances have systematically become constitutional challenges that seem to be topically repeated every decade, especially since the U.S. modified its immigration practices under HCA-65.[403]

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[399] *See e.g.,* James A Morone, 'Jefferson's Rickety Wall : Sacred and Secular in American Politics' (2009) 76 Social Research 1199; Derek H Davis, 'Reflections on Moral Decline in America: Consulting the Founding Fathers' Views on the Roles of Church and State in Crafting the Good Society' (2000) 42 Baylor University Journal of Church and State 237. Both articles offer some degree of critique concerning the way in which the United States has espoused disestablishment (wall of separation) yet remained a religiously conservative society of people, which sometimes gives the appearance that the wall of separation does not actually hold.

[400] *See e.g.,* Davis (n 399), [III] ; Kent Greenawalt, 'Secularism, Religion, and Liberal Democracy in the United States' (2009) 30 Cardozo Law Review 2383, 2383-98; Cardozo School of Law, 'A Peyote Case: A Landmark in Religious Expression' (2010) <https://www.youtube.com/watch?v=q-vGe1s7Wto>.

[401] Davis (n 399), [II] & [III].

[402] Davis (n 399), [II] & [III].

[403] *See e.g.,* Cheryl Lynne Shanks, 'Whether to Exclude', *Immigration and the Politics of American Sovereignty, 1890-1990* (University of Michigan Press 2001); Jennifer Hochschild, Henry LaBarre and John Mollenkopf, 'The Complexities of Immigration: Why Western Countries Struggle with Immigration Politics & Policies'; The Statue of Liberty-Ellis Island Foundation, 'Immigration Timeline' <https://www.libertyellisfoundation.org/immigration-timeline>; 'The Legacy of the 1965 Immigration Act: Three Decades of Mass Immigration' (*Center for Immigration Studie*s, 1995) <https://cis.org/Report/Legacy-1965-Immigration-Act> accessed 9 August 2018. The Hart-Celler Act of 1965 abolished the national origin-based quota system that had been the foundation for the immigration policy in the United States since the 1920s. Not expected to affect immigration in America, "the unexpected result has been one of the greatest waves of immigration in the nation's history — more than 18 million legal immigrants since the law's passage, over triple the number admitted during the previous 30 years, as well as uncountable millions of illegal immigrants."

A more expansive description of multiculturalism appears to have brought with it the propensity to claim that one's specific immigration narrative warrants a reassessment of the 1st Amendment. This is especially true if the governmental framework of the nation from which an immigrant hails does not espouse liberal democracy and/or has not disentangled religion and government. This circumstance also appears to result in a failure to understand that repeatedly raising faith-based constitutional challenges, expecting a different judgment than the one afforded the previous challenger, has the unintentional—*or intentional*—consequence of signifying that there is something superlative about one denomination or religious subgroup that warrants extraordinary deference. This has arguably become the perspective buttressing requests for Islamic law exceptionalism. Despite the many criticisms of the United States' present separationist church-state arrangement, subsequent chapters will evidence that the Islamic law inquiry is one of the conundrums that the separation of church and state was intended to overcome. Thus, disestablishment was an appropriate and effective response to colonization and the imposition of the POGG doctrine in the American colonies. If the post-colonial considerations that buttressed the Constitutional Framers' reasoning for promoting the separation can be continuously regarded and sustained, then disestablishment can also endure as the appropriate and effective response to multiculturalism's insulation of the political ideologies and religious precepts often associated with those who espouse Islam.

Where it pertains the Constitutional Framers' reasoning, the important fact to remember is that politicizing religion by attempting to bind the souls of citizens to a governmental infrastructure is not unfamiliar to the American experience. The history of colonial America's 'established church-state arrangement' is simply a reality that is often selectively overlooked. For many if not all the British Empire's overseas possessions, religious establishment in some way affected the national identities that emerged on the post-colonial side of those experiences. The United States is no exception. Therefore, it cannot be discounted that America's present wall of separation has its origins in the American colonies' individual and collective responses to colonialism and Great Britain's implementation of the POGG doctrine. To recall why separation of church and state became *the* appropriate constitutional response, it is necessary to refresh one's recollection concerning the years between the issuance of constituting documents to establish British-America and the signing of the constituting document to establish the United States of America. During this time, non-Anglican denominations generally believed the Church of England to be little more than an imperially-sponsored reiteration of the

Catholic Church.[404] Likewise, there was little trust for those attempting to proliferate either dogma as exceptional.[405] Notwithstanding this reality, the British Empire predicated colonization on the proliferation of the Church of England, which contrary to the British Empire's political viewpoint was not the full breadth and scope of Christendom.

3.3 The Principal Imperative: Religiosity Clauses in American Colonial Charters

In 1584, writer and cleric Richard Hakluyt addressed Elizabeth I concerning the "propagation of the Church of England in new territories across the ocean."[406] His petition was in response to France and Spain's efforts to "propagat[e] the Catholic Church anywhere they planted their respective flags."[407] Hakluyt's appeal entitled *Discourse on Western Planting*, made a case for colonizing territories across the Atlantic Ocean "for the enlargement of the gospel of Christ whereunto the Princes of the reformed religion are chiefly bound amongst whom her Majesty is principal."[408] Hakluyt went on to author additional publications "advocating English colonization for the propagation of England's church and for the glory of England on the global stage."[409] Consequently, Elizabeth I issued a colonial charter affording Walter Raleigh approximately six years to colonize an area of North America not claimed by other Christian empires. In relevant part, the charter permitted Raleigh to:

> 'discover, search, finde out, and view such remote, heathen and barbarous lands, countries, and territories, *not actually possessed of any Christian Prince, nor inhabited by Christian people*,...to inhabite or remaine, there to build and fortifie, at [Ralegh's] discretion,' *on behalf of the English Realm*.[410]

In other words, the charter contained a 'Religiosity clause'. Raleigh settled England's first North American colony in 1587; however, it and the settlers had vanished by 1590.[411] The lost colony of Virginia (*as it is known*) was wholly unsuccessful. Even still, the language of the charter demonstrates the most significant precondition to the establishment of the

[404] Boyd Stanley Schlenther, 'Religious Faith and Commercial Empire' in PJ Marshall and Alaine Low (eds), *The Oxford History of the British Empire: Volume II: The Eighteenth Century* (Oxford University Press 2011) 128-29.
[405] Schlenther (n 404), 128-29.
[406] Turner (n 117), 3.
[407] Turner (n 117), 3.
[408] Turner (n 117), 3.
[409] Turner (n 117), 3; *See also*, James (n 173), 4-5.
[410] 'Charter to Sir Walter Raleigh' <http://avalon.law.yale.edu/16th_century/raleigh.asp> accessed 10 August 2018.
[411] James Horn, 'The Founding of English America: Jamestown' (2011) 25 Magazine of History 25, 25-9; Theo Emery, 'The Roanoke Island Colony: Lost, and Found?' *The New York Times* (New York, 5 August 2015) <https://www.nytimes.com/2015/08/11/science/the-roanoke-colonists-lost-and-found.html>.

POGG doctrine in the North American colonies: the expansion of Great Britain's Anglican footprint.

There are some historians who have analyzed the proliferation of England's preferred denomination as a tangential facet of British Imperialism. They suggest that the comprehensive goal of Great Britain's imperialist overtures was always territorial dominance. For example, Andrews and Canny contend that the proliferation of the Church of England was secondary or even tertiary to expectations of plunder, trade, and territorial dominance.[412] Along the same lines, Strong notes that the British Government did not link colonialism and the proliferation of Anglicanism until the seventeenth century.[413] David Armitage suggests that where Great Britain's imperialist ideals surround religious proliferation are concerned:

> [n]o particular pan-Protestant theory or support for empire emerged in either England or Scotland during the sixteenth and seventeenth centuries because of the fractured nature of British Protestantism between the episcopalian Church of England and the presbyterian Church of Scotland. Consequently, religious conceptions of empire played little part in imperial identity and justification until the eighteenth century.[414]

In responding to Armitage's claim however, Strong points out that, "while religion may not have prompted large-scale concern for colonization, that did not mean it was thought to be unimportant…."[415] Other historians and legal theorists, such as Falola, Heaton, and even Yusuf suggest that the proliferation of the Church of England was somewhat of a red herring employed to divert attention away from Britain's primary motives.[416] Specifically,

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[412] Kenneth R Andrews, *Trade, Plunder and Settlement: Maritime Enterprise and the Genesis of the British Empire, 1480-1630* (Cambridge University Press 1984) 2-3; Nicholas Canny, 'The Origins of Empire: An Introduction' in Nicholas Canny (ed), *The Oxford History of the British Empire: Volume I: The Origins of Empire: British Overseas Enterprise to the Close of the Seventeenth Century* (Oxford University Press (Online) 2011) 1-35.

[413] Strong (n 384), 42.

[414] David Armitage, *The Ideological Origins of the British Empire* (Cambridge University Press 2000) 63.

[415] Strong (n 384), 2.

[416] Toyin Falola and Matthew M Heaton, *A History of Nigeria* (Cambridge University Press 2008) 86-9; Yusuf (n 103), 128-39. In both instances, the theorists attempt to address to some degree the application of the religious imperative of the POGG doctrine. In the case of Falola and Heaton, they focus on how missionaries used religion to push political agendas in Nigeria. Yusuf on the other hand focuses more on the effects or application of the specific clause (§§ 65(1) and 70(1) of Nigerian Constitutions). As such, it appears that the outcomes of the application of POGG during Nigeria's continuum of colonial, military, and authoritarian rule were the effects that Yusuf's text highlights. They both demonstrate that the doctrine was more than a red herring to secure natural resources or territory. In effect, the British Empire's attempt to lay the POGG template atop of the circumstances already in existence in Nigeria, where the aforementioned imperatives remain evident in the region, demonstrates the POGG doctrine's existence. It also demonstrates how the doctrine, when applied to different national situations, could yield disparate outcomes in Nigeria, Canada, the U.S., and England. Whether each nation finds it constitutionally prudent to heed the effects of those imperatives is the inquiry that is central to this study.

these scholars claim that while missions brought Anglicanism in the form of church congregations and Western education, the real aims were the subjugation of natives and the exploitation of the natural resources of the colonies.[417] This particular line of reasoning is especially prolific where it pertains the activities of Anglican missions in the British Empire's later overseas acquisitions like India and Nigeria.[418]

With all due respect to the aforementioned perspectives, the British Empire's promotion of Anglicanism reflects neither a lack of ideological perspective nor the characteristics of a red herring. Besides Strong's recognition of the importance of religion to the English who migrated overseas from mainland Britain, the legal documents associated with Great Britain's expeditionary efforts evidence that the proliferation of either Catholicism or Anglicanism was a distinct precondition that dates back to at least the later part of the fifteen century.[419] Although not a stipulation in the expeditionary charter for Christopher Columbus in 1492, Henry VII's issuance of the *Letters Patents* to John Cabot and his sons in 1498 illustrates the scope of the religious precondition.[420] Specifically, the Charter provides for the Cabots to "seeke out, discouer, and finde whatsoever isles, countreys, regions or *prouinces of the heathen and infidels whatsoeuer they be*, and in what part of the world soeuer they be, which before this time *haue bene vnknowen to all Christians*…"[421] Once located, the Cabots were authorized to "subdue, occupy and possesse, as [the Crown's] vassals, and lieutenants," for the purpose of settling the territory on behalf of England.[422] This and subsequent charters evidence that carrying forward her preferred religion was integral to England's (and subsequently Great Britain's) overseas expansion plans. As was demonstrated in the previous chapter, the 'royal' religious ideology shifted from Catholicism to Anglicanism between the issuance of the 1498 Charter and Hakluyt's petition to Elizabeth I. As such, it is reasonable to conclude that the proliferation of Anglicanism became much more significant because Anglicanism was England, and to be truly English was to be a part of the Church of England. Therefore, the presence or absence of a pan-Protestant agenda was arguably irrelevant to England's

[417] Falola and Heaton (n 416), 86-9; Yusuf (n 103), 128-39.
[418] Falola and Heaton (n 416), 86-9; Yusuf (n 103), 128-39.
[419] Strong (n 384), 1-2.
[420] 'Privileges and Prerogatives Granted by Their Catholic Majesties to Christopher Columbus: 1492' <http://avalon.law.yale.edu/15th_century/colum.asp>.
[421] 'The Letters Patents of King Henry the Seventh Granted unto Iohn Cabot and His Three Sonnes, Lewis, Sebastian and Sancius for the the Discouerie of New and Unknowen Lands' <http://avalon.law.yale.edu/15th_century/cabot01.asp> accessed 11 August 2018.
[422] 'The Letters Patents of King Henry the Seventh Granted unto Iohn Cabot and His Three Sonnes, Lewis, Sebastian and Sancius for the the Discouerie of New and Unknowen Lands' (n 421).

overseas expansion plans. If Anglicanism was the 'true' religion, then why would there need to be concern about the importance of other religions in the American colonies or a unified plan that encompassed the divergent religious views of the whole of the British Isles? Put another way, if Anglicanism was to be the official religion, what non-Anglicans believed would become a matter of political expediency instead of policy based on genuine concern for individual conscience or belief.

Returning to Hakluyt's petition to Elizabeth I, a salient feature of his promotion of overseas colonization was the acknowledgement of Elizabeth I as the 'principal' of the 'reformed religion' to be propagated.[423] Therefore, it can be inferred that the objective of the Religiosity clause was not to spread Christianity, *per se*. It was to spread Anglicanism as the superior interpretation of Christianity. Recall that by the end of Henry VIII's reign in 1547, schisms caused by conflicting doctrinal and liturgical perspectives within the 'catholic' or 'universal' Church changed the outlook on the continuation of an undivided Christian belief system. As Armitage points out, the religious landscape had become fractured.[424] The breach prevailed throughout the British Isles well before the plantation of Ulster and before the first 'viable' territory across the Atlantic presented itself. Therefore, the divergent perspectives, which resulted in anti-Catholic or Protestant denominations, made the establishment of a homogenous religious landscape within the North American colonies fundamentally unachievable from the outset.[425] This reality notwithstanding, the proliferation of Catholicism and then Anglicanism remained integral to, and a legal stipulation of, England's imperial aspirations from the 15th century onward.[426]

It is worth clarifying that, as it relates to the British Empire's later colonial pursuits, these acquisitions came at the end of or even well after the American colonial experience. By that time, D.B. Swinfen suggests that the British had begun moving toward a more

[423] Turner (n 117), 3.
[424] Armitage (n 414), 63.
[425] Charles H Lippy and Peter W Williams, 'Denominationalism' in Charles H Lippy and Peter W Williams (eds), *Encyclopedia of Religion in America* (CQ Press) 542-3. As will be discussed more fully in the next chapter, France created a homogenous religious landscape during its possession of French-Canada by establishing a Catholic-only migration scheme. It is generally understood that the British Empire utilized the colonies for not only settlement but also as a dumping ground for non-Anglicans, criminals, and other undesirables. To make Anglicanism a condition of entry might defeat the secondary purpose of the colonial experience. Where it pertains French-Canada, the result was that the British Empire relied on the POGG doctrine to attempt religious restructuring for the purpose of proliferating Anglicanism. The effects of the failed restructuring are still prevalent in Canada today.
[426] Carey (n 381) 156.

stratified, less stringent approach to colonization.[427] Similar to the customary practices of the French and the Spanish in spreading Catholicism, the British also began chartering Anglican missions like the Society for Promoting Christian Knowledge ('SPCK') and the Society for the Propagation of the Gospel in Foreign Parts ('SPG') at the start of the 18th century.[428] These organizations were Anglican enterprises that assumed the role of proselytizing to bring the Church of England to the indigenous inhabitants of Great Britain's overseas conquests.[429] This delegation or transfer of responsibility did not lessen the significance of the proliferation of Anglicanism. Instead, it added a new agent to correct the problematic perception of passing legislation in promotion of religious tolerance while simultaneously building an empire buttressed by the promotion of an established church. This is a noteworthy distinction between the British Empire's early and later overseas colonial efforts. Although the pecuniary aims of early and later British colonization were undoubtedly the same, the proliferation of Anglicanism was not an ancillary endeavor or a delegated responsibility in the North American colonies. Instead, it functioned as the principal imperative of POGG in the establishment of each of the thirteen American colonies as well as English- and French-speaking British-Canada.

Returning to the attempt to establish the colony of Virginia, juxtaposition of the 1584 Charter and the 1606 Charter illustrates the thematic continuation of grounding colonization in the proliferation of Anglicanism:

> …by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God,… [430]

One might be tempted to interpret the vagueness of referring to 'Christian Religion' as Great Britain's acceptance of Catholic and other non-Anglican denominations. If that were the case, there would be no need to compete with Spain or France over Catholicism. Moreover, the laws on tolerance and/or the necessity of colonial migration to secure religious autonomy would have been superfluous. Strong clarifies that from 1606 onward, the Crown's colonial governors in Virginia "were required to promote the established

[427] Swinfen (n 119), 1.
[428] Strong (n 384), 41; *See also*, Robert M Calhoon and Ruma Chopra, 'Religion and the Loyalists' in Mark David Hall and Daniel L Dreisbach (eds), *Faith and the Founders of the American Republic* (Oxford University Press (Online) 2014) 102-03.
[429] Strong (n 384), 41; Schlenther (n 404), 128-31.
[430] 'The First Charter of Virginia: April 10, 1606' <http://avalon.law.yale.edu/17th_century/va01.asp> accessed 10 August 2018.

religion of England in the areas under their jurisdiction. They were to ensure that the 'true' word, and service of God and Christian faith be preached, planted, and used" according to the rights, doctrine, and religion established within the realm of England.[431] Therefore, it was assumed that the Church of England "would be Virginia's church and directed settlers to follow its practices 'in all fundamentall pointes'," although the House of Burgesses did not formally establish the Church of England in Virginia until 1619.[432]

The references to religion in Virginia's charter and all other applicable charters—whether corporate, proprietary or royal—continuously implicated the Church of England as the established church of the American colonies. This was the case even where religious tolerance was purported to either reflect the generousness of the Crown's royal prerogative—*i.e.,* sanctuary colonies—or accept the practical realities of the time—*i.e.,* religious tolerance as a political means to an end. The next five case studies analyze noteworthy charter variations that demonstrate how Great Britain responded to one or both situations. In each case, the constituting stipulations either directly or indirectly revert to setting the religious baseline for the supremacy of Anglicanism and the Church of England.

3.3.1 The Colony of Massachusetts—A Sign of Divine Consent?

In 1629, Charles I granted a proprietary charter to the Massachusetts Bay Company, which was a Puritan-owned trading enterprise.[433] The accompanying settlement of Massachusetts Bay was the first to be populated by the afore-referenced disenchanted Puritans seeking religious autonomy from the Church of England and the British Crown.[434] They believed that, "God had revealed America at just the right time for them to escape a religiously corrupt Europe."[435] Accordingly, they came to the North American continent with the primary objective of "establish[ing] their own shining 'citty…upon a Hill,' free of the sin and corruption of the land and society they were leaving."[436] Much to their chagrin,

[431] Strong (n 384), 41.
[432] Edward Bond, 'Church of England in Virginia' (*Encyclopedia Virginia. Virginia Foundation for the Humanities*, 2014) <https://www.encyclopediavirginia.org/Church_of_England_in_Virginia#start_entry> accessed 11 July 2018.
[433] 'The Charter of Massachusetts Bay: 1629' <http://avalon.law.yale.edu/17th_century/mass07.asp#1> accessed 10 August 2018.
[434] Rebecca Beatrice Brooks, 'History of the Massachusetts Bay Colony' (*The History of Massachusetts Blog*, 2015) <http://historyofmassachusetts.org/history-of-the-massachusetts-bay-colony/> accessed 19 July 2018. Brooks is citing Barbara Moe's *The Charter of the Massachusetts Bay Company: A Primary Source Investigation Into the 1629 Charter* (Rosen Publishing Group 2003).
[435] Strong (n 384), 42.
[436] Brooks (n 434). Brooks is citing Vincent Virga and Dan Spinella's *Massachusetts: Mapping the Bay State through History: Rare and Unusual Maps from the Library of Congress* (1st edn, Globe Pequot 2011).

immigration would not completely free them from the British Government or the Church of England. The 1629 Charter for Massachusetts Bay provides:

> according to the Course of other Corporacons in this our Realme of England, and for the directing, ruling, and disposeing of all other Matters and Thinges, whereby our said People, Inhabitants there, may be soe religiously, peaceablie, and civilly governed, as their good Life and orderlie Conversacon, maie wynn and incite the Natives of Country, to the Knowledg and Obedience of the onlie true God and Saulor of Mankinde, and the Christian Fayth, which in our Royall Intencon, and the Adventurers free Profession, is the principall Ende of this Plantacion...[437]

As the colony became the most lucrative in New England, Charles I converted it into a royal colony, which implied direct rule by the Crown.[438] As a result of the rise in status, the colonists began taking advantage of their perceived autonomy to self-govern. Conflict between the colony and the Crown immediately followed. According to Virga and Spinella, the colonists "moved quickly to establish their political and religious—and eventually, geographical—authority, with confidence based on their religious faith and the later economic success that they took as a *sign of divine consent*."[439] One such exercise of colonial autonomy included the creation of religious laws that barred the proliferation of Anglicanism within the colony.[440] Another step taken by the colonists after the establishment of the English Commonwealth in 1649 was to declare "Massachusetts a commonwealth, although they had no authority to do so."[441] When James II attempted to exercise his royal prerogative to exert control over the settlements throughout New England, these and other unsanctioned acts resulted in the revocation of the royal charter in 1684.[442] Brooks highlights that the bases for the charter's revocation included, "repeated violations of the charter's terms [including] establishing religious laws, discriminating against Anglicans and Quakers, and running an illegal mint."[443] It is unclear whether the Crown would have taken issue with the religious practices of the colony if they had not implicated the Church of England. However, the Crown's response to the national church being shunned in one of her overseas possessions seemingly cut at the heart of the

[437] 'The Charter of Massachusetts Bay: 1629' (n 433).
[438] Brooks (n 434). Brooks is citing Barbara Moe's *The Charter of the Massachusetts Bay Company: A Primary Source Investigation Into the 1629 Charter* (Rosen Publishing Group 2003).
[439] Brooks (n 434). Brooks is citing Vincent Virga and Dan Spinella's *Massachusetts: Mapping the Bay State through History: Rare and Unusual Maps from the Library of Congress* (1st edn, Globe Pequot 2011).
[440] Brooks (n 434).
[441] Brooks (n 434).
[442] 'The Charter of Massachusetts Bay: 1629' (n 433).
[443] Brooks (n 434).

Crown's control over not only how the colony was governed, but also the degree of religious deference afforded the colonists. The Empire's response lends support to the assertion that the Church of England was meant to be afforded legal and political exception or privilege in each of the American colonies, notwithstanding the degree of religious tolerance afforded other denominations.

3.3.2 Safe Haven Colonies—Maryland & Connecticut

Maryland and Connecticut were established for the primary purpose of providing religious sanctuary to non-Anglican believers.[444] The former was established in 1634 by Lord Baltimore as a religious haven for those espousing the Catholic faith.[445] After the Reformation, "monasteries and Catholic hierarchy [in England] lost their real estate and legality."[446] It was also unlawful for Catholic priests to be trained or to minister in England.[447] Therefore, the colony served as a settlement site for Catholics who continued to be persecuted because of the schism between the British monarchy and the Roman Catholic Church.[448] The latter was founded in 1635 by Puritan minister Thomas Hooker and was meant to be a religious sanctuary for colonial Puritans who, like English Puritans, sought separation from the Church of England.[449]

Analogous to the outcomes in Massachusetts, religious or political deference went to the Crown and the Church of England above that of the non-Anglican denominations. The 1632 Charter establishing the colony of Maryland denoted that if 'peradventure'—*i.e.,* questions or doubts—resulted from the charter language, then:

> … [the] Interpretation to be applied always, and in all Things, and in all Courts and Judicatories whatsoever, to obtain which shall be judged to be the more beneficial, profitable, and favorable to the aforesaid now Baron Baltimore, his Heirs and Assigns: [*Provided always, that no interpretation thereof be made, whereby God's holy and true Christian Religion, or the Allegiance due to Us, our Heirs and*

444 'Charter of Maryland: 1632' <http://avalon.law.yale.edu/17th_century/ma01.asp> accessed 10 August 2018; 'Charter of Connecticut: 1662' <http://avalon.law.yale.edu/17th_century/ct03.asp> accessed 10 August 2018.
445 'Charter of Maryland: 1632' (n 444).
446 Edward Terrar, 'Was There a Separation between Church and State in Mid-17th-Century England and Colonial Maryland?' (1993) 35 A Journal of Church and State 61, 62.
447 Terrar (n 446), 62.
448 'Charter of Maryland: 1632' (n 444); *See also,* Terrar (n 446), 61-62; Nelson Rightmeyer, 'The Anglican Church in Maryland: Factors Contributory to the American Revolution' (1950) 19 Church History 187, 187-88.
449 'Charter of Connecticut: 1662' (n 444).

> *Successors, may in any wise suffer by Change, Prejudice, or Diminution;*]...[450]

Despite the expectation of perpetual deference to 'queen and country,' the colony of Maryland never received royal status.[451] If Catholicism was to flourish in the colony, it would be an up-hill battle as clerics could not be trained on the mainland, so they could not be readily dispatched to the British-American colonies. Moreover, the language of the charter makes clear that religious deference would not result in the Crown and/or the 'true Christian religion' being changed, prejudiced or demoted from its place of preeminence in the colony. Therefore, it is not surprising that, despite Maryland being chartered as a Catholic haven, the situation only lasted until 1649 when Anglicanism interceded as the official religion of Maryland.[452] To ensure that Anglicanism continued to suppress non-Anglican denominations in Maryland, the SPG was given specific direction from 1701 to 1783 to not only center its efforts to spread Anglicanism in Virginia, but also Maryland.[453]

Connecticut's charter presents differing circumstances brought on by a thirty-year span of time and a changing of the monarchial guard. However, the religious imperative implicated by POGG yielded a similar result. Although the colony was founded in 1635, it did not secure constituting documentation until 1662.[454] A change to the monarchy—*i.e.,* from Charles I to Charles II—had the potential to result in differing views on the political expediency of religious tolerance. The shift compelled the colonial leaders to secure a foundational charter to avoid curtailment of the religious autonomy that Puritans had been afforded under the royal prerogative of Charles I.[455] The terms signified that the inhabitants would be, "religiously, peaceably, and civilly governed" and were to encourage natives to accept the knowledge of "the only true GOD, and He Saviour of Mankind, and the Christian faith."[456] However, the British Empire also required that nothing could be done in the colony that was, "contrary to the Laws and Statutes of this Our Realm of England."[457] Each sub-section of the charter reiterates this provision. Although the Connecticut charter did not reference a 'true Christian religion,' it left no doubt of the fact that the continuation of religious tolerance was within the royal prerogative of the Crown and the laws of his realm. This stipulation made any religious practice subject to the same

[450] 'Charter of Maryland: 1632' (n 444).
[451] 'Charter of Maryland: 1632' (n 444); Terrar (n 446), 62.
[452] Strong (n 384), 42-3.
[453] Strong (n 384), 42-3.
[454] 'Charter of Connecticut: 1662' (n 444).
[455] Strong (n 384), 99.
[456] 'Charter of Connecticut: 1662' (n 444).
[457] 'Charter of Connecticut: 1662' (n 444).

laws that afforded supremacy to the preferential relationship between the Crown and the Anglican Church.

3.3.3 A Charter Notwithstanding!—The Duke of York's Land Grant

As the Dutch founded New York as a colony under the name New Netherland, the colony's origin is not as much about establishment as it is about conquest. New York had been a Dutch settled colony for almost a half a century before Charles II seized it to derail the Dutch's trading relationship with the American colonies.[458] Charles then bestowed the usurped territory upon his brother, the Duke of York in 1664, incorporating it into the British Empire.[459] Despite New York's more recent 'sanctuary state' mantra, it cannot be taken as an indication that the lack of transfer/charter documents gave rise to New York becoming a haven for Christians *and* non-Christians alike.[460] Instead, the circumstances surrounding the acquisition of the colony offer a more plausible and probable interpretation. The Duke of York was brother to the English monarch, who was the head of the Church of England at the time he bestowed the land upon York.[461] Although Charles was a proponent of religious tolerance, he did not hesitate to support the reinstatement of the monarchial/'defender of the Anglican faith' paradigm after the British monarchy was restored in 1660.[462] Charles not only supported Parliament's reestablishment of the monarchy, he accepted the re-entanglement of the monarchy with the Church of England, which was dismantled during the reign of his father.[463]

Johnson clarifies that except for "Dutch enclaves such as Brooklyn and Flushing, the Long Island townships of New York were settled by Connecticut Puritans."[464] Although the same Puritans that settled Massachusetts and Connecticut also settled New York, those of New York were denied a colonial legislature because the colony had been appropriated territory.[465] Likewise, after the 1689 Act of Toleration was passed on the mainland, the

[458] Johnson (n 116), 6; *See also,* Smith, *Cases and Materials on the Development of Legal Institutions* (n 205), 432.
[459] Johnson (n 116), 7.
[460] *See e.g.,* The Editorial Board, 'Proud to Be a Sanctuary City - The New York Times' *New York Times* (New York, 2016) <https://www.nytimes.com/2016/12/18/opinion/proud-to-be-a-sanctuary-city.html>; Jimmy Vielkind, 'In Response to Trump, Assembly Passes "sanctuary State" Bill' *Politico* (New York, 7 February 2017) <https://www.politico.com/states/new-york/albany/story/2017/02/assembly-passes-sanctuary-state-bill-as-trump-response-109389>.
[461] Johnson (n 116), 7.
[462] Henry Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II* (Cambridge University Press 2012) 175.
[463] Hallam (n 462), 178.
[464] Johnson (n 116), 7.
[465] Johnson (n 116), 7.

New York Supreme Court of Judicature reaffirmed New York's religious trajectory when it held that that the Act did not extend to the colony.[466] As a result, the colonists of New York were subject to all the imperatives of POGG, but lacked the requisite level of autonomy to exercise their rights to contribute to the colony's governance. These occurrences make the notion that the religious imperative of POGG did not extend to New York historically inconsistent with the practices of the British Empire. Implicit in the familial relationship between York and the English sovereign is ample support for the assumption that New York was meant to be primarily Anglican like the other twelve. Along the same lines, the preclusion of religious tolerance for the colony's settlers suggests that the establishment of 'civil order' and 'settled & quiet government' in New York also implicated the proliferation of the Church of England so long as the colony fell within the purview of the British Empire.

3.3.4 The Last British-American Colony—Georgia's Latent Religiosity Clause

By the time the British Empire added the colony of Georgia to its portfolio of overseas possessions, it had been perfecting the means to proliferate Anglicanism for almost two hundred years—*vis-à-vis* the two centuries to which Gill refers—during the reigns of approximately nine different monarchial personalities. At the same time, the presence of non-Anglican denominations and other non-Christian subgroups continued to expand. Despite the political conundrums that emerged from empire building for the proliferation of a national church controlled by so many personalities, the imperatives of POGG continued to be endorsed. Georgia was the last colony to be constituted before the War of Independence. Both the Spanish and the British claimed rights to it, but it ultimately became a British colony in 1732.[467] Recall Hakluyt's contention that the Spanish and French introduced the Catholic Church to every territory they planted their imperial flag. While under Spanish rule between 1540 and 1732, Catholicism flourished in that area.[468] Historical archives indicate that "prior to English settlement in Georgia, the Spanish operated multiple Catholic missions on Georgia's barrier islands and along the coast."[469]

[466] Johnson (n 116), 7. *See also,* Smith, *Cases and Materials on the Development of Legal Institutions* (n 205), 432. Smith clarifies that, charter notwithstanding, the conquest of New York implicated the Crown's royal prerogative. In practical terms, the prerogative meant that the laws of New York could not be *repugnant to*, *contrary to*, but instead *as near as agreeable* to the laws of England.
[467] Georgia Historical Society, 'Religion in the Georgia Charter' (*Oglethorpe and Religion in Georgia*) <https://georgiahistory.com/education-outreach/online-exhibits/featured-historical-figures/james-edward-oglethorpe/oglethorpe-and-religion-in-georgia/> accessed 12 July 2018.
[468] Georgia Historical Society (n 467).
[469] Georgia Historical Society (n 467).

As such, it is reasonable to conclude that Catholicism was a predominant or even the exclusive religious denomination espoused by the people inhabiting the region.

Accordingly, it would seem reasonable for the charter to provide for the liberty of conscience for the "greater ease and encouragement of [the Empire's] loving subjects…."[470] Moreover, Nichols suggests that those who relocated to Georgia expected that 'ease and encouragement' to be quite liberally granted.[471] However, it came with stipulations:

> there shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said provinces and that all such persons, *except papists*, shall have a free exercise of their religion, so they be contented [*with the quiet and peaceable enjoyment of the same, not giving offence or scandal to the government*].[472]

The inclusion of a 'Liberty of Conscience' clause might suggest that by the middle of the 18th century the British Empire had come to genuinely support religious plurality, or at least discontinue the practice of making Anglicanism an obligatory aspect of colonial constitution. According to Colonial Records for the State of Georgia, many of the colonists had similar hopes.[473] Pastor Bolzius, a German Lutheran, noted that Georgia was expected to be an "[a]sylum for all sorts of Protestants to enjoy full Liberty of Conscience Prefferable to any other American Colonies in order to Invite Numbers of Oppressed or persecuted People to Strengthen [the] Barrier Colony…."[474] However, the practical implications of the charter further the religious imperative of the POGG doctrine. After the issuance of the 1732 Charter, Catholics were effectively expelled, while non-Anglican colonists wrestled with the fact that the Church of England was installed as the official church and Anglicanism as the official religion of the colony from 1758 until the American Revolution.[475] The last monarch to rule the American colonies—*i.e.,* George III—assumed the throne in 1773, and colonial discontent reached its climax, so war was an inevitable outcome.[476]

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[470] 'Charter of Georgia: 1732' <http://avalon.law.yale.edu/18th_century/ga01.asp> accessed 18 August 2018.
[471] Joel A Nichols, 'Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia' (2005) 80 New York University Law Review 1693, 1695.
[472] 'Charter of Georgia: 1732' (n 470).
[473] Nichols (n 471), 1695.
[474] Nichols (n 471), 1695 [1] The statement made by Johann Martin Bolzius, paster of Georgia's Salsburger Lutheran Community, was included in The Colonial Records of the State of Georgia and cited by Nichols.
[475] Nichols (n 471), 1695.
[476] Alden (n 237), 45 and 226-27.

Similar to the circumstances amongst the kingdoms of the British Isles in 1689, the perceived promotion of tolerance during a period of growing discontent was the Empire's politically expedient response. This is especially the case as circumstances had shown the maneuver to be a familiar mode of furthering POGG in the enlargement of the Empire's overseas portfolio. As will be discussed more fully in the next chapter, it was also employed in 1760 with the signing of the Articles of Capitulation of Montreal to secure British-Canada as well as the Quebec Act of 1774 to retain the French-Quebecois when American rebellion was imminent.[477] In Georgia's case, the charter provision had the practical effect of prompting a religious cleansing of Catholics from the British Empire's last American colony, while simultaneously subjugating the non-Anglican adherents after inviting immigration based on the promise of religious equanimity. Thus, the latent effects of the religious imperative motivated Georgia's willingness to rebel against imperial rule. By February 1776, the colonists of Georgia had seized control of the government from the royal governor, who they held under house arrest until he was ushered out of the colony.[478] Georgia's trustees fashioned a temporary constitution, which was promulgated on April 15, 1776.[479] According to Nichols, the temporary constitution "made no mention of religion, but merely established rules for keeping peace until such time as a fuller form of governance could be constructed."[480] It has been suggested that "revolutionary feelings took hold only slowly in Georgia."[481] However, it would appear that even the last British-American colony found that the distinction between the patent and latent implications of the charter were enough to compel the colony to become a signatory to the Declaration of Independence.[482] As a tangential note, Georgia's historical records reflect that because of the ban on papists, Catholicism did not take hold again in Georgia until well after the American Revolution.[483]

Whether American colonial charters referenced Anglicanism explicitly or indirectly, they all reflect religion and governmental entanglement as a facet of POGG. Moreover, POGG achieved legal and political ends by affording a modicum of tolerance to denominations (and later-included religious subgroups), whilst also furthering the religious end of

[477] Peter DG Thomas, 'The Problem of Quebec: May–June 1774', *Tea Party to Independence: The Third Phase of the American Revolution 1773-1776* (Oxford University Press 1991) 88-90.
[478] Nichols (n 471), 1722.
[479] Nichols (n 471), 1722.
[480] Nichols (n 471), 1722.
[481] Nichols (n 471), 1722.
[482] Georgia Historical Society (n 467).
[483] Georgia Historical Society (n 467).

safeguarding and sponsoring the proliferation of the Anglican Church as the established church. The British Empire retained the same imperial dynamic well after America's colonial period ended, notwithstanding the religious landscape of later acquisitions. Recall that the British Empire's later colonization of India prompted Victoria I to make similar commitments to respect indigenous belief systems, which included several non-Christian dogmas. Not unlike the dynamic with Anglican and non-Anglican Christian denominations, the commitment creates a religious and political irregularity where the Crown—as the protector and defender of the 'Anglican' faith—endorses a national church but commits to the accommodation of rival religious beliefs. Commitments notwithstanding, there was an upsurge in Anglican converts in India during Victoria's reign.[484] As the same approach to tolerance is practiced in the United Kingdom today, it also suggests that so long as there is a hereditary monarchy, England's confounding church-state arrangement will endure. Likewise, it is to be expected that England will continue to uphold the theory that the conundrum can be overcome by unprecedented exceptionalism. To do otherwise strikes at the foundation of more than the extensive history of the British Empire and its overseas possessions. It could also challenge the hegemony of Anglicanism. Thanks to British Imperialism, the Anglican Communion and its associated offspring are as expansive as the Empire's past and present overseas territories.[485]

Where it pertains the North American colonies, the history of Great Britain makes clear that religious denominationalism was not only reasonably foreseeable—*vis-à-vis* Maryland, Massachusetts, Connecticut, New York, and Georgia—but a domestic and overseas reality during the entirety of the period the British Empire controlled the American colonies. As Hakluyt's petition specifically implicated the Church of England, as do American colonial charters, the extension of Anglicanism into the North American colonies as the superlative denomination was a foregone conclusion. Where tolerance was afforded, it was to the extent that it was politically expedient while at the same time retaining compulsory deference to the religious imperatives of POGG. For this reason, Maryland and Connecticut's charters afforded deference to the Church of England through the Crown by incorporating provisions that ensured that colonists' religious autonomy remained in a

[484] *See e.g.,* Eyre Chatterton, 'A History of the Church of England in India Since the Early Days of the East India Company' (1924) <http://anglicanhistory.org/india/chatterton1924/> accessed 9 August 2018; The Open University, 'Queen Victoria Becomes Empress of India' (*Making Britain Discover how South Asians Shaped the Nation, 1870-1950*) <http://www.open.ac.uk/researchprojects/makingbritain/content/queen-victoria-becomes-empress-india>.
[485] John McManners, *The Oxford History of Christianity* (Oxford University Press 1993) 274-76.

perpetual state of revocability at the prerogative of the Crown. Georgia's charter reserved British control of the proliferation of Anglicanism by completely suspending Catholicism in a region that had been catholically-inclined for at least a century. The British Empire employed POGG to retain control over Massachusetts by outright revoking the colony's constituting charter when colonists prohibited the spread of Anglicanism, which is analogous to the Empire's objectives in Georgia concerning Catholicism. These case studies evidence the fact that there was no practical way for sovereign nations to exercise favoritism by constitutionally articulating or establishing a superior religious denomination without the effects of those political choices infringing upon or being involuntarily (and in more modern settings, unconstitutionally) imputed to the adherents of all the others.

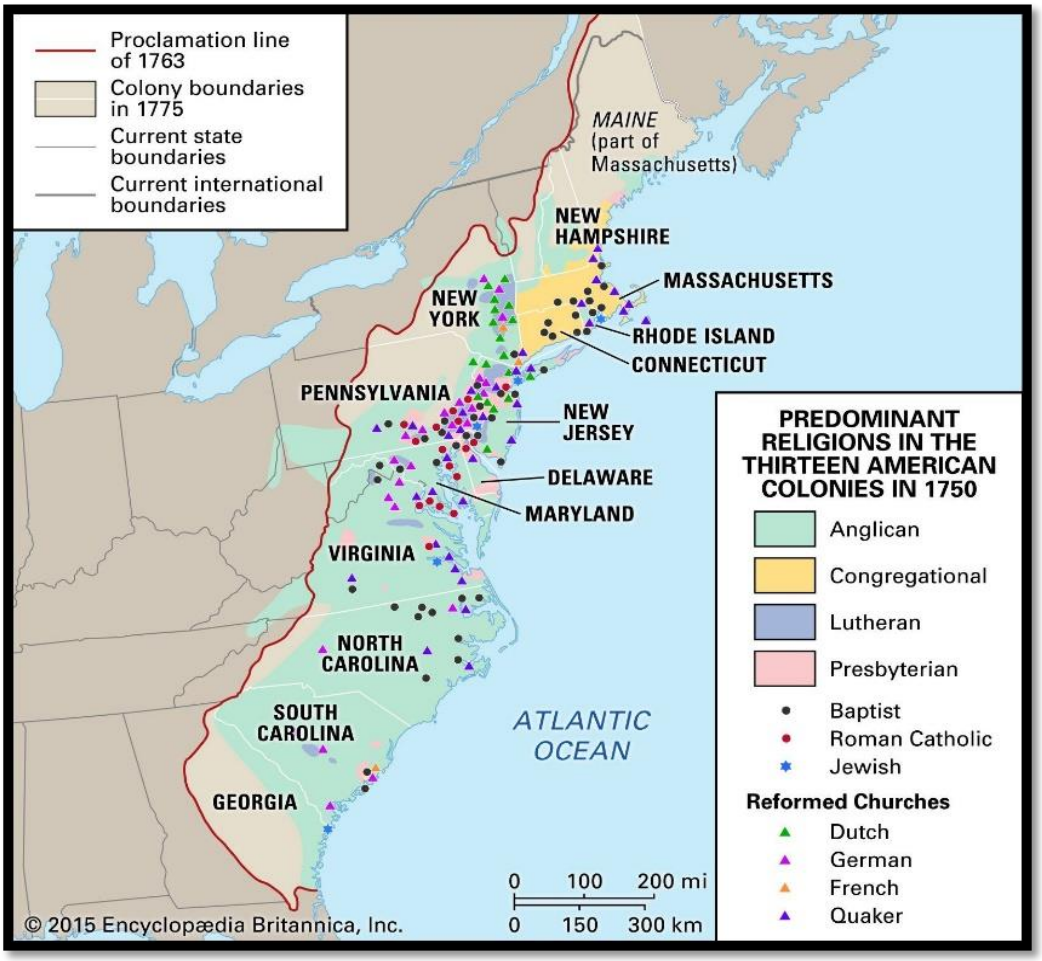


Figure 3.1: Predominant Religions in Thirteen American Colonies in 1750 © Encyclopaedia Britannica, Inc.

Figure 3.1 illustrates that by 1750 the Anglican Church came to represent the controlling religious denomination in the British-American colonies. The Church of England literally usurped the religious landscape making it impossible to put distance between other believers and the effects of the Anglican Church or the Imperial government. This was not

the expectation of the non-Anglican denominations that came to the colonies for a religious 'fresh start'.[486] Thus, colonial inhabitants eventually took issue with the fact that the colonies came to look too much like the situation from which they emigrated. Moreover, the objectives purported by legislatively establishing religious tolerance in 1689 had been found wanting. It appears that the distance between the colonies and the mainland prevented the British Empire from noticing the twigs of discontent fostered by POGG…that is, until they became bundled into a detailed inventory of religious, political, and legal issues and were too deeply rooted to avoid rebellion.[487] The British Empire did eventually take notice when the issues were outlined in the document that declared American independence from colonial rule. For this reason, it can be inferred that the religious imperative of POGG not only advanced the British Empire and its established church regime, but it also advanced American independence. However, the American colonies' collective experience under POGG made it emphatically unacceptable as the manifesto upon which to bring the colonies out of colonialism into independence in the establishment of the United States.

3.4 The Political & Legal Imperatives: '*Civil Order*' and '*Settled & Quiet Government*'

In addition to the Church of England being installed as the established church in the colonies, close adherence to the Empire's monarchial/parliamentary framework and colonial rule of law served as the other imperatives to POGG. The legislative powers of the Royal Council as well as the juridical infrastructure in the colonies, including the Supreme Court of Judicature, belonged to the British Empire. They became cooperative instruments of the Crown or Parliament imposed on the colonies to institute 'civil order' and 'settled & quiet government'. In his description of colonial antecedents to the American system of government, Cane endorses the idea that the monarchial, parliamentary, and juridical imperatives were conditions to the establishment of the American colonial infrastructure. According to Cane, the colonial government was meant to be a replica of that in England:

> …consisting of an executive governor (who was, in the royal colonies, technically the Monarch's representative but in practice the

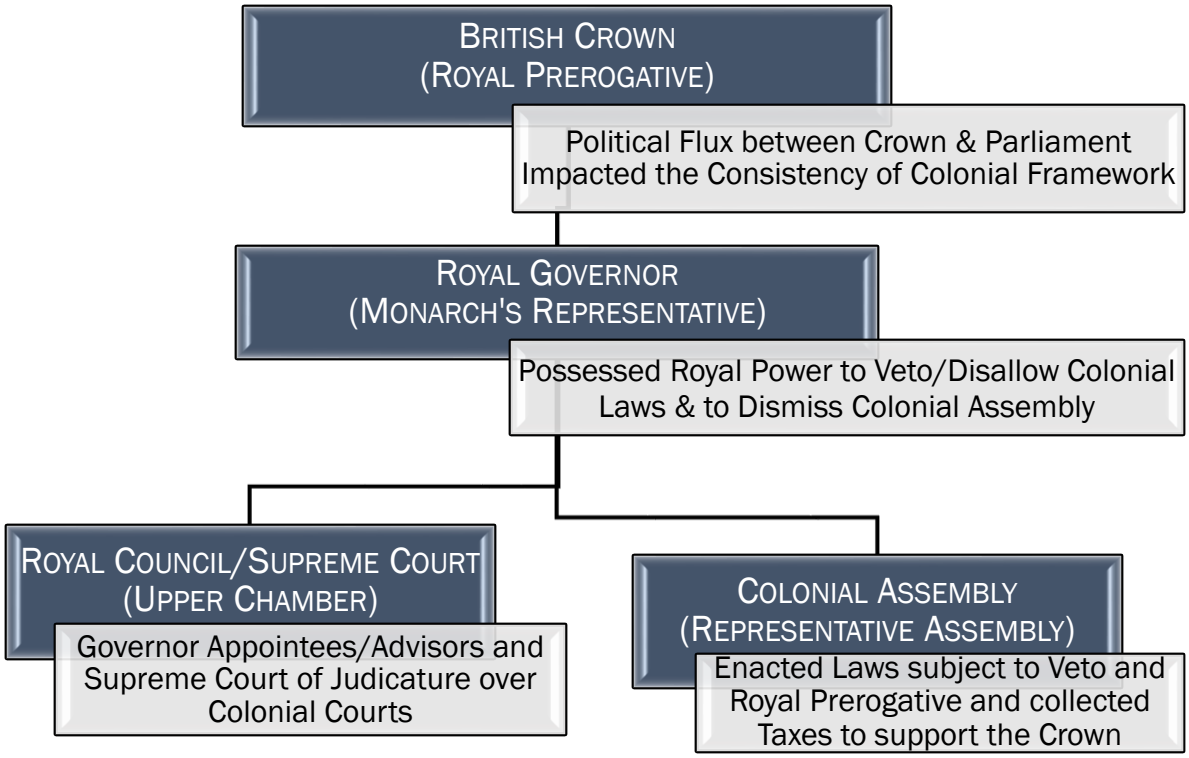
[486] Elizabeth Jane Errington, 'British Migration and British America, 1783–1867' in Phillip Buckner (ed), *Canada and the British Empire* (Oxford Scholarship Online 2011) 145 and 155-56. Errington discusses how migration after the Treaty of Paris was in some way driven by the desire to "recreate the political, social, and religious world of the former Thirteen Colonies." Moreover, having such a diverse religious landscape helped new settlers integrate into the American landscape.

[487] 'Declaration of Independence: A Transcription' (*U.S. National Archives and Records Administration*, 2018) <https://www.archives.gov/founding-docs/declaration-transcript> accessed 8 August 2018; *See also,* Alden (n 237), 226-44.

> representative of the British Government), a legislature consisting of a representative assembly and an upper chamber, and a system of local courts. Moreover, just as in British legislative sovereignty resided in the Monarch-in-Parliament, so (the argument ran) in the colonies it resided in the Monarch acting in concert with the various colonial legislatures.[488]

Figure 3.2 attempts to illustrate Cane's interpretation of the governmental framework in the American colonies:[489]

Figure 3.2: Diagram of the Colonial Governmental Framework under POGG



Although the Colonial Courts were often approved by the Colonial Assembly, there was an obvious imbalance within the infrastructure. The imbalance caused the colonies to challenge not only the origin and power of the Empire to establish laws in the colonies, but also the ability of the Courts to enforce English law on the colonies.[490] In the text, *The Rule of Law in the Realm and the Province of New York: Prelude to the American Revolution*, Herbert Johnson explains:

[488] Peter Cane, 'The US System of Government', *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press 2018) 58.
[489] Cane (n 488), 58-59.
[490] Johnson (n 116), 13.

> Constitutionally the origin of the colonial judicial power was but one manifestation of other uncertainties in the…colonial constitution. This involved the question of whether colonial legislative power was based upon the consent of the people or if it was dependent upon prerogative powers vested in royal colonial governors by virtue of their commissions.[491]

The British Empire maintained that the colonists were subject to the rule of law itself as well as the juridical infrastructure that enforced the law.[492] According to Smith, the two chief means whereby the Crown kept its finger on the law of the colonies were: (2) review of colonial legislation; [and] (2) appeals from colonial courts."[493] Therefore, to say that the laws of England extended to the colonies was to acknowledge that the imperial courts administering those laws had jurisdiction over the colonies.

The effects of the varying monarchial personalities' perspectives on the royal prerogative however, often made it difficult to reconcile statutory laws and/or judicial decisions throughout the colonies.[494] From a practical perspective, POGG made the establishment and reconciliation of the laws in Great Britain's vast empire "cumbersome and roundabout."[495] In the text *Imperial Control of Colonial Legislation 1813-1865*, Swinfen points out that, where it concerned law making, British colonial policy after 1783 did not change radically despite the forfeiture of the thirteen American colonies.[496] Apparently, the lessons taken away from the loss of the American colonies only resulted in gradual reforms brought about by pressures on the British to adopt "a new attitude towards empire."[497] Consequently, the British came to understand "in the half century after 1815, that it might be to the mutual benefit of Britain and her overseas possessions if the bonds of empire were relaxed."[498] These changes however came only after the loss of the American colonies and a second conflict with the American states during the War of 1812. It was not the case during the period between the commencement of the American colonial experience in 1603 and its conclusion in 1783. Notwithstanding the type of charter issued or how much governmental autonomy was promised, the British Empire used POGG to keep a tight reign over British-America. The Crown, Parliament, and English colonial law

[491] Johnson (n 116), 13.
[492] Johnson (n 116), 13.
[493] Smith, *Cases and Materials on the Development of Legal Institutions* (n 205), 433.
[494] Swinfen (n 119), 1-5; Leonard Le Marchant Minty, *Constitutional Laws of the British Empire* (Sweet & Maxwell Limited 1928) 44-51.
[495] Swinfen (n 119), 1.
[496] Swinfen (n 119), 1.
[497] Swinfen (n 119), 1.
[498] Swinfen (n 119), 1.

functioning in tandem to regulate the colonies. The constituting documents for the establishment of the colonies of Virginia and New Jersey are illustrative of the most straight-forward and most complicated nuances of furthering the political and legal imperatives of POGG. They also demonstrate the scope of political and legal flux that resulted from the inner workings of the doctrine. It should be noted that suggesting that Virginia's establishment was the most straight-forward by no means suggests that it was ideal in its implementation or maintenance.

3.4.1 The Colony of Virginia—Colonial America's Bastion of POGG?

James I renewed colonial pursuits in North America by granting a corporate charter to a London-based merchant company—the Virginia Company—in 1606. The first of three charters to settle the colony of Virginia provided that in addition to, "*propagating… [the] Christian Religion to such People,"* the colonizers *"may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government…"*[499] Within the first two years of settlement, the colony was on the brink of failure due to illness and starvation.[500] To continue to foster Virginia's economic viability, a second proprietary charter was issued in 1609, which accompanied additional colonists and provisions. The 1609 charter was issued to Thomas Gates (*i.e.,* the future governor of Jamestown) and George Somers (*i.e.,* subsequent founder of Bermuda) specifically.[501] The charter instructed the men to "divide themselves into two Colonies… [a]nd have yielded and granted in any and sundry Privileges and Liberties to each Colony, *for their quiet settling and good Government therein*…"[502] The principle aim of the charter was to expand the settlement base to increase the colonies chances of survival, which would also further the promotion of POGG.

By the time a third charter was issued in 1611, James I had dissolved the Virginia Company and converted Virginia to a royal colony.[503] As it relates to the imperatives of POGG, the 1611 Charter outlined the framework for the implementation of the Royal Governor, Council, and rule of law:

[499] 'The First Charter of Virginia: April 10, 1606' (n 430).
[500] James C Thompson, *The Birth of Virginia's Aristocracy* (Commonwealth Books 2014) 19-26.
[501] 'The Second Charter of Virginia: May 23, 1609' <http://avalon.law.yale.edu/17th_century/va02.asp> accessed 10 August 2018.
[502] 'The Second Charter of Virginia: May 23, 1609' (n 501).
[503] 'The Third Charter of Virginia: March 12, 1611' <http://avalon.law.yale.edu/17th_century/va03.asp> accessed 10 August 2018.

> "…our said Council, or any two of them for the time being, shall, *and may have full Power and Authority,* either here to bind them over with good Sureties for their good Behaviour, and further therein, *to proceed to all Intents and Purposes as it is used in other like Cases, within our Realm of England;* …. as the Governor, Deputy or Council there, for the Time being, shall think meet; Or otherwise, according to such Laws and Ordinances, as are and shall be in Use there*, for the well-ordering and good Government of the said Colony."*[504]

Consistent with Figure 3.2 and Cane's characterization of the colonial infrastructure, the provision of the 1611 Charter vested substantial power to govern with the British Crown through the Royal Governor and the Royal Council, which also acted as the Supreme Court.[505] The Colonial Assembly was not granted enumerated or exclusive powers to govern, so every law that was made in or applied to Virginia "had to be confirmed in England."[506] Where the Assembly could and did enact laws, the Crown (and/or Parliament) would retain its control by arbitrarily 'vetoing' or 'disallowing' the proposed laws.[507] The British Empire reasoned that the power to disallow benefited the colonies, as "no two colonies were at the same stage of political development or economic viability."[508] Therefore, the colonial government needed imperial oversight to legally protect them from themselves.[509] In actuality, the British Empire benefitted from the right of disallowance, even if the individual colonies did not.

If there was an enumerated power, it was the Colonial Assembly's taxing power, making the Assembly responsible for taxing the colony to support the Empire. Even the taxing power came under imperial scrutiny when the British Empire attempted to usurp it to further the Stamp Act and other pieces of legislation designed to increase colonial taxes for the benefit of the mainland.[510] In Virginia, it was not until 1619 that the colonists sought more autonomy with the establishment of the House of Burgesses.[511] The House of Burgesses was the representative assembly—elected by popular vote—to guarantee the colonists' ability to take an active role in their colony's governance. However, the *Laws Enacted by the First General Assembly of Virginia* illustrates the tenuous nature of colonial autonomy:

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[504] 'The Third Charter of Virginia: March 12, 1611' (n 503).
[505] Cane (n 488), 58-9.
[506] Smith, *Cases and Materials on the Development of Legal Institutions* (n 204), 433.
[507] Swinfen (n 119), 1.
[508] Swinfen (n 119), 1.
[509] Swinfen (n 119), 1.
[510] Alden (n 237), 68-9.
[511] HR McIlwaine and John P Kennedy (eds), *Laws Enacted by the First General Assembly of Virginia, 1619* (1905) <http://oll.libertyfund.org/pages/1619-laws-enacted-by-the-first-general-assembly-of-virginia>.

> In 1618 the council in London instructed the Virginia governor to initiate the first representative assembly in the colonies. It was felt that the colonists needed to have some voice in local affairs if order and economic prosperity were to be reestablished in the faltering colony. The legislature lasted until 1624, when a reorganization imposed by the king restored all power to the governor.[512]

Restoring power to the Governor was an undeniable exercise of the Crown's royal prerogative.[513] According to the McIlwaine and Kennedy, "the governor continued to call the House of Burgesses for unofficial consultations; however, he was forced to rely primarily on the upper house, the Council of State appointed by the king, and he could not act without its approval."[514] While under British rule, arbitrary exercises such as this stymied the consistency of representative government in Virginia—as well as the other colonies—to allow the Crown and/or Parliament to keep the colonies within its locus of control.[515]

Likewise, Virginia's colonial legal scheme became the framework closest to Great Britain's.[516] Johnson notes, "the law of Virginia was established [in the colonies] as being the statutes and case law of England…."[517] Although circumstances resulted in pragmatic variations, the laws adopted in other colonies were modeled and reconciled with the laws of Virginia while Virginia's law were reconciled with those of the Empire.[518] Virginia essentially emerged as the archetype upon which all other colonial governmental infrastructures attempted to be based. The reasons for this circumstance could be that Virginia was the first successful settlement, and it yielded the most aristocratic society of proper English men and women.[519] According to Lawrence, "the wealth that flowed from Virginia [as a result of its tobacco boom] contributed to that of Britain and its power grew accordingly."[520] It could also be attributed to the fact that the Crown continuously cultivated its survival by establishing it as a royal colony as early as 1611.[521] Likewise, it could be because the colonies' founders and settlers were not separatists with lingering resentful feelings toward the Crown, Parliament, and/or the Church of England.[522] This

[512] McIlwaine and Kennedy (n 511).
[513] McIlwaine and Kennedy (n 511).
[514] McIlwaine and Kennedy (n 511).
[515] 'Declaration of Independence: A Transcription' (n 487).
[516] Johnson (n 116), 5.
[517] Johnson (n 116), 5.
[518] McIlwaine and Kennedy (n 511); Johnson (n 116), 5.
[519] Thompson (n 500), 19-26.
[520] James (n 173), 7.
[521] 'The Third Charter of Virginia: March 12, 1611' (n 503).
[522] Turner (n 117); Bond (n 432).

does not suggest that they did not find issue with all three institutions; however, they respected the political framework of Great Britain because they believed it treasonous to do otherwise.[523] They also still believed that it was possible to reform the Anglican Church, so complete separation or the establishment of a new denomination was not their objective.[524] Accordingly, it can be inferred that the colony of Virginia typified the best-case scenario: the imperatives of POGG systematically functioning to afford the mainland control for the furtherance of 'civil order' and 'settled & quiet government'.

Compounding the problem of imperial rigidity was the fact that the sheer distance between the Crown and the colonies prevented expedient responses to many important colonial issues.[525] The British Empire's efforts to employ POGG ensured a governmental presence, but it failed to provide consistent and trustworthy governance. Alden observes that Great Britain's "prestige exceeded her power…her men of public affairs were, with some exception, ill fitted to govern distant dependencies peopled by Englishmen."[526] Along the same lines, the English Bill of Rights of 1689, which was said to be the inauguration of a constitutional monarchy, was supposed to curtail the monarchy's power to govern in favor of Parliament.[527] This notwithstanding, disbanding colonial assemblies, taxing the colonies arbitrarily, precluding the establishment of legislatures in new colonies, revoking charters, requiring colonial conferences to be held in England, and exercising royal prerogatives to haphazardly exert supremacy continued well after 1689.[528] Moreover, the occurrences continued to incite tension between the colonies and the British Empire.

On a fundamental level, imperial/colonial tension seems to have been caused by a misapprehension concerning the dynamics of the game being played. Like the saying goes, it's like bringing checkers to a chess match. Notwithstanding the level of equality that the American colonies embraced as British transplants, the British Empire did not see them as such. Colonialism was not to create a relationship of equals. The fact that the English Bill of Rights was passed and celebrated as a 'powerful statement' concerning the rights of British subjects, but did not extend to the American colonies, was evidence of this reality. Moreover, POGG was not only the philosophy guiding colonization, it also established the

[523] Turner (n 117).
[524] Turner (n 117); Bond (n 432).
[525] Alden (n 237), 32-35.
[526] Alden (n 237), 227.
[527] 'On This Day, the English Bill of Rights Makes a Powerful Statement' (*Constitution Daily*, 2018) <https://constitutioncenter.org/blog/on-this-day-the-english-bill-of-rights-makes-a-powerful-statement> accessed 14 August 2018.
[528] 'Declaration of Independence: A Transcription' (n 487).

basis for Great Britain to continue to legislatively and judicially inhibit the establishment of equality. As such, the rights guaranteed to British subjects by the English Bill of Rights became "part of the disputes between [the British Government] and American colonists, which led to the Revolutionary War and American independence."[529] This then led to the American colonies' establishment of the American Bill of Rights, which was undoubtedly a statement to the British Empire about the inflexibility of its colonial rule. Although Great Britain could not appreciate it at the time, these issues facilitated the formation of ideological differences between the mainland and the colonies concerning interdependence, and more importantly independence. The irony of Virginia being POGG's centerpiece for the American colonies is that the doctrine's impact eventually set the foundation for Virginians like Washington, Jefferson, and Madison to become leaders in conceiving a different means to achieve peace, civil order, and an effective governmental infrastructure in the new nation that followed.[530]

Eventually, the undesirable effects of POGG were too overly burdensome for even the aristocracy of Virginia, as well as the rest of British-America.[531] It did not however prevent Virginia from offering symbolic deference to its history after becoming an autonomous state.[532] At the point of statehood, Virginia adopted the 'commonwealth' designation in its name instead of being designated a state (the other three Commonwealths are Massachusetts, Pennsylvania, and Kentucky, which was originally a part of Virginia).[533] The U.S. State Department's Foreign Affairs Manual however makes clear, "the term 'Commonwealth' does not describe or provide for any specific political status or relationship,…the term broadly describes an area that is self-governing under a constitution of its adoption…."[534] Thus, Virginia's (and the other three states) adoption of the nomenclature has been disengaged from any residual deference to the supremacy of the British Empire. The adoption however is undoubtedly an homage to the vestiges of the POGG doctrine. Likewise, the American arm of the Anglican Communion officially divested itself from the Church of England during the Founding era to make clear the

[529] 'On This Day, the English Bill of Rights Makes a Powerful Statement' (n 527).
[530] Turner (n 117).
[531] Thompson (n 500), 19.
[532] Thompson (n 500), 20.
[533] Thompson (n 500), 23.
[534] United States Department of State, '7 FAM 1120' (*Acquisition of U.S. Nationality in U.S. Territories and Possessions*, 2009) <https://fam.state.gov/FAM/07FAM/07FAM1120.html#M1121_2_1> accessed 11 July 2018.

disestablishment of religion and government in the United States.[535] According to Podmore, the divestiture or separation of church and state affected the entire scope of the relationship between American and British Anglican congregations.[536] Not only was reliance on Anglican Ecclesiastical law altered, but divergence emerged in every aspect of church governance, which included the ability for American Anglican clergy to preach in Great Britain and vice versa.[537] Consequently, Anglicanism under the designation of 'Episcopalian' has emerged as one of the many denominations in America, instead of the one with exceptional deference or superlative distinction.

3.4.2 The Colony of New Jersey—A Bumper-Crop of Constituting Documents

The constituting documents for the colony of New Jersey are arguably the most convoluted in the way of evidencing the POGG doctrine. This is because the territory was legally usurped, gifted, transferred, repossessed, bifurcated, partially leveraged, partially auctioned, and left fluctuating between the imperial governments of two larger colonies before finally being surrendered to the British Crown in 1702.[538] In the process, at least fifteen different transfer documents were recorded, three of which were constituting (or reconstituting) documents drafted by three different proprietary establishments.[539] These are the documents that are germane to this study, as each is drafted with the aim of promoting some semblance of POGG. Whether their aims were in full compliance with the British Empire's ideology is somewhat debatable. Nevertheless, the documents are relevant, as they are demonstrative of how perspectives in the American colonies subtly

[535] Colin Podmore, 'Two Streams Mingling: The American Episcopal Church in the Anglican Communion' (2011) 9 Journal of Anglican Studies 12, 13-14. Podmore assesses the distinctions that emerged from the separation of church and state in the U.S. and their effects on congregational relations within the Anglican Communion, which covered both the U.K. and the U.S. The American Revolution brought about not only the curtailment of ecclesiastical courts in the U.K. and their rejection in the U.S., but it also resulted in a remarkable difference in church governance. According to Podmore, the 'polity' of the Episcopal Church in the U.S., which was formed after the American Revolution, reflected a democratic and egalitarian ecclesiology. By contrast, the "United Church of England and Ireland…continued the episcopal structure inherited from the Western Church, albeit now subject to royal, rather than papal, supremacy."
[536] Podmore (n 535), 13-14.
[537] Podmore (n 535), 13-14.
[538] 'The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and With All and Every the Adventurers and All Such as Shall Settle or Plant There - 1664' <http://avalon.law.yale.edu/17th_century/nj02.asp> accessed 10 August 2018; 'The Duke of York's Release to John Lord Berkeley, and Sir George Carteret, 24th of June, 1664' <http://avalon.law.yale.edu/17th_century/nj01.asp> accessed 10 August 2018; 'Charles II's Grant of New England to the Duke of York, 1676 - Exemplified by Queen Anne; 1712' <http://avalon.law.yale.edu/18th_century/nj14.asp> accessed 10 August 2018.
[539] Aaron Leaming and Jacob Spicer, *The Grants, Concessions, and Original Constitutions of the Province of New-Jersey* (Rutgers University Libraries 1881) <https://archive.org/stream/grantsconcession00newj#page/100/search/religion>.

transitioned to the ideology of LLPH when POGG failed to effectively address changing colonial attitudes and circumstances.

The province of New Jersey—like the colony of New York—had been an overseas possession of the Dutch as a part of New Netherland until it was usurped by Great Britain in 1664.[540] It was then gifted to the Duke of York, who retained New York but transferred the rights to New Jersey.[541] As such, it was not granted a founding charter by the British Empire. Instead, York simply released the territory to John Berkeley and George Carteret.[542] The transfer of rights left the responsibility of establishing an effective governmental infrastructure to Carteret. The *Concessions and Agreement of the Lords Proprietors of the Province of New Jersey* was his colonial brainchild; however, there are notable aspects of POGG therein. Specifically, the document's primary objective was to ensure "*safety, peace and well-government*".[543] To achieve these ends, the document provided for a 'provincial governor' who possessed the right to "take to him six councellors at least, or twelve at most, or any even number between six and twelve," with whose advice and consent he would govern the colony.[544] A provincial assembly was established to include members elected from the proprietors of the province.[545] A chief Secretary was instituted to "do all other…things that we by our instructions shall direct, and the Governor, Council, and General Assembly shall ordain for [*the good and welfare of the said Province*]."[546] To ensure loyalty to the British Empire, provincial office holders were required to swear allegiance to "the King of England, his heirs and successors;"…and be "faithful to the interests of the Lords Proprietors…."[547] Carteret's document of *Concessions* yielded a bumper-crop of migrants, mostly Puritan transplants from other regions, mainly New York and New England.[548] They joined the residual Dutch, Swedish and German colonists who immigrated to New Netherland.[549]

[540] 'The Duke of York's Release to John Lord Berkeley, & Sir George Carteret, 24th of June, 1664' (n 538).
[541] 'The Duke of York's Release to John Lord Berkeley, & Sir George Carteret, 24th of June, 1664' (n 538).
[542] Leaming and Spicer (n 539).
[543] Aaron Leaming and Jacob Spicer, *Laws in Carteret's Time* (Rutgers University Libraries 1881).
[544] Leaming and Spicer (n 543).
[545] Leaming and Spicer (n 543).
[546] Leaming and Spicer (n 543).
[547] Leaming and Spicer (n 543).
[548] Charles A Goodrich, *A History Of The United States Of America* (Nabu Press 1858) 44 <https://archive.org/details/historyofuniteds00ingood/page/44>.
[549] Goodrich (n 548), 109.

Where it concerned non-Anglican beliefs, Carteret seemed to appreciate the pecuniary benefits that religious liberty provided. As such, the customary Religiosity clause is absent from the *Concessions* document. Instead, a Liberty of Conscience clause designated:

> [t]hat no person qualified as aforesaid within the said Province, at any time shall be any ways molested, punished, disquieted or called in question for any difference in opinion or practice in matter of religious concernments, who do not actually disturb the civil peace of the said Province; …persons may…freely and fully have an' enjoy his and their judgments and consciences in' masters of religion…[*behaving themselves peaceably ant quietly,* and not using this liberty to licentiousness, *nor to the civil injury or outward disturbance of others*]; any law, statute or clause contained, or to be contained, usuage or custom of this realm o England,…[550]

Allegiance to the British Crown notwithstanding, the *Concessions* document is somewhat unique in that the Proprietors' individual commercial interests are unmistakable. As has been previously established, the proliferation of the Anglican Church was part and parcel of the gift to the Duke. However, it appears that Carteret was less concerned about religion and more concerned about the colony turning a profit. Therefore, religious tolerance was endorsed as long as quit-rents were consistently paid.[551]

By 1674, Berkeley's debts forced him to leverage the West half of the province, which York attempted to repossess as an annex of New York, to no avail.[552] In 1682, Carteret auctioned off the East half of the province. As a result, two distinct colonies—West New Jersey and East New Jersey—were established, and the new proprietors adopted two distinct constituting 'agreements'. West New Jersey's *Charter of Fundamental Laws* was instituted in 1676, while East New Jersey's *Fundamental Constitutions for the Province of East New Jersey in America* was instituted in 1683.[553] Although there are notable references to 'civil order' and 'settled & quiet government' in both documents, the two agreements do not overtly implicate the Church of England as a fundamental condition to

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[550] Leaming and Spicer (n 543).
[551] 'Quintipartite Deed of Revision, Between E. and W Jersey: July 1st, 1676' <http://avalon.law.yale.edu/17th_century/nj06.asp> accessed 10 August 2018.
[552] 'Charles II's Grant of New England to the Duke of York, 1676-Exemplified by Queen Anne; 1712' (n 538).
[553] 'The Charter or Fundamental Laws, of West New Jersey, Agreed Upon-1676' <http://avalon.law.yale.edu/17th_century/nj02.asp> accessed 10 August 2018; 'The Fundamental Constitutions for the Province of East New Jersey in America, Anno Domini 1683' <http://avalon.law.yale.edu/17th_century/nj10.asp> accessed 10 August 2018; 'The King's Letter Recognizing the Proprietors' Right to the Soil and Government' <http://avalon.law.yale.edu/17th_century/nj11.asp> accessed 10 August 2018.

colonial establishment. Instead, economic viability again made religious ideologies a secondary or tertiary consideration.

Where it pertains the governmental frameworks, Figure 3.2 also illustrates the structure outlined in the agreements for both halves of New Jersey.[554] However, there are noteworthy circumstantial distinctions between the documents. In the agreement for West New Jersey, Chapter 17 demonstrates not only the customary language associated with POGG, but also a clause that appears to be an early iteration of the United States' philosophy of LLPH:

> That no Proprietor, freeholder or inhabitant of the said Province of West New Jersey, [*shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever*,] without a due tryal, and Judgment passed by twelve good and lawful men of his neighborhood…[555]

Moreover, the agreement for West New Jersey appears to make slavery illegal in the colony. Chapter 23 provides for "all and every person and persons inhabiting the said Province, shall, as far as in us lies, be free from oppression and slavery."[556] Although beyond the scope of this study, the provision should not be taken as a foregone conclusion that Chapter 23 insolated New Jersey from the effects of the Transatlantic Slave Trade. To the contrary, Carteret and Berkeley openly promoted using slave labor to address the chronic scarcity of free labor in the region.[557] Therefore, at least "sixty acres for every slave" was afforded any man who imported slaves from 1664 to 1682.[558] Once the two halves were rejoined when New Jersey became a royal colony, the British Crown "dispatched [New Jersey's Royal Governor] from London with instructions to keep the settlers provided with "a constant and sufficient supply of merchantable Negroes at moderate prices."[559] He likewise was ordered to assist slave traders and "to take especial care that payment be duly made."[560] Despite the inclusion of Chapter 23, the British Crown (*i.e.,* at this point the sovereign was Anne) as well as its Colonial Government contributed to the unified state of

[554] Cane (n 488), 58; 'The Fundamental Constitutions for the Province of East New Jersey in America, Anno Domini 1683' (n 553).
[555] 'The Charter or Fundamental Laws, of West New Jersey, Agreed Upon-1676' (n 553).
[556] 'The Charter or Fundamental Laws, of West New Jersey, Agreed Upon-1676' (n 553).
[557] Henry S Cooley, *A Study of Slavery in New Jersey* (Johns Hopkins University Press 1896) 9; *See also,* Edgar J McManus, *Black Bondage in the North* (Syracuse University Press 1973) 5.
[558] Cooley (n 557), 9.
[559] Cooley (n 557), 13.
[560] McManus (n 557), 5.

New Jersey becoming one of the last northern states to abolish slavery, which was done by force after the end of the American Civil War.[561]

Where it pertains the Religiosity clause, both agreements leave to each colonist his/her, "opinion, judgment, faith or worship towards God in matters of religion…[and] the exercises of their consciences in matters of religious worship…."[562] However, East New Jersey's agreement goes further to suggest that not only should men speak as men without "respect-to one's particular persuasion in matters of religion," but also they should not "be compelled to frequent and maintain any religious worship, place or ministry whatsoever;…"[563] This provision appears to anticipate the varying viewpoints espoused by those who were already living in the colony, the first wave of Puritan immigrants, and any religious subgroups/denominations that might relocate to East New Jersey with the intent to further religion by compulsory measures. Moreover, it appears to attempt to mitigate the possibility of church wardens pressuring for compulsory religious worship, which was common within the Anglican Church as well as many of the more orthodox denominations who immigrated to the region.[564] The major caveat to East New Jersey's Liberty of Conscience clause was that holding public office was predicated on being a Christian.[565] The question of whether any denomination of Christianity would meet the condition seemingly returns to the laws of the Empire. As was the case with previously colonial holdings, it can be inferred that office holders were Anglican. If they were of any other denomination, they could not be papists. As was the case with Carteret's original *Concessions* document, the objective was to afford religious tolerance as long as one had faith in God and was willing to "live peaceably and quietly in a civil society."[566] As both documents evidence the imperatives of POGG to varying degrees, the political and economic expediency in religious tolerance prevailed in New Jersey's collection of constituting documents.

The most noteworthy aspect of New Jersey's three constituting documents is that they were drafted by proprietors attempting to promote the economic sustainability of the colony, which entailed affording deference to the "king of England, his heirs and successors" but also acknowledging "the true right of liberty and property, as well as the just ballance both

[561] Cooley (n 557), 13.
[562] 'The Charter or Fundamental Laws, of West New Jersey, Agreed Upon-1676' (n 553); 'The Fundamental Constitutions for the Province of East New Jersey in America, Anno Domini 1683' (n 553).
[563] 'Fundamental Constitutions for the Province of East New Jersey in America, Anno Domini 1683' (n 553).
[564] Terrar (n 446), 62.
[565] 'Fundamental Constitutions for the Province of East New Jersey in America, Anno Domini 1683' (n 553).
[566] 'Fundamental Constitutions for the Province of East New Jersey in America, Anno Domini 1683' (n 553).

of the Proprietors among themselves, and betwixt them and the people:…."[567] These nuances appear to demonstrate the subtle shift away from the colonial perspective occasioned by POGG toward the individual rights of the proprietors and the colonists (or future American citizens). After falling into disrepair due to multiple transfers and shifting shareholders, authority over the two colonies sporadically shifted between New York and New England until they were surrendered to the Crown in 1702.[568] Despite the temporary emergence of the philosophy of LLPH, New Jersey ultimately reverted to POGG while under the imperial leadership of New York.[569] Therefore, it would stand to reason that it was subject to many of the same political and legal limits placed upon New York.[570]

By the end of the 18th century, the British Empire had issued sufficient charters to encompass thirteen independent colonies and secure possession of large swaths of Canadian territory. Figure 3.3 details the language included in the remaining six of the 13 original American colonies as well as that included in the Constitution of the first post-war state, Vermont. Taken in conjunction with the case studies undertaken herein, it becomes evidence that American colonial charters referenced the establishment of 'good government,' in conjunction with terms like 'well-ordering,' 'quiet settling', 'settled', 'civilly governed', 'peaceable', 'better managed', or some derivative thereof. The linguistic conjugations are unquestionably indicative of an American iteration of POGG. As the three iterations of Virginia's charter demonstrate, Great Britain employed what could be termed colonial-era 'boilerplate text' to dictate how the colonies interacted with each other and with the mainland to maintain imperial control. As the three iterations of New Jersey's colonial agreements demonstrate, POGG also fostered a trickle-down effect as it relates to the governance structure, so imperial control was not completely lost. However, the proprietary interests of the colonies' investors seemingly shifted the focus away from the fixed aims of POGG to further distinct commercial ends. In both cases, POGG is evident; although in colonial New Jersey, the customary imperatives of POGG appear to have been revised to deal with New Jersey's distinctive set of circumstances.

[567] Leaming and Spicer (n 539).
[568] 'Surrender from the Proprietors of East and West New Jersey, of Their Pretended Right of Government to Her Majesty; 1702' <http://avalon.law.yale.edu/18th_century/nj13.asp> accessed 10 August 2018.
[569] 'Surrender from the Proprietors of East and West New Jersey, of Their Pretended Right of Government to Her Majesty; 1702' (n 568).
[570] Recall the analysis at Section 3.4.1.

Figure 3.3: POGG Provisions in Charters for Residual American Colonies[571]	
Charter Particulars:	Reference to the Imperatives of POGG—*vis-à-vis* 'Religiosity clause' and 'Civil Order' and 'Settled & Quiet Government' provision.
1. New Hampshire[572] **Founded: 1623** **(originally part of Mass. Bay Colony)** **Royal Charter: 1679** **Sovereign: Charles II**	**Commission of John Cutt (1680):** "…that by such examples ye infidel may be invited & desire to partake of ye Christian Religion, & for ye greater ease & satisfacc'on of or sd loving subjects in matters of Religion We do hereby will, require & com'and yt liberty of conscience shall be allowed unto all protestants; & yt such especially as shall be conformable to ye rites of ye Church of Engld, shall be particularly countenanced & incouraged." *And* further We do by these prsents, for Its,…give & grant unto ye said Councell & their successors for ye time being, full & free liberty, power, and authority, & hear & Determine all emergencies, relating to the care & good Government of Our subjects within ye sd Prov: & also to sum'on & convene any person or persons before them & punish contempts;"
2. Rhode Island[573] **Founded: 1636** **Royal Charter: N/A** **Sovereign: Charles II**	**Charter of Rhode Island and Providence Plantations (1663):** And wee doe likewise, for vs, oure heires and successours, give and graunt vnto the sayd Governour and Company and theire successours by these presents, that, for the more peaceable and orderly Government of the sayd Plantations,…". ▪ **Religious Freedom outlined in Charter**: "…Now know bee, that wee beinge willinge to encourage the hopefull undertakeinge of oure sayd lovall and loveinge subjects, and to secure them in the free exercise and enjovment of all theire civill and religious rights, appertaining to them, as our loveing subjects; and to preserve unto them that libertye, in the true Christian ffaith and worshipp of God, which they have sought with soe much travaill, and with peaceable myndes, and lovall subjectione to our royall progenitors and ourselves, to enjoye; and because some of the people and inhabitants of the same colonie cannot, in theire private opinions, conforms to the publique exercise of religion, according to the litturgy, formes and ceremonyes of the Church of England, or take or subscribe the oaths and articles made and established in that behalfe; and for that the same, by reason of the remote distances of those places, will (as wee hope) bee noe breach of the unitie and unifformitie established in this nation: Have therefore thought ffit, and doe hereby publish, graunt, ordeyne and declare, That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; …they behaving themselves peaceablie and quietlie, and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others;…".

[571] Colonial Charters for Remaining Six American Colonies, *see generally* <http://avalon.law.yale.edu/subject_menus/statech.asp>.
[572] 'Commission of John Cutt: 1680' <http://avalon.law.yale.edu/17th_century/nh08.asp>.
[573] 'Charter of Rhode Island and Providence Plantations: July 15, 1663' <http://avalon.law.yale.edu/17th_century/ri04.asp>.

3. Delaware[574] **Founded: 1638** **Royal Charter: N/A** **Sovereign: N/A-land grant from Duke of York**	**Charter of Delaware (1701):** "KNOW YE THEREFORE, That for the further Well-being and good Government of the said Province, and Territories; and in Pursuance of the Rights and Powers before-mentioned, I the said William Penn do declare, grant and confirm, unto all the Freemen, Planters and Adventurers, and other Inhabitants in this Province and Territories, these following Liberties, Franchises and Privileges, so far as in me lieth, to be held, enjoyed and kept, by the Freemen, Planters and Adventurers, and other Inhabitants of and in the said Province and Territories "hereunto annexed, for ever." ▪ **Religious Freedom outlined in Charter:** "…I do hereby grant and declare, That no Person or Persons, inhabiting In this Province or Territories, who shall confess and acknowledge One almighty God, the Creator, Upholder and Ruler of the World; and professes him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Persuasion. ▪ **Religious Test (Public Service):** "AND that all Persons who also profess to believe in Jesus Christ, the Saviour of the World, shall be capable (notwithstanding their other Persuasions and Practices in Point of Conscience and Religion) to serve this Government in any Capacity, both legislatively and executively, he or they solemnly promising, when lawfully required, Allegiance to the King as Sovereign, …."
4. North Carolina[575] **Founded: 1653** **Royal Charter: 1729** **Sovereign: Charles I & II**	**Charter of Carolina (1663):** "And because such assemblies of freeholders cannot be so conveniently called, as there may be occasion to require the same, we do, therefore, by these presents, give and grant unto the said Edward Earl of Clarendon, George Duke of Albemarle, William Lord Craven, John Lord Berkley, Anthony Lord Ashley, Sir George Carteret, Sir William Berkley, and Sir John Colleton, their heirs and assigns, by themselves or their magistrates, in that behalf lawfully authorized full power and authority from time to time to make and ordain fit and wholesome orders and ordinances, within the province aforesaid to be kept and observed as well for the keeping of the peace, as for the better government of the people there abiding, and to publish the same to all to whom it may concern; ….so as such ordinances be reasonable, and not repugnant or contrary, but as near as may be, agreeable to the laws and statutes of this our kingdom of England, …." ▪ **Religious Freedom outlined in Charter:** "And furthermore, the patronage and advowsons of all the churches and chappels, which as Christian religion shall increase within the country, isles, islets and limits aforesaid, shall happen hereafter to be erected, together with license and power to build and found churches, chappels and oratories, in convenient and fit places,…."

[574] 'Charter of Delaware: 1701' <http://avalon.law.yale.edu/18th_century/de01.asp>.
[575] 'Charter of Carolina: March 24, 1663' <http://avalon.law.yale.edu/17th_century/nc01.asp>.

5. South Carolina[576] **Founded: 1663** **Royal Charter: 1729** **Sovereign: Charles I & II**	**Charter of Carolina (1665):** "… give and grant unto the said Edward Earl of Clarendon, George Duke of Albemarle, William Earl of Craven, John Lord Berkeley, Anthony Lord Ashley, Sir George Carteret, Sir John Colleton, and Sir William Berkeley, their heirs and assigns, by themselves, or their magistrates, in that behalf lawfully authorized, full power and authority, from time to time, to make and ordain fit and wholesome orders and ordinances within the province or territory aforesaid, or any county, baronny, or province, within the same, to be kept and observed, as well for the keeping of the peace, as for the better government of the people there abiding, and to publish the same to all to whom it may concern; …so as such ordinances be reasonable, and not repugnant or contrary, but as near as may be, agreeable to the laws and statutes of this our kingdom of England; …." ▪ **Religious Freedom outlined in Charter**: "And furthermore, the patronage and advowsons of all the churches and chapels, which, as Christian religion shall increase within the province, territory, isles, and limits aforesaid, shall happen hereafter to be erected; together with licence and power to build and found churches, chapels and oratories, in convenient and fit places, within the said bounds and limits; and to cause them to be dedicated and consecrated, according to the [ecclesiastical laws] of our kingdom of England; …; **saving always the faith, allegiance, and sovereign dominion, due to us, our heirs and successors, for the same**:…"
6. Pennsylvania[577] **Founded: 1682** **Royal Charter: N/A** **Sovereign: Charles II**	**Charter for the Province of Pennsylvania (1681):** "CHARLES the Second, by the Grace of God, King of England, Scotland, France, and Ireland, Defender of the Faith, &c. To all whom these presents shall come, Greets. WHEREAS Our Trustie and wellbeloved Subject WILLIAM PENN, Esquire, … as also to reduce the savage Natives by gentle and just mamlers to the Love of Civil Societie and Christian Religion, hath humbley besought Leave of Us to transport an ample Colonie unto a certaine Countrey hereinafter described…in the Partes of America not yet cultivated and planted; And hath likewise humbley besought Our Royall Majestie to Give, Grant, and Confirme all the said Countrey, with certaine Privileges and Jurisdictions, requisite for the good Government and Safetie of the said Countrey and Colonie, to him and his Heires forever." **Charter of Privileges Granted by William Penn, esq. to the Inhabitants of Pennsylvania and Territories (October 28, 1701):** "KNOW YE THEREFORE, That for the further Well-being and good Government of the said Province, and Territories; …." ▪ **Religious Freedom outlined in Charter:** "…I do hereby grant and declare, That no Person or Persons, inhabiting in this Province or Territories, who shall confess and acknowledge One almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be

[576] 'Charter of Carolina: June 30, 1665' <http://avalon.law.yale.edu/17th_century/nc04.asp>.
[577] 'Charter for the Province of Pennsylvania: 1681' <http://avalon.law.yale.edu/17th_century/pa01.asp>;
'Charter of Privileges Granted by William Penn, Esq. to the Inhabitants of Pennsylvania and Territories: October 28, 1701' <http://avalon.law.yale.edu/18th_century/pa07.asp>.

	compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or super any other Act or Thing, contrary to their religious Persuasion. ▪ **Religious Test (Public Service):** "AND that all Persons who also profess to believe in Jesus Christ, the Saviour of the World, shall be capable (notwithstanding their other Persuasions and Practices in Point of Conscience and Religion) to serve this Government in any Capacity, both legislatively and executively, he or they solemnly promising, when lawfully required, Allegiance to the King as Sovereign, and Fidelity to the Proprietary and Governor, …."
7. Vermont[578] **Founded: 1777 (after start of War of Independence; therefore, it was never apart of British-America).**	**Constitution of Vermont (08 July 1777): "**And whereas, the inhabitants of this State have (in consideration of protection only) heretofore acknowledged allegiance to the King of Great Britain, and the said King has not only withdrawn that protection, but commenced, and still continues to carry on, with unabated vengeance, a most cruel and unjust war against them; employing therein, not only the troops of Great Britain, but foreign mercenaries, savages and slaves, for the avowed purpose of reducing them to a total and abject submission to the despotic domination of the British parliament, with many other acts of tyranny, (more fully set forth in the declaration of Congress) whereby all allegiance and fealty to the said King and his successors, are dissolved and at an end; and all power and authority derived from him, ceased in the American Colonies."

[578] 'Constitution of Vermont: July 8, 1777' <http://avalon.law.yale.edu/18th_century/vt01.asp>.

It has been demonstrated that POGG was a systematic means to manage Great Britain's new international paradigm, the imperial/colonial relationship on the North American continent. Recall that Yusuf contends that the effects of the POGG doctrine were dualistic in nature. In addition to facilitating authority over the British Empire's overseas territories, it was also intended to grant powers for colonial governments to self-rule. Where the American colonies were concerned, the rigidity of the imperatives repeatedly frustrated the latter aim. Humphreys notes that the colonies were established as "dependent communities legally subject to the authority of the English Crown."[579] Consequently, the Crown's royal prerogative was enforced upon the North American colonies notwithstanding the degree of autonomy afforded them by the terms of the charters, or how distinctive their regional circumstances.[580] Leading up to American rebellion, the contentious power struggle that developed between the Crown and Parliament concerning the scope and ownership of the 'royal prerogative' made the latter aim of POGG unduly burdensome if not impossible for the American colonies. Humphreys notes:

> The history of [the American colonies'] constitutional development in the first half of the eighteenth century is essentially the history of the efforts of the colonial assemblies to establish their supremacy within the colonies and over the instruments of the royal prerogative.[581]

The conflicts specifically occasioned by George III's approach to his royal prerogative, and Parliament's efforts to constrict his power in its own favor, instead of toward the colonial assemblies was at the heart of the colonies' rebellion.[582] Taken collectively, the British Empire's imperatives—the Religiosity clause, the monarchial/parliamentary governmental framework, and the British colonial rule of law—demonstrate that POGG was not just a constitutional clause associated with the British Commonwealth. It was in fact also a colonial American phenomenon. But/for the British Empire's failure to effectively promote the second aim of POGG, it might have become so rooted in the psyche of the American colonies that the history of the United States might have been a different one.

3.5 The Rejection of POGG for '*Life, Liberty & the Pursuit of Happiness*'

It is well understood that the American colonies informally issued a declaration of independence from Great Britain in 1775, which in 1776 was formally memorialized and

[579] RA Humphreys, 'The Rule of Law and the American Revolution' in John R Howe, Jr. (ed), *The Role of Ideology in the American Revoluation* (Holt, Rinehart and Winston 1970) 20.
[580] Humphreys (n 579), 20-4.
[581] Humphreys (n 579), 20.
[582] Alden (n 237), 141-44.

distributed internationally. The purpose of the declaration was to recognize the sovereignty of thirteen independent states no longer colonially tethered to the British Empire. The declaration realized several outcomes relevant to the present constitutional dynamic of England, Canada, and the United States. It "reflected a range of concerns about security, defense, commerce, and immigration," which from the colonists' perspective, necessitated responses beyond the scope of the British Empire's POGG doctrine.[583] It also recognized that the established-church regime was unworkable in the American colonies where so many denominations had migrated for the distinct purpose of disengaging from the effects of the entanglement of the Church of England and the British Government.[584] The most prejudicial aspect of POGG was that the legal deference afforded Anglicanism infringed on the religious liberties of all non-Anglican denominations by frustrating their ability to fully flourish. Alden notes that shortly after the official declaration, the status of the British Empire was likened "to that of the Romans in fatal decline."[585] This comparison seemingly speaks to the practical realities that plagued both empires when they expanded beyond that which was logistically manageable, while attempting to keep too tight a rein on so many distinct territories.

The declaration was also a point of demarcation for the transition of British colonies into independent states. Armitage observes that, "the Declaration marked the entry of those states into what would now be called international society…and open[ed] American commerce to a wider world outside the limits previously set to it by the laws of the British Empire."[586] From an ideological perspective, the declaration conveyed a permanent deviation from the imperial/colonial relationship that had prevailed. According to Alden, "it is not to be denied that the colonists became less like the English with every passing day after the founding of [Virginia]. It could not be otherwise. Unquestionably a notable gap emerged between the Englishman and the American as early as 1763, and that gap grew thereafter."[587] Former U.S. President John Adams suggested that the American Revolution had actually "[begun] in 1607, when Englishmen and colonists began to pursue separate courses."[588] Consequently, the colonies gravitated away from the ideological 'difference in degree' that framed British-Canada's perspective as a dominion of the British

[583] David Armitage, *The Declaration of Independence: A Global History* (Harvard University Press 2007), 16.
[584] Gill (n 164), 61-62.
[585] Alden (n 237), 478.
[586] Armitage, *Declar. Indep. A Glob. Hist.* (n 583), 16.
[587] Alden (n 237), 227.
[588] Alden (n 237), 227.

Empire. No longer colonial British, the American colonies came out on the other side of the revolution proclaiming an ideological 'difference in kind'.

After the Revolution, each colony was established as an internationally recognized autonomous state, allowing each to self-determine and to decide whether to join a united collection of states or chart its own course.[589] As a condition of linking their fates to one another, a new direction was fundamental to their continued unity, which necessitated shedding POGG and its associated imperatives. Accordingly, disestablishment replaced establishment. The establishment and proliferation of the Anglican Church gave way to the separation of church and state where religion would flourish to meet the needs of the people without governmental promotion, preference, and/or entanglement. The people abandoned the British monarchy and Parliament, collectively the backbone of POGG, in favor of an executive and legislative branch of government elected by the people and removable by the people. As it pertains to the rule of law, "the colonists saw [English] 'common law' as a set of unchanging principles of public law, principles which [American] usage would describe as 'constitutional'."[590] Thus, the U.S. Constitution serves first as a social contract constituting the states of America as no longer colonies of the British Empire. It also constitutes the basis for a national framework, including the rule of law and juridical structure, intended to reinforce the parameters of the social contract of the American states. It was meant to be a framework that did not possess the same characteristics that "colonial representatives and lawyers perceived as being employed for the purpose of 'imperial exploitation'."[591] Consistent observations made by Sachs pertaining to the law of 'the Founding', it can be inferred that American Constitutional and Common law were established in distinct contravention of the British framework.[592]

The American colonies' resolve concerning the adoption of a different national ideology was intensified by French and British responses to their joint declaration and commitment to defending their resolution to the point of war. By 1779, France had afforded *de facto* international recognition that was accompanied by offerings of political alliance and trade agreements.[593] Alden notes that although Parliament fully accepted that the colonies were lost to the British Empire as early as 1781, George III refused to admit defeat.[594] Even

[589] Armitage, *Declar. Indep. A Glob. Hist*. (n 583), 104.
[590] Johnson (n 116), 7.
[591] Johnson (n 116), 5.
[592] Johnson (n 116), 7.
[593] Samuel Flagg Bemis, *The Diplomacy of the American Revolution: The Foundations of American Diplomacy, 1775-1823* (D Appleton-Century Company, Inc 1935) 58-69.
[594] Alden (n 237), 478.

after Parliament voted to "consider as enemies to his Majesty and this country" those who continued an offensive campaign "for the purpose of reducing the revolted colonies to obedience by force," George "would not unequivocally promise to refrain from further military action against the Patriots."[595] Leading up to the finalization of the 1783 treaty, the British Empire continued to attempt to cajole the colonies back into the fold by offering partial recognition.[596] Great Britain went so far as to offer the American colonies a similar deal to the one Canada would receive; the British Empire would extend qualified independence to the thirteen states. This included greater autonomy than that which had been afforded them as colonies, but a lesser level of sovereignty within the British Empire than unfettered independence granted.[597] Needless to say, the states passed on the offer.

In the same way that the 1763 Treaty of Paris ended a war and brought enlargement to the British Empire, the 1783 Treaty of Paris ended a war and brought about territorial retrenchment. As for that which it did not cede, representatives for the American states attempted to persuade the British Empire to "cede all of Canada to the United States," without the slightest degree of success.[598] Alden explains that the United States was "forced to abandon the Patriot dream of converting Canada into a fourteenth state. [*Canada was to remain British*…]"[599] Independence notwithstanding, it would require additional treaties—*e.g.,* Jay's Treaty, which established territorial boundaries between the U.S. and Canada—as well as another war—*i.e.,* the War of 1812—for the British Empire to accept that the colonies were gone forever and to finally discontinue its efforts to exert control over American territories and citizens.[600]

3.6 Conclusion

This chapter demonstrates that the 'civil order' and 'settled & quiet government' provision directly or indirectly occurs in the charters for each of the thirteen colonies. The circumstances related to six of the 13 colonies, which are examined herein, rebut the presumption that the British Empire's views on colonialism evolved and relaxed over the 200 years that the American colonies were subject to British control. The six focus colonies encompass the first British-American colony (1607), the last British-American colony

[595] Alden (n 237), 478; *See also,* Bemis (n 593), 243-56.
[596] Alden (n 237), 485.
[597] Alden (n 237), 485; Bemis (n 593), 101.
[598] Alden (n 237), 486.
[599] Alden (n 237), 487.
[600] Bemis (n 593), 232-35; *See also,* Caitlin CM Smith, 'The Jay Treaty Free Passage Right in Theory and Practice' (2012) 1 American Indian Law Journal 161, 161-65.

(1774), and each of the colonies that were specifically designated as sanctuary colonies for Catholics, non-Anglican Protestants, and other religious subgroups. The final two selected colonies are those which are noteworthy because they are illustrative of colonial and/or imperial discontent concerning the nature of the relationship between the colonies and the Crown. Focusing on these specific colonies offers substantive support for the proposition that POGG was a systematic institutional scheme employed to establish the American colonies well before the Empire secured British-Canada from the French. Moreover, POGG was never intended to yield an alliance or partnership as the American (and later Canadian) colonists perceived; instead, it was designed to establish an institutional hierarchy within the British Empire by ensuring dominion and control over overseas territories. This is the case notwithstanding whether the colonists were formerly from the British Isles or indigenous to the region usurped by colonization efforts.

Much scholarly and legal debate has gone into whether the American colonies considered themselves revolutionaries when they sought to break from the British Empire. Evaluation of the colonies' declaration of freedom as a forthright legal petition responding to the imperatives of POGG suggests that the colonists did not see themselves as anything more than men and women who were tired of being grist in the mill of Imperialism. The domestic and international publication of the document was an indictment; an appeal for post-colonial unity; and a call for aid by way of international recognition and financial support. It is safe to assume that they had no way of knowing the future effects of the choices they made, no more than they knew what the future held *when* or *if* they secured independence. Had the aims of the POGG doctrine been fully successful, the branches of government in the United States might look very different, as the drafting and adoption of the U.S. Constitution might have never been. Instead, the POGG doctrine might have become as deeply-rooted in the United States as it has come to be in Canada.

CHAPTER 4
THE BASTION OF POGG:
CANADA'S APPROACH TO DISESTABLISHMENT

"Colonialism is a denial of the reality of self in favour of an imaginary special position inside the mythology of someone else's empire. That special position can never exist because empires have their own purpose."[601]

This chapter continues the historiographic analyses undertaken in previous chapters to demonstrate how the POGG doctrine became the mainstay of Canadian constitutionalism. The doctrine initially thwarted the Canadian colonies' ability to fully self-govern as early as 1749 and continued until 1982; therefore, Canada's post-colonial identity is the national embodiment of the POGG doctrine. This chapter first evidences how during Canada's colonial era, national autonomy was stagnated by the British Empire's integration of POGG to promote 'Britishness' in Canada without adequately reconciling the divergent social, religious, and political perspectives of the non-British colonists over whom the Empire took dominion. Moreover, the promotion of Anglican exceptionalism and favoritism toward British Loyalists severely frustrated British-Canada's ability to embrace a cohesive national identity and promote religious equilibrium between British Loyalists and non-Anglican religious subgroups.

This chapter then demonstrates how Canada's decision to remain a British overseas possession during the American rebellion resulted in her acquiescence to POGG, which consequently became the nation's mode of constitutional evolution from imperial possession to Commonwealth nation. As modernity has afforded Canada opportunities to move toward a national identity divorced from United Kingdom—especially since constitutional 'patriation'—this chapter evidences that the POgG clause functioning in tandem with Canada's Charter of Rights and Freedoms has altered the trajectory of the aftereffects of remaining steadfast to a status of perpetual annexation. As such, this chapter demonstrates how preservation of POGG in Canada buttresses the national policy of one law for all Canadians and appropriately encompasses the concept of 'multiculturalism' in light of the nation's colonial history and its aspirations toward being 'a free and democratic society'.[602]

[601] Saul (n 104), 19.
[602] Charter of Rights and Freedoms, s 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

4.1 When Freedom Finally Rings: Proclaiming Disestablishment in Canada

Due to the extended association with the British Empire, Canada's Constitution both resonates and rebuffs the influences of British Imperialism. Canada's loyalty to the British Empire—and later the British Commonwealth—has been held responsible for the creation of a fractured nation of Canadians of predominantly French, British, and Aboriginal ancestry.[603] The degree of ostracism experienced by French and Aboriginal Canadians from Canadian Loyalists continues to reverberate throughout the nation. It originally led to exclusion of the Aboriginal people from the political process.[604] It has also led to multiple succession attempts by French-Canadians—the most recent in 2014—who have not felt a part of the nation since 1763.[605] At the epicenter of Canadian dissonance is the legacy of the vendetta between the French and English empires over the entanglement of religion and government.[606] The battle for supremacy between political-Catholicism and political-Anglicanism has arguably affected or infected every overseas territory controlled by either empire. Akin to the American colonial experience, imperial supremacy came by way of the systematic integration of imperatives of the POGG doctrine.

The implementation of POGG in the Canadian colonies—until the point of national adoption—was arguably as systematic and problematic as it was in the Ulster and American colonies. Once Canadians willingly embraced POGG as indicative of their constitutional identity, its effects created a life-line to the British Empire. As will be illustrated herein, it was neither the association they coveted nor a relationship that advanced a holistic outlook for an independent Canada.[607] Comparable to the colonists in the American colonies, British-Canadians believed that migration to North America was neither a downgrade in British social status nor indicative of a desire to be stripped of rights afforded them as British subjects living on the mainland.[608] According to Buckner, "[e]ven prior to Confederation the British population in [British-Canada] increasingly referred to

[603] Saul (n 104), 15.
[604] Julie Evans and others, 'Canada: "If They Treat the Indians Humanely, All Will Be Well"' in John M MacKenzie (ed), *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830s-1910* (Manchester University Press 2003) 3.
[605] 'The Clarity Act (Bill C-20)' (*The Canadian Encyclopedia*, 2014) <https://www.thecanadianencyclopedia.caen/article/the-clarity-act-bill-c-20> accessed 6 November 2018. The Act gives effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference 2014.
[606] MH Ogilvie, 'Between Liberté and Égalité: Religion and the State in Canada' in Peter Radan, Denise Meyerson and Rosalind F Atherton (eds), *Law and Religion* (Routledge 2004) 124.
[607] Phillip Buckner, 'The Creation of the Dominion of Canada, 1860– 1901' in Phillip Buckner (ed), *Canada and the British Empire* (Oxford Scholarship Online 2011) 67.
[608] Bumsted (n 361), 48-9.

themselves collectively as British-Americans. They saw themselves as provincial Britons, claiming on the basis of ethnic descent the right to self-governing institutions similar to those possessed by the metropolitan British…."[609] The larger impact of this significant misalignment of expectations seemingly resulted in Canada needing to distinguish herself apart from the British Empire and establish a post-colonial national identity that balances her colonial past with her present cultural demography.

Seymour Lipset points out that "the American Constitution rejected church establishment; the Canadian did not."[610] In actuality, the statement appears to be only partially correct. Where it pertains Canada's definitive stance on disestablishment, Ogilvie observes that, "compromise and hypocrisy are ingrained in the Canadian soul."[611] Therefore, the boundaries of church and state were undefined in Canada until 1982, because "religion as well as all other aspects of life in Canada…is under constant negotiation and readjustment."[612] As POGG became fully integrated in British-Canada—and the Dominion established in 1867—Canada's constitutional documents did not broach the subject of disestablishment.[613] Even after the Statute of Westminster was passed in 1931, affording Canada a larger stake in her own independence, Canada's constitutional documents did not stipulate the separation of religion and government.[614] Thus, Great Britain's church-state arrangement figured vicariously in Canada's approach to religious plurality. Since Elizabeth II serves as the head of state in Canada, her role as supreme governor of the Church of England and the defender of the Anglican faith afforded certain assumptions regarding religious establishment in Canada.[615] In other words, it was presumed that Canada's national religious ideology was Anglicanism by default, with limited exceptions associated with Catholic education.[616] A practical benefit of the presumption of an established church is that it left Canada with the ability to rebut the presumption after 1982. Canada is now more clearly defining the limits of its 'accommodationist' church-

[609] Phillip Buckner, 'Introduction: Canada and the British Empire' in Phillip Buckner (ed), *Canada and the British Empire* (Oxford Scholarship Online 2011) 5.
[610] Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (Routledge 1990) xiii.
[611] Ogilvie (n 606), 124.
[612] Ogilvie (n 606), 124.
[613] Ogilvie (n 606), 124.
[614] Government of Canada, 'The Statute of Westminster, 1931: Giving Canada Its Own Voice' (*Important and Commemorative Days*, 2017) <https://www.canada.ca/en/canadian-heritage/services/important-commemorative-days/anniversary-statute-westminster.html> accessed 1 June 2019.
[615] Lynch (n 245), 155.
[616] Ogilvie (n 606), 125.

state arrangement, even though constituting documents assumed the religious regime of her colonizer.[617]

Comparable to the situation in the United States, multiculturalism has created unforeseen challenges to religious plurality in Canada. This is especially pronounced where it pertains immigrants from Muslim-majority nations that do not espouse democracy and/or nations where religion and government are so intertwined that they are essentially one. For some who have emigrated from nations with these conditions, there has been an expectation that Canadian democracy demands accommodation of the full breadth of political and religious preferences from their countries of origin. Moreover, the expectation is often couched such that a rejoinder in the negative is labelled as disenfranchisement or a failure "to foster peaceful co-existence built on the principle of tolerance."[618] These are the circumstances that Canada's present approach to disestablishment has attempted to balance. Specifically, Canada's adoption of its Charter of Rights and Freedoms was an attempt to not only establish coalescence amongst the three foundational ethnic groups, but also memorialize a national policy on fundamental freedoms—*e.g.,* speech, religion, belief, or expression.[619] According to Hogg, the "Charter's natural momentum was towards centralization because "where guaranteed rights exist, there must be a single national rule."[620]

As the POgG clause is also enshrined in Canada's constitutional documents, it stands to reason that any decisions concerning disestablishment that affect the legislative competencies outlined in the Constitution Act of 1867 ('BNA') must be evaluated in relationship thereto. Amid these conditions, which are unique to Canada, is where requests for faith-based legal exceptionalism arguably find themselves, creating a conundrum for both the legislature and the judiciary. For these reasons, Canada's decision to preclude faith-based legal exceptionalism evidences a commitment to safeguarding her church-state arrangement and the national rule of law. More importantly, the decision appears to be a reaction to Canada's foundational ideals and commitments and is

[617] Durham, Jr. (n 64), 1419.
[618] Kamaruddin, Oseni and Rashid (n 66), 245.
[619] James B Kelly, 'Reconciling Rights and Federalism during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999' [2001] Canadian Journal of Political Science / Revue canadienne de science politique, 321-24.
[620] Peter Hogg, 'Federalism Fights the Charter' in David Shugarman and Reg Whitaker (eds), *Federalism and Political Community* (Broadview Press 1989); *See also,* Kelly (n 619) 321, 339-40.

demonstrative of a prudent rejoinder for nations that espouse liberal democracy and disestablishment.

To understand why remaining steadfast in the preclusion of faith-based legal exceptionalism is the appropriate constitutional response for Canada, it is necessary to consider the years leading up to the British Empire's conquest of British-Canada in conjunction with those surrounding the issuance of the 1982 Charter. In Canada's decades-long renegotiation for devolution of power from Great Britain, the nation has adopted an approach to disestablishment that appears to avoid the history of confrontation between Catholics and Anglicans. Specifically, her accommodationist approach moves away from the first imperative of POGG, thereby absolving Canada of joint liability for the effects of faith-based legal exceptionalism associated with the religious practices of the British Empire.

4.2 British-Canadian Compliance & Embracing the POGG Doctrine

Where POGG was introduced in the American colonial charters by the specific terms, 'civil order' and 'settled & quiet government', the terms adopted in Canadian constituting documents were 'peace, welfare, and good government' and subsequently 'peace, order, and good government'. Akin to the American colonies, the collection of documents advanced three specific imperatives: (1) the proliferation of Anglicanism (presumptively); (2) the establishment of the British monarchial and parliamentary governance paradigm; and (3) the extension of British colonial law as legislative and juridical substrates of each province. If the British Empire determined it expedient to confer independence on its overseas territory—which did not occur in the American colonies and was arguably only partly achieved in British-Canada until 1982—the far-reaching tentacles of the doctrine made it politically and legally impracticable to implement an infrastructure that did not include remnants of POGG. Since 1749, this has been the cause of an ever-continuing reevaluation of Canada's national identity.

From 1749 onward, the machinations associated with POGG continued to suppress the colonial structure of existing inhabitants in New France who, although not all indigenous to the region, were forced to depart the colonies or acquiesce to marginalization of the pre-existing social order. In its place, POGG came to be associated with British Loyalists or Tories who migrated to British-Canada directly before, during, or after the American War of Independence. These British refugees were committed to the Empire and the spirit of

POGG.[621] Thus, it is an unquestionable reality that because of POGG, British-Canada was established with three distinct populations: those who were indigenous to the region; those who immigrated as colonists under the French flag; and in due course, those who emigrated from the American colonies to remain under the British flag.[622] Ethnic and religious diversity notwithstanding, the British Empire made little notable effort to promote coalescence. Coates notes that "French Canadians had many reasons to feel ambivalent about the British Empire…the French settlements in North America faced almost continual threat from the British."[623] Thus, it appears that the British simply built POGG's infrastructure around and in some cases on top of the other two populations. This offers context for Bumsted's contention that, "[f]rom 1763, French Canadians have been in the world of the British Empire and Commonwealth, but they have not been 'of' the British Empire."[624]

Contrary to prevailing perspectives on the definitive link between POGG and Canadian constitutionalism, John Ralston Saul has attempted to reconstruct the world view of Canada as a nation divorced from POGG. In the text, *A Fair Country: Telling Truths about Canada*, Saul examines the significance of the Aboriginal people of Canada and affords them the recognition not often given by the British Empire for contributing to Canada's national identity. He suggests that Canada is neither the posterchild for POGG nor a people steeped in the legacy of the imperatives associated with establishing POGG.[625] Saul claims that it is the "empire-besotted elite" who suggest that "POGG is the defining motto of the Canadian Constitution."[626] He also contends that instead Canada was founded as 'a Métis civilization,' which despite contentions to the contrary explains Canada's evolution.[627] With all due respect to Saul's challenge to Canadian history, this study considers not only Saul's compelling analysis but also the weight of documentary support, including colonial legislation, the BNA, the Charter of Rights and Freedoms, subsequent judicial analyses, and associated legal studies. These documents offer a compelling assessment of Canada's domestic and international identity. The introductory language of §91 of the BNA provides:

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[621] John J Garcia, '" He Hath Ceased to Be a Citizen "' (2017) 52 Early American Literature 591, 591-92.
[622] Bumsted (n 361), 43; Garcia (n 621), 591-92.
[623] Colin M Coates, 'French Canadians' Ambivalence to the British Empire' in Phillip Buckner (ed), *Canada and the British Empire* (Oxford University Press (Online) 2011) 181.
[624] Bumsted (n 361), 58.
[625] Saul (n 104), 112.
[626] Saul (n 104), 112.
[627] Saul (n 104), 4.

> *It shall be lawful for the Queen*, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the *Peace, Order and good Government* of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated;...[628]

Noteworthy legal scholars such as Richard, MacDonald, Chapnick, Killey, and even Justice Bora Laskin, former Chief Justice of Canada, have contributed comprehensive analyses concerning the omniscience of POGG in Canada from a domestic and/or international perspective.[629] As was established in previous chapters, Yusuf has evaluated relevant history and substantive theories to explicate the causal link between the breadth and scope of POGG in colonial and post-colonial Canadian constitutionalism. In aggregate, theirs are contributions that explain how POGG has been a part of the Canadian identity since shortly after the territory was conquered by the British Empire. They also explain how the purposeful inclusion of the POgG clause in Canadian colonial and constitutional documents makes it an essential aspect of Canada's modern national and international outlook.

From a domestic law perspective, these scholars focus on the effects of POGG by analyzing constitutional cases to explicate the POgG clause. They demonstrate how POGG remains central to delineating between legislative competencies (or enumerated powers) of the federal government (*i.e.,* Section 91 of the BNA) and the provincial governments (*i.e.,* Section 92 of the BNA).[630] To varying degrees, each of the aforementioned theorists have analyzed the central legal issue of how the POgG clause distinguishes national and provincial legislative competencies. To illustrate, Yusuf, Laskin, and Killey have evaluated cases like *Russell v. The Queen*, *Hodge v. The Queen*, and *Louis Riel v. The Queen ex parte Riel* as illustrative of judicial decisions that have sought to balance the aforementioned powers. Moreover, they claim that such balancing is sometimes achieved in a manner that invites criticism for pitting preservation of the POGG doctrine against upholding judicial

[628] Constitution Act, 1982, s 91 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
[629] *See generally,* Saul (n 104); Yusuf (n 103); Killey (n 104); Lithwick (n 104); Wilson (n 104); John Ralston Saul, 'The Roots of Canadian Law in Canada' [2010] McGill Law Journal 671; Chapnick (n 104); Laskin, 'Peace, Order and Good Government Re-Examined' (n 104); McLellan, Gall and Panneton (n 104).
[630] Constitution Act, 1982, s 91 and 92 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (n 628).

competence.[631] The collective position taken by these scholars could mean that upholding the POgG clause is the appropriate means of achieving judicial competence by continuing to further POGG. Although extensive analysis of these cases is beyond the scope of this study, each case considers a constitutional question centered on the clause—*vis-à-vis* the Queen's or federal government's—residuary powers that may emanate from national emergencies, gaps in the law, and/or aspects of lawmaking that may have both Dominion/Federal and provincial facets (*i.e.,* the double aspect doctrine), such as the legalization of faith-based legal exceptionalism.[632]

Theorists also provide support for the inference that because of Canada's espousal of POGG, her present and future identity on the international stage remains one of a middle-power.[633] For the sake of clarity, middle-power nations are those whose role in the larger international sphere—especially since the end of the Second World War—lack dominance and assertiveness in relation to super-power nations.[634] Although a full analysis of Canadian 'middlepowermanship' is also beyond the scope of this study, scholars allude to the fact that this is Canada's position because of the enduring resolve to remain committed to the myth of the perfect kingdom, even when the kingdom had ceased to exist.[635] The goal of this analysis is not to pass judgment on the way in which POGG has affected the governance scheme in Canada. However, it is fair to say that without a complete divorcement, it was unlikely that a different ideology and/or a distinct infrastructure could be introduced into any newly independent nation, let alone Canada's. According to Harvey, POGG brought with it a "history and constitutional development [that could not] be simply

[631] Yusuf (n 103), 137-40; Laskin, 'Peace, Order and Good Government Re-Examined' (n 104), 157-60; Killey (n 104), 40-50.
[632] *See e.g.,* Bora Laskin, 'The Supreme Court of Canada: The First One Hundred Years: A Capsule Institutional History' (1975) 53 Canadian Bar Review 459. Although beyond the scope of this study, scholarly contributions by Justice Laskin, MacDonald, and Richard collectively offer an excellent foundation for understanding the early constitutional analyses concerning the interplay between Sections 91 and 92 and the implications of the POgG clause on determining legislative subject matter jurisdiction.
[633] *See e.g.,* Robert W Murray, 'Middlepowermanship and Canadian Grand Strategy in the 21st Century' (2013) 14 Seton Hall Journal of Diplomacy and International Relations 89; Robert M Behringer, 'The Dynamics of Middlepowermanship' (2013) 14 Seton Hall Journal of Diplomacy and International Relations 9; David Cooper, 'Somewhere Between Great and Small: Disentangling the Conceptual Jumble of Middle, Regional, and "Niche" Powers' (2013) 14 Seton Hall Journal of Diplomacy and International Relations 23; Laura Neack, 'Pathways to Power: Comparative Study of the Foreign Policy Ambitions of Turkey, Brazil, Canada, and Australia' (2013) 14 Seton Hall Journal of Diplomacy and International Relations 53; Adam Chapnick, 'Middle Power No More? Canada in the World Affairs Since 2006' (2013) 14 Seton Hall Journal of Diplomacy and International Relations 101; Jeremy R Youde and Tracey Hoffmann-Slagter, 'Creating "Good International Citizens": Middle Powers and Domestic Political Institutions' (2013) 14 Seton Hall Journal of Diplomacy and International Relations 123.
[634] Behringer (n 633).
[635] *See e.g.,* Lipset (n 610), 24-36.

wished away."[636] Like the impracticability of getting rid of England's hereditary monarchy and established church, undoing the effects of POGG after such a protracted relationship, with all its implications, is a more challenging proposition than "merely…designing a constitution from scratch."[637] This explains the necessity of the divorcement between the American colonies and the Empire and why the constitutional philosophy of LLPH is unquestionably a premeditated act of shedding the remnants of POGG in order to establish a clean slate upon which to construct a new nation.[638] Thus, a fundamental truth about Canada and POGG is that being ideologically constrained by its legacy was inevitable.

For Canada, the constraints eventually facilitated the power to self-rule and subsequent independence. They also left Canada attempting to determine what self-rule and independence would entail. Underhill and Chapnick both contend that POGG was a consequence of Canada's historical need to differentiate itself from the United States.[639] According to Chapnick, "[s]ince America declared itself the land of life, liberty, and the pursuit of happiness, Canada had to become something else."[640] POGG expediently offered 'something else'. Even if the POGG doctrine never wholly represented the Canadian populous, as Saul claims, it is unquestionable that it represented those who remained loyal to the British Empire after the American War of Independence. Likewise, it came to represent the indigenous populous who because of their own internal conflicts found it expedient to assist those loyal to the British. By default, it also came to represent those who acquiesced when other alternatives were presented. To appreciate how this dynamic informs Canada's present approach to disestablishment, it is worth reevaluating the two prominent imperial forces at work in colonial Canada and how their animosity made embracing POGG conceivable.

4.3 '*Le Pays des Canadas*': Substitution of Colonizers & Enforcement of Belief

After the religious wars in France, the proliferation of Catholicism became an accompanying aspect of the settlement of New France and French social ordering.[641]

[636] Harvey (n 251).
[637] Harvey (n 251).
[638] David B Robertson, *The Constitution and America's Destiny* (Cambridge University Press 2009) 31-32.
[639] Chapnick (n 104), 641; *See also,* Frank H Underhill, 'Some Reflections on the Liberal Tradition in Canada' (1946) 25 Report of the Annual Meeting 5, 7-9 <http://id.erudit.org/iderudit/290014ar>.
[640] Chapnick (n 104), 641.
[641] William Wood, 'North America during the Seven Years' War /L'Amérique Du Nord Au Cours de La Guerre de La Conquête' (The Passing of New France: A Chronicle of Montcalm, 1915) 14.

Through the proliferation of Catholicism, a 'Frenchified' social order developed.[642] Since a principal condition of POGG was the proliferation of Anglicanism (which continued to perpetuate the British Empire's crusade against Catholicism), the subjugation of French influences not only suppressed the French approach to 'monarchial' supremacy and French Civil law, but also the religion that the colonists had come to embrace. This suggests that the 'sectarian bitterness' between the French and British left little room for colonial coalescence, which offers a cogent rationale for Canada's more recent efforts to promote cohesion, especially since 1982.[643]

Approximately fifty years before the British approached North American shores with intensions to colonize, the French and Spanish vied for territorial rights in North America. Dickason explains that French colonization of Canadian territory dates back to 1534, when the French began occupying large tranches of land that extended from the Gulf of St. Lawrence to the Gulf of Mexico.[644] Although colonial charters were issued by the French Crown as early as 1588, one of the first charters of record associated with Canadian colonization was the 1603 Charter to settle Acadia (Nova Scotia).[645] It was granted by Henry IV of France to Pierre du Gast, Sieur de Monts, instructing him to:

> people and inhabit the lands, shores, and countries of Acadia, and other surrounding areas, stretching from the fortieth parallel to the forty-sixth, and there to establish our authority, and otherwise to there settle and maintain himself in such a way that our subjects will henceforth be able *to be received, to frequent, to dwell there, and to trade* with the savage inhabitants of the said places…[646]

The charter afforded du Gast a monopoly on the fur trade and an appointment to the office of lieutenant-general "of the coasts, lands and confines of Acadia, Canada and other places in New France."[647] In return, du Gast had to populate the territory with 60 colonists a year

[642] Micah True, 'Maistre et Escolier: Amerindian Languages and Seventeenth-Century French Missionary Politics in the Jesuit Relations from New France' (2009) 31 Seventeenth-Century French Studies 59 <http://www.tandfonline.com/doi/full/10.1179/175226909X459696>.
[643] Ogilvie (n 606), 125; Saul (n 104), 111.
[644] Olive P Dickason, *The Myth of the Savage: And the Beginnings of French Colonialism in the Americas* (The University of Alberta Press 1997) 63-6.
[645] 'Charter of Acadia Granted by Henry IV of France to Pierre Du Gast, Sieur de Monts; December 18, 1603' <http://avalon.law.yale.edu/17th_century/charter_001.asp> accessed 12 August 2018.
[646] 'Charter of Acadia Granted by Henry IV of France to Pierre Du Gast, Sieur de Monts; December 18, 1603' (n 645).
[647] 'Charter of Acadia Granted by Henry IV of France to Pierre Du Gast, Sieur de Monts; December 18, 1603' (n 645).

and establish business enterprises with indigenous inhabitants.[648] He was also expected to convert the indigenous people to the Protestant faith.[649] Analogous to the first British charter to establish an American colony, the charter illustrates that evangelism was an imperative to French imperial pursuits in North America.

History reflects that Roman Catholicism became the primary religion in France by 1627. Like the pecuniary aspirations of Henry IV, Louis XIII through his chief minister Cardinal de Richelieu, issued a charter to *Compagnie des Cent-Associés* or 'the Company of 100 Associates' to officially settle New France and promote economic viability in the region.[650] According to the Charter, the Company was contracted to settle Canada based on the following:

> *… tout le pays de la Nouvelle-France, dite Canada », dont le territoire s'étend, d'est en ouest, de l'île de Terre-Neuve « jusqu'au Grand lac de la mer douce et au-delà », et du sud au nord, de la Floride jusqu'à l'Arctique. Parmi les privilèges octroyés par Sa Majesté figure le monopole de la traite des fourrures. La compagnie s'engage à établir 4 000 colons en quinze ans, dont 300 dès la première année*.[651]

Although available archives do not include the Religiosity clause, Wallace alludes to its existence.[652] It appears that Catholics and Protestants—*i.e.,* Huguenots—were initially meant to have equal access to colonize and evangelize in French-Canada, as a compromise resulting from the Religious Civil War that nearly destroyed the French Empire.[653] Thus, the clause stipulated that New France would be a Catholic settlement, because of fear that Catholics and Huguenots could not peaceably co-exist while concurrently colonizing the region.[654] Instead, the "danger of religious strife in the colony, such as that which had rent the mother country with civil war," resulted in the inclusion of a stipulation that "no

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[648] George MacBeath, 'DUGUA DE MONTS (Du Gua, de Mons), PIERRE – Volume I (1000-1700) – Dictionary of Canadian Biography', *Dictionary of Canadian Biography, vol. 1* (University of Toronto 2017) <http://www.biographi.ca/en/bio/du_gua_de_monts_pierre_1E.html> accessed 12 August 2018.
[649] MacBeath (n 648).
[650] Stewart Wallace, 'Religious History of Canada', *L'Encyclopedie de L'histoire du Quebec* (University Associates of Canada 1948) 186 <http://www.canadahistory.com/>.
[651] Robert-Joseph Pothier and Edmond Lareau, *L'Histoire Du Droit Français Depuis Les Origines de La Colonie Jusqu'aqu'a Nos Jours* (A Periard, Libraire-EDiteur 1888). Lareau citing Pothier in Lareau's 1888 text. Google Translation: "…the whole country of new France, 'Canada', whose territory extends from east to west from the island of Newfoundland 'to Great Lake of the Sweet Sea and beyond,' and from south to north from Florida to the Arctic. Among the privileges granted by Her Majesty is the monopoly of the fur trade. The company is committed to establishing 4,000 settlers in fifteen years, including 300 from the first year."
[652] Wallace (n 650).
[653] Wallace (n 650).
[654] Wallace (n 650).

colonists should be sent to New France who were not Roman Catholics."[655] Moreover, "this position remained in effect during the whole of the period of French rule," making New France "almost exclusively Roman Catholic."[656]

To proliferate Catholicism, Catholic missionaries were dispatched to the colonies of New France. Of note is Jesuit missionary Paul Le Juene, whose journals and letters detail his effort to spread Catholicism to the indigenous population of Canada from 1632 onward.[657] According to Micah True, the efforts to establish a colonial society was modeled after South American Catholic missions.[658] The indigenous inhabitants "were settled in European-style permanent villages where life was rigidly ordered around religion."[659] Moreover, the Jesuit missionaries "followed the example of their brethren in South America in envisioning the colony as a place that would be perfectly ordered and regulated by pious devotion to religion, and in which Amerindians could be 'Frenchified' and evangelized."[660] Thus the colonies evolved into largely homogenous religiously-centered communities. Despite homogeneity, the colonists of New France were not immune to the French Civil War or the conflicts between the French and British Empires. Neither the rivalry for territorial and religious supremacy nor colonization to aid in the proliferation of Christendom was unfamiliar to those who settled in New France.[661] The significant difference for the French-Canadian colonists is that by the time the British took over the region, they already espoused a non-Anglican faith as well as the French approach to social ordering. The competing religiously-political perspectives aligned with competing empires was not compelling enough to change their views on spirituality or the Frenchified social perspectives. That is until the integration of POGG further politicized religion by stripping away the socio-legal infrastructure that existed and making Anglicanism a legal condition of being a functioning member of British-Canadian society.

A subtle nuance that offers a distinction between France's approach to Catholicism and colonialism and the British Empire's imposition of Anglicanism returns to Henry VIII's break with the Church in Rome. Although the French overtly patronized the Catholic Church and

[655] Wallace (n 650).
[656] Wallace (n 650).
[657] True (n 642), 61.
[658] True (n 642), 61.
[659] True (n 642), 61.
[660] True (n 642), 61.
[661] Cole Harris, 'The French Background of Immigrants to Canada before 1700' (1972) 16 Cahiers de géographie du Québec 313 <https://www.erudit.org/fr/revues/cgq/1972-v16-n38-cgq2612/021058ar.pdf> accessed 12 July 2018.

promoted Catholicism in France to the point of civil war, the French Government and the Church were not the same infrastructure as it was with the British Empire.[662] As has been previously established, it was not until the loss of the American colonies that the British Empire adopted new tactics to spread Anglicanism.[663] These methods included essentially those employed by the French—*i.e.,* delegating evangelism to religious societies.[664] Carey notes that "the rupture created by the loss of the American colonies, [] led, in due course, to the creation of the first Anglican colonial dioceses, beginning with Nova Scotia in 1787 and expanding very slowly to include new dioceses in India, the West Indies, Australia, New Zealand, and Jerusalem."[665] Recall that in conjunction with the creation of Anglican dioceses, SPCK and SPG were also licensed in the American and Canadian colonies to practice "energetic Imperial Anglicanism."[666] These organizations saw that their imperial mission was to continue the "rivalry with Roman Catholic France and Spain."[667] As the British Empire continued to expand, these ecclesiastical agents adopted the imperial mission of rivaling any non-Anglican faith that it encountered.[668] Until the time of Great Britain's new approach, France *endorsed* the Church in Rome, while the British Empire *encompassed* the Church at home. Schlenther points out that, "[i]n lieu of a bishop, the [British Imperial] Governor acted as the effective head of the [Anglican] church, holding the right to license, appoint, and dismiss all clergyman."[669] As the American colonial charters demonstrate, the tolerance of other Christian denominations fluctuated at the will of the Governor appointed by the Crown or Parliament. A consequence of this situation is that there is strict separation between church and religion in France, while Great Britain still wrangles with a national religion and church, and the untidy optics associated therewith.

4.4 The Canadian Colonial Paradigm: Conquest under the 1763 Treaty of Paris

Britain's imperial pursuits in North America began and ended with two conflicts that occasioned expansion and retrenchment, respectively. The terms of these were memorialized by the signing of two treaties in Paris, with a span of twenty years between them. The first Treaty of Paris of 1763 officially ended the protracted conflict between the

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[662] Alan S Kahan, 'Religion in France', *Tocqueville, Democracy, and Religion: Checks and Balances for Democratic Souls* (Oxford University Press 2015) 148.
[663] Hilary M Carey, 'Gladstone, the Colonial Church, and Imperial State' in Hilary M Carey and John Gascoigne (eds), *Church and State in Old and New Worlds* (BRILL 2011) 156.
[664] Carey (n 663), 156.
[665] Carey (n 663), 156.
[666] Schlenther (n 404), 131-32; *See also*, Calhoon and Chopra (n 428), 102-03.
[667] Schlenther (n 404), 132.
[668] Schlenther (n 404), 132.
[669] Schlenther (n 404), 132.

British and the French. As is illustrated by Figure 4.1, the political boundaries of the North American continent before the 1763 Treaty reflects that the British Empire's colonial territories were split by French-America. Rupert's Land under the Hudson Bay Company—which would later become Manitoba (1870), Alberta (1905), and Saskatchewan (1905)—was to the north of New France and Louisiana and the thirteen colonies were to the east.

Figure 4.1: Imperial Transition before/after the 1763 Treaty of Paris[670]

[670] 'France in America: Map Showing Imperial Context in North America before the 1763 Treaty of Paris / La France En Amérique: Le Contexte Impérial En Amérique Du Nord Avant Le Traité de Paris de 1763' (*The*

The Seven Years' War (European theater) and the French and Indian War (American territory) were to a large extent part of the cost of building an empire on the backs of competing religious dogmas. According to Ward, the war was the "long-expected Armageddon between Catholic and Protestant [*i.e.,* Anglican]."[671] Accordingly, France and Great Britain—with the aid of supplemental belligerents, including the American colonies—were at war for the better part of seven years. On 10 February 1763, France, Spain, and Great Britain finalized the first Treaty of Paris, effectively ending both wars.[672] As is illustrated by Figure 4.1, the political boundaries of the North American continent after 1763 left the British Empire in possession of a large portion of the French Empire's North American portfolio. Although the 1763 Treaty transferred Canada from one empire to another, it was not the defining moment that started Canada on its way to becoming the defender of POGG. There were two crucial instances that substantially contributed to Canada's present constitutional character. One was initiated by the British Empire, and the other was the conscious choice made by Canadian colonists.

4.4.1 Nova Scotian Expulsion—The First Iteration of POGG in British-Canada

According to Yusuf, one of the earliest references connecting Canada with the POGG doctrine was in 1749, which was in "an instrument appointing Edward Cornwallis Governor of Nova Scotia by…George II."[673] The instrument conferred on the governor "full power & authority, to make, Constitute or Ordain, Laws Statutes & Ordinances for the [*Public peace, welfare & good Government*] of our said province and of the people and inhabitants thereof…"[674] After almost two centuries of systematic application in the American colonies, POGG was indeed a strategic doctrine that would also be the means to colonize the Canadian colonies. Conferral of the POGG power to Governor Cornwallis was undoubtedly a continuation of that doctrine notwithstanding what might have been the views of the colonists of New France or those who subsequently immigrated to British-Canada thinking

Library of Congress: Globarl Gateway, 2018) <http://international.loc.gov/intldl/fiahtml/map4.html> accessed 12 August 2018; 'France in America: Map Showing Imperial Context of North America after the 1763 Treaty of Paris / La France En Amérique: Le Contexte Impérial En Amérique Du Nord Après Le Traité de Paris de 1763' (*Library of Congress: Global Gateway*, 2018) <http://international.loc.gov/intldl/fiahtml/map5.html> accessed 12 August 2018.

[671] WR Ward, 'Religion after the Seven Years War', *Christianity under the Ancient Régime, 1648–1789* (Cambridge University Press 2012) 225.

[672] 'Treaty of Paris 1763' <http://avalon.law.yale.edu/18th_Century/Paris763.asp> accessed 18 August 2018.

[673] Yusuf (n 103), 68; *See also*, Halifax Military Heritage Preservation Society, 'Historical Paper No. 1: Edward Cornwallis' (2018) 1-2.

[674] Yusuf (n 103), 49.

themselves an extension of mainland British society.[675] Unfortunately, the loss of the American colonies did not facilitate an immediate period of reflection concerning imperial bureaucracy in achieving POGG, despite those same imperatives being central to Irish and American rebellion. The British Empire would unquestionably employ POGG again and again to colonize and Anglicize other overseas territories—*e.g.,* Australia in 1788, India in 1858, and Nigeria in 1901.[676]

In anticipation of usurpation, the British Empire began advancing the first imperative of POGG, notwithstanding the degree of religious tolerance purported to exist in British-Canada in 1749. As the Empire prepared to establish the Anglican Church in the Canadian colonies, the first order of business was establishing an environment for Anglicanism to flourish as the national religion.[677] To eliminate the need to actually 'tolerate' Catholicism in Nova Scotia, the Acadian colonists were collectively expelled.[678] Expulsion came in two waves, in 1755 and 1758, which deported the colonists mostly to other French territories—like Louisiana—or returned them to France.[679] In their place, the British Empire initially immigrated 2,600 European Anglicans, which was followed by "substantial immigration of English-speaking colonists, both from Britain and New England."[680] Delâge observes that the British conquests in Acadia were originally characterized by outrageous plundering.[681] After the occupation was decisive, "the British strove to shape Acadia on the systematic mode of social management. It became a matter of ensuring political loyalty, of securing conversion from Catholicism to [Anglicanism], and of modifying the integration model between colonists and Indians to one of apartheid."[682] In the process, the last two imperatives of POGG could be achieved. Specifically, Governor Cornwallis' appointment brought with it the British monarchial and parliamentary structure, which is analogous to

[675] Julie Evans and others, 'Imperial Expansion and Its Critics' in John M MacKenzie (ed), *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830s-1910* (Manchester University Press 2003) 20.
[676] Yusuf (n 103), 37.
[677] Schlenther (n 404), 147-48.
[678] 'The First Acadians' <http://acim.umfk.maine.edu/first_acadians.html> accessed 15 August 2018; 'Catholic Church-Acadian Culture in Maine' <http://acim.umfk.maine.edu/catholic_church.html> accessed 15 August 2018.
[679] Jean Daigle, 'Acadia of the Maritimes: Thematic Studies from the Beginning to the Present' in Christopher Hobson (ed), *The Acadian Diaspora* (Oxford University Press 2011) <https://www.oxfordbibliographies.com/view/document/obo-9780199730414/obo-9780199730414-0086.xml>.
[680] Evans and others (n 675), 20.
[681] Denys Delâge, 'Review: An Unsettled Conquest : The British Campaign against the Peoples of Acadia by Geoffrey Plank' (2018) 89 The Journal of American History 604, 604.
[682] Delâge (n 681), 604.

that which Cane ascribes to the American colonial infrastructure as early as 1607.[683] Despite any initial promises made to the French colonists concerning the retention of French property rights and Civil law, British-Canada's ability to self-rule was restricted in the same manner as in the American colonies: "the laws and statutes to be so made were not to be repugnant to but 'as near as may be agreeable' to the laws of Great Britain."[684] These noteworthy similarities not only evidence the British Empire's comprehensive imperial doctrine for colonization throughout North America, but are also relevant because they demonstrate the similar set of circumstances faced by American and Canadian colonies at the point of American rebellion.

4.4.2 The Treaty of 1763—Not a Game-Changer for the Quebecois

Despite the British Empire's proliferation of Anglicanism as a condition of POGG, much ado has been made about the extraordinary bandwidth afforded French Catholics when the British Empire gained New France.[685] However, juxtaposition of the terms and outcomes of the 1763 Treaty; the 1689 Act of Toleration; and the colonial charters for Maryland and Georgia reveals that there was arguably nothing out of the ordinary course of imperial business in the Treaty. The same degree of subterfuge accompanied them all. It also reinforces the premise that the British Empire never saw any other Christian denomination as equal to Anglicanism. Bulman suggests that the British Empire believed that "Anglican Christianity was the ideal civil religion," …offering "peace and virtue on earth, and salvation above."[686] As such, there was an apparent comparative/superlative game afoot concerning the view that Anglicanism was superior not only to Catholicism but all other non-Anglican faiths.

Prima facially, Article IV of the 1763 Treaty afforded protection of the religion of French-Canadians.[687] The Article provided that, "His Britannick Majesty, on his side, agrees to

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[683] Halifax Military Heritage Preservation Society (n 673), 1-2; Jacques Dube, 'Special Advisory Committee on the Commemoration of Edward Cornwallis and the Recognition and Commemoration of Indigenous History - Terms of Reference' (2017) <https://www.halifax.ca/city-hall/boards-committees-commissions/a-c/task-force-commemoration>. *See also*, Figure 3.2 at Chapter 3.
[684] Yusuf (n 103), 108.
[685] *See e.g.,* Thomas S Kidd, 'Act of Toleration (1689)' (*Encyclopedia Virginia*, 2017) <https://www.encyclopediavirginia.org/Act_of_Toleration_1689>; Gordon J Shochet, 'The Act of Toleration and the Failure of Comprehension: Persecution, Nonconformity, and Religious Indifference' in Dale Hoak and Mordechai Feingold (eds), *The World of William and Mary: Anglo-Dutch Perspectives on the Revolution of 1688–89* (Stanford University Press 1996); Mark Mancini, '10 Things You Should Know About The Treaty Of Paris (1763)' *Mental Floss* (New York, 31 July 2017) <http://mentalfloss.com/article/502826/10-things-you-should-know-about-treaty-paris-1763>; *See also*, 'Treaty of Paris 1763' (n 672).
[686] William J Bulman, 'Introduction: From Learning to Liberalism?', *Anglican Enlightenment : Orientalism, Religion and Politics in England and its Empire, 1648–1715* (Cambridge University Press 2015) 12.
[687] 'Treaty of Paris 1763' (n 672).

grant the liberty of the Catholick religion to the inhabitants of Canada: he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, *as far as the laws of Great Britain permit*."[688] However, it was well understood that Catholicism was all but illegal throughout Great Britain.[689] Thus, the British Empire approached Catholicism in the Canadian colonies the same way it did in Ireland and the American colonies of Maryland and Georgia.[690] Despite the provisions of Article IV, the British Empire limited the training and dispatch of Catholic clergy, which effectively shut down access to education in Quebec.[691] At the time the Treaty was instituted, every level of academia in the region was administered by Catholic missionaries and churches.[692] Where it concerned the monarchial and governmental infrastructure, the practical effect of the Treaty was that papists were prevented from holding public office in British-Canada.[693] Therefore, the Canadian legislature and judiciary were essentially Anglican enterprises, with the bandwidth to create laws that were 'as near as may be agreeable' to the laws of mainland Britain.[694] The groundswell that ended the way POGG affected the American colonies and briefly modified its effect in the Canadian colonies was American rebellion.

4.4.3 The Quebec Act of 1774—The Carrot/Stick Stratagem?

Recall from the previous chapter that the mistrust of the British monarchy and Parliament spread through the American colonies. The fissures in the façade of the relationship between the colonies and the Crown were fundamentally unrepairable less than a decade after the ratification of the 1763 Treaty. When George III issued his royal proclamation of rebellion in August of 1775, authorizing British officers to use their utmost endeavors to resist and quash the rebellion, the American colonies were for all intents and purposes lost to the British Empire.[695] The colonies officially declared their independence in the summer of 1776 with an official indictment of George III that was published for the international community to take notice.[696] As the POGG doctrine was cast-off in favor of LLPH, the colonies had begun functioning as a *de facto* national presence with a Continental

[688] 'Treaty of Paris 1763' (n 672).
[689] 'Catholic Church-Acadian Culture in Maine' (n 678); See also, Carey (n 663), 115-16.
[690] Recall the analyses from Chapters 2 and 3.
[691] John Douglas Belshaw, 'British North America at Peace and at War (1763-1818)', *Canadian History: Pre-Confederation* (BCcampus) <https://opentextbc.ca/preconfederation/>.
[692] Belshaw (n 691).
[693] Belshaw (n 691).
[694] Belshaw (n 691).
[695] Armitage, *Declar. Indep. A Glob. Hist*. (n 583), 33.
[696] Armitage, *Declar. Indep. A Glob. Hist.* (n 583), 4.

Congress acting on their collective behalf.[697] It was at this juncture that the trajectory of the Canadian colonists might have changed. The crucial opportunity that gave rise to Canada's commitment to Great Britain and the stringent adoption of POGG has come to be known by some theorists as the 'Great Refusal'.[698] Specifically, the U.S. Continental Congress broached the subject of unification with the people of Canada as early as 1774.[699] The motivation for the exchange is evidenced by Congressional communiqués sent to the people of Quebec in 1774 and 1775 and to British-Canada in 1776.[700] The objective of the first two missives was to raise awareness of the rights that French-Quebecois were denied under the 1774 Quebec Act and to gain support for American *and Canadian* independence.[701]

For some who claim that the American colonies were disingenuous in their attempts to aid the Quebecois, they often buttress their position by pointing to the American colonies' aid in the expulsion of the French from North America during the 1760s.[702] Specific attention is afforded the fact that Benjamin Franklin favored the British Empire's usurpation of French territory.[703] According to excerpts from Franklin's correspondence, he believed that it was in the British Empire's best interest to remove France from the American continent to suppress the prospect of future territorial confrontations.[704] This reality notwithstanding, the American colonial rebellion apparently precipitated a change in circumstances that altered previous perspectives and alliances. As Franklin aided in authoring the American Declaration of Independence, it can be inferred that his was one of those perspectives that changed. It can also be inferred that if Franklin understood the benefit of expelling the French, he could also appreciate the doggedness of the British

[697] Alden (n 237), 154.
[698] Underhill (n 639), 7-9; Chapnick (n 104), 641.
[699] *Secret Journals of the Acts and Proceedings of Congress: From the First Meeting, Thereof to the Dissolution of the Confederation, by the Adoption of the Constitution of the United States* (Thomas B Wait 1821) <https://archive.org/details/secretjournals01unit/page/n6>.
[700] 'Continental Congress to the Inhabitants of the Province of Quebec' <http://press-pubs.uchicago.edu/founders/documents/v1ch14s12.html> accessed 12 August 2018; 'Journals of the Continental Congress - Letter to the Inhabitants of Canada: May 29, 1775' <http://avalon.law.yale.edu/18th_century/contcong_05-29-75.asp> accessed 12 August 2018; *Secret Journals of the Acts and Proceedings of Congress: From the First Meeting, Thereof to the Dissolution of the Confederation, by the Adoption of the Constitution of the United States* (n 699).
[701] 'Continental Congress to the Inhabitants of the Province of Quebec' (n 700); 'Journals of the Continental Congress - Letter to the Inhabitants of Canada; May 29, 1775' (n 700); *Secret Journals of the Acts and Proceedings of Congress: From the First Meeting, Thereof to the Dissolution of the Confederation, by the Adoption of the Constitution of the United States* (n 699).
[702] Wood (n 641), 14-15.
[703] Benjamin Franklin, 'Benjamin Franklin, The Interest of Great Britain Considered, With Regard to Her Colonies, 1760, Excerpts' <http://nationalhumanitiescenter.org/pds/becomingamer/american/text1/franklinbritainconsidered.pdf> accessed 16 August 2018.
[704] Franklin (n 703).

imperial engine. Therefore, it is plausible that Franklin understood that the American colonies' best interest would be served by removing Great Britain—*vis-à-vis* British-Canada—from the American continent for the same strategic reasons that it was beneficial to remove the French.

It is well established that the American colonies were heavily involved in the conflicts with the French that brought about the 1763 Treaty. Such intimate involvement supports the proposition that the colonies were keenly aware of what Voltaire meant when he spoke about French-Canada and the relentlessness of the British Empire:

> Great Britain…having already provided [the American colonies] with a much larger population, will not tolerate the presence of another European power in that area and will relentlessly attack Canada until such presence is ousted. Given the enormous disproportion in population and material resources between the French and British colonies in North America, [and] the impossibility of modifying that imbalance in the foreseeable future…[*Britain will inevitably prevail sooner or later*].[705]

It has also been demonstrated that the American colonies had intimate knowledge of the inner workings of the imperatives of POGG. As has been demonstrated, the constitutional phraseology had been reiterated throughout American colonial charters since 1607. Mancini and Alden point out that prior to the 1763 Treaty, the only thing keeping the American colonies loyal to the British Crown was the threat of invasion by French-Canadians.[706] This is especially the case as the 1763 Treaty reignited issues concerning imperial taxation without colonial representation; the colonies right to self-governance; and the British Empire's reiteration of its power to pass any laws over the colonists that it saw fit.[707] It is reasonable to conclude that just because the American colonies were for the British Empire against French-Canada in 1760 does not mean that the colonies would remain for the British Empire against the Quebecois when the prospect of independence was up for grabs. If there was ever a time for priorities to shift, this was it.

Somewhere between 1763 and 1774, the benefit of liberating Canada from Great Britain and gaining it as part of an independent America was undoubtedly in the minds of those in power in the American colonies. Canadian independence provided the means of removing the British Empire's influence—*vis-à-vis* the POGG power—from the entire American

[705] Haydn Mason, 'Voltaire and War' (University of Bristol); 'The Complete Works of Voltaire, Vol. 106, Correspondence XXII' <http://www.voltaire.ox.ac.uk/>.
[706] Alden (n 237), 226-27; Mancini (n 685).
[707] Mancini (n 685).

continent. As such, the American colonies attempted to align with Canada and lessen the likelihood of repeated territorial confrontations as well as attempts by the British to exert control over the newly formed United States.[708] Similar to the British Loyalists living in the American colonies, French- and English-speaking Canadian colonists refused to side with the American colonies, because frankly, they did not believe the colonies would prevail.[709] Some scholars suggest that French-Canadians opted to take the 'wait and see' approach with the expectation of establishing alliances based on the post-war landscape.[710] As the Loyalists were those who left the American colonies in favor of the British Empire, their mass exodus evidenced their choice.

Recognizing the possibility of losing parts or the whole of British-Canada to the American cause, the British Empire issued the Quebec Act of 1774, in which the imperatives of POGG play a conspicuous role. As the Act was repealed almost immediately after the conclusion of the War of Independence, it appears to have been little more than a carrot on a stick. In other words, the timing and assurances made by the Act in the grand scheme of things were simply too good to be true. As such, the Quebec Act was most likely a calculated attempt to appease French-Canadians while American colonial relations digressed toward war. Nevertheless, there are those who espouse a different narrative.[711] In the text, *The Problem of Quebec: May–June 1774*, Peter Thomas contends that the Quebec Act, "was not hastily devised as an expedient to prevent the French Catholic inhabitants of Britain's newly conquered colony from joining the older settlement colonies of North America in rebellion."[712] Attributing the timing to an unusually busy legislative term and a series of shifts in Parliamentary leadership and responsibilities related to British North America, Thomas opines:

> Before the Boston Tea Party the North ministry had made the decision to introduce legislation on Quebec in the Parliamentary session of 1774. There is no clear evidence that the timing of the measure—its introduction at the end of an unexpectedly busy session—was in any way motivated by the desire then to retain the loyalty and support of Canada in any impending clash with the colonies further south.[713]

Instead of being contrivance on the part of the British Empire, Thomas proposes that the concessions of the Quebec Act were "statesmanlike provisions" that were "enlightened in

[708] Alden (n 237), 206.
[709] Alden (n 237), 200.
[710] Alden (n 237), 200.
[711] Thomas (n 477), 88-120.
[712] Thomas (n 477), 88.
[713] Thomas (n 477), 88.

the context of contemporary prejudices."[714] In other words, the British turned away from its deeply held intolerance of Catholicism and hatred of the French, which prevailed throughout the British Empire, to embrace the French-Quebecois. As it relates to Thomas' contentions, this altruistic gesture represented a new way of thinking in the empire.[715] This was the case notwithstanding the fact that the British did not pursue a similar course during the virtually concurrent settlement of the American colony of Georgia, where religious demographics were comparable.[716] Accepting Thomas' perspective as accurate, the Quebec Act could be perceived as an excessively magnanimous overture by British Parliament and its monarch, George III.

With all due respect to Thomas' contentions, the Act undoubtedly represented shrewd stratagem instead of a late add to 'an unexpectedly busy session'.[717] This becomes evident when the Act is appropriately evaluated in light of the imperatives of POGG and George III's views on his royal prerogative.[718] There can be no doubt that the two circumstances—*i.e.,* the prospect of Quebecois rebellion and the certainty of American rebellion—contributed to Britain's newly-adopted broadmindedness. The Act came just in time to counter the American colonies planned exodus that included encouraging Canadians to consider a joint endeavor. Why not tolerate a degree of political inconvenience to mitigate a rebellion that would be a short-lived colonial catastrophe?

Moreover, the British were well aware of the statistics in Quebec. Article IV of the 1774 Act acknowledges that "the Inhabitants whereof amounted, at the Conquest, to above sixty-five thousand Persons professing the Religion of the Church of Rome."[719] Thomas offers a higher estimate, with Catholics in Quebec numbering as high as 150,000, with "only about 500 British settlers."[720] The imperial government could not simply treat Quebec as it had Nova Scotia; it was unfeasible and would have been a palpable motive for a 'joinder of claims' in favor of rebellion. Hence, Articles V and VI expediently gave the French-Quebecois that which they sought:

> That his Majesty's Subjects, professing the Religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and

[714] Thomas (n 477), 88.
[715] Thomas (n 477), 98.
[716] Georgia Historical Society (n 470). The only notable distinction was that Catholicism was brought to Georgia by the Spanish, while the French brought it to Canada.
[717] Thomas (n 477), 88.
[718] Recall the analysis at Chapter 3.
[719] 'The Quebec Act: October 7, 1774' <http://avalon.law.yale.edu/18th_century/quebec_act_1774.asp> accessed 17 August 2018.
[720] Thomas (n 477), 89.

> enjoy, the [*free Exercise of the Religion of the Church of Rome, subject to the King's Supremacy*,...][721]
>
> [*Provided nevertheless*:] That it shall be lawful for his Majesty, his Heirs or Successors, to make such Provision out of the rest of the said accustomed Dues and Rights, *for the Encouragement of the Protestant Religion, and for the Maintenance and Support of a Protestant Clergy within the said Province*.[722]

The provisions are analogous in terminology and effect as those employed in relation to Ireland as well as those integrated to varying degrees in the thirteen American colonial charters.[723] They afford a modicum of short-lived autonomy while ensuring not to diminish the supremacy of the Church of England, which would be enforced as the national church once the full breadth of British control was restored. Or in this case, the risk of loss had passed.

Like the provisional preservation of denominationalism, the British Empire also agreed to preserve the French colonial governmental and legal infrastructure. Article XII of the Act conferred on Quebec a governor and council for colonial administration under French Civil law.[724] The governor and council were endowed with "Power and Authority to make Ordinances for the *Peace, Welfare, and good Government,* of the said Province, with the Consent of his Majesty's Governor, or, in his Absence, of the Lieutenant-governor, or Commander in Chief...."[725] However, the most telling bit of the provision is the last four words thereof, "*for the Time being*."[726] Notwithstanding what French colonists understood about the British Empire's laws related to 'settlement, conquest, or cession', the Empire never intended to honor those commitments beyond a convenient period of time.[727] Saul observes that colonialism creates an "imaginary special position inside the mythology of someone else's empire."[728] Moreover, he cautions that 'the special position' is illusory because empires have their own agenda.[729] This was arguably the case here. The British returned to the business of empire at its earliest opportunity, which conveniently turned out to be less than a decade after the 1783 Treaty recognized American independence and

[721] 'The Quebec Act: October 7, 1774' (n 719).
[722] 'The Quebec Act: October 7, 1774' (n 719).
[723] Recall the analysis at Chapter 2 as well as 3.
[724] 'The Quebec Act: October 7, 1774' (n 719).
[725] 'The Quebec Act: October 7, 1774' (n 719).
[726] 'The Quebec Act: October 7, 1774' (n 719).
[727] 'Patterns of Colonial Governance and Law' <https://web2.uvcs.uvic.ca/courses/lawdemo/mod02/MOD2C.htm> accessed 9 November 2018.
[728] Saul (n 104), 19.
[729] Saul (n 104), 19.

gained the United States much of the territory that the French had ceded to the British under the 1763 Treaty.[730] More importantly, it occurred when the window of opportunity for Canadian liberation and independence had sufficiently closed.

4.4.4 The Prospect of Canadian Independence & the Practicality of Aid

In evaluating the connection between the 1763 Treaty and the 1774 Quebec Act, there are scholars who contend that the religious terms of the Act actually caused American rebellion.[731] As if Catholic intolerance was a creature of colonial America's making, Metzger submits that, "the toleration granted to Canadian Catholics by the Quebec Act so offended religious prejudices in the Protestant colonies and so aroused the colonists against the authors of the measure that the act may be classed as a primary cause of the [American] Revolution."[732] The issue with this line of reasoning is that it continues to advance the distorted perception that American colonists saw Anglicanism as a fellow beleaguered denomination of Protestantism. This misconception allows for an inaccurate shift of responsibility for authoring colonial anti-Catholic propaganda from the British Empire to the American colonies. Further, this line of reasoning discounts the aims of American independence, which above all else was 'Liberty'.[733]

Anglicanism has often been designated as a sister to or extension of Catholicism because the Henrician split from the Catholic Church did little more than fully entangle the British monarchy with the Church of England.[734] As has been illustrated, the Church of England continues to declare historical lineage to the Catholic Church. Moreover, the propagation of the Church of England as the established church—and Anglicanism as the established religion—in the American colonies was the first imperative of POGG when it was instituted there. This was the case notwithstanding the desires of the non-Anglican denominations who immigrated to the American continent to put some distance between themselves and the British monarchy and the Anglican/Catholic religious vendettas. In the American

[730] *See* Figure 4.1.
[731] *See e.g.,* Robert A Ferguson, 'The Dialectic of Liberty: Law and Religion in Anglo-American Culture' (2004) 1 Modern Intellectual History 27; Leonard W Labaree and Charles H Metzger, 'Review : The Quebec Act : A Primary Cause of the American Revolution' (1938) 11 The New England Quarterly 663; Geoff Smock, 'Blame Canada: The Quebec Act & the American Revolution' *Journal of the American Revolution* (12 January 2017) <https://allthingsliberty.com/2017/01/blame-canada-quebec-act-american-revolution/> accessed 18 August 2018; Thomas (n 477); David Brian Robertson, 'The Constitution from 1620 to the Early Republic' in Mark Tushnet, Mark A Graber and Sanford Levinson (eds), *The Oxford Handbook of the US Constitution* (Oxford University Press 2015).
[732] Labaree and Metzger (n 731), 663.
[733] Ferguson (n 731), 27-8.
[734] Recall the analysis at Chapter 2.

colonies, Anglicanism was seen as the 'ecclesiastical arm of Imperialism,' and those who aided in the imperial mandate were given labels like 'Anglican Jesuits' and 'storm-troopers'.[735] Schlenther highlights the yoke created by Anglicanism, when he implies that the British Empire spent decades attempting every means fair and unfair to push Anglicanism on American colonies as well as "draw back into the fold those sheep whose…forebears had escaped the Church of England in order to seek their own New World ecclesiastical pastures."[736] He also contends that from "the non-Anglican perspective, it must have seemed as if what their forefathers had fled now threatened them in their American haven."[737]

It is convenient to identify Anglicanism as an outgrowth of Protestantism because of the timing of Henry's infamous dissociation with the Church in Rome. Scholars also appear to do so in a lazy attempt to cluster all those who espouse Christianity in one collective belief-bucket for the purpose of comparison, contrast, and/or scrutiny. However, it is well-established that the motives driving the Protestant and Henrician Reformations were not synonymous. Catholicism and Anglicanism were often mutually linked as religious substructures of the empires that sponsored them—as they continue to be linked today. As such, Protestant dissenters in the American colonies had no more trust in Anglicanism and the Church of England than they did in Catholicism and the Church in Rome.

The former's reputation predates the American colonial experience, as it was a consequence of the Protestant Reformation in the 16th century. Therefore, the pejorative perspective of Catholicism is undeniably of British establishment and propagation. The latter's reputation undoubtedly emanates from British Imperialism. It was arguably a consequence of the empire's efforts to utilize the imperatives of POGG as a system of colonization. As has been demonstrated herein, the mutual disdain displayed by the major empires that espoused the two faiths—*vis-à-vis* the French and British Empires—were the means of obstructing the development of many of the religious subgroups and denominations that established colonies in America.[738] At the core of these circumstances is the misconception that the American colonies were responsible for authoring anti-Catholic sentiment in British North America. According to Alden, the American colonies'

[735] Schlenther (n 404), 131.
[736] Schlenther (n 404), 130.
[737] Schlenther (n 404), 130.
[738] Gill (n 164), 62. Gill notes that the first proposition of religious intolerance in colonial America was that "minority denominations prefer religious liberty while dominant churches tend to desire government-imposed restrictions on upstart sects."

condemnation of the religious freedom granted to French-Canadians, which included "permit[ing] the Roman Catholic Church to collect tithes," was demonstrably attributable to the fact that it resulted in "discrimination against them…in favor of the inhabitants of French-Canada."[739] In other words, the sentiment resulted from the effects of encouraging faith-based legal exceptionalism.

Recall from the previous chapter, the English Crown supported Anglicanism against all other denominations represented in the colonies. It effectively gave societal and legal exception to those who espoused Anglicanism. Taken in tandem with the other 'intolerable' acts that were a part of the Quebec Act, the American colonies took issue with religious exceptionalism, which was common to imperial infrastructures and has become a common modern response to the promotion of multiculturalism. Myriad historians suggest that there was no love lost between Protestant colonists and the Catholic Church in colonial America.[740] However, blame shifting has promoted the suggestion that notwithstanding the remarkable prospect of liberty and independence, the American colonies so hated Catholics that they would go to war with their mother country. Moreover, the disdain was so strong that it made the colonies unwilling to aid or be aided by those who espoused the faith.

The content and context of correspondence to the Canadian people from 1774 to 1776 offer compelling contradiction to the theory of 'America's war on Catholicism'. Despite Great Britain's efforts to mandate colonial communication through imperial channels, the Continental Congress sent communiqués directly to the Quebecois after the British Empire adopted the Quebec Act in October 1774.[741] Moreover, the objectives thereof were known to British Parliament, which was well aware that the American colonies hoped to add (at a minimum) Quebec as an American state.[742] Not only did the 1774 correspondence outline the restrictions to colonial rights imposed on the Quebecois under the Quebec Act, but it also invited them to join the cause of independence, "not on the small influence of [their] single province, but on the consolidated powers of North-America…."[743] This initial letter

[739] Bumsted (n 361), 48-9.
[740] Janet Epp Buckingham, 'Freedom of Religious Expression', *Fighting over God: A Legal and Political History of Religious Freedom in Canada* (Montreal-Quebec University Press 2014) 3-5.
[741] *Secret Journals of the Acts and Proceedings of Congress: From the First Meeting, Thereof to the Dissolution of the Confederation, by the Adoption of the Constitution of the United States* (n 699).
[742] *Secret Journals of the Acts and Proceedings of Congress: From the First Meeting, Thereof to the Dissolution of the Confederation, by the Adoption of the Constitution of the United States* (n 699).
[743] 'Continental Congress to the Inhabitants of the Province of Quebec' (n 700).

also invited the colonists of Quebec to send delegates "to represent [the] province in the continental Congress to be held at Philadelphia on the tenth day of May, 1775."[744]

The 1775 correspondence extended a second petition to unite "in the defence of [their] *common liberty*…"[745] As Ferguson observes, "liberty in the eighteenth century was…the most cherished right that a people could possess…." "The very definition of liberty," Humphreys notes, "was freedom from arbitrary rule."[746] This was central to the actions and reactions of the American colonists.[747] As will be discussed more fully in the next chapter, the American colonies did not believe that Canadian and American *common liberty* was synonymous with common religion. It was instead synonymous with an idea of democracy in a republican form of government and a legal system that was common to all.[748] This is not dissimilar to the rationale buttressing the need for Common law in England instead of the laws arising out of Anglican Ecclesiastical courts. This idea of one law for all—which would also buttress the creation of American Common law—in turn would allow for the "most potent voice in religious expression."[749]

Recognizing their similar plight, and fully able to foretell Quebec's future course, the Continental Congress reaffirmed their common political and legal subservience as cause for friendship, instead of reduc[ing] [Americans] to the disagreeable necessity of treating [Canadians] as enemies."[750] The longstanding colonial condition of the two British territories left no doubt of the religious proclivities of the Quebecois. However, American colonists had arguably come to find the pitfalls of colonialism a bit more abhorrent than the comparative/superlative trappings of imperial-Catholicism versus imperial-Anglicanism. Unlike the French and British Empires, the American colonies were not seeking to colonize or usurp Canada. The Congressional missives evidence that—despite military tactics that included invading British-Canada as an act against the British Empire—the American colonies were looking to establish an alliance with their similarly-situated sibling.[751] Their objective was liberty against Imperialism, which America believed was to their mutual benefit.[752]

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[744] 'Continental Congress to the Inhabitants of the Province of Quebec' (n 700).
[745] 'Journals of the Continental Congress - Letter to the Inhabitants of Canada; May 29, 1775' (n 700).
[746] Humphreys (n 579), 21.
[747] Humphreys (n 579), 21.
[748] Ferguson (n 731), 27-8.
[749] Ferguson (n 731), 27.
[750] 'Journals of the Continental Congress - Letter to the Inhabitants of Canada: May 29, 1775' (n 700).
[751] Ferguson (n 731), 32.
[752] Ferguson (n 731), 32.

From a purely pragmatic perspective, there was no practical wisdom in making Catholicism a deal-breaker. If it were, then it is unlikely that the American colonies would have attempted to form an alliance with the French of Canada from 1774 to 1776; accept aid from France in 1775; or agree to a French-American alliance in 1778.[753] It is well established that many American colonists were non-Anglican subgroups and denominations; however, the correspondence with French-Canadians and the treaty with France demonstrate early attempts in the American states to separate religion from domestic and foreign policy. As will be explored more fully in the next chapter, this was also the stance of the U.S. Government during its war with the Barbary States (*i.e.,* Morocco, Algiers, Tunis, and Tripoli) from 1786 to 1816.[754] Despite efforts by the North African states to behave like other empires predicating government action on the recognition of national denominational supremacy—in that instance, a denomination of Islam—the United States approached the 1796 Treaty of Tripoli as international foreign policy.[755] As such, the U.S. did not attempt to proliferate or elevate a national belief system or church.

In the furtherance of colonial liberation, the French and American governments signed the Treaty of Alliance and the Treaty of Amity and Commerce on February 6, 1778, making France the first international realm to recognize the colonies as independent states.[756] It is well understood that, "the single most important diplomatic success of the [American] colonists during the War for Independence was the critical link they forged with France."[757] Instead of independence, the Canadian colonies opted to remain provincial Britons in whatever capacity that could be achieved. However, French-Canadian ambivalence subsequently shifted, as American colonial concerns transitioned into Upper and Lower Canadian provincial concerns, when the 'statesmanlike provisions' that conveyed a modicum of autonomy and religious deference were repealed in 1791.[758]

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[753] 'Treaty of Amity and Commerce Between The United States and France: February 6, 1778' <http://avalon .law.yale.edu/18th_century/fr1788-1.asp> accessed 18 August 2018.
[754] John P Burkett and Frederick C Leiner, *End of Barbary Terror : America's 1815 War against the Pirates of North Africa* (Oxford University Press 2006) <http://ebookcentral.proquest.com/lib/bham/detail.action?docID=272902.>.
[755] 'The Barbary Treaties 1786-1816 - Treaty of Peace and Friendship, Signed at Tripoli November 4, 1796' <http://avalon.law.yale.edu/18th_century/bar1796t.asp> accessed 19 October 2018; Burkett and Leiner (n 754).
[756] 'Treaty of Amity and Commerce Between The United States and France; February 6, 1778' (n 753).
[757] United States Department of State, 'French Alliance, French Assistance, and European Diplomacy during the American Revolution, 1778–1782' (*Office of the Historian, Bureau of Public Affairs*, 2018) <https://history.state.gov/milestones/1776-1783/french-alliance>.
[758] Smock (n 731).

4.5 POGG *versus* LLPH: The Importance of Remaining British

France's constitutional motto was and is styled, *'liberté, égalité, fraternité'* or 'liberty, equality, and fraternity'.[759] Although not formally adopted as France's national philosophy until after the French Revolution, the ideology was a facet of the rise of the first and second French colonial empires as a means of transforming Revolutionary France into a 'Republic of Virtue'.[760] As such, the British Canadian colonies effectively proceeded from one colonial ideology to another. The transition resulted in the new philosophy of POGG marginalizing French influences and people in Canada. Bourrie suggests that the transition is one from which "Quebec is still trying to adapt…[f]or most of their history, the descendants of the settlers of New France have fought against the political, cultural and social impact of the 'conquest'."[761] After the war for American independence, the Loyalists who charted British-Canada's constitutional direction became the most strident supporters of POGG in the British Empire, as well as the Commonwealth that was established thereafter. Chapnick points out that "[Canadians] chose to stay loyal to Great Britain, and grew proud of that loyalty."[762] Therefore, it is evident that despite the transfer of imperial power occasioned by the 1763 Treaty of Paris, it was actually the Quebec Act of 1774 that afforded the Canadian colonies a choice concerning their constitutional trajectory. Whether designated a colony, dominion, or province, the continuation of the British/Canadian 'overseas' paradigm, which set Canada on its way to becoming the bastion of POGG, stopped being British imperial encroachment and became a preference after 1776.

Within two years after the signing of the 1783 Treaty of Paris, it is estimated that 35,000 to 40,000 British Loyalists migrated to British-Canada to retain their place as British subjects, identifying strongly with their British heritage.[763] This estimate does not account for the thousands of Loyalists who initiated their departure as early as 1774, after opting to await the war's end on the mainland or in uncontested territory.[764] It also excludes those who switched sides mid-stream and joined the British militia encamped throughout the region. Lastly, it discounts 'late Loyalists,' who "abandoned the early Republic in response

[759] Michael J Hughes, 'Imperial Virtue: The Evolution of French Patriotism', *Forging Napoleon's Grande Armée : Motivation, Military Culture, and Masculinity in the French army, 1800-1808* (New York University Press 2012) 82-3.
[760] Hughes (n 759), 82-3.
[761] Mark Bourrie, 'The War That Made Canada' *National Post* (Toronto, 7 February 2013) <nationalpost.com/opinion/mark-bourrie-the-war-that-made-canada>.
[762] Chapnick (n 104), 641; Underhill (n 639), 7-9.
[763] Errington (n 486), 140; Bumsted (n 361), 64.
[764] Errington (n 486),140.

to offers of Canadian land made after 1791."[765] Among other things, the Act included, "generous provisions to encourage migration…cheap land, low taxes, and little oversight in the way of state authority."[766] Garcia suggests that at least fifteen thousand more American citizens defected in the late Loyalist wave between 1791 and 1800.[767]

Of those who left before and during the war, there were many whose residence in Canadian territory was not meant to be permanent. They expected to simply return to their homes and property in the colonies when the rebellious Patriots were quashed.[768] Once they realized that they were on the wrong side of history, countless Loyalists were denied reentry to the United States.[769] Even before affording Loyalists preferential treatment in British-Canada, the British Empire sought to retain control in the newly-formed American states by lobbying post-war exceptionalism for the Loyalists.[770] The Empire advocated to restore them to their previous status before the war, which included granting them American citizenship.[771] Just as the negotiations to secure Canada as the fourteenth state were futile, so too were appeals for the indemnification of Loyalists.[772] The newly formed nation was quite aware that accepting the returning Loyalists would result in a repopulation of those who remained loyal to the British Empire.[773] Moreover, it would have been a means to allow the British a foothold in controlling the destiny of her former colonies. According to the text of the preliminary articles of peace for the Treaty of Paris, the British Empire requested Congress' commitment to 'earnestly recommend' to American states that they hold returning Loyalists harmless for desertion.[774] However, the only state that did so in earnest was Massachusetts.[775] Other states "would not comply immediately, fully, or unanimously."[776] Alden notes that "[i]if the Revolution contained an element of Genesis for the Patriots, it was Exodus for many of the Loyalists, including both men and women who could not safely return to their homes and Tories who preferred to begin life anew outside the United States and under the British flag."[777] The mass exoduses and lost rights of reentry arguably assisted in establishing Canada as different by degree while the

[765] Garcia (n 621), 595.
[766] Garcia (n 621), 591.
[767] Garcia (n 621), 595.
[768] Bumsted (n 361), 64.
[769] Garcia (n 621), 591-95.
[770] Alden (n 237), 493-94.
[771] Alden (n 237), 493.
[772] Alden (n 237), 494.
[773] Alden (n 237), 494.
[774] Bemis (n 593), 235-38.
[775] Alden (n 237), 493-94.
[776] Alden (n 237), 493-94.
[777] Alden (n 237), 494.

American states moved toward becoming a nation that was different in kind following the war.

Several scholars allude to the fact that British, British-Canadians, and Americans all upheld stories about the caliber of men and women who were lost or gained by pre- and post-war migration.[778] Each nation was guilty of debasing the other in order to promote their own national image and elevating their subjects/citizens. Like references to the myth of Britain's perfect kingdom, the 'myth' of superiority of stock was just that, a myth. Alden notes:

> [a]ll the disparate elements in the American colonial population were to be found among [the Loyalists], and in much the same proportions, with two exceptions. There were Negros among them, but only a few; there were Scots [from North Britain] among them, relatively many.... [t]he Jews supplied devout Loyalists as well as devout Patriots.[779]

Like those original migrants from the British Isles, the Canadian and American colonists were also from the same nucleus of common demography. These were overlapping societies whose lineage includes a national rebellion against the Roman Empire; consistent efforts to retain collective control of the British Isles against outside invaders; as well as episodic conflicts between and amongst one another for countrywide recognition and equality. The difference was one of perspective on being a part of the British Empire versus the perspective of being a free agent able to chart a different course. One might liken the perspective to that which the Irish felt when it separated from Great Britain, or even Great Britain's predecessors felt when Roman-Britain was finally free from the Roman Empire. It may even become the perspective that sweeps the United Kingdom when her secession from the European Union is finally complete. Notwithstanding the impediments that may transpire moving forward, the 'possibility of purpose' was (and is) the thing.

For those who chose British-Canada, they were assured that as long as the British Empire existed, their commitment to it meant that their wagons would be hitched to that imperial horse.[780] At the time, it was headed toward greatness, while the future of the American states was, 'yet to be determined'. Loyalists were afforded employment, real property, and new homes to build a new life in British-Canada to live as provincial Britons, even though there were not seen as such by those on the mainland.[781] Christianity—in the general

[778] *See e.g.,* Alden (n 237), 494; Buckner (n 609), 5; Bumsted (n 361), 43.
[779] Alden (n 237), 494.
[780] Garcia (n 621), 591-92; *See also,* Calhoon and Chopra (n 428), 102-03.
[781] Garcia (n 621), 591.

sense—remained the connective tissue between the British Empire and British North America. However, it has been established herein that the difficulties inherent in Great Britain's strategies to achieve POGG shifted religious, political, and legal ideologies in both the American and Canadian colonial regions. As has been demonstrated, POGG resulted in a shift away from the Empire's collectivist hierarchical view of social ordering toward a more individualist perspective in the American colonies. Instead of attempting to "preserve a historical source of legitimacy [where] government[s] derive[] its title-to-rule from a monarchy linked to church establishment," America sought to "overthrow an oppressive state…and create a type of government never seen before."[782] For the Canadian colonies, POGG had the opposite effect. Whether embraced or imposed, POGG became the cement for Canadian social ordering under British authority.

Once Canadians declined the opportunity for independence, the British Empire took the necessary legislative steps to memorialize the provinces' role as subordinate to the British Empire. The Constitutional Act of 1791 repealed the 1774 Quebec Act, instituted the POgG clause, and relegated Upper and Lower Canada by adapting each colony's constitution to that of the British Empire.[783] According to Hatter, the 1791 Act continued to further the imperatives of POGG by shaping the Canadian Government in Great Britain's image:

> A lieutenant-governor represented the monarchical element of government. The Legislative Council, representing the aristocratic element, consisted of members appointed by the Crown for life. Indeed, in a nod towards the hereditary British House of Lords, the Act reserved the right for the Crown to confer hereditary titles on members of the Legislative Council. Finally, an elected Legislative Assembly, representing the democratic element and mirroring the British House of Commons, completed the legislative structure of government.[784]

The 1791 Act also ensured that English property rights replaced French-Canadian 'seigneurial tenure'.[785] Likewise, Acts of Parliament established English law, rather than French Civil law in all criminal, civil, and property disputes in both English- and French-speaking regions of Canada.[786] 'For the time being' effectively elapsed with the integration of the legislative and juridical imperatives of POGG. Hence, Canada was to be "a model

[782] Lipset (n 610), 1.
[783] Lawrence BA Hatter, 'The Narcissism of Petty Differences? Thomas Jefferson, John Graves Simcoe and the Reformation of Empire in the Early United States and British-Canada' (2012) 42 American Review of Canadian Studies 130, 136.
[784] Hatter (n 783), 136.
[785] Hatter (n 783), 136.
[786] Hatter (n 783), 136.

British colony—a replica of the mother country—…a Superior, more happy, and more polished form of Government than [the republican form] found in the United States….which was too flimsy a fabric out of which to fashion a nation."[787] As such, British-Canada was well on her way to embracing POGG as the cornerstone of her continued connection to retaining Britishness.

4.6 The Antithesis to *The King's Peace*: Canada's *Welfare* under POGG

From 1791 to 1867, the imperatives of POGG continued to be more indicative of the direction of British-Canada's national character. Along the way, the phrase itself transitioned, as the British Empire seemed to have the foresight to distinguish the imperial/colonial dynamic between it and the Canadian provinces. Similar to the terms used with the American colonies—*i.e., civil order*—the constitutional phraseology of British-Canada transitioned from 'peace, *welfare*, and good government' to 'peace, *order*, and good government'. Numerous Canadian scholars have analyzed the significance of this linguistic variation, especially since the term '*order*' has been used far fewer times than '*welfare*' in Canada's constitutional documents.[788] Analyses diverge concerning whether the terminologies convey the same meaning. Considering the strategic nature of the British Empire's application of POGG, it seems highly unlikely that the change was arbitrary or meant to yield the same connotations. A noteworthy perspective concerning the dichotomy associated with the shift in terminology is addressed in Saul's text, *A Fair Country*. As it relates to the one-word substitution, Saul opines:

> [w]hat a difference one word can make. Peace, Order, and Good Government. What could such a phrase possibly mean? This, we are told, is our *liberté, égalité, fraternité*, our *life, liberty, and the pursuit of happiness*. And if it is boring by comparison, *well*, so be it. We are a careful, boring lot. In any case, this is the lot we must struggle against while, of course, remaining careful….
>
> …the real meaning of welfare over the preceding half-millennium was perfectly clear: faring well, well-being, bien-être, being well, fare ye well, good fortune, happiness, Bonheur, felicity. Used by a government, this was clear reference to the public good. The public weal. The welfare of the people. The welfare of the state. The welfare of the subject, who later became the individual.[789]

[787] Hatter (n 783), 136.
[788] *See e.g.,* Saul (n 104); Yusuf (n 103).
[789] Saul (n 104), 111.

Moreover, "the wellbeing of the individual within society" was central to the kingdom when kings actually ruled.[790] His description appears to be indicative of the concept of the King's Peace.[791] For Saul "[t]his was the just King, who wishes his subjects [above all else] to be treated justly, who [was] concerned with their welfare."[792]

Saul's description of the concept of the King's Peace evokes images of Geoffrey of Monmouth's Arthur Pendragon—the once and future king of Albion—and his idealistic realm of Camelot.[793] As has been noted in previous chapters, the imposition of POGG is seemingly where the King's Peace or the Peaceable Kingdom and the archetype for empire parted ways. The one-word substitution is arguable illustrative of the imposition of the three precise imperatives under a dozen monarchial personalities to achieve that objective. Therefore, it is not too far afield to suggest that the change established an imperial/colonial dichotomy similar to the one attempted in the American colonies from 1607 to 1776. As has been previously established, a notable similarity between Canadian and American colonists is that both believed their wellbeing should be paramount. However, the establishment of '*civil order*' and '*settled &* quiet *government*' and 'peace, *order*, and good *government*' demonstrate the Empire's effort to impress upon their colonies a condition of an imperial mother country and a collection of colonial daughters.[794] However, the Empire failed to consider that, "for the colonial power…one day the 'daughter[s]' would grow up and acquire full independence."[795] Therefore, Great Britain's plan undoubtedly signifies the establishment of colonial *order* for the benefit of imperial *welfare*, not necessarily the other way around.

The passage of the BNA in July 1867 and the replacement of *welfare* with *order* seemingly changed the way Canadians saw themselves. Saul notes that with the inclusion of order, "[their] legal, public description of [themselves], the concept of welfare…had been erased."[796] It was at this point—the point of full ideological submission—that the British conferred on Canada the limited right of self-rule. By recognizing the Dominion of Canada—

[790] Saul (n 104), 111.
[791] Recall the analysis of the *King's Peace* in Chapter 2.
[792] Saul (n 104), 116.
[793] *See generally,* Geoffrey of Monmouth, *The History of the Kings of Britain: Including the Stories of King Arthur and the Prophesies of Merlin: Amazon.Co.Uk: Geoffrey of Monmouth, C.V. Ruisdael: 9781511437318: Books* (C.V. Ruisdael ed, CreateSpace Independent Publishing Platform 2015).
[794] Anthony Pagden, 'The Law of Continuity: Conquest and Settlement within the Limits of Kant's International Right' in Katrin Flikschuh and Lea Ypi (eds), *Kant and Colonialism: Historical and Critical Perspectives* (Oxford University Press 2015) 23.
[795] Pagden (n 794), 23.
[796] Saul (n 104), 165.

i.e., the confederation of Nova Scotia, New Brunswick, and the colonies of Ontario and Quebec—Great Britain conceded to an incremental move toward the second aim of POGG.[797] According to Canadian historians, the move toward Canadian autonomy emanated from a number of national concerns, such as "the need for a common defense, the desire for a national railroad system, and [*the necessity of finding a solution to the problem of French and British conflict*]."[798] One of the most significant reasons for the provinces need for autonomy was the havoc that Great Britain's entangling religion and government wreaked on English- and French-Canadian relations. The contentious political environment that continued from the British Empire's promotion of Anglican social and legal exceptionalism is arguably one that has been felt by every British colony, notwithstanding the presence of other Christian denominations or non-Christian religious subgroups. This is a circumstance that the Canadian people—now fully independent and looking to refine their national persona—are left to repair in order to espouse a national identity inclusive of the original three ethnicities as well as the rest of its diverse population.

The effects of Great Britain's confounding church-state arrangement taken in light of Canada's move out from under its umbrella illustrates the common misconception that affording exceptionalism is the proper course for achieving cohesion in multicultural landscapes. As will be discussed more fully in subsequent chapters, recent requests for Islamic law exceptionalism, and/or suggestions that Islam is the answer to the ills of the West, emanate from the same fallacy. Moreover, the legacy of conflict between two 'imperialized' denominations of Christianity in Canada was also the situation in the American colonies. The issues associated therewith are what the American Constitutional Framers understood about religiosity when they drafted the 1st Amendment.[799] The conflicts also make clear the inaccuracy of suggestions concerning the innocuous nature of faith-based legal platforms, especially those associated with religions that remain tethered to present or former empires. These religious infrastructures and those who espouse them seem to demand allowances that almost never result in bi-lateral acceptance of the beliefs of others. Therefore, exceptionalism has seemingly become the

[797] 'Canada Act | Canada-United Kingdom [1982]', *ENCYCLOPÆDIA BRITANNICA* (Encyclopaedia Britannica, Inc 2018) <https://www.britannica.com/event/Canada-Act> accessed 19 August 2018.
[798] Staff, 'CANADIAN INDEPENDENCE DAY' (*HISTORY Around the World*, 2010) <https://www.history.com/this-day-in-history/canadian-independence-day> accessed 19 August 2018.
[799] *See e.g.,* Denise A Spellberg, *Thomas Jefferson's Qur'an: Islam and the Founders* (Knopf Publishing Group 2014); Max M Eding, 'Conclusion: The Constitution, The Federalists, and the American State', *Revolution in Favor of Government: Origins of the US Constitution and the Making of the American State* (Oxford University Press 2003).

short-sighted response to ethnic migration in post-colonial settings. Moreover, it seems to discount the possibility that it is discriminatory to the larger populous. As has been demonstrated, exceptionalism has not been proven to be anything more than overtly discriminatory. As will be demonstrated in the final two substantive chapters of this study, faith-based legal exceptionalism as a facet of multiculturalism neither promotes equity or equality nor achieves cohesion on any level.

4.7 Even in the Borderlands: The Enduring Effect of the POGG Doctrine

Despite a persistent connection to Great Britain's legacy of tethering Anglicanism to the functioning of her national government, Canada's accommodationist church-state arrangement has seemingly evolved into sound constitutional policy. It is a policy that has yielded a constitutionally prudent response to requests for faith-based legal exceptionalism. Moreover, it is a policy that can be effectively replicated while retaining constitutional integrity. In Canada's case, it "insist[s] on separation of church and state, yet retain[s] a posture of benevolent neutrality toward religion."[800] In practice, this policy has come to represent a more "secular and privatized" approach to religion, which attempts "to treat religion as…[an] individual belief system" whether "grounded in religion or in a secular morality [*i.e.,* secularism as religion]."[801] In comparison with the United States' separationist church-state arrangement, legal scholars suggest that the differences between their underlying perspectives are *de minimis*.[802] This and other similarities have continued to fuel considerable debate concerning whether disestablishment as it has been approached in the United States influenced Canada's post-1982 perspective.[803] This inquiry is especially germane in light of Canada's recent decision to ban faith-based legal exceptionalism, while the United States continues to ruminate over the issue as if her foundational history lacks prudent direction.

When making assessments about Canadian or American approaches to law and politics, there is a natural inclination toward comparison. According to Nick Baxter-Moore *et al.*, there has been a longstanding debate concerning the distinctness of the two nations whose essential cultural attributes and political customs emanate from their common

[800] Durham, Jr. (n 64), 1419.
[801] Ogilvie (n 606), 132.
[802] Durham, Jr. (n 64), 1419.
[803] Durham, Jr. (n 64), 1419-20.

British colonial heritage.[804] In their 2018 study focused on *Explaining Canada-US Difference in Attitudes toward the Role of Government*, Baxter-Moore *et al.* join the 'lively debate' by evaluating current contrasting hypotheses. These are centered on the work of Seymour Martin Lipset and those who refute his conclusions.[805] These studies concern the degree to which Canadians and Americans have diverged since the War of American Independence.[806] Lipset's text *Continental Divide: The Values and Institutions of the United States and Canada* starts with the basic proposition:

> Americans do not know but Canadians cannot forget that two nations, not one, came out of the American Revolution. The United States is the country of the revolution, Canada of the counterrevolution. These very different formative events set indelible marks on the two nations.[807]

As a country established as a refuge for counter-revolutionaries, Lipset claims that Canada's values stem from "the nation's founding constitutional principles of Peace, Order and Good Government, while American values are based on the aspirational goals of Life, Liberty and the Pursuit of Happiness."[808] Moreover, he suggests that these constitutional principles inform Canadian and American perspectives concerning the impact of religion on political perspectives; the manner that law functions in society; and the normalization of social stratification, which led to exceptionalism amongst specific subsets of society.[809]

Amongst Lipset's detractors are Edward Grabb *et al.,* who challenge his findings in *Defining Moments and Recurring Myths: Comparing Canadians and Americans after the American Revolution* (2000) and *Regions Apart: The Four Societies of Canada and the United States* (2005). According to Grabb *et al*., the socio-political value differences in Canada and the United States are wholly attributable to the respective cultural outliers—*vis-à-vis* the American South and Francophone Quebec.[810] Grabb *et al.* also suggest that "close

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[804] Nick Baxter-Moore and others, 'Explaining Canada–US Differences in Attitudes toward the Role of Government: A Test of S.M. Lipset's "Continental Divide'' ' (2018) 56 Commonwealth & Comparative Politics 472, 472.
[805] *See e.g.,* JF Conway and others, 'Canada and the U.S.: What Makes Us Different? A Response to Seymour Martin Lipset' [1991] Labour / Le Travail; Victor Konrad and Heather N Nicol, 'Border Culture, the Boundary Between Canada and the United States of America, and the Advancement of Borderlands Theory' (2011) 16 Geopolitics 70; Baxter-Moore and others (n 804); Edward Grabb, James Curtis and Douglas Baer, 'Defining Moments and Recurring Myths: Comparing Canadians and Americans after the American Revolution' [2000] Canadian Review of Sociology; Douglas Baer, Edward Grabb and William Johnston, 'National Character, Regional Culture, and the Values of Canadians and Americans' [1993] Canadian Review of Sociology/Revue canadienne de sociologie.
[806] *See generally,* Lipset (n 610); Baxter-Moore and others (n 804).
[807] Lipset (n 610), 1.
[808] Baxter-Moore and others (n 804), 473.
[809] Lipset (n 610), 1-18.
[810] Grabb, Curtis and Baer (n 805), 407-09.

examination of the values and attitudes of Americans who do not reside in the South and of Canadians outside Quebec fail to turn up significant differences across the Canada-US border."[811] In the text *Border Culture, the Boundary Between Canada and the United States of America, and the Advancement of Borderlands Theory,* Victor Konrad and Heather Nicol expound on the work of Grabb *et al.* by assessing whether the ideologies do more than have cross-national influence but instead combine to establish an amalgamated ideology.[812] Konrad and Nicol assert that where it pertains to POGG and LLPH, there is actually a convergence of values among citizens of both nations who live closer to the Canada-U.S. border and regularly interact.[813]

At this theoretical juncture, Baxter-Moore *et al.* attempt to fine-tune the debate by testing the validity of the distinctiveness of Canadian and American socio-political value systems concerning both constitutional ideologies. Sampling Canadian- and American-born university students, Baxter-Moore *et al.* evaluate those living within a 30-mile radius of each other in what is considered part of the hinterland of both nations (*i.e.,* universities in New York and Ontario closest to the Canada-U.S. border).[814] The 771 student-sample (*i.e.,* 431 Canadian- and 340 American-born students) offers insight into whether living in such close proximity and having frequent interaction results in Lipset's perceived, divergent values closing in on each other.[815] This question is especially significant where socio-political perspectives might be shaped less by the legacy of constitutional ideologies, and more by the effects of interacting with students in higher education on the other side of the border.[816] The survey produced by Baxter-Moore *et al.* covers a broad range of topics related to governmental responsibilities, such as hiring minorities and women, guaranteeing access to abortion, alleviating homelessness, regulating fire-arms, and accommodating customs associated with religious difference.[817] The findings concerning accommodation of religious difference—and the proper limits thereof—will be taken up in the next chapter. As it relates to Canada's POGG doctrine, the survey poses five questions that are useful in making inferences about the degree to which POGG continues to impact the socio-political landscape of modern Canada. Students were asked the following:

[811] Grabb, Curtis and Baer (n 805), 407-09; *See also*, Baxter-Moore and others (n 804), 473.
[812] Konrad and Nicol (n 805), 70.
[813] Baxter-Moore and others (n 804), 475; *See also,* Konrad and Nicol (n 805), 75-79.
[814] Baxter-Moore and others (n 804), 475.
[815] Baxter-Moore and others (n 804), 483.
[816] Baxter-Moore and others (n 804), 483.
[817] Baxter-Moore and others (n 804), 483.

Figure 4.2: Excerpt of International Survey of Attitudes on the Role of Government[818]

(1= strongly disagree; 2=disagree; 3=neutral; 4=agree; 5=strongly agree)

Q1	It is the responsibility of government to provide for the well-being of all of its citizens.
Q2	It is the responsibility of individuals to take care of themselves and their families.
Q11	Most of the time, I trust the government of Ottawa/Washington to do what is right.
Q12	Peace and order are more important than freedom of speech.
Q13	It is better to live in an orderly society than to allow people so much freedom that they become disruptive.

The outcomes of the study demonstrate consistency with a number of Lipset's contentions. Specifically, responses to questions 1 and 2 reveal that "Canadians are more likely than Americans to see the role for government in providing for family well-being and less likely to see this as an individual responsibility."[819] Where it pertains questions 11 through 13, responses allude to the fact that "Canadians in general are much more trustful of their federal government than Americans, but they are also more likely than Americans to value peace and order more than freedom of speech [a fundamental freedom], and to express a preference for living in an orderly society than one that prizes freedom more heavily."[820]

Based on these findings, it can be inferred that notwithstanding Saul's contentions that POGG is the preference of the 'empire-besotted elite', the doctrine's effects are still central to Canadian socio-political perspectives. This is the case notwithstanding whether Canadians live and educate themselves in close proximity to Americans. It would appear that the outlooks that came from British loyalty continue to impute to the Canadian Government an expectation to provide for the well-being of the Canadian family structure in exchange for steadfast loyalty to queen and country. This also seems to be reminiscent of what Saul's suggests about Canadians' expectations of POGG before *welfare* was replaced by *order*. As the POgG clause of the BNA implies, the Crown and later Parliament remains the residual guarantor of peace and civil order throughout the provinces.[821] These findings also suggest that preservation of the essence of POGG continues to rank higher than certain fundamental freedoms in Canada. The study specifically addresses freedom

[818] Baxter-Moore and others (n 804), 482.
[819] Baxter-Moore and others (n 804), 483.
[820] Baxter-Moore and others (n 804), 483.
[821] Constitution Act, 1982, s 91 and 92 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (n 628).

of speech.[822] However, does it also follow that if *speech* were exchanged with *religious expression* (*i.e.,* not freedom of conscious but acting of those beliefs) a similar outcome would result?

As it relates to Canada's decision to ban faith-based legal exceptionalism, it appears that there is a basis for concluding that achieving the aims of POGG was likely of implicit or explicit importance. Moreover, Canada's national trajectory is arguably consistent with furthering a legislative and juridical framework that promotes values that are 'common' to all Canadians. As has been demonstrated in this and the previous chapter, Canada and the United States have in common a colonial relationship with the imperatives of POGG as well as post-colonial adoption of disestablishment, despite the imperial enforcement of Anglicanism. However, ideological influence by proximity in this instance is not supported. In other words, Canada's decision not to sanction faith-based legal exceptionalism appears to have been by Canadians for the benefit of Canadians, which is as it should be when the inquiry is one of constitutional significance. As Canada has returned to her foundational roots to assess the question of faith-based legal exceptionalism, a relevant question is whether the United States will do the same? That is, will the United States return to her foundational ideals and commitments to address the question of Islamic law exceptionalism?

4.8 Post-Patriation Reconciliation: Bijuralism & the Charter

It has now been established that Canada's position on faith-based legal exceptionalism was not a restatement of the British Empire's established church-state arrangement or an espousal of the ideology of those living below the Canadian border. Therefore, it can be deduced that Canada's national policy appropriately endeavors to reconcile the following:

- The British Empire's colonial establishment of a religiously, linguistically, and ethnically disjointed populous;
- Relevant legislative competencies enshrined in §§ 91 and 92 of the BNA, which would likely necessitate selective augmentation or abrogation to accommodate religious law. This is especially case where certain provisions—*e.g.,* assessing interest, marriage and divorce, solemnization of marriage, and property rights—fall clearly within the legislative competencies of Federal or provincial governments.[823]

[822] Baxter-Moore and others (n 804), 483.
[823] Constitution Act, 1982, s 91 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (n 628).

- Relevant provisions of the Charter of Rights and Freedoms, which afford not only freedom of conscience and religion but also gender equality and equal protection under the law.[824]

As it concerns these aspects of pre-constitutional (*i.e.,* colonial law) and constitutional law, there is arguably no occurrence more suitable for consideration than the transfer of full sovereignty that brought about Canada's current legislative and juridical framework. Canada's 'patriation' of its constitutional documents from Great Britain in 1982 is the most significant achievement in fully relinquishing the last vestiges of the colonial-era POGG doctrine. This is the case even though the POgG clause remains part of Canada's constitution as a means to clarify Canadian federalism—similar to the Tenth Amendment to the U.S. Constitution, which clarifies "the relationship between Federal and state governments."[825] Canada's history—which has been discussed at length herein—also offers explanation for the importance of establishing a central legal framework for all Canadians, instead of going down a potentially unconstitutional road of affording exception to a subset of her citizenry based on religious proclivities.

It is well established that Canadian constitutional supremacy was not distinct from that of Great Britain until 1982; therefore, Canadian perspectives on democracy, responses to religious plurality, and/or judicial interpretations of the separation of religion and government were originally inherited from English law.[826] Laskin acknowledges that, as new provinces were added to British-Canada, "the British Monarch, the British Cabinet, the British Parliament and such British courts as the House of Lords and the Judicial Committee of the Privy Council…played major roles in the establishment of Canadian legal institutions and in the direction taken by Canadian law."[827] According to Girard, it was not until after World War II that the Canadian legislature and judiciary sought to exist beyond the shadows of 'British justice'.[828] Laskin further notes that after the war, it was finally "possible for the first time to contemplate deviation of Canadian law from British law in all its branches."[829] Before patriation, any major changes to Canada's constitutional law

[824] Charter of Rights and Freedoms, s 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (n 602).
[825] 'Tenth Amendment to the U.S. Constitution', *Legal Information Institute* (Cornell Law School 2018) <https://www.law.cornell.edu/constitution/tenth_amendment> accessed 13 November 2018.
[826] Laskin, *The British Tradition in Canadian Law* (n 83) xiii; Philip Girard, 'British Justice, English Law, and Canadian Legal Culture' in Phillip Buckner (ed), *Canada and the British Empire* (Oxford Scholarship Online 2011) 259-60.
[827] Laskin, *The British Tradition in Canadian Law* (n 83), xiii.
[828] Girard (n 826), 260.
[829] Bora Laskin, 'The Supreme Court of Canada: A Final Court of and for Canadians' (1951) 29 Canadian Bar Review 1038, 1069; *See also,* Girard (n 826), 260.

could only be made by British Parliament.[830] This made Canadian national sovereignty and constitutional supremacy illusory at best. Moving past the illusion apparently occasioned a paradigm shift for Canadian views on law and politics. This shift was influenced by Canadian lawyers and politicians who advocated in favor of distinguishing Canada's political and legal structures from the British model.[831] This meant embracing the supremacy of Canada's Constitution as comprehensive indication of Canadian law.[832] Recall that in the process Canada transitioned from Great Britain's political constitutionalist approach of lawmaking toward legal constitutionalism.

Due to the nature of Canada's establishment, the shift also necessitated the institution of 'bijuralism,' which is a juridical arrangement exclusive to Canada. Specifically, there are "two legal systems coexist[ing] in Canada, each having their own unique terminology, [*civil law*] in the province of Quebec and [*common law*] in the other provinces and territories."[833] According to the Justice Department, Canadian bijuralism is a measure of reconciliation from the Quebec Act of 1774:

> [a]s a legacy left by the colonisation of North America by France and Great Britain, Canadian bijuralism is an expression of the coexistence of the civil law and common law legal traditions in Canada. This coexistence found its first formal expression in the [*Quebec Act, 1774*].[834]

Consequently, Canadian "federal legislation, acts and regulations, must speak to four audiences when its provisions deal with private law matters: common law Anglophones, civil law Anglophones, common law Francophones, and civil law Francophones."[835] As is evidenced, the bijural status is neither occasioned by religious preferences, promoting religious determinants, nor steeped in Ecclesiastical law.[836] Instead, it is a reflection of the societal fragmentation that resulted from the British Empire's implementation of the legislative and juridical imperatives of POGG, while assuming that the degree of

[830] William C Hodge, 'Patriation of the Canadian Constitution: Comparative Federalism in a New Context' (1985) 60 Washington Law Review 585, 610-11.
[831] Bora Laskin, 'Canada''s Bill of Rights: A Dilemma for the Courts?' (1962) 11 International and Comparative Law Quarterly 519, 529.
[832] Laskin, *The British Tradition in Canadian Law* (n 83); Laskin, 'The Supreme Court of Canada: A Final Court of and for Canadians' (n 829), 1069; *See also,* Hodge (n 830), 610-11.
[833] Justice Canada, 'Third Series of Proposals to Harmonize Federal Law with the Civil Law of the Province of Quebec' (2008) <https://www.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/harmonization-loisdharmonisation.html#one>.
[834] Canada Department of Justice, 'About Bijuralism' <https://www.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/aboutb-aproposb.html> accessed 12 November 2018.
[835] Justice Canada (n 833).
[836] Canada Department of Justice (n 834).

incompatibility would eventually repair itself in favor of the British imperial way of life.[837] Likewise, Canada's accommodationist approach to disestablishment in conjunction with the rights guaranteed by the Charter of Rights and Freedoms remain overriding conditions of federal law under its bijural framework.[838] The practical effect of bijural status is that Canada's constitutional documents endeavor toward "equal treatment before and under the law, and equal protection and benefit of the law without discrimination…which is equally guaranteed to both men and women."[839] All of which are fundamental under Canadian federalism and can be limited only as is "justified in a free and democratic society."[840]

4.9 The Islamic Inquiry in Canada: POGG in the Post-Colonial Context

As the United States sought inspiration from other nations and developed a uniquely American approach to constitutionalism, so too did Canada. Girard explains that when Canada began moving toward legislative and legal autonomy, there was greater interest in governmental models of nations other than Great Britain, most notably Scandinavia.[841] One might be inclined to suggest that Canada's location in the West would result in undervaluing the governmental models in Muslim-majority nations, as there is nothing to suggest that, when Canada sought to fully devolve from the British Empire, she looked to the Middle or Far East for constitutional guidance. For this reason, it is worth noting that there are and were no similarly situated Muslim-majority democratic nations. For the sake of clarity, the 2016 iteration of *The Economist's Democracy Index* identifies Indonesia and Turkey as best and worst in the top five Muslim-majority nations espousing democratic ideals.[842] Neither of these nations were in this position leading up to 1982.[843] In 2016 however, the two nations ranked 48th and 97th, respectively, with 88.1% and 98.6% of the population espousing Islam.[844] Moreover, both nations were (and continue to be) plagued

[837] Canada Department of Justice (n 834).
[838] Canada Department of Justice (n 834).
[839] Canada Department of Justice (n 834); Charter of Rights and Freedoms, s 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (n 602).
[840] Charter of Rights and Freedoms, s 1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (n 602).
[841] Girard (n 826), 275.
[842] The Economist Intelligence Unit, 'Democracy Index 2016: Revenge of the "Deplorables"' [2017] The Economist 74, 7-11.
[843] United States Central Intelligence Agency, 'Introduction to Indonesia' (*The World Factbook* , 2018) <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html> accessed 13 November 2018; United States Central Intelligence Agency, 'Introduction to Turkey' (*The World Factbook* , 2018) <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html> accessed 13 November 2018.
[844] The Economist Intelligence Unit (n 842), 7-11.

by sectarian bitterness between Sunni and Shia Muslims, reminiscent of Canada's tumultuous history with Catholicism and Anglicanism.[845] This reality is also supported by the breadth of scholarly and political discourse focused on whether Western democracy and Islam might co-exist at any point.[846] By contrast, Canada ranked 6th in terms of a stable, liberal democratic government, which advocates disestablishment and equal treatment for men and women.[847] Therefore, it is reasonable for Canada to look not to nations that advocate religion/government entanglement or a return to problematic colonial practices. As such, the proper models were those that are either on par or surpassing Canadian performance.

There are some scholars who advocate for reassessments of Western democracy to account for the cultural practices of the nations from which immigrants may hail.[848] In Canada's case, this includes Arab, South Asian, and/or West Indian nations.[849] In response to those who espouse this viewpoint, it is easy enough to contend that the statistics speak for themselves. Instead, this appears to be one of the few instances where it is wholly appropriate to respond that Canada is not an Arab, South Asian, and West Indian nation. It is a nation formed by confederation of a collection of provinces established as a result of the British Empire's colonial pursuits on the continent of North America. It has a distinct history that encompasses—and therefore must evaluate—more than post-nineteenth century migration from Arab, South Asian, and/or West Indian nations. As Canada does not carry the weight of Imperialism that buttresses England's policies concerning faith-based legal exceptionalism, it can be inferred that the decision not to sanction a platform for the practice of Islamic law is neither discriminatory nor exclusionary.

Of course, there may be pockets within Canada's Islamic community whose responses and protests have had the effect of taking issue with the reality that Canadian law affords a

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[845] *See generally*, Carool Kersten, 'Secularism, Pluralism and Liberalism in Indonesian Muslim Contexts', *Islam in Indonesia: The Contest for Society, Ideas and Values* (Oxford University Press 2016); United States Central Intelligence Agency, 'Introduction to Indonesia' (n 843); United States Central Intelligence Agency, 'Introduction to Turkey' (n 843).

[846] *See e.g.,* Owen IV (n 62); Turner and Arslan (n 322); Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press 2010); Nader Hashemi, *Islam, Secularism, and Liberal Democracy: Toward a Democratic Theory for Muslim Societies* (2009); Rex Ahdar and Ian Leigh, 'Religious Freedom in the Liberal State' [2010] Religious Freedom in the Liberal State. Each of the texts and/or articles highlighted here is dedicated to answering the question of whether political-Islam or Islam in general can ever be compatible with liberal democracy.

[847] The Economist Intelligence Unit (n 842), 7-11.

[848] *See e.g.,* Kamaruddin, Oseni and Rashid (n 66); Tariq Modood, *Multiculturalism: A Civic Idea* (Polity Press 2007); U Khaliq, 'The Accommodation and Regulation of Islam and Muslim Practices in English Law' (2008) 6.

[849] Daood Hamdani, 'Canadian Muslims: A Statistical Review' <www.cdndawnfoundation.ca>.

broader array of rights than does Islamic law. Those same pockets may find it appropriate to punish those within the community for seeking protection or taking advantage of Canadian law, as an affront to the Islamic faith. However, hyper-magnification of those instances is not indicative of an error in Canada's decision not to sanction Islamic law exceptionalism. Instead, it is a testament to the need for Islamic law reform for Muslims living in Muslim-minority nations, which appears to be consistent with the scholarly discourse of theorists like An-Na'im and Manea. Likewise, it is instructive in why foundational perspectives are integral to constitutional decisions. Considering these factors, Canada's policy sends a clear message that it is not the role of Government to act as gatekeeper or policing agent against the interests of those who aspire to live under the tenets of liberal democracy. Notwithstanding views to the contrary, Canada's decision is recognition of the larger continuum of national progression in the promotion of "a posture of benevolent neutrality toward [all] religion."[850]

It is also important to understand that the aforementioned statistics on Turkey and Indonesia do not consider the denominations existing within religious subgroups—*e.g.,* Sunnis and Shias. If tribunals were sanctioned, the sectarian bitterness inherent between the two largest denominations of Islam might occasion the need for Canada's government to become embroiled in petitions to bifurcate Islamic law tribunals, as each might find their religious views worthy of separate adjudicators. Thereafter, Anglicans and Catholics may reassert their desire for government-sponsored Ecclesiastical courts, claiming a pre-existing constitutional right. In light of the full breadth of religious plurality, requests for extraordinary treatment based on distinctions could continue *ad nauseam*. This begs the question: *Where does it end*?

4.9.1 Legal Exceptionalism Does Not Multiculturalism Make

Recall that Durham, Ryskamp, and Hirschl collectively distinguish Canada's church-state arrangement as one where there is strict separation of church and state with an emphasis on multi-cultural accommodation. As many Muslim-majority nations promote the idea that religion and government are indistinguishable, analyses concerning the issues associated with Western nations espousing or returning to a similar perspective for the sake of inclusion seemingly turn on the possibility of only two outcomes: exceptionalism or disenfranchisement. As has been the case with Muslim migration, this dichotomy

[850] Durham, Jr. (n 64), 1419.

seemingly prevails notwithstanding how many religious subgroups—including the non-religious—are required to stand-down so Muslims can achieve exceptionalism.

Where it pertains multicultural accommodation, Canada's commitment to POGG has seemingly resulted in a line of demarcation that stops exceptionalism at the point of embracing non-democratic political ideologies and yielding to the domestic rule of law. Specifically, Canada's rule of law is imputed to not only those ethnicities present at the point of establishment but also later ethnic transplants.[851] This includes those who espouse the Islamic faith. This reality notwithstanding, the migration of Muslims created a recent need to evaluate the constitutionality of Islamic law tribunals functioning in a sphere beyond or within the Canadian legislature and judiciary. The accommodationist church-state arrangement that has emerged in Canada since it discontinued relying on the constitutional standards of the British set the backdrop for the question of accommodating Islamic law exceptionalism.[852] Questions concerning Islamic law tribunals initially emerged in Ontario. In 2003, "the Islamic Institute of Civil Justice proposed that Muslims have their own tribunals and a parallel legal system–Sharia law–in Ontario."[853]

Gender Equality Advocacy groups backed by Muslim women living in Ontario "argued that Sharia tribunals would undermine women's rights and 'push back Canadian law by 1,400 years'."[854] Specifically, Homa Arjomand of the International Campaign Against Sharia Court in Canada was quoted in an interview stating that, "…studying the decision of several arbitration cases…expose[s] how women are victimised by male-dominated legal decisions based on 6th century religion and traditions."[855] Much of the debates—which spread throughout the provinces—focused on the repressive circumstances created by application of Islamic law in Canada's democratic landscape.[856] The debates centered on the

[851] Alison Crawford, 'Shariah and Rules That Govern Religious Practices in Other Faiths Are Not to Be Feared, Spiritual Leaders Say' *CBC News* (20 September 2017) <https://www.cbc.ca/news/politics/shariah-religion-islamophobia-1.4295453>.
[852] *See* Marion Boyd, 'Ontario's "Sharia Court": Law and Politics Intertwined' in Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2017) 176-86.
[853] Candice Malcolm, 'Stop Normalizing Sharia Law in Canada' (*Toronto Sun*, 2017) <https://torontosun.com/2017/09/25/stop-normalizing-sharia-law-in-canada/wcm/e9de51b5-8aef-4a11-a1eb-79a87b570930> accessed 12 November 2018.
[854] Malcolm (n 853).
[855] James Sturcke, 'Sharia Law in Canada, Almost' *The Guardian* (London, 8 February 2008) <https://www.theguardian.com/news/blog/2008/feb/08/sharialawincanadaalmost>.
[856] *See e.g.,* Reiss (n 198), [III]; Elizabeth Kendal, 'Canada: Quebec Rejects Sharia to Preserve Equality and Rights' (2005) <http://www.ea.org.au/ea-family/Religious-Liberty/Canada--Quebec-rejects-Sharia-to-preserve-equality-and-right> accessed 3 October 2017; Anna C Korteweg, 'The Sharia Debate in Ontario: Gender, Islam, and Representations of Muslim Women's Agency' [2008] Gender & Society; Malcolm (n 853).

imbalance of power and/or lack of agency that certain members of Islamic communities lose under these legal schemes.[857] In other words, equality under the law essentially yields to patriarchal dominance. Thus, gender equality becomes essentially non-existent, making the voluntary nature of the tribunals illusory. Several interviews with Muslim women affirmed that they would feel unsafe living in Canada if Islamic law were sanctioned.[858] Beyond the concerns specifically focused on women, statistical data on the life choices of Muslims lean toward the need for a centralized rule of law. Recent reports by the Sound Vision Foundation suggest that there are approximately 750,000 Muslims living in Canada.[859] Of those, 32% are single, 59% are legally married, while 3.5% are divorced.[860] Another 2.9% are separated, while 7,540 Muslims are cohabitating or living in domestic partnerships (*i.e.,* whether these are hetero- or homo-sexual living arrangements is unclear), and 21,145 are single parents.[861] If these statistics are to be believed, then the subtleties of Muslim life appear to be proportionate with the larger Canadian populous.

In response to heightened public concern expressed in the media and through groups and individuals about the use of Islamic law in arbitrations, former Attorney General Marion Boyd was tasked to investigate the prevalence of Islamic law tribunals throughout Ontario.[862] Boyd's report recommended that Islamic law tribunals be allowed for the sake of judicial expediency.[863] The report suggested that there were legal benefits to Canadian Muslims being afforded the option to voluntarily submit civil disputes to these religious tribunals under the Ontario Arbitration Act.[864] However, the report failed to address how the body of law that emerged from tribunal decisions would filter into Federal or provincial court systems in Canada.[865] In line with the custom of following the U.K.'s lead, Canada initially moved in the direction of allowing Islamic law tribunals. Similar to the outcomes in

[857] Sherene H Razack, 'The "Sharia Law Debate" in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture' (2007) 15 Feminist Legal Studies 3; Maryam F Razavy, 'Faith-Based Arbitration in Canada: The Ontario Sharia Debates' (2010) <http://journals.cambridge.org/abstract_S0956618X00004725>.
[858] Malcolm (n 853).
[859] Abdul Malik Mujahid and Amerah Egab, 'Profile of Muslims In Canada' (*Sound Vision Foundation, Inc.*, 2018) <https://www.soundvision.com/article/profile-of-muslims-in-canada> accessed 14 November 2018.
[860] Mujahid and Egab (n 859).
[861] Mujahid and Egab (n 859).
[862] Marion Boyd, 'Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion' (2004) <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html>; Boyd (n 852), 176-86.
[863] Boyd (n 862).
[864] Arsani William, 'An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England' (2010) 11.2 Stanford Journal of International Relations 40, 41 <https://web.stanford.edu/group/sjir/pdf/Sharia_11.2.pdf>.
[865] Boyd (n 862).

the U.K. discussed in Chapter 2, the report and the decision triggered huge controversy concerning equality, judicial oversight, and the separation of government and religion. Ontario's government rejected the recommendation, and Ontario banned all faith-based arbitration tribunals in the province.[866] Likewise, Quebec's National Assembly supported blocking the use of sharia principles in Quebec courts.[867] Other provinces with fewer Muslim inhabitants followed Ontario and Quebec's lead. Presently, the national legislature has effectively rejected the use of Islamic law—or any other religious law—at any adjudicatory level, including arbitration.[868]

In evaluating the rationale for making Islamic law tribunals illegal, Saul offers insight into the 2004 sharia debate in Ontario specifically, but Canada generally. He notes that the debate was over "whether shari'a courts could be created to permit Islamic family arbitration in the province."[869] A question, which Saul notes, even divided the Islamic community.[870] Apparently, not every Muslim resident of Canada was in favor of integrating faith-based legal exceptionalism, especially when the practical effect was fewer rights for some Muslims without any oversight to correct the discriminatory imbalance. As a result, the tribunals were not perceived as a benefit to multiculturalism; instead, many saw the move as "the failure of multiculturalism" in Canada.[871] According to Saul:

> [e]ventually, the Ontario government decided that the problem was not Sharia courts of arbitration. Rather, the error lay in the broad decision some years before to permit any sort of religious family arbitration. The intention had been good…[b]ut the fall out was worse than the advantage gained. So these arbitration courts were banned for all religions. It had been a decade-long experiment that was finally put aside.[872]

Saul further notes that after the decision, the provincial government responsible for the choice in Ontario was re-elected, "with no signs…of cultural communities or ethnic minorities punishing the government for its decision."[873] Moreover, Muslim immigration to Canada has increased since Canada's decision.[874] This increase may have 'everything' to do with the fact that Islamic law exceptionalism is not legally sanctioned.

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[866] Razavy (n 857); Harvey Simmons, 'One Law for All Ontarians.' *The Toronto Star* (Toronton, 2010).
[867] Kendal (n 856).
[868] William (n 864); Malcolm (n 853); Saul (n 104), 148.
[869] Saul (n 104), 148.
[870] Saul (n 104), 148.
[871] Saul (n 104), 148.
[872] Saul (n 104), 148.
[873] Saul (n 104), 148.
[874] Saul (n 104), 148.

4.10 Conclusion

This chapter demonstrates the detrimental toll that sectarian bitterness and Anglican exceptionalism took on social interaction during the foundation of Canada. Canadian colonial- and post-colonial history appears to be a testament to the interplay between exceptionalism and disenfranchisement. If Canada desires to continue to promote a "free and democratic society," the national government can never forget that its infrastructure is not impervious to problems that emanate from being too cavalier toward foundational issues in an effort to appease later immigrants to the provinces. As will be discussed in the next chapter, the United States has been legislatively and judicially slack in this regard. This has been to her detriment, and the people who felt overlooked have used the ballot box to demonstrate their dissatisfaction.

As such, Canada appears to be taking the opportunity post-patriation to make clear her approach to constitutionalism. In the process, Canada must be cognizant of the fact that to again resort to religious exceptionalism as even the most well-meaning answer to multiculturalism would undoubtedly be tantamount to democratic regression. A primary question posed during the Islamic law debates focused on: *How accommodating Islamic law promotes multiculturalism*?[875] For Western nations that have disentangled religion and government, this question is of the utmost significance. In Canada's case, the answer was (and is): *It does not*.[876] As a nation with colonial ties to Canada, the question must also be addressed by her southern sibling. In light of the pitfalls of colonialism that led to rebellion, this question should remain central to any analyses concerning legalizing faith-based legal exceptionalism in the United States of America.

[875] Saul (n 104), 146-47.
[876] Saul (n 104), 146-47.

CHAPTER 5
OBSERVATIONS ON HEEDING FOUNDATIONAL PERSPECTIVES IN THE U.S.

> *"[**This Constitution**], and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; …."*[877]
>
> *****
>
> *"I'm Irish and you're German. But what makes us both Americans? Just one thing. One. Only one. The rule book. We call it the Constitution, and we agree to the rules, and that's what makes us Americans."*[878]

This chapter returns to the Islamic law inquiry in the United States to continue investigating the effects of the POGG doctrine to clarify foundational perspectives and to assess the prudence of sanctioning faith-based legal exceptionalism. Previous chapters establish that POGG was instrumental in framing perspectives on faith-based exceptionalism in England and Canada. Specifically, England extended legal exception to Islamic law, which is consistent with her colonial-era practices under POGG. In light of England's established church-state arrangement, the legacy of POGG has been carried forward to reinstitute faith-based legal exceptionalism notwithstanding how the decision affects the nation's shared values. Alternatively, Canada prohibited all forms of faith-based legal exceptionalism, which appears to be consistent with the nation's constitutional adoption of POGG as an aspect of federalism. Specifically, Canada's accommodationist church-state arrangement entails heeding her foundation history and continuing to foster a uniform rule of law for all of Canada, especially where Charter rights are concerned. The outcomes in England and Canada not only demonstrate the value of grounding such significant constitutional decisions in foundational principles, but they also offer justification for the divergent outcomes in other Western nations that may or may not find it prudent to sanction Islamic law exceptionalism.

Unlike England and Canada, the United States continues to ruminate over taking a definitive stance on Islamic law exceptionalism. Now that it has been established that POGG was also an American colonial phenomenon, this chapter analyzes the present situation in the U.S. to highlight how ambivalence has left unresolved certain foundational

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[877] U.S. CONST. art. VI, § 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[878] Sam Adams and Daniel Prothero, 'Obama Era Cinema: The Rule Book–Bridge of Spies and the Shifting Constitutional Battleground' [2016] *Little White Lies* <https://lwlies.com/articles/obama-era-cinema-bridge-of-spies-steven-spielberg/>.

issues that affect the perspective on religious law being indiscriminately entangled with American Common law. The first issue relates to an undervaluation of what the Framers' understood about Islam when drafting the U.S. Constitution. The next issue relates to the overemphasis on the amalgamative nature of Judeo-Christian denominations when evaluating the Framers' perspectives on disestablishment. These misconceptions are arguably consequences of disconnecting the causal link between POGG as a stipulation in constituting charters and the establishment of the original American nation-states. By attempting to correct the aforementioned misconceptions, this chapter will demonstrate how properly framing American colonial perspectives affords the proper basis for legislative and judicial consensus concerning faith-based legal exceptionalism in the United States.

5.1 Consequences of America's Vacillation on Islamic Law in U.S. Courts

The U.S. Congress and Supreme Court have had decades to respectively create legislation and binding legal precedent that endeavors to maintain the wall of separation between religion and government enshrined in the 1st Amendment. This indicates that they have also had decades to rebut any claim that the American legal system is a conduit for proliferating Christianity, which also negates the contention that non-Christian immigrants should be able to circumvent U.S. law on religious grounds. It is well understood that both branches of government have consistently endeavored toward a uniform rule of law that remains distinctly American—*vis-à-vis* creating legislation and legal precedent that is consistent with the U.S. Constitution and not a means to further the political ideologies, laws and/or religious objectives of other nations. Despite these realities and the intractable language of the Supremacy Clause and the separationist church-state arrangement buttressed by the 1st Amendment, the United States seems to be stymied by requests for faith-based legal exceptionalism.[879]

This is especially the case for those requests posed by Muslim advocacy groups in favor of holding Muslims to different legal standards than the rest of American citizenry. This specific request is based on a claim that Muslims are denied religious liberty in Western nations if the Quran and Sunnah are not the primary sources of law in their adjudicative matters.[880] Central to this claim is the fact that Common law often separates religion and

[879] First Amendment to U.S. Constitution. "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."
[880] Pew Research Center, 'The World's Muslims: Religion, Politics and Society: Beliefs About Sharia' (2013) <https://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia/>.

state, where they are considered an inextricable entity in the Muslim context.[881] As such, the aforementioned branches of government have avoided addressing what Professor Fish highlights as the "vexing question of how a liberal state can accommodate citizens whose religious commitments require them to be illiberal."[882] Branches of government appear to be treating this seminal constitutional question concerning the constancy and supremacy of the national rule of law as if its significance is solely attributable to accommodating multiculturalism and those negative perceptions of Islam that were exacerbated by 9/11. In this instance however, understating the issue's significance by cloaking it in 'political correctness' will not make the assessment any less essential to the future of the supremacy of the U.S. Constitution or juridical infrastructure.[883]

Since 9/11, approximately 32 of 50 U.S. states have put forth legislation with language to preclude foreign, international, and/or religious law.[884] It appears that the remaining third have opted to do nothing, or they have linked Islamic law exceptionalism with forms of religious accommodation, such as religious cloaks (*abayas*), face veils (*nicabs*), or head-coverings (*hijabs*). As a result of the timing of the requests, some state legislatures' responses to the Islamic law inquiry have been chalked up to conservative radical reactions to imaginary threats.[885] This is likely attributable to the fact that some state legislatures have acted with such singularity of focus on Islam that the judiciousness of furthering legitimate aims gets lost in the socio-political squabbling about the legislation's patent or latent promotion of Islamophobia. This notwithstanding, it seems unlikely that over two-thirds of U.S. states are over-dramatizing the prospect of integrating bodies of law where

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[881] Brougher (n 306), 5.

[882] Stanley Fish, 'Book Review: Dust Jacket' in Nicholas Adhar, Rex Aroney (ed), *Shari'a in the West* (Oxford University Press 2010).

[883] George Carlin, *When Will Jesus Bring the Pork Chops?* (Hyperion 2004) <https://www.goodreads.com/work/quotes/833245-when-will-jesus-bring-the-pork-chops>. Carlin makes a relevant observation concerning the way political correctness has become a gag order when questioning the limits of tolerance, which has seemingly resulted in the suppression of free speech for the sake of tolerance. He notes: "[p]olitical correctness is America's newest form of intolerance, and it is especially pernicious because it comes disguised as tolerance. It presents itself as fairness yet attempts to restrict and control people's language with strict codes and rigid rules. I'm not sure that's the way to fight discrimination. I'm not sure silencing people or forcing them to alter their speech is the best method for solving problems that go much deeper than speech."

[884] Jeremy Grunert, 'How Do You Solve a Problem Like Sharia? Awad v. Ziriax and the Question of Sharia Law in America' (2013) 40 Pepperdine Law Review 695, 695-696.

[885] *See e.g.,* Sarah Topy, 'Sharia Law in the Sooner State and Beyond: How the First Amendment Impacts the Future of Anti-Sharia Statutes' (2011) 80 University of Cincinnati Law Review 617; Uri Friedman, 'The Coming War on "Radical Islam"' [2016] *The Atlantic* <https://www.theatlantic.com/international/archive/2016/11/ trump-radical-islam/508331/>. Topy brands the concerned caused by Islamic law in American courts "xenophobic hysteria," while Friedman analyzes how 'radical Islam' has been taken seriously enough to create a new political agenda that is expected to change the way the United States fights terrorism.

the source materials are interpretations of religious texts from divergent belief systems. This is particularly significant as the move creates issues with sustaining the supremacy of the national rule of law in a nation that, since her international recognition of sovereignty, has built a codified body of law attempting to respect the constitutional separation of 'church and state'.

Where it pertains state legislatures' evaluation of Islamic law, the challenging consequences of integrating legal exceptionalism in the name of Islam is a subject that has been taken up by political scientists and legal scholars alike.[886] Besides the obvious issue concerning disestablishment, there is also the fact that the inextricable nature of religion and government that describes Islamic law is derived mostly from authoritarian regimes.[887] As such, it is not too far afield to suggest that any attempts to integrate interpretations of Islamic law will not only result in entangling church and state, but it may also result in attempts to balance tenets of American democracy with tenets of authoritarianism.[888] This is evidenced by the Democracy Fund's recent survey, which clarifies that although support for democracy is widespread in the U.S., "notable minorities display…fondness for authoritarian approaches."[889]

Moreover, labeling these consequences as an extension of multiculturalism appears to foster an imprecise understanding of what is actually occurring. This is demonstrated by the perplexing contradiction in making what appears to be unprecedented expansion to the limits of the Free Exercise clause of the U.S. Constitution to encompass social interactions that are customarily understood as civic in nature. The aims are manifested by attempts to read into the Constitution a basis for circumventing the national rule of law

[886] *See e.g.,* Mara Revkin, 'The Journal of Legal Pluralism and Unofficial Law Deprivatizing Islamic Law : An Argument for Judicial Interpretation of Shari ' a in American Courts' (2015) 47 The Journal of Legal Pluralism and Unofficial Law 37 <http://dx.doi.org/10.1080/07329113.2015.1008840>; Turner and Arslan (n 322); Shirish P Chotalia, 'Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective' (2006) 15 Constitutional Forum constitutionnel 63; Kimberly Karseboom, 'Sharia Law and America: The Constitutionality of Prohibiting the Consideration of Sharia Law in American Courts' (2012) 10 Georgetown Journal of Law & Public Policy 663; Grunert (n 884); Yaser Ali, 'Shariah and Citizenship - How Islamophobia Is Creating a Second-Class Citizenry in America' [2012] California Law Review. Similar to the discussion concerning public veiling, the discussion of Islamic law and sharia, constitutionality, and liberal democracy is long on discussion, but short on solutions due to the very subjective nature of religious belief. For this reason, this study attempts to consider the constitutional and foundational basis for assessing Islamic law exceptionalism.

[887] Richard Wike and Janell Fetterolf, 'Liberal Democracy's Crisis of Confidence' (2018) 29 Journal of Democracy 136, 137 <https://muse.jhu.edu/article/705724>.

[888] Wike and Fetterolf (n 887), 137.

[889] Wike and Fetterolf (n 887), 137; Lee Drutman, Larry Diamond and Joe Goldman, 'Follow the Leader: Exploring American Support for Democracy and Authoritarianism' (2018) <https://www.voterstudy group.org/publications/ 2017-voter-survey/follow-the-leader>.

for certain immigrants to achieve multicultural authenticity.[890] As was established at the beginning of this study, these ends are beyond what is generally understood as multicultural inclusion. They are also beyond what is understood as conscientious/ religious exemptions. Therefore, they give rise to a valid question of whether this is a move toward 'constitutional amendment by stealth'.[891] That is, where certain "political actors consciously establish a new democratic practice whose repetition [or normalization] is intended to compel their successors [or constituents] into compliance."[892] This is especially the case since this kind of exceptionalism associated with voluntary immigration appears to be unprecedented in the history of England, Canada, or the United States, except under imperialistic mandates associated with conquest or cession. When considered from this perspective, there is legitimate cause for more detailed analysis.

As it pertains America's juridical infrastructure, there does not appear to be consensus or uniformity concerning Islamic law or the possibility of Islamic law platforms becoming an aspect of ADR. Since the U.S. federal judiciary is constitutionally prohibited from issuing advisory opinions, and most state courts avoid them as well, actual cases or controversies generally set the floor and ceiling for determining the prudence of engaging with Islamic law or sanctioning Islamic law exceptionalism.[893] Recently, the American Bar Association's ('ABA') House of Delegates adopted a resolution opposing "federal and state laws that impose blanket prohibitions on consideration or use by courts or arbitration tribunals of the entire body of law or doctrine of a particular religion."[894] This is the case notwithstanding the fact that the U.S. Supreme Court has demonstrated that it is not averse to upholding the supremacy of American law by prohibiting entire bodies of law from any of

[890] Scott Milligan, Robert Andersen and Robert Brym, 'Assessing Variation in Tolerance in 23 Muslim-Majority and Western Countries' (2014) 51 Canadian Review of Sociology 239. According to *Et al*., "[r]ecent political developments in the Middle East and North Africa suggest an increasing appetite for democracy in the region, but have also failed to resolve the question of whether liberal democracy will sink deep roots….Islam still has a significant effect on intolerance in Muslim-majority countries, but that is largely because state and religion are so tightly intertwined."

[891] Kymlicka (n 34), 97; Kevin Vallier and Michael Weber, *Scopes of Religious Exemption* (2018) 138 <http://www.oxfordscholarship.com.ezproxye.bham.ac.uk/view/10.1093/oso/9780190666187.001.0001/oso-9780190666187-chapter-9>; Richard Albert, 'Constitutional Amendment by Stealth' (2015) 60 McGill Law Journal 673, 673 <https://www.erudit.org/en/journals/mlj/2015-v60-n4-mlj02270/1034051ar/>.

[892] Albert (n 891), 673.

[893] U.S. Const. art. III, § 2 cl. 1. An actual controversy is a constitutional requirement for federal courts that demands there be a real dispute between two parties capable of being resolved by the court, as opposed to a hypothetical case brought in an attempt to get the court to issue an advisory opinion, https://www.law.cornell.edu/ wex/actual_controversy; *See also,* The Editors of Encyclopaedia Britannica, 'Advisory Opinion', *Encyclopædia Britannica* (Encyclopædia Britannica, inc 2009) <https://www.britannica.com/topic/advisory-opinion>.

[894] American Bar Association, 'House of Delegates Resolution' (American Bar Association 2011) <www.philadelphiabar.org/…/WebServerResources/CMSResources/>.

the particular nations where this particular religion or—any other religion—is the majority belief system.[895] Maintaining that the rights enshrined in the U.S. Bill of Rights are beyond the vote, the ABA appears to have equated competing religious law platforms or the U.S. judiciary's engagement with religious law with the right of free exercise of religion enshrined in the 1st Amendment.[896] However, the national debate over the question of 'exceptionalism' suggests that there may be a misalignment between the rights enshrined in the Bill of Rights—as are equally applicable—and the exceptions that are claimed by some, which appear to be contrary to the Bill of Rights.

As if to address this national conundrum by installing American lawyers as the backstop for policing Islamic law within the U.S. judiciary, the resolution also declares that "American courts will not apply Sharia or other rules (real or perceived) that are contrary to our public policy, including, for instance, rules that are incompatible with our notions of gender equality."[897] The ABA's resolution notwithstanding, sidestepping this inquiry leaves unanswered questions about both branches of government tacitly approving the practice of Islamic law via unauthorized Ecclesiastical courts and/or national courts relying on religious texts for adjudicative purposes. As such, both branches have seemingly failed to fully scrutinize the national and international implications of America's vacillation on the Islamic law issue.

The void created by indecision appears to continue to encourage insularity concerning Islam instead of ranking it as one of the many U.S. religious subgroups with ideological variances. As has been previously established, an increasing number of legal scholars and political scientists are moving toward a consensus that there can be nothing enigmatic about Islam as a belief system that makes it fitting, or most importantly, constitutional to allow some Muslims—or other religiously conservative citizens—to circumvent the national rule of law because of a fondness for authoritarian principles or partiality for certain adjudicative outcomes that religious law affords. In reality, the question regarding faith-based legal exceptionalism has been answered in whole or in part by the occurrences that buttressed the War of Independence and America's Founding Fathers' constitutional responses thereto. By returning to that history, a foundational analysis allows for a proper

[895] C-SPAN, 'Scalia & Breyer: Constitutional Relevance of Foreign Court Decisions' <https://www.c-span.org/video/?185122-1/constitutional-relevance-foreign-court-decisions>.
[896] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The ABA Resolution cites to Justice Jackson: "The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond reach of majorities and officials to establish them as legal principles to be applied by the courts."
[897] American Bar Association (n 894).

reference point when the Constitutional Framers consciously decided to forgo adopting the laws of the British Empire, which included denominational and religious law exceptionalism as an imperative of the POGG doctrine.

As was evidenced in previous chapters, POGG "has a long legislative pedigree."[898] When first conceived, the associated imperatives were a means to extend the King's Peace throughout English lands. Recall that by the time it became a British imperial doctrine, there were different iterations of the doctrine—*vis-à-vis* 'civil order' and 'settled & quiet government'; 'peace, welfare & good government'; or 'peace, order & good government'—but the imperatives for furthering POGG remained unchanged. Therefore, Yusuf's conception of POGG as a conduit to control and later confer independence on Britain's colonial holdings affected both the American and Canadian colonies but to differing degrees.[899] The most notable consequence was American colonial rebellion/war, which stymied POGG's application in the American colonies and subsequent states. It also resulted in a redistribution of the colonial migration profile based on allegiances and religious proclivities. Canada became the bastion of POGG, while the United States became a champion for religious denominationalism.[900]

Therefore, it is necessary to understand that the Constitutional Framers' commitment to disestablishment was not just a response to colonial frustration with British imperial control. It was also grounded in setting the historical baseline for religious equilibrium amongst the many denominations already co-existing in the United States. The fact is that American rebellion made some form of religious tolerance a foregone conclusion, especially since it already existed in the form of the imperial establishment of Anglicanism. However, achieving equilibrium was the overriding objective, since it demanded that early Americans grasp the importance of not returning to the practice of comparative/superlative religious politics by installing another denomination as the national replacement to Anglicanism. This seems to be an under-evaluated aspect of American foundational

[898] Yusuf (n 103), 28.
[899] Yusuf (n 103), 7.
[900] Steven Waldman, *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty* (Random House 2009) xi. Waldman clarifies why the U.S. was not founded on a specific denominational perspective and how religious freedom in the U.S. was settled as a consequence of the British Empire's effort to have one religious denomination rule over others—*i.e.,* Anglicanism. *See also*, Lippy and Williams (n 425), 2. Lippy and Williams explain that denominationalism "emerged in Western societies as they searched for stratagems and policies other than coercion and repression for coping with the religious diversity and discord that emerged from the sixteenth-century reformations and seventeenth-century religious wars." Thus, it is plausible that the promotion of denominationalism in the U.S. is a response to the coercive and repressive nature of the religious imperative of POGG.

history. As it relates to Islamic law exceptionalism, the practical effects of affording such exceptionalism yield comparable outcomes to those that were present at the point of colonial rebellion. Put another way, the practical effect is the reestablishment of the comparative/superlative dynamic between religious denominations and/or subgroups. This is especially the case since requests for exceptionalism are buttressed in part by the theory that Islam is in some way exceptional. This is the case notwithstanding how well-meaning the theory of affording exception might appear when viewed through the lens of multiculturalism.

5.2 The Guise of Multiculturalism: Legislative & Judicial Interaction with Islamic Law

In the United States, only about one-third of U.S. states have actually passed legislation in response to requests for Islamic law exceptionalism.[901] For those that have attempted yet failed, noteworthy politically-charged cases such as those involving Muneer Awad, then executive director of the Council on American-Islamic Relations and Paul Ziriax, acting on behalf of the Oklahoma State Board of Elections, exemplify specific reasons for failure. Where it pertains the juridical aspect of the debate, recent decisions concerning the nature of arbitration seemingly tie the hands of national courts to avoid religious agreements that are contrary to the national rule of law.[902] Despite the ABA's national declaration concerning Islamic law, there is no evidence that U.S. judiciaries have established clear guidelines for addressing claims that require judges to refer to or contextualize religious texts, while at the same time perpetually upholding the wall of separation between church and state. In other words, there is no consensus of state and federal legislation and no clarity on how U.S. judges would or could adjudicate claims while not only preserving the doctrine of *stare decisis,* but also preventing interpretations of the Quran and/or the Sunnah from binding the 99% of America's multicultural population that does not espouse Islam.[903]

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[901] 'State Legislation Restricting Judicial Consideration of Foreign or Religious Law' (2013) <http://www.pewforum.org/files/2013/04/State-legislation-restricting-foreign-or-religious-law.pdf>; *See also,* Liz Farmer, 'Alabama Joins Wave of States Banning Foreign Laws' *Governing: The State and Localities* (14 November 2014) <http://www.governing.com/topics/elections/gov-alabama-foreign-law-courts-amendment.html>.

[902] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. ___ (2019).; *See also*, '*Henry Schein, Inc. v. Archer & White Sales, Inc*., 586 U.S. ___ (2019).' (*Justia: U.S. Supreme Court*, 2019) <https://supreme.justia .com/cases/ federal /us/586/17-1272/> accessed 6 June 2019.

[903] Besheer Mohamed, 'A New Estimate of U.S. Muslim Population' (2018) <http://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/> accessed 20 November 2018; Oyen (n 203). Latin for "to stand by things decided." In the United States, Canada, and the United Kingdom, the term has generally come to mean the doctrine of

In the few noteworthy instances where Islamic-centric cases have come before the U.S. judiciaries, interpretations of the Quran were relied upon to support the cause of action and/or to uphold affirmative defenses and/or substantiate mitigating circumstances.[904] In addition to illustrating the issues inherent in engaging with Islamic law, these cases also demonstrate that faith-based legal exceptionalism affords opportunities for substantiating certain petitions that are not equally available to Muslims and non-Muslims. As will be assessed more fully in the next chapter, the imbalance created by legal exceptionalism establishes a 'dormant' or negative effect on other claimants because of their beliefs, whether based in religion or moral secularism. This begs the uncomfortable question of how far beyond the scope of foundational perspectives and/or Constitutional principles is the United States willing to go under the guise of multiculturalism to ingratiate more insular religious proclivities?

5.2.1 Islamic Law Incongruity—From the Legislature to the Judiciary

Although they were dubbed cases about religious discrimination, the *Awad* cases just as easily deserve attention because they demonstrate how post-9/11 trepidation frustrated a suitable opportunity to better shape the manner in which state legislatures safeguard disestablishment and uphold the supremacy of the rule of law when it is being challenged.[905] Specifically, the Oklahoma House of Representatives and Senate proposed Joint Resolution 1056, which sought to amend the Oklahoma state Constitution.[906] Dubbed the 'Save our State Amendment,' the resolution was to be voted on by the citizens of Oklahoma in the fall of 2010. In relevant part, the Amendment provides the following:

> [W]hen exercising their judicial authority [the courts] shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, *and if necessary the law of another state of the United States provided the*

precedent. "According to the U.S. Supreme Court, stare decisis '*promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process*.'...Moreover, proponents argue that the predictability afforded by the doctrine helps clarify constitutional rights for the public. Other commentators point out that courts and society only realize these benefits when decisions are published and made available."

[904] *See generally*, Center for Security Policy, 'Shariah in American Courts: The Expanding Incursion of Islamic Law in the U.S. Legal System' (2014).

[905] The Court also left unanswered the question of Equal Protection; however, for the sake of considering Original ism, the supremacy of the laws of the United States addresses the issue without need for further inquiry.

[906] Save Our State Amendment, H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), Invalidated by *Awad v. Ziriax*, 670 P.3d 1111 (10th Cir. 2012).

> *law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.* The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.[907]

Once the Resolution cleared the House and Senate, the Secretary of State forwarded it to the Attorney General for legal review. The Attorney General raised issue with the proposed language due to lack of specificity concerning "the definition of either Sharia Law or International law."[908] The Attorney General's revised referendum provides in relevant part:

> This measure amends the State Constitution…It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law*. It forbids courts from considering or using Sharia Law.* International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons. The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties. *Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.*
>
> SHALL THE PROPOSAL BE APPROVED?
>
> FOR THE PROPOSAL — YES___ AGAINST THE PROPOSAL — NO ___[909]

The revised referendum was balloted as Oklahoma State Question 755 ('SQ755').[910] Approximately 71% of the voting population decisively approved SQ755, which passed on November 2, 2010.[911] Once the Oklahoma Board of Elections certified the election results, SQ755 would become a part of Oklahoma's state Constitution. The American Civil Liberties Union ('ACLU') then commenced a civil action on behalf of Awad in the U.S. District Court in Oklahoma.[912] Awad's complaint challenged the constitutionality of the Amendment and sought to temporarily enjoin the certification of the election results for SQ755.[913] Moreover, Awad alleged that the Amendment violated the Establishment and Free Exercise

[907] Save Our State Amendment (n 906).
[908] John T Parry, 'Oklahoma's Save Our State Amendment and the Conflict of Laws' (2012) 65 Oklahoma Law Review 6, [19] <https://digitalcommons.law.ou.edu/cgi/viewcontent.>; Grunert (n 884), 694.
[909] Save Our State Amendment (n 906).
[910] Save Our State Amendment (n 906).
[911] *Awad v. Ziriax, et al.*, 754 Fed. Supp. 2d, 1298 (2010) < https://www.aclu.org/legal-document/awad-v-ziriax-district-court-decision>.
[912] 754 Fed. Supp. 2d, 1298 (2010) (n 911).
[913] Grunert (n 884), 702-03.

Clauses of the 1st Amendment.[914] The Court granted the request for temporary injunction, "finding plaintiff Awad had standing [and] the alleged violation of plaintiff Awad's 1st Amendment rights constituted irreparable injury...."[915]

The Board of Elections appealed the judgment, and the Appellate Court affirmed the District Court's grant of a preliminary injunction. The ACLU amended its original complaint and refiled with the District Court in Oklahoma in order to seek a permanent injunction.[916] The amended complaint added additional claimants—most if not all of whom were Islamic law activists. The complaint also included additional claims. Not only were the Free Exercise and Establishment Clauses implicated, but also the Equal Protection and Supremacy Clauses of the U.S. Constitution. The enlargement of claims and claimants appears to have been a litigatory maneuver to avoid a dismissal based on procedural grounds, particularly Awad's lack of judicial standing. The maneuver also may have been attempted to set up a basis for a petition for certiorari to the U.S. Supreme Court concerning the limits on the free exercise of religion in the United States.

The District Court again determined that the language of the 'Save Our State Amendment' was facially discriminatory since it was evident that banning Islamic law was the primary purpose thereof. Despite Oklahoma's claims to the contrary, the Court reasoned that Oklahoma legislators added a Sharia law provision allowing courts to consider the law of another state of the U.S., only if the law of the other state does not include Sharia Law.[917] By contrast, no similar restriction was added limiting the use of other states' law where it includes international law or the legal guidelines of other nations or cultures.[918] As such, the Court found it appropriate to permanently enjoin the Election's Board from certifying the results for SQ755, as it was in the interest of upholding an individual's rights.[919] Consequently, the state of Oklahoma was precluded from modifying its state Constitution for the sole purpose of singling out Islamic law.

Since the commencement of *Awad*, analyses of the Islamic law inquiry produced legislation that can be characterized as: (1) Islamic law specific; (2) the supremacy of American law over foreign law and customary practices; and (3) the supremacy of American law over

914 754 Fed. Supp. 2d, 1298 (2010) (n 911).
915 754 Fed. Supp. 2d, 1298 (2010) (n 911).
916 754 Fed. Supp. 2d, 1298 (2010) (n 911).
917 Grunert (n 884), 702-05.
918 Grunert (n 884), 702-05.
919 Grunert (n 884), 702-05.

international law.[920] As it relates to variations in nomenclature, the terms 'foreign' and 'international' were used interchangeably in some states.[921] However, states also drafted legislation that referenced both terms to make distinction between international law and foreign law. Specifically, international law encompasses the 'law of nations' as is defined by the international legal community.[922] Foreign law on the other hand encompassed the laws of 'other' countries as well as social and religious customs or practices (*i.e.,* customary practices).[923] It appears that these customs or practices may not rise to the definition of law as a codified legal lexicon—like Tort law or the law of Contract—but are steeped in tradition and may be loosely designated as 'law' so as to elicit a noteworthy place within that community of believers—*e.g.,* Mosaic law or Sharia. To fully appreciate the analytical distinction, it is important to understand that the holdings in *Awad* address category (1) only.

It might seem as if the *Awad* cases lend support to individual, faith-based choices of law or faith-based forum shopping in place of U.S. law—whether through ADR or before a U.S. judiciary. In reality, they appear to do no more than reinforce a long-held legal premise that facially discriminatory legislation is an unconstitutional means to target the proclivities of *any* religious subgroup or denomination that may be democratically challenging, yet have not been deemed illegal or against public policy.[924] However, they do not address whether reinforcing the supremacy of state law is problematic if done so in a religiously neutral way, *vis-à-vis* the inclusion of what is tantamount to a neutral 'state law supremacy clause'. This question is particularly relevant when evaluated in light of the fact that the national Supremacy Clause achieves similar results at the national and international levels. As there are at least fifteen U.S. states that to some degree succeeded under categories (2) and/or (3), the *Awad* cases do not appear to offer an affirmative response to the question of whether Islamic law is a natural extension of free exercise in the U.S. or whether religious choice of law in general is a natural extension of the universal right of conscience.

Although a lesser evaluated but no less significant perspective, the series of cases also seem to reinforce what the Framers understood about legally 'favoring one religion over another', which will undoubtedly have certain effects that are imposed upon all non-

[920] Karseboom (n 886), 663-665.
[921] Karseboom (n 886), 663.
[922] Karseboom (n 886), 663.
[923] Karseboom (n 886), 663.
[924] Huma Khan, 'Oklahoma's Ban on Sharia Law Struck Down by Federal Appeals Court' *ABC World News* (11 January 2012) <http://abcnews.go.com/blogs/politics/2012/01/oklahomas-ban-on-sharia-law-struck-down-by-federal-appeals-court/>.

Muslims. As will be borne out in the remaining chapters, the collective work of scholars like Kymlicka and Wright *et al.* illustrates that these effects are beyond the general understanding of accommodation of multicultural difference.[925] Specifically, allowing interpretations of the Quran and/or the Sunnah, while disallowing other religious texts to act as the source material in ADR and/or adjudication establishes a recognizable imbalance that appears to be illustrative of the issue that early Americans raised about affording Anglicanism social and legal exception above other denominations.

This imbalance appears to be exacerbated by the reality that in the same way that Sunnis and Shias have established multiple interpretive perspectives on the Quran and Sunnah, so too have other faiths, hence the various denominations.[926] Therefore, it is essential to understand that the *Awad* cases do not deal with the practical substantive and/or procedural circumstances that undoubtedly instigate larger socio-political and socio-legal issues. These issues would likely emanate from America's long history of legislating and litigating toward the separation of church and state only to renege on this foundational principle to afford exception to Islamic law (or any other religious law). This reality may explain why the Court declined to address the merits of the claims involving the Free Exercise Clause, the Equal Protection Clause, the Due Process Clause, or the Supremacy Clause, despite the fact that petitioner's writ of certiorari addressed each of them.[927] Depending on the religious beliefs and legal claims of subsequent petitioners, these are the claims that could prompt a national acknowledgement that Islamic law is inconsistent with the Framers' view of religious liberty or freedom of conscience as well as constitutionally impermissible because it encroaches upon the United States' separationist church-state arrangement and by extension the religious liberties of non-Muslims.

5.2.2 Religious Claims & Defenses from Arbitration to the National Judiciary

Beyond the constitutional implications emphasized by the *Awad* cases, allowing interpretations of religious texts to buttress judicial decisions or to be incorporated by reference in state or federal judiciaries is generally acknowledged to be fraught with issues

[925] *See e.g.,* Kymlicka (n 34), 97-100; Wright and others (n 5), 114-25.
[926] Mike Shuster, 'POLITICS & POLICY: The Origins Of The Shiite-Sunni Split' <https://www.npr.org/sections/parallels/2007/02/12/7332087/the-origins-of-the-shiite-sunni-split?t=1552844515310>; Samira Ahmed and Carool Kersten, 'Sunnis and Shias: What's the Story?' *BBC & Kings College London* (London, 2019) <http://www.bbc.co.uk/guides/z373wmn>.
[927] *See e.g.,* 754 Fed. Supp. 2d, 1298 (2010). (n 911); 670 F.3d 1111 (2012). (n 906); *Awad v Ziriax,* 966 F.Supp.2d 1198 (2013).

in light of America's separationist church-state arrangement.[928] Thus, engagement by the national judiciary with the Quran and/or the Sunnah as a result of claims originating in national courts also appears to give rise to challenging questions of excessive entanglement between religion and government. Although England's legalization of faith-based legal platforms as an aspect of the country's ADR scheme might send a different message, it is important to fully distinguish the motivation behind England's national policy. Therefore, the issues concerning excessive entanglement in the United States are substantial and are arguably no less challenging when brought about by arbitration instead of litigation. Legal scholars who attempt to explain the legal logistics of Islamic law exceptionalism indicate that arbitration statutes would serve as the means by which the tribunals are sanctioned. Specifically, tribunals would rely on 'voluntary' arbitration, which implicates procedural aspects of Contract law as the conduit for affording the parties the ability to rely on interpretations of the Quran and/or Sunnah for the substantive legal precepts that undergird legal decisions.

Islamic law skeptics raise issue with the fact that by employing binding arbitration for the purpose of reinforcing religious texts, the U.S. Court system is effectively acting as a conduit for the violation of rights beyond those that are perceived to emanate from the 1st Amendment.[929] This is especially the case because this adjudicative method ties the hands of the Court to ensure that the decision was fair for all the parties involved. In the Supreme Court's 2019 holding in *Henry Schein, Inc. v. Archer & White Sales, Inc*., [17-1272], Justice Kavanaugh speaking on behalf of a unanimous court made clear that arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.[930] Although *Schein* involves the Federal Arbitration Act ('FAA') and was not specific to religious tribunals, the proposed use of pre-existing state arbitration legislation to sanction faith-based legal platforms—which will be more fully addressed in the next chapter—makes the Court's general statements apt for the analysis herein. Thus, it can be inferred that when parties agree to delegate their claims to religious arbitrators, the Court may not override the agreement, notwithstanding how steeped in religious ideology the

[928] Stephanie Hertzenberg, 'The Holy Books of World Religions' (*Faiths & Prayer*, 2018) <https://www.beliefnet.com/faiths/the-holy-books-of-world-religions.aspx> accessed 16 March 2019.
[929] *See e.g.*, Amy S Fancher, 'Policies, Frameworks, and Concerns Regarding Shari'a Tribunals in the United States-Are They Kosher?' (2012) 3 Regent University Law Review 1; Topy (n 885); Steven M Rosato, 'Saving Oklahoma's 'Save Our State" Amendment: Sharia Law in the West and Suggestions to Protect State Legislation from Constitutional Attack' (2014) 44 Seton Hall Law Review 659; Grunert (n 884); Karseboom (n 886). All of the law review articles included herein provide a balanced summary of the Islamic law debate as it relates to either Canadian or U.S. application.
[930] 586 U.S. ___ (2019). (n 902).

agreement or how vulnerable or lacking in free-will one party may be in comparison to the other(s). This establishes a basis for questioning whether the U.S. Government, by sanctioning faith-based legal exceptionalism, is also sanctioning the promotion of laws that are "at odds with the values of modern [American] democracy."[931]

Another issue is that despite the fact that arbitration is meant to be in lieu of litigation, arbitrated cases have the propensity to bleed into the national rule of law as a matter of course, especially if one of the parties attempts to overturn the decision or when the Court attempts to enforce the judgment.[932] This circumstance is amplified when considered in light of the previous discussion concerning England's decision to sanction Islamic law tribunals (including issues with jurisdictional creep). The substantive and jurisdictional issues faced by Parliament and England's national judiciary when parties attempt to appeal decisions from Islamic law tribunals to the national courts are ongoing, even though parties are keenly aware of limitations placed on their claims when they pursue binding religious arbitration in lieu of litigation. England's issues offer a pragmatic foretaste of circumstances in the United States, if she followed in England's footsteps.[933] There is every probability that claimants in the United States would follow the lead of claimants in England with analogous legal suppositions. Thus, religion-centric cases would undoubted find themselves knocking at the doors of U.S. courthouses expecting affirmation and/or validation of the religion to which they are attached. This is the case despite the fact that England and the United States have notably dissimilar church-state arrangements (established-church *versus* separationist) as well as approaches to constitutionalism (political *versus* legal). Moreover, these foundational differences offer disparate constitutional motivators for the rationale and extent to which faith-based legal platforms have been appraised.

Where it pertains U.S. state courts more recent attempts to engage with Islamic law outside the constitutional law context, the outcomes have seemingly legitimized the concerns of those who see sanctioning faith-based legal exceptionalism as creating an unfounded right of certain religious adherents to avoid adhering to and upholding the law of the land.[934] The 2010 case, *S.D. v. M.J.R.* illustrates one of the more egregious efforts to rely on Islamic

[931] Anonymous, 'Leaders: Sense about Sharia: Islamic Law and Democracy' (2010) 397 *Economist* 16, 18.
[932] Kimberly Karseboom, 'The Future of Sharia Law in American Arbitration' (2015) 48 Vanderbilt Journal of Transnational Law 891, 897-99.
[933] Recall the analysis at Section 2.6 of Chapter 2.
[934] Center for Security Policy (n 904), 13-17.

law to circumvent the national rule of law.[935] According to the legal transcript, "plaintiff, S.D., and defendant, M.J.R., [were] citizens of Morocco and adherents to the Muslim faith. They were wed in Morocco in an arranged marriage in 2008, when plaintiff was seventeen years old."[936] After relocating to New Jersey for M.J.R.'s employment, he physically abused S.D. on three different occasions, which left bruises and also resulted in him having nonconsensual sex with her on several occasions."[937] S.D. sought a restraining order ('TRO') under the state's Prevention of Domestic Violence Act to prevent further physical abuse.[938]

The New Jersey Superior Court found that M.J.R. had violated the statute by physically and sexually abusing S.D.; nevertheless, he invoked principles of Islamic law and claimed a right to the free exercise of religion to excuse his conduct.[939] M.J.R. claimed that 'his desire to have sex when and whether he wanted to, was something that was consistent with his [religious] practices and…was something that was not prohibited."[940] Consequently, the Court found in favor of M.J.R. citing that, "he believed his conduct was permitted by his religion."[941] This case gives rise to a number of pertinent questions. The first is substantively comparative: whether the holding would be the same if the claim were brought before an Islamic law tribunal? The second is socio-political: if the holding were the same under Islamic law, under what conditions could the U.S. Government rationalize the outcome as a valid use of America's ADR framework or a constitutionally appropriate means to promote multiculturalism?

Although the judgment was ultimately reversed on appeal, the case demonstrates the kinds of incongruent claims that have been furthered in the name of religious law as a purported indispensable extension of free exercise. In this specific instance, it creates legal precedent that treats the actualization of the sexual desires of Muslim men differently than the actualization of the sexual desires of other husbands, domestic partners, or significant others in the U.S. The practical effect is affording a man who espouses Islam a pass for the same behavior that would undoubtedly end punitively for a non-Muslim who could not

[935] Center for Security Policy (n 904), 23.
[936] 2 A.3d 412, 428 (N.J. Super. 2010).
[937] 'S.D. v. M.J.R.' *New Jersey Law Journal* (Newark, 29 July 2010) <https://www.law.com/njlawjournal/almID/1202464042552/SD-v-MJR/?slreturn=20190309133353>.
[938] 'S.D. v. M.J.R.' (n 937); Center for Security Policy (n 904), 23.
[939] 'S.D. v. M.J.R.' (n 937); Center for Security Policy (n 904), 23.
[940] 2 A.3d 412, 428 (N.J. Super. 2010) (n 936).
[941] 'S.D. v. M.J.R.' (n 937).

rely on interpretations of Islamic law to mitigate what is tantamount to criminal conduct.[942] Cases such as this also open the door for insular religious subgroups/denominations to justify certain behavior by pointing to sections of their religious texts or imported interpretations of those texts to justify behavior that would otherwise be objectionable in America's democratic environment. Accommodating or affording exception to these outcomes is a recipe for establishing absurdities within the American rule of law by yielding incongruent outcomes as it relates to the rights of those who are non-Muslim in establishing legal claims and defenses as well as possible judgments and/or penalties. Notwithstanding how many Muslim litigants are willing to subjugate their rights to the will of Islamic law, the same cannot be presumed for non-Muslims whose cases might fare worse than certain Muslims under the same set of circumstances.

This case gives rise to the question of whether sanctioning faith-based legal exceptionalism is the proper American constitutional conundrum to establish a basis for not only legislative involvement in certain 'privileges' secured by the Bill of Rights but also for determining the goal of nationally sanctioning faith-based legal exceptionalism. This is particularly relevant since this case demonstrates that there is a disconcertingly unpredictable nature to certain religious claims and/or defenses, which creates legitimate concerns about whether religious laws are compatible with the aims of American democracy and/or the national rule of law. Since the outcome will affect the scope of all Americans' equal protection under the law and not just those who advocate for adding Islamic law to the American juridical framework, it may be disingenuous to haphazardly include Islamic law exceptionalism in the category of multiculturalism. As will be analyzed in more detail herein, multiculturalism has encouraged an understatement of certain issues inherent in what Silverman refers to as "the U.S. legal system pay[ing] the price of…interacting with faith-based tribunals."[943] In other words, such engagement risks the destabilization of the supremacy of the national rule of law.[944] Once that authority is gone, no amount of national hubris or international self-aggrandizement will undo the damage.

[942] 'S.D. v. M.J.R.' (n 937).
[943] Shai Silverman, 'Before the Godly: Religious Arbitration and the U.S. Legal System' (2017) 65 Drake Law Review 719, 719.
[944] Silverman (n 943), 719.

5.3 The Principal Consequence of POGG: The Road to Religious Disestablishment

There appears to be no evidence that, since the effectuation of the U.S. Constitution, the Supreme Court has considered the constitutionality of faith-based legal exceptionalism or any other legal platforms operating in contravention of the state and/or federal judiciary. This is presumptively because Article VI Section 2 taken in conjunction with the 1st Amendment covers the legal landscape concerning the possibility of using the U.S. judiciary as a conduit for the dispensation of the laws of other nations and/or cultures, whether based in religious denominationalism or secularism. This is not to say that the United States legislature and judiciary have not been confronted with the prospect of considering foreign law as a result of national cases involving foreign litigants.[945] Examples of these circumstances include cases brought under the Alien Tort Claims Act ('ATCA')—also the Alien Tort Statute ('ATS').[946] The ATCA grants U.S. federal courts original jurisdiction over civil actions by a foreign national for violations of a U.S. treaty or international law notwithstanding where in the world the act was committed.[947] The ATCA was originally employed to bring claims against individuals for human rights infractions, but it has also become the means to bring claims against national or international corporations for complicity in environmental crimes.[948]

Likewise, the U.S. executive and judiciary have been confronted with the possibility of considering international law where it involves commitments that might "delegate legislative or adjudicative powers to international bodies created by treaties."[949] In the text, *The Court and the World: American Law and the New Global Realities,* Justice Stephen Breyer acknowledges that, "American law promises to a significant extent to take content from, or to be bound by, certain decisions of foreign or international tribunals."[950] The

[945] Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (1st edn, Vintage Books 2016), 131-64. In Chapter 6 specifically, Justice Breyer discusses how the ATS has been used to 'open the doors' to the U.S. Supreme Court to foreign litigants for the purposes of preserving fundamental human rights.

[946] 'Alien Tort Statute or Alien Tort Claims Act', Legal Information Institute (Cornell Law School 2019) <https://www.law.cornell.edu/wex/alien_tort_statute> accessed 09 July 2019; *See also*, Duane Windsor, 'Alien Tort Claims Act', *Encyclopædia Britannica* (Encyclopædia Britannica, inc 2019) <https://www.britannica.com/topic/Alien-Tort-Claims-Act>.

[947] J Romesh Weeramantry, 'Time Limitation under the United States Alien Tort Claims Act' (2003) 85 IRRC: Current Issues and Comments 628 <https://www.icrc.org/en/doc/assets/files/other/irrc_851_ weeraman...>.

[948] 'Alien Tort Statute or Alien Tort Claims Act' (n 946); Windsor (n 946).

[949] Breyer (n 945), 199. In Chapter 9, Justice Breyer considers the Treaty Power that is delegated to the President through the Supremacy Clause of the U.S. Constitution. He addresses how it has been utilized and where the United States has placed limits on being bound by certain international treaty provisions.

[950] Breyer (n 945), 199.

practical reality is that although U.S. Courts have been alluding to foreign/international authority since the nation's founding, "[the] citations are rare, and [the] effect on the outcome [of American cases is] rarer still."[951] According to Frank Easterbrook, citations to foreign authority "are just filler, added by law clerks or by the Justices themselves when engaged in belt-and-suspenders reasoning. They do not imply that the cited sources have any legal effect."[952] Promises notwithstanding, it is well understood domestically and internationally that throughout history all three branches of the U.S. Government have been loath to make any promises that have the practical effect of 'bastardizing' the Supremacy Clause or impeding the American rule of law.

Where it pertains America's policy of not citing to foreign or international authorities when interpreting the meaning of the U.S. Constitution, it is worth recalling Calabresi's definition of Originalism and Sachs's discussion of 'constitutional continuity' and era of the Founding included in Chapter 1. Specifically, Constitutional supremacy extends from the compromise that resolved the power struggle between the central government and independent states during the founding era.[953] Many of the newly-formed states had enacted statutes during the founding that "forbade such citations…to sever ties to the colonial power."[954] Thus, America's prudently-adopted perspective on the importance of safeguarding Constitutional supremacy most likely has its genesis in the collective compromise necessitated by colonial disdain for Great Britain's royal prerogative, which included the imperial policy of 'disallowance'. As was previously demonstrated, the British Empire's royal prerogative encompassed what was essentially an arbitrary claw back provision to restrict colonial autonomy.[955] It had the practical effect of making the laws formed by American colonial governments voidable if they failed to uphold the imperatives of POGG. The American colonists, who represented various religious denominations, condemned the application of the prerogative because a primary aspect thereof was affording religious and legal exception to Anglicanism. Moreover, the policy of disallowance came to frustrate the reliability and uniformity of rulemaking in the colonies. Considering the *Awad* cases as well as domestic engagement with Islamic law, a worthwhile question is what makes the more recent attempts toward legal exceptionalism under the guise of

[951] Frank H Easterbrook, 'Foreign Sources and the American Constitution' (2006) 30 Harvard Journal of Law & Public Policy 223, 223.
[952] Easterbrook (n 951), 224.
[953] Dustin M Dow, 'The Unambigous Supremacy Clause' (2012) 53 Boston College Law Review 1009, 1012-13.
[954] Easterbrook (n 951), 224.
[955] Recall the analysis at Chapter 3.

'multiculturalism' any less injurious than was legal exceptionalism under the doctrine of 'civil order' and 'settled & quiet government'?

5.3.1 U.S. Constitutional Framers' Rejection of Faith-Based Legal Exceptionalism

Despite the tendency to arbitrarily amalgamate and label 'Christians' in modern America, the fact is that religious diversity is remarkably robust. The same can also be said about the religious subgroups and denominations co-existing in the American colonies. Therefore, demands for legal exception based on religious proclivities is not a new phenomenon; similar expectations were evident as the principle imperative of the POGG doctrine. In the colonial American context however, the issues were brought about by imperial force. Modern America has seemingly rebranded this issue so as to invite it in as an expansive view of promoting multicultural inclusion. As was established in Chapter 2, foundational circumstances reflect that this approach to plurality was disruptive to the establishment of democratic values and denominational inclusion in colonial America. The disruption created is no less prevalent in America's modern multicultural climate.

Many American historians who focus on the events leading up to the American Revolutionary War take care in haphazardly supposing that one Christian denomination can be interchanged with another, as if the definition of denominationalism is the opposite of what it actually is.[956] As was also the case in colonial America, hundreds of subgroups and denominations in modern America have adherents who are subject to the national rule of law notwithstanding how tenuous their connection to Christianity.[957] This is especially important since religious diversity in America—as well as other Western nations—is based on independent, voluntary associations that exist on a sizeable continuum, which moves from extreme conservativism to extreme liberalism. For example, the beliefs of the 'Plain People' preclude them from partaking of electricity from the national grid or owning technological devices, while the United Methodist Church has recently undergone a schism, resulting in two denominations, as a result of modern attempts to read into Biblical scriptures the practice of ordaining gay/lesbian clergy and performing same-sex

[956] *See e.g.,* Ragosta (n 391); Holmes (n 393). *See also*, footnote 425, where Lippy and Williams define 'denominationalism' in the context of it being a response to the coercion and repression associated with established church regimes.

[957] Association of Statisticians of American Religious Bodies, 'U.S. Religion Census: 1952 to 2010' (*United States Religion Census*) <http://www.usreligioncensus.org/> accessed 15 June 2019; *See also,* David B Barrett, George T Kurian and Todd M Johnson, 'A Comparative Survey of Churches and Religions in the Modern World', *World Christian Encyclopedia* (2nd edn, Oxford University Press 2001).

weddings.[958] The sizeable continuum also demonstrates that Muslims are not the only religious devotees who worship in communities that identify with ethnic and/or geographic origins—*e.g.,* Dutch Orthodox, Greek Orthodox, or Roman Catholic. Therefore, American colonial history and modern demographics illustrate that it is wholly inappropriate to chuck the many Judeo-Christian denominations into one enormous 'belief-bucket' for the purposes of defending the idea of sanctioning competing extra-constitutional legal platforms for certain insular religious subgroups/denominations who see their religious views as exceptional.

Recall that Calabresi points out that advocating in favor of an Originalist evaluation on any current constitutional issue means determining whether the Constitutional Framers have spoken before current branches of government take steps that might eviscerate aspects of the U.S. Constitution.[959] To make such an evaluation however, it is often necessary for Originalist analyses to include not just the paper-trail but also historical circumstances and conditions that led to rebellion and the declaration of independence in 1776.[960] Based on the totality of those circumstances, it becomes evident that, in regards to religious plurality in the U.S., the further away from 1776 America moves, the less it seems to heed the disadvantages inherent in faith-based legal exceptionalism versus the inherent benefits of disestablishment. This is especially noteworthy when disestablishment is viewed not through America's current politically distorted lens, but instead through her rear-view mirror. From that perspective, it is easier to discern why the Framers concluded that disestablishment was the foundation upon which all religious liberty in America should be built (and continues to be sustained). Furthermore, deviation from this constitutional pillar is not likely to achieve multicultural inclusion. Instead, it will likely lead to further individual and national polarity as well as possibly renewed threats of state secession.[961]

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[958] Julie Zauzmer and Sarah Pulliam Bailey, 'Will the United Methodist Church Split Up over LGBT Debate? Leaders Try to Reach an Answer.' *The Washington Post* (Washington DC, 22 February 2019) <https://www.washingtonpost.com/religion/2019/02/22/will-nations-third-largest-church-split-up-over-lgbt-debate-leaders-try-reach-an-answer/>; Matthew Diebel, 'The Amish: 10 Things You Might Not Know' *USA Today* (16 August 2014) <https://eu.usatoday.com/story/news/nation/2014/08/15/amish-ten-things-you-need-to-know/14111249/>.

[959] Calabresi (n 121).

[960] Calabresi (n 121).

[961] *See e.g.,* Lis Wiehl, 'Falling Apart: U.S. Secessionist Movements Gather Attention' *The Washington Post* (Washington DC, 13 June 2017) <https://www.washingtontimes.com/news/2017/jun/13/secession-movements-in-us-gaining-steam/>; Sasha Issenberg, 'Divided We Stand: The Country Is Hopelessly Split. So Why Not Make It Official and Break Up?' [2018] *New York Magazine* <http://nymag.com/intelligencer/2018/11/maybe-its-time-for-america-to-split-up.html>.

As to the question of Islamic law tribunals, certain occurrences in America's foundational experience demonstrate that the United States—*vis-à-vis* the American colonies and early states—had already counted the costs of legal exceptionalism. More importantly, they found that the cost was too high as exceptionalism has historically shown to be overtly discriminatory and detrimental to efforts to foster religious equilibrium as well as individual choice in religiously plural societies. Moreover, it can be inferred that the Framers' original decisions were aimed at avoiding the risk of future generations taking similar steps, which would return the United States to the same problematic position that was experienced by the American colonies. John Ragosta has examined the problems inherent in Anglican-centric legal exceptionalism during the period leading up to and directly after the American Revolutionary War. His work focuses on Virginia and other Anglican strongholds; however, the previous analysis of British-America's colonial charters reveals that many of his assertions are generally applicable to the other colonies.

Ragosta observes that notwithstanding the continued growth of religious denominations in the American colonies, "the legal and social dominance of the Church of England was unmistakable."[962] The British Empire held firm to imperial-Anglicanism, which had been "formed from her cradle under the nursing care of regular government."[963] As British imperial hubris made it almost impossible to fathom a win for the American colonies, the British imperial strategy in 1776 included "win[ning] the war and establish[ing] the Anglican Church even more fully in America, preventing any serious effort to use British protection of religious dissent to encourage loyalty."[964] Recall that the religious landscape of the American colonies 25 years prior to the war indicated that Anglicanism had been so primed and propagated that it was considered the *de facto* national faith with the Church of England as the *de facto* national church.[965] To suggest that Anglicanism would become 'more fully established' can only suggest that it would relinquish *de facto* status to take on *de jure* status. Those who remained loyal to the British Empire during the colonial period of rebellion and the Revolutionary War were emboldened by the prospect of permanently cementing the American iteration of POGG in the newly independent states.[966] From the Tories and/or Loyalists' vantage point, they had been in a position to make Anglicanism

[962] Ragosta (n 391), 3.
[963] Ragosta (n 391), 79.
[964] Ragosta (n 391), 71.
[965] Recall the analysis and map at Chapter 3.
[966] Ragosta (n 391), 72-4.

the established religion in the colonies.[967] They also expected to be in the advantageous position of fortifying Anglicanism throughout the states after the war.[968] Likewise, they would be in the position to revoke any war-time rights negotiated between the British Empire and the factions of non-Anglican religious dissenters, while at the same time vigorously punishing those dissenting rebels for treason.[969]

Therefore, to properly understand the legacy and continued significance of America's separationist church-state arrangement, one must understand that it was the many denominations of non-Anglican dissenters who recognized how detrimental establishment and faith-based legal exceptionalism were to American democracy. In a letter to James Madison, Judge Caleb Wallace—a Scottish-American of the Wallace clan—posed the apropos question, "[i]f this [Anglican establishment] is continued, what great advantage [was gained] from being independent from Great Britain?"[970] In other words, establishment and/or exceptionalism were detrimental to the preservation of the independence of denominational choice, which is arguably the true epitome of religious liberty.[971] The dissenters became acutely aware of the fact that the only way to establish a common bond of freedom was to avoid trading in one form of exceptionalism for another.[972] In fact, the formation of that common bond was arguably a direct consequence of religious dissenters not falling into the identical comparative/superlative trappings of extending legal exception to one denomination over the others. As such, it can be inferred that American perspectives on faith-based legal exceptionalism were not only integral when foundational decisions were made, but they also drove Canadian/American disbursement of colonial and post-colonial migration patterns.[973] In essence, some of those who wanted to uphold the imperatives of POGG went north, and some of those who did not became Americans.

As was established in the previous two chapters, the promise of religious equilibrium was often an illusory bargaining chip employed by the British Empire to secure loyalty and/or evade the possibility of colonial alliances against Imperialism.[974] Moreover, the 'Great

[967] Ragosta (n 391), 72-4.
[968] Ragosta (n 391), 72-4.
[969] Ragosta (n 391), 72-4.
[970] Ragosta (n 391), 99; *See also,* James A Padgett, 'LETTERS OF CALEB WALLACE TO JAMES MADISON' (1937) 35 Register of Kentucky State Historical Society 205, 205-19 <www.jstor.org/stable/23371622>.
[971] Ragosta (n 391), 137.
[972] Ragosta (n 391), 99.
[973] Maya Jasanoff, *Liberty's Exiles: American Loyalists in the Revolutionary World* (Vintage Books 2011) 5-6.
[974] Recall the analysis at Chapter 4.

Refusal' was a direct result of the British Empire's strategic issuance of the Quebec Act of 1774 to prevent French-Canadians from siding with the American colonies.[975] From the French-Canadian perspective, the Act afforded religious and legal 'concessions' as a consequence of the French having possessed Canadian territory from the late 1500s until 1763.[976] From the British imperial perspective, it proved to be little more than a 'carrot' to ensure that French-Canadians rebuffed American invitations to join the cause of independence. As with the French-Canadians, the hope of religious and legal equilibrium was also employed as a bargaining chip in the American colonies. Specifically, it was used as motivation for conscription of the non-Anglican denominations in support of the British cause.[977] Their numbers came to represent a strategic advantage where it concerned the possibility of turning the tides of war. To put the imperial Anglican/dissenter dichotomy in its proper perspective, religious dissenters had been sailing across the Atlantic Ocean since 1607 seeking religious freedom from imperial-Anglicanism and imperial-Catholicism. By the time the colonies collectively declared independence in 1776—*i.e.,* almost 200 years later—the British Empire was still leveraging the '*prospect*' of religious and legal equilibrium amongst the denominations. Even after the tides of war were turning toward the colonies (with the aid of the French), Ragosta and Alden note that imperial representatives expended considerable time and energy endeavoring to maintain dissenters' support for post-war British Imperialism, while at the same time, attempting to retain Anglican supremacy and preeminence for the Church of England.[978] This explains why countless religious dissenters embraced the Baptists' declaration: "[t]hese things granted, we will gladly unite with our Brethren of other denominations, and to the utmost of our ability, promote the common cause of Freedom."[979]

During the period between the "revolution through the ratification and amendment of the U.S. Constitution (1775-1791), the protection of religious liberty, and the proper relationship of religion to politics, were of great concern to the Founders."[980] As the United States presently engages in moderately antagonistic political debates over sanctioning Islamic law exceptionalism, proponents continue to make claims that the infusion of

[975] Underhill (n 639); Chapnick (n 104).
[976] Underhill (n 639).
[977] Ragosta (n 391), 99.
[978] Ragosta (n 391), 7.
[979] Ragosta (n 391), 8.
[980] Matthew J Franck, 'Religious Freedom' (*Roots of Liberty*, 2018) <http://rootsofliberty.org/religious-freedom-in-the-federalist/> accessed 17 March 2019.

Islamic law into the U.S. juridical framework would be harmless.[981] When the Framers' intent is raised as a rebuttal, the Framers' concerns for the inherent issues with mingling religion and government are sometimes downplayed as unwarranted fears.[982] This is especially evident when some scholars criticize the Framers' approach to disestablishment—*vis-à-vis* the wall of separation—and their zeal for protecting the supremacy of the national rule of law.[983]

On the contrary, it seems more plausible that the Framers were guided by the momentous impact of charting the direction of America's future after two hundred years under the American iteration of POGG.[984] The first paragraph of the first essay of the collection that has come to be known as *The Federalist Papers* illustrates this reality. *The Federalist No. 1* proclaims:

> After a full experience of the insufficiency of the existing federal government, you are invited to deliberate upon a new Constitution of the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.[985]

Although not one of the 85 essays/articles of *The Federalist Papers* focuses exclusively on the centuries of Anglican exceptionalism under the doctrine of 'civil order' and 'settled & quiet government', there can be little doubt that the Framers grasped one overarching fact, as they were responding to the pressure of Imperialism. There was no possible way toward

[981] Gerhard Bowering and others (n 38), 263. Islamization is defined as "the process by which practices, laws, knowledge, meaning, or peoples convert, conform, or adapt to Islam. It can describe… (2) The integration of cultural, political, legal, or scientific systems with Islamic doctrines, language, and ethics, or their production from an Islamic perspective."
[982] Morone (n 399), 1199-1120.
[983] Morone (n 399), 1199-1120.
[984] William F Swindler, 'The Treaty That Made America a World Power' (1983) 69 American Bar Association Journal 1247, 1247; *See also,* The Independence Hall Association, 'Foundations of American Government: Independence and the Articles of Confederation' <http://www.ushistory.org/gov/2b.asp> accessed 15 June 2019.
[985] Alexander Hamilton, 'Federalist Paper No. 1: Deliberation on a New Constitution' <http://avalon.law.yale.edu/18th_century/fed01.asp> accessed 6 May 2019.

denominational liberty in an environment where one religious denomination is afforded exception because it purports to be the answer to the ills of the others.[986]

5.3.2 Historical Nexuses & Efforts to Revise the Framers' Intent

Broadly defining Multiculturalism also appears to be the basis for reinterpreting certain aspects of America's foundational history to suggest that integrating Islamic law into the U.S. legal framework was 'theoretically' within the realm of possibilities for early Americans and the Constitutional Framers. Relying on interpretations of Thomas Jefferson's state papers, Denise Spellberg's text, *Thomas Jefferson's Qur'an: Islam and the Founding Fathers*, invites such an inference while analyzing the Constitutional Framers' and early Americans' support for Muslims becoming future citizens of the United States.[987] In fact, one could argue that she establishes a circumstantial thread that might support such a conclusion without explicitly defending it. To further the study attempted herein however, it is necessary to go beyond mere allusion.

The survival of Thomas Jefferson's copy of the Quran, which includes notes in his own handwriting, makes his ownership of the text irrefutable. However, Spellberg puts forth several other important claims that when evaluated in tandem with the legacy of POGG assist in extrapolating whether the Framers would have supported legal exceptionalism in the name of Islam. Most notably, Spellberg indicates that Thomas Jefferson purchased the text in 1765, and it "informed his ideas about plurality and religious freedom in the founding of America."[988] Jefferson's ownership of the text also supports Spellberg's assertion that there were noteworthy early Americans who "moved beyond European ideas about the toleration of Muslims" and willingly learned about and understood the tenets of Islam.[989] Moreover, it establishes a basis and timeline for the contention that the Founding Fathers were knowledgeable about Islam at the time the Constitution was drafted, debated, and ratified. Jefferson's investigation of Islam's religious text creates not only the impetus but also the occasion for the Framers to fully debate the likelihood of the United States hosting immigrants of various religious dogmas, including Islam. Therefore, they possessed requisite knowledge to discern whether the tenets of Islam and/or Islamic law furthered

[986] John Griffing, 'We Are Above the Law of the Land' [2013] *WND: In Front Page* <https://www.wnd.com/2013/03/we-are-above-the-law-of-the-land/>.
[987] Spellberg (n 799), 1-11; Mark David Hall, 'Thomas Jefferson's Qur'an: Islam and the Founders' (2014) 101 Journal of American History 562, 562-64.
[988] NPR Staff, 'INTERVIEW with Denise Spellberg: The Surprising Story Of "Thomas Jefferson's Qur'an"' *All Things Considered* (12 October 2013) <https://www.npr.org/2013/10/12/230503444/the-surprising-story-of-thomas-jeffersons-quran?t=1554134442456>.
[989] NPR Staff (n 988); Spellberg (n 799), 89-93.

the democratic ideals that they sought to promote in the newly-formed United States. This includes the provisions of the Bill of Rights.[990]

Based on the weight of the documentary support however, Jefferson's ownership of the text cannot be construed to mean that the Constitutional Framers would have sanctioned integrating Islamic law into the U.S. legal framework. It seems to suggest quite the opposite. In fact, Jefferson's possession and meticulous study of the text makes it reasonable to question whether the Framers saw the imperatives of Islam as too closely resembling the imperatives of POGG. This is especially relevant since POGG was rejected by the Framers and early Americans in favor of the foundational ideology of LLPH. Thomas Jefferson's state papers evidence that a similar question was likely in the forefront of his thoughts as he deliberated the future of the United States.[991] Specifically, Jefferson had occasion to juxtapose Anglicanism and Islam while defending a proposed piece of legislation to disestablish the Church of England from the Government of Virginia in 1776.[992] In front of the Virginia House of Delegates, he likened Anglicanism to Islam as notably similar religious ideologies that bind religion and government so tightly that they frustrate freedom of religious choice, and by extension religious equilibrium.[993]

Where it pertains evaluating Jefferson's perspectives on Islam by today's politically-correct standards, it is too convenient to dismiss them as ill-informed or prejudicial toward those who espouse Islam. However, the fact that the Quran is the source material for Islamic law makes it oxymoronic to suggest that Jefferson's analyses were both ill-informed about Islamic law and well-informed about the content of the Quran. Jefferson had more than marginal awareness of the fact that many European nations tended toward religious regimes, as the American states were barely on the other side of being a part of one. As a consequence of more than a decade of access to his own copy of the Quran, it appears that he understood that 'Mehomitan nations' tended toward religious regimes as well. Therefore, the juxtaposition of the two belief systems demonstrates not only Jefferson's

[990] Spellberg (n 799), 197-200; *See also*, Bureau of Public Affairs Office of the Historian, 'Barbary Wars, 1801–1805 and 1815–1816' (2019) <https://history.state.gov/milestones/1801-1829/barbary-wars>.
[991] Thomas Jefferson, 'Jefferson's Outline of Argument in Support of His Resolutions, 11 October–9 December 1776' in Julian Boyd (ed), *The Papers of Thomas Jefferson: Volume 1, 1760-1776* (Princeton University Press 1950) <https://jeffersonpapers.princeton.edu/volumes/volume-1>.
[992] Thomas Jefferson, 'Rough Draft of Jefferson's Resolutions for Disestablishing the Church of England and for Repealing Laws Interfering with Freedom of Worship' in Julian Boyd (ed), *The Papers of Thomas Jefferson: Volume 1, 1760-1776* (Princeton University Press 1950) <https://jeffersonpapers.princeton.edu/volumes/volume-1>.
[993] Spellberg (n 799), 102.

substantive understanding of the Quran, but also his recognition of how the tenets of Islam have a propensity to connote inflexible religious, political, and legal conformity.

Another point of note is that the aims of Jefferson's comparison were not to validate or discredit the veracity of Islam, thus he was not making a value judgment.[994] Instead, he was establishing a foundational basis for religious liberty in the newly-established American states, after decades of 'religious toleration' under British Imperialism.[995] This affords an explanation for Jefferson's predication of religious equilibrium on discontinuing the "bloody European history of church/state entanglement" as the basis for adopting the Virginia statute instead of disparaging Islam or Islamic law.[996] According to Spellberg, Jefferson's objective for the comparison was to ensure that non-Anglican denominations never again engaged in religious politics associated with religious regimes, which led from legal exceptionalism to rebellion to war.[997] This was an integral aspect of the Framers' collective rationale for embracing disestablishment, which then came to encompass the possibility of citizenry who adhered to Islam or other religious dogmas co-existing in the U.S.[998] According to Spellberg, "[for Jefferson] to include Muslims meant to include every[] one of every faith: Jews, Catholics and all others. And to exclude Muslims meant that there would be no universal principle…for all believers in America."[999]

It is also important to recognize that not only Jefferson, but all of the 55 delegates who took part in the Constitutional Convention were dedicated to addressing the particular challenges facing the United States during and beyond their lifetimes.[1000] As most of them were also involved in British-American colonial rebellion, they understood the importance of establishing foundational principles that would endure and direct the new nation into an indeterminate future.[1001] In preparation for the drafting of the U.S. Constitution, the Framers reviewed hundreds of publications, treaties, and official papers focused on socio-legal, socio-political, and philosophical theories of effective governance throughout the

[994] Spellberg (n 799), 102.
[995] NPR Staff (n 988). Recall Gill's discussion of the two centuries prior to the drafting of the 1st Amendment to the U.S. Constitution.
[996] Ragosta (n 391), 138.
[997] Spellberg (n 799), 102; *See also,* Thomas Jefferson (n 992).
[998] John Ragosta, 'Jefferson's Enduring Legacy', *Religious Freedom: Jefferson's Legacy America's Creed* (University of Virginia Press 2013) 209.
[999] NPR Staff (n 988).
[1000] 'Meet the Framers of the Constitution' (*The U.S. National Archives and Record*s, 2018) <https://www.archives.gov/founding-docs/founding-fathers> accessed 20 November 2018.
[1001] Geoffrey Stone and William P Marshall, 'The Framers' Constitution' (2011) Summer DEMOCRACY: A Journal of Ideas <https://democracyjournal.org/magazine/21/the-framers-constitution/>.

known world.[1002] Spellberg's claims concerning the extent to which these early Americans considered Islam endorses the plausibility that one such document was Muhammad's Medina Charter. This theory is particularly plausible since the Charter was essentially a social contract between Muslims and 'People of the Book.'[1003] The Charter "established governing rules for the people of…Medina…and addressed specific social issues of the community in an attempt to end the chaos and conflict that had been plaguing the region for generations."[1004] To put another way, the charter was essentially a treaty that endeavored to address generations of political and legal turmoil caused by Muslims commandeering the territory of Medina in the name of Islam and needing to determine the treatment of non-Muslims (*i.e.,* Jews and possibly early Christians) who possessed the territory first.

Although there is no evidence of a residual copy labeled Jefferson's 'Charter' in the same way that Jefferson's Quran has survived, nothing about the Framers' commitment to drafting the Constitution suggests that Jefferson would own and study the text in a vacuum, while discounting the political ideologies and/or the laws of those who adhered to the religion. The time dedicated and meticulous degree to which he made notes in the margins do not support a cursory review. Spellberg makes clear, "…Jefferson was curious about the religion and *law* of Muslims, and that's…why he bought the Quran."[1005] She and other scholars generally agree that Jefferson's interaction with persons who definitively espoused Islam was not until the Barbary conflicts.[1006] Therefore, it is reasonable to conclude that his evaluation of Islam and Islamic law was purely academic, and it was one of the many resources that aided in parsing out the proper direction for the newly-formed United States. This is particularly significant since Spellberg makes clear that [Jefferson] had no interest in personally espousing the faith but "was able to separate his principles about Muslim religious liberty …from [those] inherited European prejudices about Islam."[1007] Therefore, the likelihood that the Framers evaluated the content and context

[1002] 'Meet the Framers of the Constitution' (n 1000).
[1003] *See e.g.,* Yetkin Yildirim, 'Peace and Conflict Resolution in the Medina Charter' (2006) 18 Peace Review: A Journal of Social Justice 111, 111.
[1004] Yildirim (n 1003), 111.
[1005] NPR Staff (n 988).
[1006] Spellberg (n 799), 102; *See also,* Thomas S. Kidd, 'The Founders and Islam' in Mark David Hall and Daniel L. Dreisbach (eds), *Faith and the Founders of the American Republic* (Oxford University Press 2014); Christoper Hitchens, 'Jefferson Versus the Muslim Pirates: America's First Confrontation with the Islamic World Helped Forge a New Nation's Character' (2007) Spring City Journal <https://www.city-journal.org/html/jefferson-versus-muslim-pirates-13013.html>; The Monticello Foundation, 'The First Barbary War' (*Thomas Jefferson Encyclopedia*, 2019) <https://www.monticello.org/site/research-and-collections/first-barbary-war> accessed 15 June 2019.
[1007] NPR Staff (n 988).

of the Medina Charter prior to drafting the U.S. Constitution has merit. Moreover, the mere possibility of Jefferson accessing the Charter taken in tandem with his definitive evaluation of the Quran supports the supposition that the Framers were aware of any aspects of Islamic law that may or may not have furthered their aims for religious liberty in the United States.

It is also worth noting that any interaction that the Framers had with the legal precepts of the Quran and/or the Medina Charter would have been in a context that seemingly negates the need to revisit the topic after every new wave of Muslim migration and every new request for faith-based legal exceptionalism in the name of Islam (or any other religious dogma). This is also applicable to any former slaves who may have espoused Islam when they were naturalized after the Civil War. Specifically, Jefferson purchased his copy of the Quran approximately 20 years prior to the Barbary conflicts.[1008] Based on the timing between Jefferson's purchase and the first Maghreb Treaty between the U.S. and Morocco in 1786, it stands to reason that any Charter assessment he may have performed occurred in a historical context before Muhammad died, which by definition means in its most pristine form—*i.e.,* before the politically-motivated schism between Sunnism and Shi'ism.

Likewise, his evaluation of the Quran would have been in a context before the Framers had reason to be inundated with competing posthumous cultural and/or political interpretative variations of Islamic jurisprudence that emerged after the Sunni/Shia schism. It was also before the full extent of the war might have skewed or soured the Framers' perspectives.[1009] Therefore, it can be surmised that the Framers were cognizant of available constitutional alternatives concerning disestablishment. One such alternative undoubtedly included taking an overly-expansive approach to scoping free exercise (*i.e.,* by continuing to bind religion and government) for the sake of the future hypothetical Muslim citizens that they envisioned as well the real Anglicans/Episcopalians who remained within their purview. This alternative notwithstanding, the Framers took up the task of drafting a social contract for the United States that included three distinct branches of government

[1008] NPR Staff (n 988).

[1009] *See e.g.,* Philip D Morgan, 'The Origins of American Slavery' <https://apcentral.collegeboard.org/series/america-on-the-world-stage/origins-american-slavery>; Michael Guasco, 'The Misguided Focus on 1619 as the Beginning of Slavery in the U.S. Damages Our Understanding of American History' [2017] *Smithsonian Magazine* <https://www.smithsonianmag.com /history/misguided-focus-1619-beginning-slavery-us-damages-our-understanding-american-history-180964873/>. Morgan and Guasco both demonstrate that the slavery is not just a British or American phenomenon, but has its origins in Islam in the same way that it has been an issue for those who espouse Christianity. This is especially the case as it relates to the trickle-down effect of Islamic slavery's link to American slavery from then Muslim-majority African nations.

and the deliberate disentanglement of religion from each. Considering these factors, it would appear that the Framers' decision concerning faith-based legal exceptionalism for disparate religious dogmas was a well-reasoned one. Therefore, faith-based legal exceptionalism, whether as the consequence of POGG or a facet of post-colonial immigration, does not appear to be in keeping with the Framers' perspectives on American constitutionalism.

Some of the first treaty commitments that the United States negotiated as a sovereign nation afforded the Framers the opportunity to personally interact with representatives of the Maghreb nations. As such, early American foreign policy practices also demonstrate that the Framers remained resolute in setting a trajectory for the United States that attempted to avoid problematic religious politics that are part and parcel of inextricably linking religion and government. Juxtaposition of the peace treaties and/or the ratification notes from the Barbary conflicts illustrates the distinction between the Framers' collective view on the future of the church-state arrangement in the U.S. versus that of both England (previously discussed) and the Muslim-majority nations. The treaty between the United States and Morocco, dated 1786, is illustrative of the relationship between religion and government that defined U.S. negotiations with the Maghreb nations, whose governments were indivisible facets of a denomination or sect of Islam. These negotiations also appear to have further shaped the Framers' commitment to disestablishment. The Treaty's seal and introductory remarks were distinguished as follows:

> The inner circle of the seal contains the name "Muhammad, son of Abdallah, son of Isma'il, God is his protector and his Lord." The border of the seal contains the verse taken from the well-known poem in praise of the Prophet, called the Burdah, which verse occurs in several other seals of these North African documents: "He who takes the Apostle of God for his helper, if the lions encounter him in their jungles, they will withdraw."[1010]

Likewise, Hunter Miller's negotiation notes demonstrate that although the Muslim nations were willing to establish treaties with 'infidels', asserting the supremacy of the Islamic belief system was a palpable aspect of those negotiations.[1011] According to Miller's notes, the seal read, "To the Great One of the American States…the President…Peace be on those

[1010] 'Treaty with Morocco - The English Translation of 1786' (*Treaties and Other International Acts of the United States of America*, 1931) <http://avalon.law.yale.edu/18th_century/bar1786e.asp> accessed 2 April 2019.
[1011] 'Treaty with Morocco - The English Translation of 1786' (n 1010).

who follow the right guidance [i.e., the Mohammedan religion]!…"[1012] Likewise, "The Great One of…is the title by which infidel rulers are addressed in letters from the Prophet. The greeting formula, 'Peace be on those who follow the right guide,' is the classical one to unbelievers, implying that they are not worth greeting."[1013] When this provision as well as the interpretative notes are evaluated in light of the myriad colonial charters issued on behalf of the British Empire, a common thread emerges. Furthermore, juxtaposition of earlier charters and the treaties of the Muslim-majority nations with Article XI of the 1796 Treaty with Tripoli, the Framers' adoption of a different perspective on establishing the United States as a religious regime becomes unmistakable:

> [a]s the [*government*] of the United States of America is not in any sense founded on the Christian Religion,-as it has in itself no character of enmity against the laws, religion or tranquility of Musselmen,-and as the said States never have entered into any war or act of hostility against any Mehomitan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.[1014]

It is worth clarifying that this provision is not meant to suggest that Christianity in the holistic sense was not an important aspect of the lives of early Americans. It is well understood that it was. However, one is not predicated on the other. If it were, then the Framers' attempt to promote religious equilibrium would have been for naught. It is well understood that there is a remarkable distinction between nations that endeavor toward disestablishment while recognizing the significance of individual belief or dedication to one's faith, and those that allocate a constitutional role for their preferred religious denomination by declaring that the nation—*e.g.,* every Islamic state—or the national government—*e.g.,* Great Britain—is an establishment in furtherance or proliferation of that particular religious dogma. Herein however, it is evident that the U.S. Government recognized that it was not a conduit for the proliferation of any religious denomination to uphold the sacrosanctity of the countless denominations that were already co-existing in America.

At this point in history, the American colonies had recently been an extension of an empire that was an instrument of Anglicanism; therefore, making remarkable legal and linguistic

[1012] 'Treaty with Morocco - The English Translation of 1786' (n 1010).
[1013] 'Treaty with Morocco - The English Translation of 1786' (n 1010).
[1014] 'Treaty of Peace and Friendship, Signed at Tripoli November 4, 1796' (*Treaties and Other International Acts of the United States of America*, 1931) <http://avalon.law.yale.edu/18th_century/bar1796t.asp> accessed 2 April 2019.

distinctions had the effect of setting precedent for religious equilibrium amongst the many discrete religious denominations in the newly established states. It also repudiated the practice of basing international foreign policy on the proliferation of a particular denominational perspective, as had been the practice of the British Empire and the Barbary states. Distinctions such as this appear to have achieved their desired result, as the U.S. Government does not and has not ever upheld a national church or religious denomination. Moreover, the question of affording exceptional treatment to one denomination over the others seems to have been settled once the Anglicans reestablished themselves as Episcopalians to separate the religion from the government that fashioned it.[1015] Returning to Jefferson's 1776 comparison of Anglicanism and Islam, it appears that it was ripe for that time and under those circumstances, without being unduly critical of the rigid alignment of religion and government that is often identified with Islamic law and the national governments that espouse it.[1016] As is demonstrated by the current continuation of academic and legal discourse focused on the same aspects of Islam that the Framers originally questioned, the comparison seemingly remains ripe during this time and under these circumstances. A reasonable follow-up question is why would the Framers be in support of the modern U.S. Government—notwithstanding whether there's a Democratic or Republican majority—affording legal exceptionalism to Islamic law now?

5.3.3 The Scope of 'Free Exercise'—The Early American Interpretation

Recall that the degree to which the question of faith-based legal exceptionalism has been addressed in England has included both the British Empire asserting a right to exceptionalism, which in turn has created an obligation to cut non-Anglican faiths a wide berth as it relates to their requests for exceptionalism. Where it pertains Canada and the United States, there is a scarcity of scholarly research on post-colonial faith-based legal exceptionalism. This appears to be attributable to the fact that both nations are constitutionally bound to disestablishment. As Canada has already established a prohibitive policy concerning all forms of faith-based legal exceptionalism, the United States' similar commitment to disestablishment creates a reasonable question concerning

[1015] Joan R Gundersen, 'Anglicans and Episcopalians in America', *Oxford Research Encyclopedia of American History* (Oxford University Press 2017) <https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-455>.
[1016] Daniel O Conkle, 'Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty' (2011) 32 Cardozo Law Review 1755, 1766 <http://papers.ssrn.com/sol3/papers .cfm?abstract_id=1739244>.

why she continues to wrangle with whether to take unprecedented steps to further expand the Free Exercise clause for this purpose. America's vacillation also makes germane the question of how the Framers and early Americans construed 'free exercise' of religion.

Most of the pertinent scholarly research concerning the Constitutional Framers' outlook on the Free Exercise clause of the 1st Amendment appears to fall within two distinctive categories. The first focuses on whether the Framers intended that the Free Exercise and Establishment clauses should define a constitutional right upon which individuals could rely to seek redress, or whether it was intended to set up the procedural limits for religious regulation amongst the states. Although a full exegesis of the first category is beyond the scope of this study, a general overview will aid in framing the second category. Constitutional theorist Steven D. Smith was the first to "raise and frame the question of whether the religious clauses were originally meant to express a principled position on the proper relationship between government and religion."[1017] Labelling his opposing perspectives as 'substantive' (a principle or theory of religious liberty) and 'jurisdictional' (a designation of jurisdiction to the states), Smith contends that the "religion clauses were not originally intended to approve any principle or right of religious freedom…[instead, they]…were purely jurisdictional in nature; they were intended to do nothing more than confirm that authority over questions of religion remained with the states."[1018] In other words, the clauses were "not a guarantee of religious freedom but a jurisdictional prohibition against the federal government enacting laws regarding religion, reserving to the states the right to legislate as they please."[1019]

There are undoubtedly academics who embrace Smith's theory; however, Professor Ellis West offers another point of view that he labels the 'normative perspective'.[1020] In actuality, the theory reconceptualizes Smith's use of the term 'substantive' to distinguish between the perception of religious liberty as a fundamental versus constitutional right.[1021] In the text, *The Religious Clauses of the First Amendment: Guarantee of States' Rights?,* West explains:

> [m]any Americans believe that religious liberty is a natural right that all humans possess and that should not be violated by any government. Therefore, it can logically be argued that the crucial

[1017] Ellis M West, *The Religion Clauses of the First Amendment: Guarantees of States' Rights?* (Lexington Books 2012) 25-6.
[1018] West (n 1017), 25.
[1019] West (n 1017), 26.
[1020] West (n 1017), 26-7.
[1021] West (n 1017), 26-7.

> issue raised by…Smith…is [not whether the clause is a principle or theory of religious liberty, but] whether the religion clauses were intended to protect natural rights of individuals or the rights of states to legislate on the subject of religion.[1022]

Likewise, West substitutes Smith's term 'jurisdictional' with 'federalist', arguing that *federalism* is the theory that creates the division "between the central government and …[the] states."[1023] Essentially, federalism and states' rights are synonymous for the purpose of West's analysis. As far as free exercise is concerned, what is relevant is that West concludes that the constitutional clause has normative instead of federalist aspects.[1024] He reasons that since the Framers denied "the national government jurisdiction over only laws prohibiting the free exercise and not laws protecting the free exercise of religion," the clause was not simply an allocation of jurisdiction between the states and federal government"[1025] Taking the Free Exercise clause as a normative constitutional provision leads to the second category, which is germane to the investigation attempted herein.

Specifically, the normative reading of the Free Exercise clause provides an analytical basis for determining to what extent, if any, the Constitutional Framers and early Americans understood the Free Exercise clause to sanction legal exceptionalism. It appears that the closest the United States has come to seriously contemplating a return to faith-based legal exceptionalism is where the Supreme Court has read religion-based exemptions into the meaning of free exercise. In West's article, *The Case against a Right to Religion-Based Exemptions*, he asks, "[w]hen, if ever, does the free exercise clause of the first amendment give an individual or organization the right to disobey with impunity a valid law of the state?"[1026] He further spells out that, "[a]lmost all the individuals and some of the groups who claim such a right do so because the laws to which they object require them to do or no to do something that is contrary to what their religion, [*as they understand it*,] requires them to do or not to do."[1027] As is the robust nature of religious diversity in America, West provides a plethora of example cases that implicate all of the Abrahamic faiths as well as the beliefs of the Native Americans and certain religious organizations.[1028]

[1022] West (n 1017), 27.
[1023] West (n 1017), 27.
[1024] West (n 1017), 28.
[1025] West (n 1017), 28.
[1026] West (n 144), 591.
[1027] West (n 144), 591.
[1028] West (n 144), 591. Footnote No. 2 of West's article provides a comprehensive list of example cases.

None of the illustrations however include comprehensive circumvention of an entire area of law or an entire juridical framework in favor of competing platforms that result in transferring foreign laws for an insular religious subgroup or denomination.[1029] The fact that much of the academic discourse focuses on religion-based exemptions is very telling when evaluated in light of the legacy of POGG and the Framers' overt attempts to establish religious equilibrium in the newly-formed American states. As such, there is support for distinguishing the meaning and extent of religion-based exemptions and faith-based legal exceptionalism. Put another way, Smith and West's analyses demonstrate that they are not mutually-inclusive concepts. Specifically, religion-based exemptions appear to be uniformly available to all believers based on their subjective, individual understanding of the precepts of the religious dogmas to which they adhere—*e.g.,* conscientious objection. While legal exceptionalism is afforded to specific religious subgroups/denominations based on claims that a particular sect "should reap superior advantages"—*e.g.,* religious law tribunals and/or religion-centric choices of law.[1030] As the latter is the basis for the expectation of both Anglican exceptionalism and Islamic law exceptionalism, a case for the return to foundational ideals makes relevant the question of whether the Framers' perceived religious exemptions differently than legal exceptionalism.

Ragosta explains that from the inception of the United States, early Americans and the Constitutional Framers embraced the ubiquity of the freedom of conscience.[1031] However, the ubiquitous nature of that freedom did not include a right to violate or circumvent the rule of law based on a determination that it was not fit for purpose in furthering one's preferred method of worship or continuing the religiously political or legal options before immigration.[1032] According to West:

> [t]he historical data makes it abundantly clear that the 'free exercise of religion' mentioned in the first amendment was not originally understood to include a right to violate legitimate laws with impunity. Rather, 'free exercise of religion' meant the absence of laws whose primary purpose or effect was either to support or harm religion in general, any particular religion, or any persons or groups because of their religion, and it meant nothing more than that.[1033]

[1029] West (n 144), 591-92.
[1030] Ragosta (n 391), 113.
[1031] Ragosta (n 391), 151.
[1032] Ragosta (n 391), 151.
[1033] West (n 144), 623.

In other words, the "government could not directly regulate worship or a religion's internal affairs…[*that is,*] the time and place of worship or who could participate."[1034] As free exercise also included the freedom to opine the merits and/or shortcomings of different faiths, it was not understood to mean that the Government could reprimand citizens for the vocalization of mere religious opinions.[1035] Beyond belief, worship, internal affairs, and debate—which were deemed unequivocal aspects of free exercise—there is a bit of a variance concerning how the Framers perceived aspects of religion that might warrant more expansive exemptions from the rule of law.

In the article, *The Original Meaning of the Free Exercise Clause: Evidence from the First Congress*, Vincent Muñoz evidences that members of the First Congress "did not understand religious exemptions to be included in the 1st Amendment's Free Exercise Clause."[1036] As a matter of fact, the only religious exemption considered was a conscientious objector exemption—*vis-à-vis* "a religious exemption from militia service"—but it was in the context of the 2nd Amendment not the 1st.[1037] This proposed addition to the 2nd Amendment was a compromise in keeping with that which was already included in state constitutions.[1038] However, the provision did not survive Congressional deliberation, thus it is absent from the ratified version of the 2nd Amendment. According to Muñoz:

> The presence of "free exercise" protections, combined with the recognition of religious exemptions from militia service in state constitutions of the time,… supports the conclusion that the right of religious free exercise was not understood to include exemptions. Both provisions would have been unnecessary if the former was understood to include the latter.[1039]

Along the same lines, Ragosta argues that although early American perspectives on 'free exercise' were "fueled by a deep devotion to religion," it was not so exhaustive as to afford the circumvention of valid, laws that "mandat[ed] or prohibit[ed] action that [are] facially neutral to religion."[1040] Ragosta's analysis substantiates the general assertion that, although early Americans and the Framers would "support exceptions to general laws," neither group would construe 'free exercise' to encompass sanctioning a legal platform for

[1034] Ragosta (n 391), 151.
[1035] Ragosta (n 391), 151.
[1036] Vincent Phillip Muñoz, 'The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress' (2008) 31 Harvard Journal of Law and Public Policy 1083, 1120.
[1037] Muñoz (n 1036), 1120.
[1038] Muñoz (n 1036), 1120.
[1039] Muñoz (n 1036), 1120.
[1040] Ragosta (n 391), 159.

a distinct choice of law.[1041] Where it pertains activities that might give rise to exemption, these included activities such as, "oath taking, military service, medical procedures, [and possibly] work schedules…"[1042] Under these circumstances, "the government [might] restrain[] its hand, in favor of those who take action or oppose taking action for religious reasons."[1043]

West takes both analyses further in two significant ways. First, he demonstrates that government legislation may be the more appropriate means of addressing religion-based exemptions in America's religiously robust landscape, even though he did not espouse Smith's supposition that the 1st Amendment was merely an allocation of power between the state governments and the Federal Government. He also appears to reaffirm the voluntary, subjective nature of religious choice, which arguably upholds the reasonableness of religion-based exemptions that are fair and neutral while advocating against faith-based legal exceptionalism. In so doing, West endorses Muñoz's claim that religion-based exemptions were not understood by the First Congress (or Constitutional Framers) to be included in the 1st Amendment.[1044]

According to West, not only is the Constitutional guarantee of religious liberty not violated when the federal or state government "interferes with the practice of religion by an individual or a church," but the Constitutional Framers never intended to create an interference-proof provision in the first place.[1045] If this were the Framers' intent, "there is almost no government action that could not at some time or another be considered a violation of religious freedom."[1046] As it appears that the current momentum in some U.S. states bends toward moving beyond religion-based exemptions to faith-based legal exceptionalism, it is important to understand that although some exemptions came to be commonplace—as Ragosta observes—sanctioning faith-based legal exceptionalism was not one of them.[1047]

5.3.4 Free Exercise & Legislatively Granted Religion-Based Exemptions

For the sake of clarification, the aim of this study is not to advocate against all religion-based exemptions. Like West's position in the previous section, the aim is adding support

[1041] Ragosta (n 391), 158.
[1042] Ragosta (n 391), 153.
[1043] Ragosta (n 391), 153.
[1044] West (n 144), 629.
[1045] West (n 144), 633.
[1046] West (n 144), 633.
[1047] West (n 144), 633.

to the supposition that the preferred method is for legislatures to grant exemptions as privileges. Such a practice would certainly distinguish exemptions that are available to all faiths from exceptionalism that is attempted by certain religious groups based on their perception that their faith is incomparable to others for the purpose of circumventing the national rule of law. More to the point, it will prevent the trappings of setting Islam as an insular belief system with hypersensitive adherents demanding treatment not afforded adherents of other faiths. Returning to the exemption that has come to be known as conscientious objection, the First Congress opted to exclude the provision covering those who are "religiously scrupulous of bearing arms."[1048] Although not a constitutional provision, the Congress stated that it would be permissible to grant such exemptions as a legislative privilege.[1049] Therefore, it can be inferred that if any exemption (or 'exception') has the effect of weakening or changing the dynamic of the constitutional framework, then proposing legislation for state constitutional and/or statutory privilege might conceivably afford American citizenry the right to vote thereon and would be the proper means to address this exceptional change of Constitutional circumstances.

An ancillary benefit of legislatively-granted exemptions is that it affords Americans the full breadth of knowledge to understand how the legalization of faith-based legal platforms—for one religious subgroup or all of them—will affect the whole of society. This appears to be more prudent than relying on an expansive interpretation of multiculturalism to shield exceptionalism to the extent that members of other religious subgroups/denominations remain unaware of how they are actually impacted. This furthers West's other contention that "religion-based exemptions [should be] granted by legislatures… [to avoid] hardship and to [promote] neutrality."[1050] Specifically, if legislatures can extend secular exemptions to persons, groups, or businesses based on undue hardship and/or fairness, then the same can be achieved for exemptions based on religious grounds.

As it relates to religious fairness and neutrality, it is well understood that some exemptions or exceptions "have the effect of significantly influencing some persons' choice of religion."[1051] This can include influencing adherents to stay in a specific religious

[1048] 'Primary Documents in American History' <https://www.loc.gov/rr/program/bib/ourdocs/billofrights.html>. The version of the 2nd Amendment that was first passed by the House in 1789 and sent to the Senate: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, [*but no one religiously scrupulous of bearing arms*, *shall be compelled to render military service in person*.]"
[1049] Muñoz (n 1036), 1120.
[1050] West (n 144), 635.
[1051] West (n 144), 635.

community or penalizing the ones who leave. If a central facet of religious liberty in the United States is the freedom of voluntary religious choice, then where in that does affording exception to religious subgroups that have as an objective stifling religious choice? To illustrate this point, recall that religious wardens and denominational persecution were commonplace within the British Empire. As the possibility of indirectly sanctioning a return to similar policies appears to be tangentially connected to Islamic law exceptionalism, it is worth exploring this possibility further.

There are some Islamic law scholars who liken Islam with other religions for the sake of supporting Islamic law exceptionalism in Western nations.[1052] Many of those rely on the Quranic verse, "[t]here is no compulsion in religion. Wisdom has been clearly distinguished from falsehood."[1053] However, there is often an inability to adequately distinguish the Quranic verse from "centuries of Muslim jurists [who have] all affirmed…ruling[s] that…clash so clearly with the Qur'an's repeated statements on the freedom of religious choice."[1054] In the text, *The Issue of Apostasy in Islam*, Jonathan Brown notes that the criminal element of apostasy has its historical association in "its public dimension and the threat it posed to a public order built on confessional identity."[1055] Therefore, harsh punishments like stoning or death for apostasy were deemed necessary to prevent the need to police individuals' public and private behavior.[1056]

Remedying inconsistent approaches to the public dimension of private belief appears to be precisely the aim of legislatively-granted exemptions. Therefore, a relevant question is not whether it's the U.S. Government's role to grant equally accessible religious exemptions. Instead, it is whether it is appropriate for the U.S. Government to legalize faith-based legal exceptionalism to further the policing of public and private religious behavior—whether blatantly or indirectly—in a nation where policing religiosity is counter to its constitutional aims? If espousing the tenets of Islam is as inherently astute as is suggested by some Quranic or Islamic law scholars, then legislatively-granted exemptions instead of exceptionalism has a ring of uniformity and fairness that is lacking in the various interpretations of Quranic meaning that give the impression of compulsion without choice. According to West, exemptions "must be made available to all religions that would

[1052] Jonathan AC Brown, 'The Issue of Apostasy in Islam' 1 <https://yaqeeninstitute.org/jonathan-brown/the-issue-of-apostasy-in-islam/>.
[1053] MAS Abdel Haleem (ed), *The Qur'an* (OWC, Oxford University Press 2018) 29.
[1054] Brown (n 1052), 1; *See also,* Conkle (n 1016), 1766.
[1055] Brown (n 1052).
[1056] Brown (n 1052).

experience the relevant hardship," [that results from affording the preference]....[o]therwise, even the moderate principle of neutrality toward religion would be violated."[1057]

Returning to the American iteration of POGG, the decisions made by the Constitutional Framers demonstrate that one of the most compelling lessons learned from approximately two hundred years of colonialism was not to equate free exercise with a "multiformity of [denominationally subjective] religious claims" that resulted in recreating the comparative/superlative religious dynamic that existed under British Imperialism.[1058] By the end of the Revolutionary War, this was undoubtedly a pillar of American constitutionalism. As such, there is historically sound evidence for the conclusion that the Constitutional Framers and early Americans would have made a sharp distinction between 'free exercise', religious exemptions, and legal exceptionalism for one belief system. Moreover, those distinctions would have undoubtedly been predicated on heeding the issues created by the religious imperative of POGG as it applied to the colonies up to the point of American independence. Said another way, considering the effects of POGG in the American colonies, it is highly unlikely that the Constitutional Framers would have supported faith-based legal exceptionalism in the name of Islam. This is especially the case as they did not support it in the name of Anglicanism. Therefore, a fair question is if it was 'unconstitutional' for those who actually drafted the Constitution, then how can it become constitutional without the U.S. Government disregarding America's foundational history and the Constitutional document it produced?

5.3.5 The Framers & Exceptionalism as a Foundational Concession

At this point, it is worth evaluating whether there were circumstances under which the Constitutional Framers might have thought it not only prudent but also justified to offer 'legal exceptions' akin to those requested by Muslim advocacy groups. This analysis is relevant to assess whether there are certain cultural subgroups co-existing within the U.S. that could be considered distinct, especially where legal tribunals and the circumvention of the U.S. juridical infrastructure are concerned. It is a universal truth that there were Aboriginal peoples co-existing on the land that presently houses the United States and Canada. Moreover, imperial and other types of expansion have been catalysts for changes to not only the topography but also cultural and religious ideologies. Recent estimates

[1057] West (n 144), 635 [185].
[1058] Vallier and Weber (n 891), 139.

suggest that there were hundreds even thousands of distinct tribes throughout the North American continent, and their "systems of belief and ritual were as legion as the tribes [themselves]."[1059]

Therefore, differences in cultures, beliefs, and the colonial/imperial dynamic between Native Americans and the British Empire, the French Empire, and the Spanish Empire resulted in corresponding issues at different points in North American history. The difficulties in question are arguably inherent in imperial attempts to colonize territories that are already inhabited by others. As was previously discussed, long before the conflict between the British and the French Empires, the French and Spanish Empires vied for North American territory. Brecher points out that after England captured Canada in 1760, the French and Indian War brought about a century and a half of conflict between the British and French Empires for control of the North American continent.[1060] By the time the American colonies transitioned into independent states, there was also a transition in the way in which those newly formed states interacted with Native Americans.[1061]

To fully understand why the legal and religious '*concessions*' extended to Native Americans are unparalleled to the religion-centric '*exemptions*' and/or '*exceptions*' associated with any subsequent immigrants—notwithstanding religion or country of origin—it is necessary to distinguish instances of colonial and post-colonial engagement. Specifically, there is an important distinction between engagements that occurred between the British Empire (or British-America) and Native Americans as indigenous peoples, and the United States and Native Americans as tribal nations. Confusing these points in history fosters the misapprehension that there were not historical points of demarcation involving different imperial forces and different motivating factors. It also obscures the fact that the involvement between the U.S. and Native Americans is not the same relationship that existed between the Spanish, French, or British Empires and Native Americans.

Analogous to the interaction between the American colonies and the British Empire under POGG and the Canadian colonies and the French and British Empires (also under POGG), the imperial/tribal relationships were focused on proliferating Catholicism and

[1059] Christine Leigh Heyrman, 'Native American Religion in Early America' (2019) <http://nationalhumanities center.org/tserve/eighteen/ekeyinfo/natrel.htm>.
[1060] Frank W Brecher, *Losing a Continent: France's North American Policy, 1753-1763* (Greenwood Publishing Group 1998) 18-23.
[1061] Joseph L Story, *Commentaries on the Constitution of the United States Vol. 2 §§ 630--35, 641--47, 673--80* (The University of Chicago Press 1833) <http://press-pubs.uchicago.edu/founders/documents/a1_2_3s22.html>.

Anglicanism, respectively.[1062] Recall that the conversion of 'savages' was integral to the aims of the British Empire.[1063] Peter d'Errico explains the relationship between the Empire and Native Americans, which predates the existence of the United States:

> [f]rom their earliest contacts with the 'new world,' colonizing powers asserted sovereignty over indigenous peoples, based on a theological-legal theory built on 'divine right.' Spain, Portugal, France, England, and other colonial regimes explicitly based their sovereignty claims on religious doctrines decreed by the Pope, who was regarded as having power to grant titles to portions of the earth for purposes of Christian civilization. The result of colonial assertions of sovereignty was that indigenous nations were legally stripped of their independent status. Their existence was in some instances not recognized at all[,] and their lands treated as legally 'vacant' (*terra nullius*). In other instances, indigenous peoples were declared to have a 'right of occupancy' but not ownership of their lands. In either instance, the fundamental principle was that supreme legal authority lay outside the indigenous nations.[1064]

By contrast, there were ancillary religious and cultural elements to the dynamic between Native Americans and the United States; however, intra-continental engagement was and remains predicated not on claims of religious exceptionalism, but on claims of 'tribal sovereignty'.[1065] Similar to the constitutional circumstances that buttress Canada's engagements with the First Nations and to some degree the French-Quebecois (*e.g.,* ethnicity, language, and territory), the colonial terms associated with the British Empire were amended or voided, and new terms with the United States were memorialized.[1066] However, the changes did not occur until both sovereign entities were no longer under British Imperial control. At the point of American independence, the Framers took certain steps to make distinction between U.S. interaction with Native Americans and the interaction between natives and the British Empire. Most notably, the Framers ratified

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[1062] Peter d'Errico, 'SOVEREIGNTY: A Brief History in the Context of U.S. "Indian Law"', *The Encyclopedia of Minorities in American Politics* (American P, University of Massachusetts, Amherst 2000) 691-93 <https://www.umass.edu/legal/derrico/sovereignty.html>.

[1063] Recall the analysis at Section 4.3 of Chapter 4.

[1064] d'Errico (n 1062), 691.

[1065] 'Commerce With Indians Tribes' <https://law.justia.com/constitution/us/article-1/44-commerce-with-indian-tribes.html>.

[1066] *See e.g.,* 'Aboriginal Affairs & Northern Development Canada' (*Royal Proclamation of 1763: Relationships, Rights and Treaties*, 2013) <https://www.canada.ca/en/crown-indigenous-relations-northern-affairs.html> accessed 15 June 2019; 'The Royal Proclamation of 1763 by King George III' <https://primarydocuments.ca/documents/RoyalProc11763Oct7>; Anthony J Hall, 'Royal Proclamation of 1763', *The Canadian Encyclopedia* (2006) <https://www.thecanadianencyclopedia.ca/en/article/royal-proclamation-of-1763> accessed 27 October 2018. The Royal Proclamation of the 1763 "set out the core elements of the relationship between First Nations and the Crown, established the recognition of First Nation rights in Canada, and laid the foundation of the treaty-making process." Reference to this proclamation is carried over into § 25 of Canada's Charter of Rights and Freedoms.

official bi-lateral treaties between the U.S. Government and Native American tribes, which are demonstrative of the fact that North American lands were not considered 'legally vacant'. Moreover, they evidence that the U.S. Government understood that Native Americans possessed more than a 'right of occupancy'.

The first official bi-lateral treaty between the U.S. and a Native American tribe—*i.e.,* the Lenape Nation—was designated, *Treaty with the Delawares, 1778*.[1067] As a matter of legal distinction, it is generally understood that treaties are "compact[s] between independent nations."[1068] Thus, the ratification of one or a series of treaties between the U.S. Government and tribal nations evidences the understanding of a shift in the rules of engagement. Compare the designation of 'Treaty' with the 'Royal Proclamation of 1763' and the 'Quebec Act of 1774' issued by the British Empire. The former established the relationship between the Crown and Canadian Aboriginals and the latter outlined the freedoms afforded the French-Quebecois. By the nature of their titles, they afford no independent designation to the Aboriginals and/or French-Quebecois, even though their existence predated British occupation.[1069] The aims of the *Delawares* Treaty were to secure food, supplies and safe passage for American troops across Lenape lands during the "United States' war against the king of England."[1070] Securing a means of ingress and egress in itself suggests that the territory is neither legally vacant nor physically unoccupied. For the sake of further exemplification, the United States entered into bi-lateral treaties with the "tribes of the Upper, Middle and Lower Creeks and Semanolies composing the Creek nation of Indians," in 1790 under the *Treaty with the Creek*s as well as in 1794 with the Six Nations, which "occupied the border between the United States and British Canada."[1071] Consistent themes were the acknowledgment of territorial

[1067] 'Treaty with the Delawares, 1778' <https://americanindian.si.edu/nationtonation/treaty-with-the-delawares.html>.
[1068] Tez Cruz, 'Limits on the Treaty Power' (2019) 127 Harvard Law Review <https://harvardlawreview.org /2014/01/ limits-on-the-treaty-power/>. Cruz citing *Head Money Cases*, 112 U.S. 580, 598 (1884).
[1069] 'The Quebec Act: October 7, 1774' (n 719).
[1070] 'Treaty with the Delawares, 1778' (n 1067).
[1071] 'Muscogee Treaty, 1790' <https://americanindian.si.edu/nationtonation/muscogee-treaty.html>. The treaty provides, "the undersigned Kings, Chiefs and Warriors, for themselves…do acknowledge themselves, and the said parts of the Creek nation, to be under the protection of the United States of America, and of no other sovereign whosoever; and they also stipulate that the said Creek Nation will not hold any treaty with an individual State, or with individuals of any State"; 'Treaty of Canandaigua, 1794' <https://americanindian.si.edu/nationtonation/treaty-of-canandaigua.html>. The treay acknowledges that, "the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same. nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use ·and enjoyment thereof: but the said reservations shall remain theirs, until they choose .to sell the same to the people of the United States, who have the right to purchase".

sovereignty as well as the recognition of legal and physical occupancy by the tribal nations.[1072]

Along the same lines, there are three relevant provisions of the U.S. Constitution—which were ratified between 1789 and 1868—that demonstrate the acknowledgement of the sovereign rights of Native Americans. Specifically, Art. 1, § 2, Cl. 3 provides that, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers… *excluding Indians not taxed*…"[1073] In the text *Commentaries on the Constitution of the United States*, Justice Story notes, "[the] arrangement adopted by [this section of] the constitution was a matter of compromise and concession."[1074] Where it concerned apportioning state representation and taxes, Justice Story explains that:

> [t]here were Indians, also, in several, and probably in most, of the states at that period,…who did not form a part of independent communities or tribes, [*exercising general sovereignty and powers of government within the boundaries of the states*]. It was necessary, therefore, to provide for these cases,…[t]here seems not to have been any objection in including, in the ratio of representation, persons bound to service for a term of years, and in excluding Indians not taxed.[1075]

Likewise, Article 1, Section 8 provides: "Congress shall have the power to regulate Commerce with foreign nations and among the several states, *and with the Indian tribes*,…".[1076] This too recognizes tribal sovereignty; but in this case, it applies to commercial activities between the U.S. Government and the tribal nations. Lastly, the 14th Amendment provides: "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, *excluding Indians not taxed.*"[1077] Admittedly, the 1868 ratification of the 14th Amendment created a problematic dichotomy concerning the definition of tribal sovereignty and the attainment of American citizenship for the purpose of equal protection under U.S. law (*i.e.,* one sovereign entity seeking protection from another sovereign

[1072] 'Muscogee Treaty, 1790' (n 1071); 'Treaty of Canandaigua, 1794' (n 1071).
[1073] 'U.S. Constitution', *Legal Information Institute* (Cornell Law School) <https://www.law.cornell.edu/constitution>.
[1074] Story (n 1061), [635].
[1075] Story (n 1061), [635].
[1076] 'U.S. Constitution' (n 1073).
[1077] Garrett Epps, 'Constitutional Citizenship: A Legislative History' (2011) <https://www.americanimmigrationcouncil.org/research/constitutional-citizenship-legislative-history> accessed 23 November 2018.

entity).[1078] Although worthy of detailed explication, full analysis of this issue is beyond the scope of this study. Suffice it to say that the three constitutional provisions have been interpreted to mean that, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[1079] Native American duality as sovereign tribes with members who are also American citizens has resulted in certain limitations to the nature of their claims of sovereignty.[1080] However, where tribal sovereignty exists, it predates the United States and exists notwithstanding the state in which the lands are situated.[1081] As is demonstrated herein, these constitutional provisions underpin the United States' acknowledgement of Native American tribes as sovereign and distinguishable from not only state and federal governments but also foreign nations.[1082] This suggests that tribal sovereignty cannot be equated with other claims for exceptionalism associated with subsequent immigration, whether voluntary or involuntary. Furthermore, there is no evidence of a constitutional equivalent to the rights and privileges associated with being first.

These concessions (*i.e.,* not exemptions or exceptions) also underpin the establishment of distinct legal infrastructures and bodies of law—*vis-à-vis* Tribal law and Indian law. As it relates to the division between Indian law and Tribal law, Cohen *et al*. explain:

> [p]rior to the creation of the United States, the entire land mass it now occupies was owned and governed by hundreds of Indian tribes. These tribes, sovereign nations under international law, were brought into [British-America] through a colonial process that was partly negotiated and partly imposed.[1083]

After the establishment of the United States, the provisions of the U.S. Constitution taken in conjunction with relevant Supreme Court decisions set the principles of "[f]ederal Indian law, [which] is the primary mechanism for mediating the resulting intergovernmental relationships among the Indian nations, the United States, and the states of the Union."[1084] In regards to Tribal law, Fletcher explains that, "[e]ach Indian nation has the authority,

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[1078] *See e.g.,* Scott Bomboy, 'The 14th Amendment's Tortuous Relationship with American Indians' [2014] Constitution Daily <https://constitutioncenter.org/blog/the-14th-amendments-tortuous-relationship-with-american-indians1>. Bomboy provides a short overview of the circumstances created by the 14th Amendment to the Constitution and Native American's claims to tribal sovereignty but also U.S. citizenship.
[1079] 'Commerce With Indians Tribes' (n 1065).
[1080] 'Commerce With Indians Tribes' (n 1065).
[1081] 'Commerce With Indians Tribes' (n 1065).
[1082] Judge Joseph J. Wiseman, 'An Overview of Key Federal Indian Law Cases' <https://www.courts.ca.gov/documents/Key-Federal-Indian-Law-Cases.pdf>.
[1083] Felix S Cohen and Executive Board of Authors and Editors, *Cohen's Handbook of Federal Indian Law* (LexisNexis 2012) [1.01].
[1084] Mathew LM Fletcher, *American Indian Tribal Law* (Wolters Kluwer Law & Business 2011) xxi-xxii.

often expressed in an organic document such as a tribal constitution or a treaty with the United States, to legislate for the general welfare of the tribe, its people, and its land…".[1085] As a result, the Native American judicial system (*i.e.,* Tribal courts) is beyond the regulatory oversight of the U.S. judiciary. The partition continues to be memorialized by the Indian Reorganization Act of 1934. Under the Act, "tribes were encouraged to exercise their inherent sovereignty to establish their own justice codes and operate court systems enforcing those laws."[1086]

However, the Tribal Law & Policy Institute acknowledges that "tribal justice systems are diverse in concept and character."[1087] Although many tribes have expansive bodies of codified law, many do not. Thus, they are at different levels of development in the creation of comprehensive and cohesive laws that have intertribal applicability.[1088] This reality has been the catalyst for tribal court decisions remaining outside the American juridical framework. Based on the Framers' acknowledgment of tribal sovereignty, enforcement of tribal court judgments outside tribal lands remains the subject of ongoing legal analysis and scholarly debate.[1089] The debated issues are not however religion-centric, so they fall beyond the scope of the Free Exercise/1st Amendment analyses linked to requests for Islamic law exceptionalism. Instead, analyses concerning the enforcement of tribal decisions fall within the purview of the Article IV, Section 1, of the U.S. Constitution—*i.e.,* the Full, Faith & Credit clause—or as a Conflict of Laws inquiry—*i.e.,* the principle of Comity.[1090]

[1085] Fletcher (n 1084), xxi-xxii.

[1086] Tribal Law and Policy Institute, 'Tribal Courts' (*Tribal Court Clearinghouse*, 2018) <https://www.tribal-institute.org/lists/justice.htm>; *See also*, 25 U.S.C. § 461*, et seq.*

[1087] Tribal Law and Policy Institute (n 1086).

[1088] Tribal Law and Policy Institute (n 1086).

[1089] *See e.g.,* PS Deloria and Robert Laurence, 'Negotiating Tribal-State Full Faith and Credit Agreement: The Topology of the Negotiation and the Merits of the Question' (1994) 28 Georgia Law Review 365. Deloria and Laurence focus on the procedural hurdles of enforcement of tribal judgments off-reservation and of state judgments on-reservation in light of the grand Indian law concept of tribal sovereignty. Specifically, both the entry of judgment against non-consenting defendants and the determination to enforce, or not, another government's judgment are acts which only sovereigns do.; William V Vetter, 'Of Tribal Courts and " Territories " Is Full Faith and Credit Required ?' (1987) 23 California Western Law Review 219. Vetter focuses one the fact that Indian tribal governments have become increasingly active, expanding both the nature and amount of their concerns and efforts. The number and variety of cases being heard in tribal courts are also increasing. However, unless tribal court judgments can be enforced outside of the reservation, judgments against non- members may be useless.; Craig Smith, 'Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited' (2010) 98 California Law Review. Smith postulates that federally recognized Indian tribes are America's third sovereigns; however, exactly what demands the existence of tribal sovereignty places on our constitutional system is a seemingly inexorable question.

[1090] *See also,* William L Reynolds, 'The Iron Law of Full Faith and Credit' (1994) 53 Maryland Law Review 412. Reynolds points out that the Framers intent was to ensure unity of the new nation while also preserving states' autonomy.; 'Comity', *Legal Information Institute* (Cornell Law School 2019)

Despite the fact that past and present questions of co-existence implicate subgroups that have come to be distinct ethnic minorities, the foundational documents referenced herein evidence that there is no connective thread between the distinctions made related to tribal sovereignty and the Constitutional Framers' analysis concerning religious equilibrium, the right of free exercise, and/or legislatively-granted religious privileges. In fact, the subject of religion is noticeably absent from the bi-lateral treaties between the United States and Tribal Nations from U.S. inception to 1868.[1091] Even after 1868, religion did not assume a role in treaties between the U.S. Government and Native Americans. Recall that 1868 is a historical landmark for the United States because Native Americans were designated U.S. citizens for the sake of equal protection under the 14th Amendment to the U.S. Constitution. Thus, Indian law turned into the legal channel between the Government and the now semi-autonomous tribes.

Unless Muslim migrants are endeavoring to collectively claim sovereign territorial rights in the name of Islam—*vis-à-vis* an Islamic state or caliphate—within the sovereign borders of the United States, their voluntary immigration to the United States is not akin to the circumstances of Native Americans. Therefore, it is reasonable to conclude that the Framers would not have established a common thread between constitutional analyses related to Native American tribal sovereignty and faith-based legal exceptionalism as is attempted by Muslim advocacy groups. This also demonstrates the complexity and imprudence of pointing to multiculturalism as the connective thread between culture, political ideologies, and faith-based legal exceptionalism in modern America. Specifically, linking the two ethnic groups as similarly-situated fosters an incongruent commonality that diminishes the legacy and history of the former and frustrates the ability to discern a constitutional resolution for the latter.

5.4 Conclusion

The research outcomes included herein suggest that the Constitutional Framers would find it prudent to legally accommodate religion-centric legal platforms in light of the lessons learned under the POGG doctrine. Moreover, they would have distinguished faith-based

<https://www.law.cornell.edu/wex/comity>. Specifically, the legal principle that political entities (such as states, nations, or courts from different jurisdictions) will mutually recognize each other's legislative, executive, and judicial acts. The underlying notion is that different jurisdictions will reciprocate each other's judgments out of deference, mutuality, and respect.

[1091] *See also,* 'Treaty with the Delawares, 1778' (n 1067); 'Muscogee Treaty, 1790' (n 1071); 'Treaty of Canandaigua, 1794' (n 1071); 'Treaty of Fort Wayne, 1809' <https://americanindian.si.edu/nationtonation/treaty-fort-wayne-1809.html>; 'Treaty with the Cherokee, 1835' <https://americanindian.si.edu/nationtonation/treaty-new-echota.html>.

legal exceptionalism from religious exemptions and/or constitutional concessions. Therefore, it can be inferred that neither the Framers nor early Americans would have construed the right of conscience, religious liberty, or free exercise to encompass faith-based legal exceptionalism, entitling adherents of Islam to carve out a separate legal infrastructure. The enduring legacy of POGG in the American colonial experience ensured that early Americans understood exceptionalism to be exactly what it is—a privilege afforded one or a few religious subgroups to the detriment of the others. It is likely that the Framers' rejoinder would have been akin to Canada's most recent national response.

In light of this reality, it is imprecise for faith-based legal exceptionalism to be construed as a natural extension of religious liberty in the U.S. Unless or until this kind of exceptionalism—and all of its known repercussions—are acknowledged as definitive extensions of one's constitutional right of free exercise or universal right of conscience or belief, it would be imprudent to use the Free Exercise clause as its conduit. To do so would implicate the 1st Amendment in achieving what is the equivalent of a religion-centric choice of law provision when the proper course of action is affording a religion-based exemption. If religious law tribunals are to be construed as religion-based exemptions, it has been established herein that the proper course is to make such a privilege uniformly available to all religious denominations or allowing U.S. citizens the option to vote on the measure, instead of returning to the practice of faith-based legal exceptionalism. To do so would respect the subjective, voluntary circumstance that is religious choice while also respecting the sanctity of the social contract that is the U.S. Constitution. This is an option preferable to continuing to instigate a degree of religious division in the United States that has not occurred on this mass scale since the American colonies denounced the British Empire.

CHAPTER 6
OBSERVATIONS ON DISREGARDING FOUNDATIONAL PERSPECTIVES IN THE U.S.

"That [fairly stable constitutional system of government] has allowed a large multiracial, multiethnic, and multireligious population to govern itself democratically while protecting basic human rights and resolving disputes under the rule of law."[1092]

This chapter concludes the investigation into the POGG doctrine's effect on U.S. constitutional history by focusing on some of the possible outcomes of disregarding the Framers' perspectives on POGG at the time the U.S. Constitution was drafted. Assessing the present Islamic law inquiry in the U.S., this chapter attempts to illustrate how multiculturalism is not the proper focal point from which to gauge legislative and judicial consensus concerning faith-based legal exceptionalism. As such, perspectives on multiculturalism are evaluated in the context of Muslim immigration to highlight how over-extended the concept has become. Likewise, this chapter illustrates how pitting multiculturalism against assimilation has resulted in a discernible 'power-grab' in determining how political and legal inquiries, which are undoubtedly constitutional in nature, are being assessed as questions of multicultural inclusion. This chapter also evidences the practicality of the United States following in England and Canada's footsteps by returning to foundational ideals and commitments to address such a consequential amendment to American constitutionalism. In light of the absolute necessity of religious equilibrium at the point of America's foundation, this chapter also demonstrates the continued necessity of avoiding comparative/superlative politics surrounding religious liberty by examining some of the not so obvious—or 'dormant'—effects of sanctioning faith-based legal exceptionalism for one religious subgroup (*i.e.,* Islamic law). Finally, this chapter puts forth a constitutional rationale for ensuring that multiculturalism does not become America's newest suicide pact.

6.1 Incongruity in Multiculturalism & the Expediency of Foundational Principles

Recall from the first chapter that the concept of multiculturalism was originally identified as a celebration of cuisine, music, customs, and traditions associated with different cultures co-existing in one nation.[1093] However, the malapportionment of more recent accommodation requests focused on political ideologies and foreign and/or religious legal

[1092] Breyer (n 945), 4.
[1093] Kymlicka (n 34), 97.

infrastructures associated with Muslim migration has placed a spotlight on the overreliance on the concept of multicultural inclusion as the response to every condition and/or issue—whether good, bad, or very bad—associated with ethnic migration. As was established at the beginning of this study, the situation was exacerbated by the promotion of multiculturalism as the antithesis to societal assimilation instead of encouraging interdependence for the sake of cultural inclusion and individual accountability.[1094] As such, national promotion of multiculturalism in the U.S.—and in other Western nations—has arguably waned or even dissipated. Recall that Barry suggests that attitudes concerning multiculturalism can be attributed to the fact that any belief or practice, even remotely linked as an element in the culture of the group who practices it, is preserved as an extension of multiculturalism.[1095] Moreover, it appears that efforts to question the issues that emanate from this kitchen-sink approach have resulted in political correctness stepping in as the proverbial 'gag order' for the purpose of quashing certain speech that might be challenging but no less necessary to properly address socio-political occurrences that raise questions concerning perceived violations to the U.S. state and federal law.[1096]

To illustrate Barry's contention in the post-9/11 American context, a recent exhibition on *Religion in Early America* was sponsored by Smithsonian's National Museum of American History and was on display from 2017 to 2018. The exhibition seemingly attempted to afford later immigrated Muslims a personal stake in the early American experience as an apparent boost to their 'cultural well-being'.[1097] Its effort to include Islam in the scope of religious diversity in early America was slightly overshadowed by its capitalization on the insidious institution of slavery to create an inherited religious legacy between more recent Muslim immigrants and Muslims whose religion was 'suppressed' or 'exploited' because

[1094] Adida, Laitin and Valefort (n 41), 44. According to Adida and others, their research evidences that national policies oriented toward assimilation have better returns for integration than do policies that emphasize multiculturalism, although assimilation policies in themselves do not prevent the discrimination associated with Muslim immigration generally. For this reason, pitting the two policies against one another has resulted in multiculturalism failing to yield social inclusion or national unification in Western nations.
[1095] Barry (n 56), 252.
[1096] *See e.g.,* Anne Reynolds, 'Political Correctness', *The First Amendment Encyclopedia* (Middle Tennessee State University: The John Seigenthaler Chair of Excellence in First Amendment Studies 2019) <https://www.mtsu.edu/first-amendment/article/1138/political-correctness>; Jay Bowen, 'The First Amendment: Mugged by Political Correctness' *Foundation for Economic Education* (Washington DC, 4 October 2018) <https://fee.org/articles/the-first-amendment-mugged-by-political-correctness/>; Aaron R Hanlon, 'Political Correctness Has Run Amok — on the Right' [2018] *The Chronicle of Higher Education* <https://www.chronicle.com/article/Political-Correctness-Has-Run/242143>. As these articles evidence, much of the political correctness debate in the U.S. has been associated with the suppression of free speech in further of multicultural inclusion.
[1097] National Museum of American History, 'Religion in Early America' <https://www.si.edu/Exhibitions/Religion-in-Early-America-5718>.

of their status as 'black chattel'.[1098] The establishment of this link seems to promote the theory that later Muslim immigrants have the same religious stake in America's history as is possessed by those who were 'involuntarily' immigrated.

Consistent with Barry's contention about the behavior of 'intellectual magpies', there does not appear to have been an assessment of whether using slavery as a historical nexus serves to benefit America's ethnically and politically fragmented landscape, or whether it even establishes a legacy that later immigrated Muslims would find appropriate. As Islam is the religious center for multiple ethnicities, can it be assumed that any of them would find something appropriate in having a history of enslavement in the United States or any other nation? This notwithstanding, the aims of multiculturalism appear to be furthered by virtue of the fact that establishing this notable connection attempts to place Islam on equal footing with Christianity in the early American experience, even if in fact it was not. Ill-contrived attempts at multicultural inclusion, such as this one, also seem to glaze over continued claims that the United States has failed to sufficiently promote multicultural inclusion for those non-Muslim involuntary immigrants or their posterity. This failure is evidenced by the fact that the topic of 'African-American or Slavery reparations' remains a 'thing' in the United States. As such, it has reemerged as an agenda item for at least two of the candidates running on the Democratic ticket for the 2020 presidential election.[1099] This is the case despite the fact that slavery was legally prohibited after the Emancipation Proclamation on 01 January in *1863*.

Along the same lines, the exhibit focused on the religious beliefs of those in the business of *purchasing* black chattel without representing the religious beliefs or history of those in the *business* of selling. Therefore, the exhibit's showpieces illustrating that there were slaves who were brought to the United States from the African continent, spoke Arabic, and

[1098] National Museum of American History (n 1097); National Museum of African American History & Culture, 'African Muslims in Early America' <https://nmaahc.si.edu/explore/stories/collection/african-muslims-early-america>.

[1099] Laura Stampler, 'What Exactly Are Slavery Reparations? 2020 Democrats Are Trying to Figure That Out' [2019] *Fortune Magazine* <http://fortune.com/2019/02/27/slavery-reparations-democrats-2020/>; Eugene Scott, 'Democratic Candidates Are Backing Reparations for African Americans. That Could Be Politically Risky.' *The Washington Post* (Washington DC, 26 February 2019) <https://www.washingtonpost.com/politics/ 2019/02/26/democratic-candidates-are-backing-reparations-african-americans-that-could-be-politically-risky/?utm_term=.6d441ed66a05>; *See also,* Olivia Paschal and Madeleine Carlisle, 'Read Ta-Nehisi Coates's Testimony on Reparations' *The Atlantic* (New York, 19 June 2019) <https://www.theatlantic.com/politics/ archive/2019/06/ta-nehisi-coates-testimony-house-reparations-hr-40/592042/>. Author Coates contends. "But we are American citizens, and thus bound to a collective enterprise that extends beyond our individual and personal reach. It would seem ridiculous to dispute invocations of the Founders, or the Greatest Generation, on the basis of a lack of membership in either group. We recognize our lineage as a generational trust, as inheritance,…" Based on his contention, heeding the Founders' views on faith-based legal exceptionalism might also fit in that category.

espoused Islam suggests that those human beings were not sold into slavery by Jews or Christians. There are some scholars who have debated not only whether Islamic slavery was more humane than imperial slavery but also the notable differences between slavery based on ethnicity versus enslavement based on religion.[1100] Despite the hair-splitting over the degrees of insidiousness associated with the practice of enslaving human beings, this area of discourse has demonstrated that the institution of slavery was an Islamic practice—including a connection to the Transatlantic Slave Trade—before it became an economic staple in many Western nations.[1101] Omissions such as this appear to contribute to the perception that it is appropriate to promote multiculturalism at all costs, even if it means the suppression or augmentation of applicable history to avoid casting a pejorative light on those who espouse Islam. Therefore, it is fair to suggest that circumstances such as this are demonstrative of Barry's contention, thereby highlighting a problematic facet of the all-inclusive approach to multiculturalism.

To further demonstrate the problematic implications of an expansive interpretation of multiculturalism, it is worth returning to the political ideologies that were referenced in previous chapters. Specifically, the ideals that buttress authoritarianism have been traditionally viewed as existing on the opposite end of the political spectrum of those that buttress democracy.[1102] Moreover, there is little to no evidence that any Western nation has or would willingly trade in democracy for authoritarianism. This is the case despite recent reports suggesting that authoritarian regimes attempt to migrate imams and other religious scholars as a 'soft-power strategy' to promote authoritarianism in Western nations.[1103] Along the same lines, statistical data suggests that there are far fewer citizens

[1100] Burkett and Leiner (n 754), 33-36; *See also*, Robert Allison, *The Crescent Obscured: The United States and the Muslim World 1776-1815* (Oxford University Press 1995). Leiner notes that "Islamic slavery was less severe than slavery in the American South." Citing Robert Allison's *The Crescent Obscured*, Leiner cosigns the depreciation of the insidiousness of Islamic slavery, claiming it was not so much a 'physical condition' but 'an attitude'. Moreover, the theory is that since Islamic slaves had the possibility of being ransomed or the 'non-compulsory option' of leaving slavery by becoming a Muslim, they had hope of freedom. According to Leiner and Allison, "[i]n this modern view, slavery in the Barbary world was an 'intellectual concept…."

[1101] *See generally,* Ronald Segal, 'America's Black Muslim Blacklash', *Islam's Black Slaves: The History of Africa's Black Dispora* (Atlantic Books 2001) 226-241; Burkett and Leiner (n 754); Allison (n 1100); Morgan (n 1009); Paul Baepler, 'White Slaves, African Masters' (2003) 588 The Annals of the American Academy of Political and Social Science 90 <http://www.jstor.org/stable/1049856>; BBC, 'Slavery in Islam' (2004) <https://www.bbc.co.uk/religion/religions/islam/history/slavery_1.shtml>.

[1102] Ahmet T Kuru, 'Authoritarianism and Democracy in Muslim Countries: Rentier States and Regional Diffusion' (2014) 129 Political Science Quarterly 399-400.

[1103] *See e.g.,* Gerasimos Tsourapas, 'How Authoritarian Regimes Use Migration to Exert "Soft Power" in Foreign Policy' *The Washington Post* (Washington DC, 6 July 2018) <https://www.washingtonpost.com /news/monkey-cage/wp/2018/07/06/how-authoritarian-regimes-use-migration-to-enact-foreign-policy/?utm_term=.cc305c903573>.

of democratic nations purposely seeking to take up residence in nations with known authoritarian regimes than there are citizens under authoritarianism seeking relocation to nations espousing democracy.[1104] Yet, even the suggestion that authoritarianism is politically and/or legally incompatible with American values appears to be an affront to multiculturalism because it might send an unwelcoming message to newer immigrants who hail from nations where the socio-political backbone is authoritarianism. Occurrences such as these allow for the inference that multiculturalism has become a catch-all expression devoid of real merit in determining how to address incongruences that accompany certain facets of plurality. Likewise, over-reliance on multiculturalism gives the impression that the United States has reached a problematic precipice that might culminate in bastardizing the supremacy of the national rule of law if political ideologies and religion-centric legal precepts continue to be defined as an aspect of multiculturalism to condone certain political and legal exceptionalism.

6.2 A Prudent Legal Inquiry: From Where Does Islamic Law Originate?

As has been previously demonstrated, a good deal of the assessment of Islamic law exceptionalism in the U.S. has been focused on multiculturalism and the 1% of the population that espouses Islam as well as far less than 1% that desires separate Islamic law platforms.[1105] However, it would appear that any assessment of Islamic law exceptionalism is better served by focusing on foundational aspirations of the Framers as well as the Constitution as a social contract, which implicates not just the 1% but also the other 99%. With this in mind, it is necessary to first understand that Islamic law and the concept of 'sharia' have been portrayed by some as both an inflexible and indivisible pillar of the Islamic belief system and the mainstay of legislative/juridical infrastructures for certain Muslim-majority nations.[1106] Depending on whether the objective is to conflate or bifurcate, the belief system could be labeled religion, law, religious law, or legalistic religion. Consequently, there have been myriad debates concerning whether Islamic law (also designated 'sharia law') is compatible with the tenets of liberal democracy upheld in the

[1104] *See e.g.,* Mohamed (n 903); Michael Lipka, 'Muslims and Islam: Key Findings in the U.S. and Around the World' (2017) <https://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/>; 'Europe's Growing Muslim Population' (2017) <https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>. Collectively, these research surveys address the migration from Muslim-majority, hugely authoritarian nations, to European nations. At the time of the submission of this research study, no such research surveys could be found to address migration from democratic nations to authoritarian ones.
[1105] Lipka (n 1104).
[1106] An-Na'im (n 305), 1-3.

United States, Canada, and/or England.[1107] As has been established, relevant scholarly discourse and political debate, which is applicable to all three nations, appear to advocate for a degree of caution and/or suggest that the question remains uncertain. However, the analysis put forth in previous chapters demonstrates a misalignment of the question of democratic integration in nations that espouse disestablishment. Where it pertains the policies adopted in England and Canada, the misalignment is circumstantially connected to the divergent outcomes associated with the effects of POGG. As the United States has seemingly failed to adopt a national stance or appreciate the causal link between POGG and the nation's perspective on disestablishment, the degree to which the U.S. has fully scrutinized England and Canada's national rejoinders as an aspect of their common colonial heritage is a work in progress.

What is clear is that recent Congressional reports evidence that the U.S. legislature is fully cognizant of the fact that religious law is exclusively imputable to those who become members of the religious subgroups/denominations to which the law is applicable. Specifically, Brougher notes that those outside a specific religious community are not bound by social and/or legal precepts of the religious dogmas espoused by those inside the community.[1108] Therefore, debating the issue of the appropriateness of U.S. legislatures—whether state or federal—statutorily excluding a collection of religious guidelines that have "no legally binding authority [on any American citizen] in the United States," demonstrates the degree to which reliance on an expansive definition of multiculturalism has seemingly distorted the 1st Amendment Free Exercise assessment.[1109]

Akin to the circumstances in England that resulted in the curtailment of jurisdiction for Anglican Ecclesiastical courts, religious plurality precludes ignoring the prospect of Islamic law exceptionalism encroaching on the religious liberty and/or other rights of non-Muslims. Engaging with sharia guidelines or Islamic law via ADR or litigation in a vacuum is reminiscent of the problematic predicament that existed for religious dissenters under the POGG doctrine at the point of American colonial rebellion. As such, it offers a plausible alternate theory of why many American citizens find something disconcerting about the

[1107] *See e.g.,* Cesari (n 29); Ahdar and Aroney (n 303); Ahdar and Leigh (n 846); Julian Rivers, 'Islam and English Law: Rights, Responsibilities and the Place of Shari'a' (2014) 25 Islam and Christian–Muslim Relations 270 <http://www.tandfonline.com/doi/abs/10.1080/09596410.2013.854965>; Julian Rivers, 'Religious Liberty as Collective Right' in Richard O'Dair and Andrew Lewis (eds), *Law and Religion* (4th edn, Oxford Scholarship Online 2012); Ali, *Modern Challenges to Islamic Law* (n 65).
[1108] Brougher (n 306), 5.
[1109] Brougher (n 306), 5.

idea of integrating Islamic law in to the American legal framework. Although it could be attributed to racism or Islamophobia, it might as easily be attributed to the fact that exceptionalism still retains the fundamental characteristics of encroaching on the personal and legal rights of others, whether religious or secular.[1110] As the United States does not have a national church in the way that England does, the Government cannot employ it to appease concerns by suggesting that Islamic law exceptionalism is the proper 'Christian' response or even in line with the values that all Americans share. Instead, previous chapters demonstrate that the proper 'Constitutional' response is to return to the objectives and outlooks of the nation's Founders. From that vantage point, it becomes reasonable to question under what circumstances would Islamic law exceptionalism—or faith-based legal exceptionalism generally—not be prohibitive in the United States of America? To address this question in the Islamic law context, it is essential to make a distinction between religious guidelines and the religion-centric laws of Islamic states.

6.2.1 Distinguishing Religion, Religious Guidelines & Religious Law

As it pertains to disestablishment in an Islamic state or *ummah*, Islamic scholars suggest that the founder of Islam made no separation between religion and government.[1111] Specifically, Muhammad made no discernible distinction in *his* community "that was at once political and religious, [of which he was] the head of state."[1112] Likewise, "he never showed his companions any sign of separation of church and state."[1113] Thus, it can be inferred that Islam has been reared on a steady diet of religion/governmental entanglement that never deviated from seeking to discern what the Quran requires and/or what Muhammad would do or say about social ordering. Even where the Medina Charter has been highlighted as illustrative of an early Islamic treaty—as is the case in this study—scholars like Bernard Lewis have qualified the assertion by noting that the agreement was "a unilateral proclamation" by Muhammad concerning the coexistence of Meccans, Medinese, and the People of the Book.[1114] Lewis also contends that the Charter "marked

[1110] Wright and others (n 5), 125.
[1111] *See e.g.,* Ibn Warraq, *Why I Am Not a Muslim* (Prometheus Books 1995); Ibn Mohamad Jawad Chirri, *Inquiries About Islam* (Islamic Center of Detroit 1965); Roy S. Moore, Benjamin D DuPré and John A Eidsmoe, 'Brief Amicus Curiae of Foundation for Moral Law, on Behalf of Defendant-Appellants, in Support of Reversal' (2011) <http://morallaw.org/PDF/Awad_v_Ziriax_OKSharia_FMLAmicus.pdf> accessed 13 March 2019.
[1112] Ibn Warraq (n 1111), 164; *See also*, Roy S. Moore, Benjamin D DuPré & John A Eidsmoe (n 1111), 12.
[1113] Ibn Mohamad Jawad Chirri (n 1111), 167; *See also*, Roy S. Moore, Benjamin D DuPré & John A Eidsmoe (n 1111), 13.
[1114] Bernard Lewis, *The Arabs in History* (6th edn, Oxford University Press 1993) 39.

the first step toward the later Islamic autocracy."[1115] Therefore, it is highly unlikely that the autocratic community that Muhammad founded is the proper reference point for determining how to address Muslim immigration to Muslim-minority nations like those that are the subject of this study.[1116]

It does however aid in understanding Brougher's assessment that many Muslim-majority nations that attempt to establish secular states or detach religion from government often opt for secular legal codes to replace established sharia practices and principles.[1117] To illustrate, recall that the 2016 Democracy Index identifies Indonesia and Turkey as Muslim-majority nations that were ranked the highest and lowest in terms of espousing democracy.[1118] Although their rankings speak to the degree to which democracy is flourishing—which includes the impartiality of their legal infrastructures—the point here is that democracy has resulted in the adoption of Civil law systems instead of the retention of Islamic law.[1119] This suggests that that there is some level of awareness that although sharia and Islamic law are distinguishable, the primary and secondary source material affects its neutrality. It is however beneficial to understand how religious guidelines and the laws of Islamic nations have been distinguished since schisms occurred within the founder's *ummah*. This is especially germane to the clarification of statutory and judicial engagement as well as 1st Amendment analysis concerning Islamic law exceptionalism.

Where it pertains sharia, Kamali explains that it represents a set of religious guidelines that are distinguishable from Islamic law.[1120] In *Understanding Islamic Law in Theory & Practice,* Mashood Baderin also acknowledges that Islam is not sharia, and sharia is not Islamic law.[1121] Although sharia is typically translated as Islamic law, the connotation is incorrect because it is inconsistent with its original meaning.[1122] Specifically, sharia,

[1115] Lewis (n 1114), 40.
[1116] For the sake of clarity, the evaluation of the Medina Charter as a means for the original Framers to assess Islamic law in the context of the *ummah* and the evaluation of Islamic law for the sake of accommodation outside the *ummah* yields the same outcomes. Specifically, entanglement of church and state was not the objective for the founding of the United States; and now that it separation of church and state is a constitutional pillar, religiously law becoming entangled with national law frustrates the separation and forces the laws of the *ummah* on those who do not espouse the beliefs or practices of the *ummah*.
[1117] Brougher (n 306), 5.
[1118] The Economist Intelligence Unit (n 842).
[1119] *See generally*, The Economist Intelligence Unit (n 842); United States Central Intelligence Agency, 'Introduction to Indonesia' (n 843); United States Central Intelligence Agency, 'Introduction to Turkey' (n 843).
[1120] Kamali (n 151), 2.
[1121] Mashood Baderin, 'Understanding Islamic Law in Theory and Practice' (2009) 9 Legal Information Management 186, 186-87.
[1122] Raj Bhala, *Understanding Islamic Law (Shari'a)* (Matthew Bender & Company, Inc 2011) xix.

"originally meant the path or track by which camels were taken to water, and so by transfer the path ordained of God by which men achieve salvation."[1123] In other words, "shari'ah literally means a way to the watering-place or a path apparently to seek felicity and salvation."[1124] Since sharia is "a path to religion…[it] is primarily concerned with a set of values that are essential to Islam."[1125] An-Na'im's observations further this idea: "[t]he term Sharia does not occur in the Qur'an at all in the meaning that we use it today. In fact, the term Sharia does not exist in Muslim sources for the first 300 years of Islam. In other words, Sharia is not a term or concept that is interchangeable with Islam that you find from the beginning."[1126]

Even more telling is the distinction Ali makes between sharia and Islamic law. She acknowledges that the scholarship on sharia varies significantly on the development and influences of sharia; therefore, it is a bit difficult to establish accuracy concerning how to conceptualize it.[1127] Fluidity notwithstanding, Ali distinguishes between sharia and Islamic law in a way that is germane to the analysis attempted herein. Specifically, she contends that references to the concept of sharia law are misleading because "[a]dding 'law' to sharia implies that sharia constitutes law in the sense of legally enforceable rules akin to black-letter law,… ."[1128] Her assertion is consistent with An-Na'im and others who make clear that principles of sharia by their nature and function cannot and therefore should not be implemented by Muslim or secular states, as they are left to the personal choices of those who espouse Islam.[1129]

Therefore, it can be inferred that sharia is a collection of guiding principles not dissimilar to moral recommendations linked with other faiths. Like all other subjective guidelines, there is nothing legally binding about them, although they are unquestionably persuasive in directing one's moral compass. As such, it is imprecise to suggest that sharia is a legal codex that possesses the elements of a body of law that demands integration of legal tribunals for the practice thereof. If this is the case, then where the U.S. Government attempts to integrate or afford exception to 'sharia law', it would seem to be complicit in legally compelling the personal and individual religious choices of those who espouse

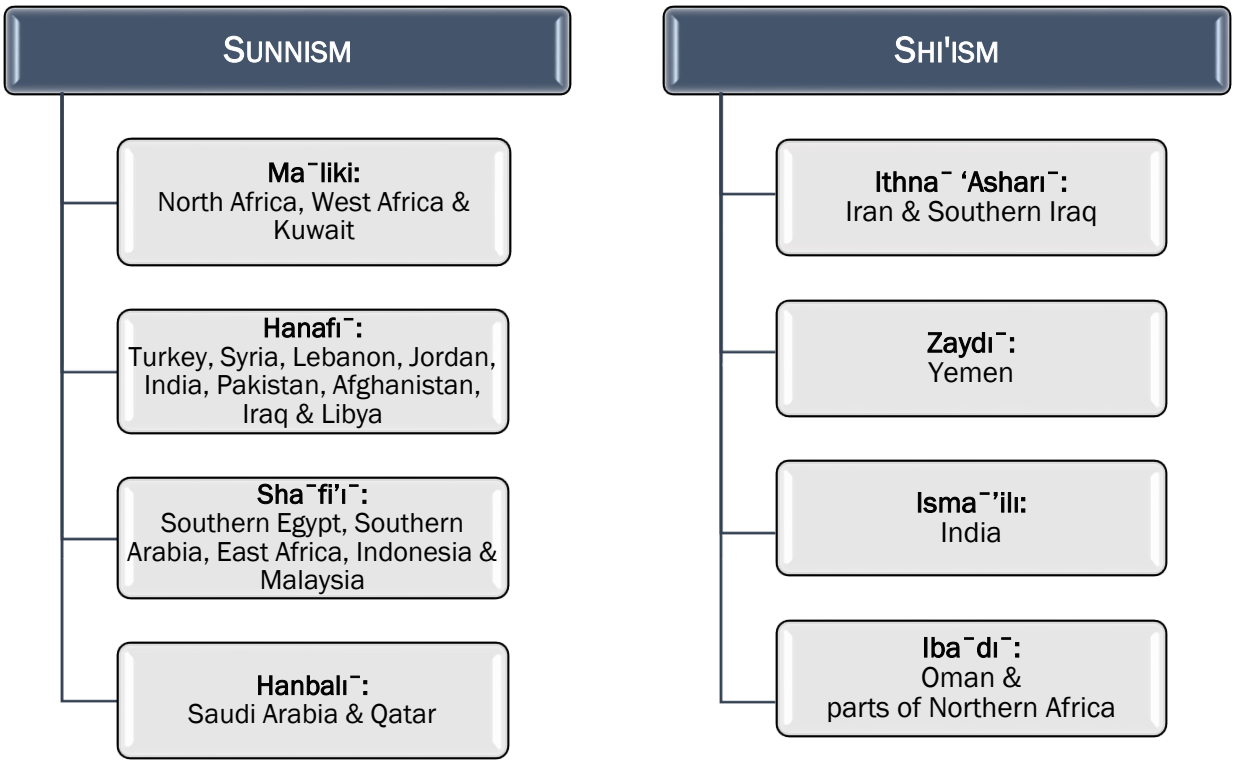
[1123] Bhala (n 1122), xix.
[1124] Kamali (n 151), 2.
[1125] Kamali (n 151), 2.
[1126] An-Na'im (n 305), 10.
[1127] Ali, *Modern Challenges to Islamic Law* (n 65), 21.
[1128] Ali, *Modern Challenges to Islamic Law* (n 65), 4.
[1129] Ali, *Modern Challenges to Islamic Law* (n 65), 21; An-Na'im (n 305), 1-3.

Islam.[1130] Thus, a relevant question is whether it is prudent for U.S. state and/or federal governments to afford deference to distinct legal platforms that have the practical effect of policing religious choices and the degree to which people follow religious 'guidelines'. This is especially pertinent since the U.S. Supreme Court has made clear "that courts should refrain from trolling through a person's or institutions' religious beliefs."[1131] Then it would appear that sanctioning Islamic law exceptionalism sets the U.S. judiciary up to become the conduit for 'trolling'…or worse…a conduit for returning to the colonial-era practice of promoting religious wardens.

Where it pertains Islamic law on the other hand, Brougher also clarifies that like sharia, the two primary sources are the Quran and the Sunnah, which signifies the words and actions of the Islamic prophet Muhammad.[1132] Similar to sharia, Islamic law returns to interpretations of the Quran but from a jurisprudential perspective. Kamali contends that Islamic law came into existence long after the first reference to sharia in the Quran.[1133] Likewise, Baderin evaluates how legal rights associated with Islamic law are comparable or compatible with Common or Civil law by distinguishing not only the source material but also the way in which that material is reinforced. Specifically, he clarifies that Islamic law is tied to legal or interpretive schools reinforcing (by reinterpretation) the Quran and/or the Sunnah. For clarity, "a legal [or interpretive] school implies a body of doctrine taught by a leader, or imam, and followed by the members of that school."[1134] The following diagram represents Baderin and Kamali's explanation of the interpretative schools by geographic location:

[1130] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge University Press: Islamic Text Society 2003) xix.
[1131] Karseboom (n 886), 699. Karseboom is citing the holding in the U.S. Supreme Court case, *Mitchell et al. v. Helms et al.*, 530 U.S. 793 (2000).
[1132] Brougher (n 306), 5.
[1133] Kamali (n 1130), xix.
[1134] Kamali (n 151), 68.

Figure 5: Diagram of Topography of Interpretive Schools of Sunnism & Shi'ism



As is illustrated herein, interpretive schools determine how and to what extent secondary sources—*ijma* (consensus amongst Muslim jurists) and *qiyas* or *aql* (*i.e.,* analogy (Sunnis) or reason (Shi'ites) taken from previously accepted decisions)—are relied upon.[1135] From an analytical or jurisprudential perspective, the aforementioned sources establish a cyclical deductive practice by: (1) extracting injunctions and principles based on interpretations of the Quran; (2) applying principles reflected through the teachings of Prophet Muhammad; (3) opining and coming to a consensus from among the confidants of Muhammad or juridical *ijma*; and (4) deducing analogies or *qiyas.*[1136] This appears to be consistent with the distinctions between sharia and Islamic law that Baderin makes, especially since any question concerning secondary sources returns to the Quran and Sunnah.[1137]

Recall that American Common law does not rely on religious texts for its formation, expansion, or contraction.[1138] This also means that Courts do not look to the views of

[1135] Brougher (n 306), 5.
[1136] Irshad Abdal-Haqq, 'Islamic Law: An Overview of Its Origins and Elements' (2002) 7 Journal of Islamic Law & Culture 36-7; *See also,* Brougher (n 306), 5.
[1137] Baderin (n 1121), 188-89.
[1138] Baderin (n 1121), 188.

prophetic figures or church liturgy to pronounce impartial judgments. Instead, Common law in the United States has a built-in system, the principle of *stare decisis*, which requires Courts to adhere to the rules established by decisions in earlier cases.[1139] The effect is that Common law builds on and corrects itself as judges continue to revisit prior legal cases to ensure stability and consistency of the rule of law as a whole. This also allows citizens to generally respect the rule of law as neutral and uniformly applicable. As a result, American legal scholars and judges—as do certain Islamic law scholars—signify that Islamic law (*i.e.,* sharia law) lacks the precision and uniformity associated with black letter law derived from Common or Civil law systems. Turner and Karrar-Lewsley observe that, "the amorphous nature of [Islamic] law can be difficult to appreciate…[i]n fact, the term [Islamic law] no more denotes a cohesive, codified law than the term 'natural law' does."[1140] Along the same lines, a Delaware Court judge in a 2003 dispute focused on Delaware's 'Borrowing Statute' noted that "[i]t is not possible to open up law books and read cases to discern [Islamic] law."[1141] These perspectives (and myriad others) are consistent with Ali's contention that Islamic law "is not and cannot be uniform, as [it] does not have a static, fixed content, extrapolated as it is from a range of sources by different juristic schools."[1142] To put another way, all roads lead back to the Quran and Muhammad, the head of the Islamic *ummah*.

Considering the distinctions highlighted herein, there appears to be an essential contradiction in the comparisons between sharia, Islamic law, and Common law. By disregarding or understating the contradiction, much scholarly discourse focuses on the somewhat oxymoronic inquiry into whether the religious source material that buttresses Islamic law can be divorced from its religious content. This would aid in determining whether Islamic law is compatible with Western democracy or whether the primary sources are malleable enough to adapt to changing times. However, this study approaches the subject from the perspective that the source material renders it lacking in the neutrality necessary to be applied uniformly without curtailing or violating the religious freedoms and legal rights of those who do not espouse the religion. To put another way, Islamic law scholars demonstrate that the application of Islamic law results in repeatedly answering

[1139] Oyen (n 203).
[1140] Paul Turner and Robert Karrar-Lewsley, 'Finding Your Path: Arbitration, Sharia, and the Modern Middle East' (2011) 6 Global Arbitration Review 3 <https://www.tamimi.com/law-update-articles/finding-your-path-arbitration-sharia-and-the-modern-middle-east/>.
[1141] Dylan Consla and Brandon Mordue, 'Stop Borrowing Trouble: Clarifying the Saudi Basic Exception to Delaware's Borrowing Statute' (2016) 41 Delaware Journal of Corporate Law 29, 29.
[1142] Ali, *Modern Challenges to Islamic Law* (n 65), 5.

two questions, which are *what does the Quran dictate* and *what would Muhammad do*? Are these questions not analogous to asking *what does the Torah dictate* and *what would Moses do*? Or *what does the Holy Bible dictate* and *what would Jesus Christ do*? Or what are the dictates of any one of the dozen or so religious texts (and the actions/thoughts of their prophetic figures) that were relied upon during the swearing in of members of the 116th U.S. Congress in January 2019?[1143]

Although the questions in themselves are arguably the most relevant and necessary questions that people of faith should ask on a consistent basis, how are these the appropriate questions for establishing legal precedent and/or dispensing judgments in a religiously plural society that espouses disestablishment? To take this point further, it might appear comparable to suggest that at one point in the histories of Western nations, religious law was the only law there was; or at some point in history, medieval kings and queens entangled religion and law (*e.g.,* Alfred the Great). However, the history of Anglican Ecclesiastical courts makes the lack of neutrality easily discernible, while at the same time invalidating the effectiveness of such a comparison. Wooding notes that the jurisdictional conflict between the law of the state (*i.e.,* Common law) and the law of the Church (*i.e.,* Canon law) continued for centuries even before Henry VIII's schism from the Church in Rome.[1144] After the split, one of the most significant factors in the religious law of Anglican Ecclesiastical courts finally giving way to English Common law and a national juridical infrastructure was the acknowledgment that it was legally unacceptable for the laws of the whole of society to be determined by the religious texts and/or canon of one denomination or subgroup. From that perspective, the encroachment on the religious liberties of non-Anglicans is unmistakable.

[1143] Amanda Jackson, 'Muslim and Jewish Holy Books Among Many Used to Swear-In Congress' *CNN World News: International Edition* (Washington DC, 4 January 2019) <https://edition.cnn.com/2019/01/03/us/congress-swear-in-religious-books-trnd/index.html>; *See also*, Aleksandra Sandstrom, 'Faith on the Hill' (2019) <https://www.pewforum.org/2019/01/03/faith-on-the-hill-116/>. The Pew Research Center highlights religious denominationalism as it relates to the 116th Congress for the express purpose of illustrating overrepresentation of Christians in Congress, while the religious schisms that exist within all other religious subgroups are noticeably left unclassified. For example, how many of the Muslims are Sunni, which represents 99% of the Muslim population worldwide, and therefore suggests a present and future expectation of overrepresentation of Sunnism in the United States. Likewise, how many of the Jews are Hasidic versus non-Hasidic or even Jews for Jesus? Along the same lines, there are certain denominations listed that may not believe in using electricity let alone running for public office. The inclusion of those on the list however aids in exaggerating the overrepresentation argument. In reality, the outcomes do not suggest that there is an overrepresentation of Christians in Congress; instead, it highlights that there is an overrepresentation of certain denominations of Christianity in Congress. It also allows for the inference that religious law exceptionalism (religious law tribunals) in light of so much denominationalism creates a problematic outcome in the United States.

[1144] Wooding (n 255), 157.

Evaluation of the same set of circumstances as a means of rationalizing Islamization as a facet of multiculturalism still results in both Anglican Ecclesiastical courts and Islamic law tribunals making demands for privilege or exceptionalism and imposing the religious laws of the few on the whole of society. The exchange of terms from Anglicanism to Islamization seemingly shifts the means by which encroachment of the rights of those outside either religious community is perceived and evaluated. Specifically, Anglican Ecclesiastical law seemingly connotes Imperialism, while Islamic law has apparently come to connote migration of a diaspora and/or multiculturalism, which necessitates the accommodation of 'difference'. In this case however, both yield the same result for those who do not believe in either perspective on religiosity. Exchanging denotations for connotations results in jurisdictional retrenchment of Anglican Ecclesiastical law/courts being deemed acceptable because it demanded expansive exceptionalism. Yet, preventing jurisdictional encroachment of Islamic law, which also demands expansive exceptionalism, is an affront to multiculturalism. This is the case despite the fact that the juxtaposition is between one of the largest religious denominations in the world (*i.e.,* Anglicanism) and the second largest and fastest growing religious belief system in the world (*i.e.,* Islam).[1145] This reality notwithstanding, the different connotations seemingly result in a failure to even question the means by which affording faith-based legal exceptionalism will affect religious liberty and equal access to justice of non-Muslims in one context, even though it created a justifiable basis for rebellion and war for the sake of religious liberty in the other context.

Therefore, it can be inferred that Islamization of American Common law represents the inverse of the circumstances that instigated assessments of the appropriateness of continuing to afford exceptional treatment to the Ecclesiastical courts of England. That is, it has the same constitutionally insupportable aspects that result in ascribing the religious guidelines or legal precepts of Muslims to the whole of society. Furthermore, any reliance on sharia or Islamic law that results in invoking what is religious primary and secondary source material brings about this outcome. As religion is a voluntary association in England, Canada, and the United States, it can also be deduced that, notwithstanding whether the religious guidelines and laws are bifurcated or conflated, there is no real way to get around this practical reality. This is also the case where methods of interpretation and dispensation bind national judiciaries to step into the shoes of Islamic jurists. Whether encroachment comes by primary or ancillary means, it is no less problematic where the

[1145] Lipka (n 1104).

legal rights and religious liberties of the non-Muslims implicated by Islamic law exceptionalism are concerned.

The aforementioned analyses provided by American and Islamic law scholars and jurists establish a basis for conceptually distinguishing between sharia and Islamic law, which also negates the theory that Islamic law is an indivisible extension of Islam or sharia. Specifically, the term sharia encompasses discrete religious guidelines linked with the 'voluntary' associations preferred by those who espouse Islam. Alternatively, Islamic law includes interpretations of the Quran and Sunnah that have become legally binding in nations where that law prevails. The apparent distinction between the concepts suggests that it is imprecise to equate sharia with Islamic law when attempting to make determinations about sanctioning either as a legal resource for ADR or adjudication in the U.S. Hence, the effects of the POGG doctrine and what those effects taught the Framers about faith-based legal exceptionalism remains extremely relevant today. In other words, the nation's comprehensive assessment of not only Anglican exceptionalism, but also of the Quran and the religious laws of Islamic *ummahs*, afforded the American colonies the requisite foundational understanding to recognize the imprudence of faith-based legal exceptionalism in 1776 remains prevalent today.

6.2.2 The Nature of Islamic Regimes—Schisms & Geography

If the United States were to discount America's connection to POGG and the Framers' perspectives, then the comparative/superlative nature of denominationalism within Islam offers a relevant prediction of the effects of entangling the American legislature or judiciary with the religiously political feud of two denominations. Recall from previous chapters that North America has already been an arena for one religious Armageddon. Not unlike the history of competitive proliferation of imperial-Catholicism and imperial-Anglicanism, the historical and geographical proliferation of Islam has similar characteristics. Specifically, the spread of Islam possesses the same schismatic attributes of denominationalism that are inherent in other religious belief systems. The most notable schism within the Islamic faith is between Sunnism and Shi'ism.[1146] Recall that Anglicanism emerged because of England's split with the Church of Rome over Henry VIII's marital circumstances. Along similar lines, the Sunni/Shia split emerged over the question of who would be Muhammad's rightful successor.[1147] According to Ahmed and Kerston:

[1146] Shuster (n 926); Ahmed and Kersten (n 926).
[1147] Shuster (n 926).

> Muslims who wanted to select [Muhammad's] successor, or Caliph, by following the Prophet had designated his cousin and son-in-law Ali as his legitimate heir. This group was called Shia Ali, or 'Party of Ali', from which comes the word Shia.[1148]

Like the religiously-political tensions between Catholicism and Anglicanism, engagements between Sunnis and Shias have resulted in "occasional instances where religious intolerances on both sides led to [national and international] conflict."[1149] Returning to Figure 5, denominationalism has resulted in comparable and in some instances competing schools assessing the Quran and Muhammad's thoughts and actions, while establishing Islamic law as the legal substrate for approximately 45 nations throughout the Middle East and Africa.[1150] Notwithstanding the fact that one can distinguish between sharia (non-legally binding religious guidelines) and Islamic law (legally binding law of certain Islamic nations), the distinction does not negate the religious nature of either, as they are both recitations of the Quran and Sunnah. Based on the relative steadiness of migration from Muslim-majority countries to the U.S., especially since the 1960s, it is safe to say that the United States plays host nation to immigrants from every nation listed in the diagram. Brougher and others contend that, for the U.S. judiciary to engage with Islamic law, it entails affording a platform for the dispensation of interpretations of religious law imported from Islamic law nations based on any of the aforementioned perspectives on the proper interpretation of the Quran and Sunnah.[1151] Thus, a relevant socio-legal inquiry is, does Islamic law possess the requisite neutrality to be applied in a nation that espouses disestablishment or whether any interpretation of it should be afforded deference in the U.S.? Moreover, how does the particular selection affect everyone else?

6.3 The 'Dormant' Effects of Marketing Exceptionalism as Multiculturalism

In light of American foundational experiences under POGG and the lessons of the Framers pertaining to faith-based legal exceptionalism, it is necessary to demonstrate the problematic implications of espousing any one of the aforementioned interpretations. This entails determining whether there are discernable 'dormant effects' on those who are

[1148] Ahmed and Kersten (n 926).
[1149] Ahmed and Kersten (n 926).
[1150] Tad Stahnke and Robert C Blitt, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries' (2005) 7 <https://www.uscirf.gov/sites/default/files/resources/stories/pdf/Comparative_Constitutions/Study0305.pdf>.
[1151] *See e.g.,* Brougher (n 306), 5; Karseboom (n 886); Katherine Lemons and Joshua Takano Chambers-Letson, 'Rule of Law: Sharia Panic and the U.S. Constitution in the House of Representatives' (2014) 28 Cultural Studies 1048, 1048-50.

outside the zone of exception. In other words, how might the legal rights of non-Muslims be affected by affording faith-based legal exceptionalism to Muslims? This question is relevant because it why is it essential to reject the notion that assessments concerning exceptionalism and/or Islamization of U.S. law should be understood as appropriate within an expansive view on multiculturalism.

The phrase 'dormant effects' is a nod toward the concept of the 'dormant or negative commerce clause,' which is a legal principle that stems from Article I of the U.S. Constitution.[1152] The principle is employed to prohibit protectionist state legislation that discriminates against interstate or international commerce.[1153] It suggests that affording exclusive power to Congress implies an inverse consequence, which is a restriction on state legislation that improperly discriminates against interstate commerce. One can generally understand the constitutional analysis as an evaluation of how individual states' subjective commercial activities (*i.e.,* intrastate activities) have a cumulative effect on the larger commercial community (*i.e.,* interstate activities). The vantage-point from which these activities are evaluated is not from one state's efforts to benefit itself or its individual residents. Instead, the activities are evaluated from the vantage point of the larger commercial community.

The 1942 case *Wickard v. Filburn*, 317 U.S. 111, offers an uncomplicated illustration of the underlying principle. Filburn was a small Ohio farmer who grew wheat to use on his farm.[1154] When the U.S. Government set production limits on wheat under the Agricultural Adjustment Act of 1938, the aim was to stabilize not only wheat supply but also associated prices.[1155] Filburn exceeded the limit permitted by nearly 12 acres and was fined as a

[1152] 'Commerce Clause', *Legal Information Institute* (Cornell Law School) <https://www.law.cornell.edu /wex/commerce_clause>; U.S. CONST. art I, § 8, cl. 3. "Congress shall have power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *See also,* the section defining the "Dormant Commerce Clause" as the prohibition, implicit in the Commerce Clause, against states passing legislation that discriminates against or excessively burdens interstate commerce.
[1153] 'Commerce Clause' (n 1152); Martin H Redish and Shane V. Nugent, 'The Dormant Commerce Clause and the Constitutional Balance of Federalism' (1986) 1987 Duke Law Journal 589 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2994&context=dlj>. Specifically, Section IIB1 addressing the *Intent of the Framers*, arguing that certain legal scholars contend that the Framers were clearly aware of the dangers of interstate economic friction, and chose to deal with the problem solely by the vesting of a power in Congress, rather than by imposition of a direct constitutional provision. This is not dissimilar to the religious argument made by Ellis concerning the proper means to address religious exemptions for the sake of religious equipoise and fairness.
[1154] *Wickard v. Filburn*, 317 U.S. 111 (1942)., *Legal Information Institute* (Cornell Law School) <https://www.law. cornell.edu/supremecourt/text/317/111>; *Wickard v. Filburn*, 317 U.S. 111 (1942). <https://www.oyez.org/cases/ 1940-1955/317us111>.
[1155] *Wickard v. Filburn,* 317 U.S. 111 (1942). (n 1154).

result.[1156] When the case reached the U.S. Supreme Court, Filburn argued, "the extra wheat that he had produced in violation of the law had been…for his own use and thus had no effect on interstate commerce,…this meant that he had not violated the law because the additional wheat was not subject to regulation under the Commerce Clause."[1157] The Court disagreed with Filburn. In a unanimous decision, the Court reasoned that, "even if each individual activity had a trivial effect on interstate commerce, as long as the intrastate activity viewed in aggregate would have a substantial effect on interstate commerce," it is within the purview of Congress's regulatory power.[1158] Therefore, Filburn's subjective activities taken in aggregate with the production of all other farmers had a negative or dormant effect on interstate commerce. Put another way, if every farmer attempted to exceed the regulatory limits for their own self-interest, it would frustrate the stability of not only wheat supply but also the national cost of wheat.

Although the terminology is customarily associated with the constitutional legalities surrounding commercial activities, the employment of the laws of commercial contract to make reasonable the concept of faith-based legal exceptionalism, or the contracting away of one's Free Exercise liberties, also makes reasonable the use of the Commerce Clause to provide theoretical application herein. Based on the meaning of faith-based legal exceptionalism ascribed to this study, it can be inferred that affording exception based on the subjectivity of one's religious beliefs may produce effects that are 'dormant' for citizens who belong to other religious subgroups/denominations. It may also be inferred that these effects could frustrate the preservation of the national rule of law and equal access thereto, especially if the effects promote 'forum shopping' or create a wider range or different set of legal standards amongst the adherents of different religious dogmas. For the sake of illustration, it is worth analyzing the circumstantial implications of Muslim Family Law ('MFL') and Muslim Banking Law ('MBL'), when balanced against the rights of the adherents of other faiths or the plurality inherent in religious denominationalism as a whole.

6.3.1 Evaluating the Dormant Effects of Muslim Family Law

Returning to *S.D. v. M.J.R.,* the defendant's claim at its core was centered in family law that had morphed into domestic abuse charges and a petition for spousal protection under a

[1156] *Wickard v. Filburn,* 317 U.S. 111 (1942). (n 1154).
[1157] 317 U.S. 111 (1942). (n 1154).
[1158] 317 U.S. 111 (1942). (n 1154).

TRO.[1159] The defendant's reliance on the assertion that the actualization of his sexual desires is not problematic in his understanding of Islam suggests that his legal counsel thought it a valid defense. Put another way, his attorney thought it acceptable to respond to the plaintiff's petition for a TRO by relying on an interpretation of the Quran or Sunnah that aided in mitigating his client's behavior. As inherently problematic as such defenses may appear, the right to make them is not predicated on how repugnant society finds them. Instead, they appear to be predicated on the degree to which the U.S. is willing to expand the margins of the Free Exercise clause to allow interpretations of religious texts to refashion certain legal standards, defenses, and/or mitigating factors for some religious subgroups.

Likewise, custodial rights under MFL offer another relevant illustration of the dormant effects. The legal implications for parental rights of non-Muslim fathers demonstrate the dormant effect, especially where fathers might benefit from America's incidental adoption of the traditional patriarchal perspectives of Islamic law. In accordance with Islamic law, there are certain rights afforded Muslim men in relation to the best interest of their children. Where it pertains divorce proceedings and custodial arrangements, "it is presumed that the best interests of the child are met by the dictates of a female having custody during younger years and a male having custody during later years."[1160] When male children in particular reach a certain age, husbands are traditionally afforded custody of those children in divorce because fathers are presumed to be in their best interest.[1161]

Notwithstanding the disparate treatment of male and female children under Islamic law, the implications relevant to this study stem from expanding the margins of the Free Exercise clause for MFL to circumvent national law. Specifically, adherents to other denominations are subject to U.S. law under a system that looks at the best interests of the child(ren) by establishing a rebuttable presumption that the mother is the custodial parent, whether in or out of wedlock, from birth to the age of majority.[1162] The burden is often on the father to rebut the presumption and establish that awarding him full custody is in the best interest of his child(ren). This outcome forces both parents to make a case

[1159] *S.D. v. M.J.R.* (n 937).
[1160] Monica E Henderson, 'U.S. State Court Review of Islamic Law Custody Decrees - When Are Islamic Custody Decrees in the Child' (1997) 36 Brandeis Journal of Family Law 423, 430.
[1161] Henderson (n 1160), 430.
[1162] Henderson (n 1160), 430-31; *See also,* Roy S. Moore, Benjamin D DuPré and John A Eidsmoe (n 1111), 20.

for full custody or work to achieve a compromise such that the child(ren)'s best interests are always paramount.[1163] According to Monica Henderson:

> Under Islamic law, long-standing presumptions regarding parental fitness direct custody decisions[,] and the law assumes such presumptions automatically protect a child's best interests. Such presumptions and their enforcement run contrary to custody law in the United States.[1164]

In other words, depending on the age and gender of a Muslim child at the point of divorce, the question of fitness to parent under Islamic law is a secondary or tertiary inquiry after the question of whether the parent is male and a Muslim. The latter requirement is consistent with interpretations of Islamic law that preclude Muslim children from being raised by non-Muslim family members.[1165] Tangentially, this suggests that any freedom or right to leave Islam is in effect denied the mother if she wants to retain the right to raise her children. For these reasons, Henderson opines that "[t]he court should ensure an Islamic decree actually serves the child instead of subjecting the child and possibly fit parent to the dictates of traditional [Islamic law] presumptions."[1166]

As a side note however, the patriarchal lens from which Islamic custody decisions are made could be a boon for divorced and single fathers who have attempted to gain custody of their child(ren) without any measurable degree of success. To put another way, the practical implications appear to encompass Muslim fathers' religion and gender creating a presumptive custodial right, while all other non-Muslim fathers are required to make a valid legal case for the same access to their children. Moreover, the disparity is created for no other reason than they fall outside the zone of Islamic law exceptionalism. To date, there have been a small number of cases where U.S. Courts have precluded an automatic presumption of custodial rights. In some of those instances, the Muslim father opts to circumvent the U.S. Court's jurisdiction by returning to his nation of origin and securing a judgment under Islamic law, to which the U.S. Court affords deference.[1167] According to Henderson's analysis, the same outcome is achieved—the Muslim father gains custody.[1168] However, the outcome is not achieved by using the American judicial system—including

[1163] Henderson (n 1160), 430-31.
[1164] Henderson (n 1160), 444.
[1165] Henderson (n 1160), 427.
[1166] Henderson (n 1160), 444.
[1167] Center for Security Policy (n 904), 23-34.
[1168] Henderson (n 1160), 444. Although beyond the scope of this study, it is acknowledged that there is still a disparity or injustice imposed upon Muslim mothers when Muslim fathers pursue Islamic law judgments in Islamic law nations and return to the United States expecting them to be afforded legal deference. For further consideration of the effects on the mother, see Henderson's article in its entirety.

state arbitration regulations—as the conduit for expanding the Free Exercise clause to foster disparate legal standards for custodial arrangements or other legal decisions for the sake of Islamic law exceptionalism. To put another way, the U.S. judiciary as a conduit affects the religious freedoms and legal rights of all Americans, while the other circumstance can be distinguished as a consequence of an expansive view on multiculturalism that encompasses political ideologies and faith-based legal systems of non-democratic nations.

For those who may be in favor of sanctioning Islamic law tribunals in the U.S. as a means to address issues such as the one highlighted above, it is convenient to claim that the wife/mother's religious commitment prevails when she freely agrees to divorce under the terms set by a religious tribunal. Taking this supposition at face value without addressing any claims concerning the perceived imbalance of power between men and women under Islam, the dormant effects on non-Muslims are implicated not just by disparate legal standards and substantive outcomes associated with adjudication, but they are even evident in the procedural disparities in the preliminary requirements of arbitration. It is well understood that arbitration in the U.S. is regulated substantively and procedurally by state and federal law. As was previously established, the FAA provides statutory coverage for federal arbitration "to ensure the validity and enforcement of arbitration agreements in any 'maritime transaction or…contract evidencing a transaction involving commerce[.]'."[1169] At the state level, the Uniform Arbitration Act ('UAA') or the Revised Uniform Arbitration Act ('RUAA') provides statutory coverage for at least 35 states, while also providing a statutory template for the regulatory schemes adopted in the remaining states.[1170] In relation to MFL specifically, the Uniform Family Law Arbitration Act ('UFLAA') has more recently been proposed to regulate all family law disputes where "the parties, usually spouses, agree to submit one or more issues arising from the dissolution of their

[1169] Jon O Shimabukuro and Jennifer A Staman, 'Mandatory Arbitration and the Federal Arbitration Act' (2017) <https://fas.org/sgp/crs/misc/R44960.pdf> 1.

[1170] *See generally*, Uniform Law Commission <https://www.uniformlaws.org/committees/community-home?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736>. The Uniform Law Commission provides each state statutory adoption by Bill No., Bill Sponsor, and date/year of enactment. In 2000, the National Conference of Commissioners on Uniform State Laws revised and adopted the RUAA to modernize and better clarify state arbitration rules in the United States. Every state has adopted the UAA, the RUAA, or a comparable regulations.

relationship to an arbitrator, who is a neutral third party for resolution [*i.e.,* a licensed attorney in good standing trained in identifying domestic violence and child abuse]."[1171]

Despite Muslim advocacy groups' promotion of MFL as a facet of ADR in the U.S., they seem to draw the line at having MFL arbitration agreements and procedures regulated like all other arbitration under the UAA, the RUAA, or the UFLAA in accordance with its adoption by each state.[1172] Similar to the situation in England, there is instead an expectation for Islamic law tribunals to be accommodated beyond the limits of the national rule of law, while at the same time providing an added privilege for Muslim claimants who subsequently seek redress from the national judiciary when religion-based arbitration yields unwelcomed outcomes. Although such a preference may seem innocuous to those who support and benefit from this exceptional option, the dormant effect on non-Muslims is created by the dispensation of unregulated arbitration decisions by lawyers, non-lawyers, or even imams using the Quran and/or Sunnah as primary and/or secondary source material. Notwithstanding how innocuous those who benefit from the situation might find this outcome, the practical effect is that any integration or commingling of arbitrated or litigated decisions made under the Quran and/or Sunnah have an impact on the rights of non-Muslims. Specifically, the decisions affect non-Muslims' right to *not* have Islam imposed upon them in contravention of their own beliefs as well as the right to have access to a national judiciary that does not integrate or commingle the edicts of Islamic religious texts as part of the law to be applied in their legal proceedings. As was established in Chapter 2, the high probability of this outcome appears to sit at the heart of legislative attempts to erect a jurisdictional fence around Islamic law tribunals in England.

Returning to the aforementioned MFL example, the 'price of admission' to state (and federal) arbitration in the U.S. implicates the laws of contract, as Justice Kavanaugh recently opined. This includes equal bargaining power between the contracting parties, or in the case of UFLAA, a neutral third party trained to detect and mitigate some of the

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[1171] National Conference of Commissioners on Uniform State Laws, 'Uniform Family Law Arbitration Act' <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b89617ae-d2c8-1c4f-c990-bab55b2d1469> 13-4.

[1172] *See e.g.,* the Revised Uniform Arbitration Act Drafting Committee, 'Policy Statement: Revised Uniform Arbitration Act (RUAA)' (2000) <https://www.uniformlaws.org/. According to the RUAA Committee, "the range of concerns raised by arbitration agreements…includes awareness of the arbitration agreement and of waiver of the right to trial;…the independence and impartiality of decision-makers, and of the administering institution, if any; the quality of the process and the competence of arbitrators; the cost, location, and time frame of arbitration; the right to representation; the fundamental fairness of hearings; access to information (discovery); the nature of arbitral remedies, …and the scope of judicial review of arbitration awards…"

potential factors that might contribute to the imbalance. How can it be said then that equal bargaining power (or at a minimum a lack of pressure or coercion) is a prerequisite for all those who pursue arbitration, *except* those who espouse Islam?[1173] If the aim of this prerequisite is to prevent "the manifestly unfair use by a stronger party of its advantage," then it appears that the preliminary determination of equal bargaining power is a moving target for faith-based legal tribunals—*e.g.,* subject to familial, cultural, or religious pressures—while remaining a constant for non-religious arbitration. This is especially noteworthy if the chief implication of this requirement is that any non-religious contractual imbalance might be modified or set aside to restore equity between the parties.[1174] This leads to the question of whether a religious free-will argument preempts any delimiting attempts based on inequity? From a practical perspective, the dormant effect created by Islamic law exceptionalism appears to afford Muslims the ability to avoid preliminary arbitration requirements as well as nullify public policy arguments that are applicable to any other claimants who pursue traditional (non-religious) arbitration.

6.3.2 Evaluating the Dormant Effects of Muslim Banking Laws

As it relates to non-familial rights, the manner in which MBLs are applied is also illustrative of instances where the rights of adherents of other religious denominations may be curtailed by faith-based legal exceptionalism in the name of Islam. In the article, *The Real Shariah Risk: Why the United States Cannot Afford to Miss the Islamic Finance Moment*, Todd Schmid advocates for the U.S. Government's reevaluation of present banking and investment principles to establish laws that are sharia compliant or that ensure "Islamic windows" by incorporating the underlying principles of Islamic finance,…[which include]: (1) the prohibition of *riba*; (2) the prohibition of *gharar*; and (3) the core emphasis of ethical notions of social justice, communal unity, fairness, and transparency."[1175] In relevant part, these principles prohibit the giving or requiring of interest.[1176] They also require that investment choices are made "according to ethical criteria."[1177] The definition of ethical criteria presumptively stems from the interpretations of the Quran and/or Sunnah based on the previously highlighted religious interpretative schools. Although a complete analysis

[1173] 'Inequality of Bargaining Power' (*Business Dictionary*, 2019) <http://www.businessdictionary.com /definition/inequality-of-bargaining-power.html> accessed 31 May 2019.
[1174] 'Inequality of Bargaining Power' (n 1173).
[1175] Todd J Schmid, 'The Real Shariah Risk: Why the United States Cannot Afford to Miss the Islamic Finance Moment' (2013) 2013 University of Illinois Law Review 1293, 1301-3 <http://www.law.newark.rutgers.edu/ files/u/LeubsdorfNYULRevArticle.pdf>.
[1176] Schmid (n 1175), 1295.
[1177] Schmid (n 1175), 1295.

of Muslim investment practices is beyond the scope of this study, what is germane is that the aforementioned principles result in financial institutions becoming compliant with primary and secondary Islamic religious sources. Does that not result in the U.S. Government seeking Quranic interpretations on the banking laws that affect Muslims and non-Muslims equally?

Schmid also notes that "[m]odern Muslim scholars advance a range of rationales for these prohibitions…because…the Quran and Sunnah[]…do not provide any detailed rationale…beyond asserting, axiomatically, that charging interest is an act of injustice."[1178] Notwithstanding whether there is anything inherently just or unjust about the aforementioned principles, "the feasibility of implementing Islamic banking in the United States [is tied to] understanding the core substantive meaning of [these] prohibition[s]"… as well as the general structure of the Islamic banking system.[1179] To put this in its proper context, MBLs implicate not only U.S. banks but also state and federal regulatory bodies. The real-world implications seemingly obligate these governmental agencies to become engrossed in Islamic religious principles to fully understand the way they are to be applied in place of or in conjunction with U.S. law. Where it relates to the Free Exercise clause, the result seems to mandate expanding the margins to make exception for the way in which certain interest-bearing accounts are treated in monetary transactions involving those who espouse Islam. This outcome first demonstrates the dormant effect on non-Muslims who have no recourse but to be subject to interest rates based on their credit scores and/or debt-to-income ratios. As was demonstrated in the previous section, it is also illustrative of the manner in which Islamic law would be imposed upon non-Muslims as MBLs are commingled with federal law via litigation and/or when federal arbitration proceedings brought under the FAA become subject to judicial review. If banking regulatory agencies, adjudicators, arbitrators, and legal counselors are implicated by the integration of MBLs, then how can it be said that the rights of non-Muslims will be spared? Put another way, how can the federal judiciary look to the Quran and/or Sunnah to supplement U.S. banking laws without affecting the financial circumstances—and religious rights—of non-Muslims?

At this point, it is worth linking this analysis back to the furtherance of an expansive view of multiculturalism. Recall that this assessment is one that has already been undertaken by America's northerly neighbor. Also recall that Durham defines Canada's approach to

[1178] Schmid (n 1175), 1303.
[1179] Schmid (n 1175), 1302.

disestablishment as an accommodationist church-state arrangement, which means strict separation of church and state with the ancillary goal of promoting multiculturalism.[1180] Central to Canada's debates concerning legalizing Islamic law tribunals was answering the question: how does faith-based legal exceptionalism promote multicultural inclusion?[1181] The Canadian legislature found no tangible nexus between the means and desired ends.[1182] In fact, Canada found that faith-based legal exceptionalism frustrates multicultural inclusion because it relies on infringements of Canadian Constitutional Law to achieve its desired ends.[1183]

As a means of distinguishing subjective preferences from the rule of law, it is worth evaluating some of the criticisms. Specifically, some proponents of Islamic law tribunals have claimed that men and women are free to choose whether they want to be treated equally based on their religious views.[1184] This makes decisions like Canada's seem prejudicial against certain Muslims. By that logic however, one could argue that every effort to further gender equality in nations that espouse democracy should be reevaluated because of religious proclivities. If that is the case, should efforts to ensure equal pay for equal work be discontinued because there may be women who have moral or religious ambivalence about receiving salaries that match or exceed their husbands? In reality, Canada's decision does not appear to preclude individuals from treating one another as unequally as they are willing to bear. It simply prevents the Canadian legislature and/or judiciary from becoming the conduit for said treatment in violation of Canadian Constitutional law. This finding apparently led Canada to prohibit all faith-based legal platforms to avoid frustrating the national rule of law.[1185] According to Saul, the Canadian Government decided that "[t]he intention had been good—[b]ut the fallout was worse than the advantage gained…[s]o…arbitration courts were banned for all religions."[1186]

Recall that Durham and others contend that the U.S. separationist church-state arrangement is more pronounced than that of Canada's accommodationist perspective (*i.e.,* separation by a wall instead of a thick curtain). Evaluating Islamic law tribunals from

[1180] Durham, Jr. (n 64), 1419.
[1181] Saul (n 104), 147-49.
[1182] Saul (n 104), 147-49.
[1183] Saul (n 104), 147-49.
[1184] *See e.g.,* Elver (n 63); Yvonne Yazbeck Haddad, *Muslim Women in America: The Challenge of Islamic Identity Today* (Oxford University Press (Online) 2006); Ali, 'From Muslim Migrants to Muslim Citizens' (n 304).
[1185] Saul (n 104), 148.
[1186] Saul (n 104), 148.

the perspective most favorable to the spirit of multiculturalism, Canada found that faith-based legal exceptionalism does nothing to actually promote or demonstrate multiculturalism. This is in keeping with Manea's assessment of the integration of Islamic law exceptionalism in England. She points out that "for decades, they had argued that everyone should be equal despite their racial, ethnic, religious or cultural differences. Now they pushed the idea that different people should be treated differently precisely because of such differences."[1187] Thus, the Canadian legislature determined that, "religious laws apply to a believer's spiritual life…[therefore]…they don't trump Canadian law," whether civil, criminal or otherwise.[1188] This position appears to treat all Canadians equally.

Despite these realities being equally applicable to the U.S. under its wall of separation, the U.S. seems to avoid a national proclamation where it pertains the scope of the 1st Amendment and returning to the practice of faith-based legal exceptionalism. For the sake of further illustration, the U.S. iteration of the same question posed in Canada (based on the aforementioned banking context) might be presented as: *What does Representative Omar's ability to wear her headscarf and prayer beads on the Congressional floor have to do with the amount of interest calculated on her home in relation to other members of Congress*?[1189] To avoid this type of arbitrary incongruence, it would seem that if MBLs are demonstrative of best industry practices, then they would be available to all American citizens without needing to label them 'for Muslims only'. In the aforementioned example, there is an obvious discriminatory element to banking practices with disparate outcomes because U.S. banking laws and Muslim banking laws yield dissimilar interest calculations for no other reason than the fact that one applicant believes in the divinity of Jesus Christ and the other believes that Jesus Christ was one in a long line of important human beings? Along the same lines, what if one applicant does not believe in any of the prophets in the Abrahamic pantheon? Notwithstanding the collective holding in the *Awad* cases or the proclamation by the ABA, which were examined in the previous chapter, it appears that the problematic outcomes in the original *S.D. v. M.J.R.* trial more accurately illustrate the practical effects of the U.S. Government discounting the Framers' perspective and vacillating too long on nationally prohibiting Islamic law exceptionalism.

[1187] Manea (n 65), 45. *See also,* note 21, where Manea notes that she is quoting women's activist Wajeha al Huwaider, which results from an email interview from June 2008.
[1188] Crawford (n 851).
[1189] Tara Law, 'Congressional Rule Change Allows Head Scarves, Religious Headwear on House Floor' [2019] *Time Magazine* <http://time.com/5494964/muslim-omar-rule-change-head/>.

6.3.3 Evaluating the Effects of Exceptionalism in Free Exercise Challenges

Another question that is relevant to this study is to what degree will the application of Islamic law frustrate those constitutional writs that actually fit the customary definition of free exercise claims? It appears that Muslim migration and the application of Islamic law are gauged somewhat superficially, ignoring from where the law originates. This seems to have resulted in Islamic law engagement being evaluated as if it is analogous to other religious claims under the 1st Amendment, or synonymous with looking to the impartial legal systems of other nations for guidance concerning certain constitutional matters. However, this appears to be a mistake. Although there is much debate over whether it is necessary or even appropriate for the national judiciary to look to other nations for guidance in interpreting the U.S. Constitution, what is relevant is that any international or foreign law consideration is neither binding on U.S. courts or imputable to American claimants.[1190]

Where it pertains the distinction between relying on Islamic law as primary source material and constitutional claims brought under the Free Exercise clause, the adoption of one appears to have the potential to render the other obsolete. Specifically, cases brought under the Free Exercise clause are characteristically associated with government action. Thus, the Supreme Court has established a tri-part test to determine whether a specific government action "encroaches too far on the free exercise of religion."[1191] The preliminary jurisdictional inquiry addresses the following questions: (1) whether the court has jurisdiction over the matter?; (2) whether the claim is justiciable?; and (3) whether there was harm by the Government's action?[1192] Although the nuances involved in determining how jurisdiction is resolved are beyond the scope of this study, what is relevant is the substantive question that follows. It determines applicability on the merits of the claim. Specifically, the Court asks whether the Government substantially burdened the claimant "for believing or doing something prohibited by claimant's religion or for refraining from believing or doing something compelled by claimant's religion?"[1193]

This question promotes an assessment concerning the veracity of the claimant's religious belief. The question of whether the Government has "disadvantage[d] [a] claimant because of some religiously motivated belief or action on the part of [the] claimant," is

[1190] Recall the analysis concerning the Supremacy of U.S. law at Chapter 5.
[1191] Russell W Galloway, 'Basic Free Exercise Clause Analysis' (1989) 29 Santa Clara Law Review 865, 865.
[1192] Galloway (n 1191), 865-66.
[1193] Galloway (n 1191), 866.

balanced against the veracity of that belief.[1194] Galloway notes that "the Supreme Court has never formulated an explicit definition of 'religion'."[1195] Instead, "the core concept is that religion concerns…'belief in relation to a Supreme Being involving duties superior to those arising from any human relation'."[1196] As was previously discussed, the nature of religion suggests that the general definition is applicable to those who believe in God as well as "non-theistic beliefs [provided that] they are the functional equivalent of belief in God."[1197] The test of religious veracity "is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[1198]

It appears that faith-based legal exceptionalism would establish disproportionate constitutional inquiries for Muslims and non-Muslims on procedural or substantive grounds. Thus, it is conceivable that government harm becomes a foregone conclusion as it relates to the expansive list of claims for accommodation associated with the voluntary religious choices of Muslims. Based on the test outlined above, affording faith-based legal exceptionalism to Islamic law also appears to have the propensity to shift the burden from the claimant (to prove veracity of belief) to the Government to disprove religious devotion. This occurs because of not only the expansive degree of societal accommodation but also because the entire religious subgroup has been afforded faith-based legal exception. Put another way, how does the veracity of belief not immediately attach when every petitioner who espouses Islam is shielded by the theory buttressing America's all-inclusive approach to multiculturalism? This question is particularly valid since, notwithstanding whether donning religious garb (*e.g., abayas* or *dish-dashas*) denotes suppression or empowerment, it is an unmistakable personification of religious attachment to a denomination of Islam and the unparalleled exception afforded by Western nations because of it. How does the accumulation of exceptions not have an effect on the question of veracity of belief?

It thus appears that establishing the veracity of belief becomes cluttered by multiculturalism in America because inclusion demands the acceptance that the sum total of Middle Eastern or North African culture is encapsulated in the tenets of Islam. Inquiries and outcomes such as these are substantively and procedurally relevant when the analysis of Islamic law integration is viewed, not through the foundational terms of the U.S.

[1194] Galloway (n 1191), 869.
[1195] Galloway (n 1191), 869.
[1196] Galloway (n 1191), 869.
[1197] Galloway (n 1191), 869.
[1198] Galloway (n 1191), 870.

Constitution, but through the undiscerning lens of multiculturalism. For this reason, foundational perspectives seem to provide much needed clarity concerning the problematic legal implications of integrating religious law, whether domestic or foreign, into a juridical infrastructure founded on a separationist church-state arrangement.

6.4 The Constitutionality of Broadly Defining Multiculturalism: A New Suicide Pact?

The final aspect of assessing the implications of not heeding the effects of POGG is addressing the question of whether not espousing the political ideologies or religious laws of Islamic-law nations has resulted in a failure to reasonably accommodate the religious sensitivities of Muslims. To further this end, it is necessary to return to Barry's juxtaposition between cultural incommensurability and cultural equality in the introductory chapter of this study. Recall that Barry contends that there is an inconsistency that exists when efforts are made to treat individual cultures as both unique and incomparable while also claiming a level of equivalence between all cultures co-existing in one nation. Although it is fair to say that cultural attributes that accompany new waves of immigrants are both unique and worthy of equal treatment, it does not then follow that acknowledgment of their value means that it is acceptable to infringe or curtail the rights and freedoms of citizens and residents who predate them.

Where it relates to cultural equality, it is well understood that a nation's political ideology and rule of law are foundational attributes that speak to the unique identity and sovereignty of that nation.[1199] They also contribute to the identities of the citizens of that nation.[1200] For the three nations that are the subjects of this study, both democracy and respect for the rule of law are included in the national standards that are upheld as non-negotiable culturally equalizing principles. Moreover, they are attributes that have arguably made migration to these nations more appealing for the million or so new arrivals who in aggregate legally relocate to these three nations each year.[1201] . However, the expansion of the definition of multiculturalism, to encourage host nations to embrace and even afford

[1199] Charles Howard McIlwain, *American Revolution: A Constitutional Interpretation* (The Macmillan Company 2005) 47-8.
[1200] McIlwain (n 1199), 47-8.
[1201] *See generally*, UK Home Office, 'How Many People Come to the UK Each Year?' (*National Statistics*, 2017) <https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2017/how-many-people-come-to-the-uk-each-year> accessed 14 December 2019; Canadian Citizenship & Immigration Resource Center, 'How Many Immigrants Come to Canada Each Year?' (2019) <https://www.immigration.ca/how-many-immigrants-come-to-canada-each-year> accessed 14 December 2019; U.S. Department of Homeland, 'Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017' (*Yearbook of Immigration Statistics 2017*, 2017) <https://www.dhs.gov/immigration-statistics/yearbook/2017> accessed 14 December 2019.

deference to the political ideologies and laws of the nations from which certain immigrants hail, has resulted in and may continue to result in "legal and political accommodation of ethnic diversity…[remaining]…in a state of flux…."[1202]

The inconsistency surrounding legal and political accommodation seemingly explains why the appearance of U.S. ambivalence to a national prohibition of Islamic law is so controversial. The idea of a nation that espouses liberal democracy relying on said democracy to circuitously further authoritarian ideals and faith-based legal exceptionalism under the guise of multiculturalism seems inherently illogical. Where it pertains the Islamic law inquiry, the political ideologies and legal precepts both lead back to interpretations of the Quran and the Sunnah, notwithstanding how many jurists evaluate them. If one looks beyond multiculturalism to determine how the parts fit together, the political ideologies and religious source materials seemingly result in the question of compatibility circling back on itself and creating a questionable dichotomy between what the U.S. claims to espouse and what is actually unfolding. Therefore, it is necessary to assess whether reasonable accommodation is discernible in the United States.

In a 2017 study on 'political multiculturalism', Wright *et al.* take up the under-analyzed question of how members of host nations are affected by the expansive degree of social interaction that Muslims link to religious claims for accommodation. In so doing, they conclude that, where it specifically pertains to Canada and the United States, it is *not* actually accommodation. The more precise label for the breadth of claims made by Muslims is 'Muslim exceptionalism'.[1203] Akin to the position taken herein concerning faith-based legal exceptionalism, Wright *et al.* conclude that exceptionalism extends beyond 'customs, traditions, music and cuisine'—*vis-à-vis* aspects that demonstrate cultural incommensurability—to encompass an expectation to incorporate the political ideologies—or choice of law preferences—of newer immigrants in the name of religion.[1204] This appears to be the case notwithstanding how compatible or incompatible the ideologies and/or preferences are with the non-negotiable culturally equalizing principles of both nations.

Measuring the effects of Muslim exceptionalism on Canadian and American native-born members, Wright *et al.* observe that exceptionalism is "convincingly demonstrate[d]" in

[1202] Kymlicka (n 34), 97.
[1203] Wright and others (n 5), 102.
[1204] Wright and others (n 5), 102.

both nations although to differing degrees.[1205] Thematically adjacent to faith-based legal exceptionalism, the study focuses on three noteworthy areas that are politically imposed upon native-born citizens and extend beyond the general understanding of religious accommodation: (1) legally upholding multicultural policies; (2) wearing religious garb; and (3) accommodating certain religious perspectives and practices.[1206] Beyond the more obvious request for exception concerning the wearing of religious garb, activities such as expecting non-Muslims to extend a degree of reverence for Muhammad consistent with that of Muslims; teaching Muslim history in schools; accommodating prayer rooms; compelling establishments to accommodate gender specific outlets like swimming pools and hair salons all fold into the three categories.[1207]

As the list highlights, the claims continue to become more expansive and continue to be shielded by the compulsions of multiculturalism. As a result, Wright *et al.* note that the requests and the ideology that shields them have also become an "increasingly salient problem."[1208] This is attributable to the fact that they represent the conflict between multiculturalists' compulsion "to accommodate Muslim sensitivities and…practices embedded in religion[,] and [the remainder of society's commitment to] liberal values founded on individual freedom and equality."[1209] Therefore, the claims have resulted in tolerance becoming "in shorter supply for Muslims than for other religious groups," which is an outcome that Wright *et al.* ascribe to the effects of secularism.[1210] If one does not readily assume that secularism is the primary motivating factor however, the findings can also be ascribed to the effects of the often-overlooked adherents of the multitude of lesser considered denominations and subgroups whose freedoms include the right *not* to have the religious guidelines and/or laws of Islam legally imposed upon them via the national courts' engagement therewith. This is especially significant as many if not all of them likely already have their own deeply held religious guidelines that are not equally forced upon the rest of society by way of national courts' integration via exceptionalism.

[1205] Wright and others (n 5), 103. Generally speaking, Wright and others make distinction between religious accommodation in general and accommodating Muslim claims in particular, which isolates what is defined as Muslim exceptionalism. That is, Muslim claims apparently extend beyond general claims of religious accommodation as well as religion-based exemptions.
[1206] Wright and others (n 5), 114-23.
[1207] Wright and others (n 5), 114-23.
[1208] Wright and others (n 5), 105.
[1209] Wright and others (n 5), 104.
[1210] Wright and others (n 5), 125.

Kymlicka suggests that these outcomes are more likely attributable to the fact that "we are…in a post-multicultural era."[1211] If this is the case, now might be the prudent time to revisit the Framers' perspectives on faith-based legal exceptionalism as well as religion-based exemptions to make discernible distinctions between proper constitutional inquiries on the one hand and the machinations of multicultural theorists who seek to add to promote an overly-broad definition of multiculturalism on the other. In the 1949 Supreme Court case *Terminiello v. City of Chicago*, 337 U.S. 1, Justice Jackson, restating President Abraham Lincoln, in his dissent observed, "there is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[1212] A relevant question is whether the same can be said about being so wedded to the rationale behind the concept of multiculturalism that there is a failure to recognize when the concept becomes more of a hindrance than a help—*vis-à-vis* when its adoption results in embracing the political ideologies and religion-central legal systems of non-democratic nations from which some late-stage American immigrants hail.

To assess the plausibility of an arbitrarily expansive definition of multiculturalism becoming America's newest suicide pact, one need only ask what multiculturalism is attempting to achieve and how it is endeavoring to achieve it. In this study, the question might be framed:

> *If American citizens endorse multiculturalism, has it become a nationally galvanizing ideology that condones its normalization at all costs? Moreover, does it mean disregarding the law of the Founding in order to effectively amend the 1st Amendment for more insular religious subgroups and denominations while simultaneously infringing on the of rights others*?

In the 1943 case, *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, the Supreme Court addressed a similar question when it overruled *Minersville School District v. Gobitis*, 310 U.S. 586, which upheld the pledge of allegiance as necessary to the State's interest in 'national cohesion'.[1213] The Court's response appears to have some relevance

[1211] Kymlicka (n 34), 98.
[1212] *Terminiello v. City of Chicago*, 337 U.S. 1 (1949)., *Legal Information Institute* (Cornell Law School) <https://www.law.cornell.edu/supremecourt/text/337/1>.
[1213] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)., *Legal Information Institute* (Cornell Law School) <https://www.law.cornell.edu/supremecourt/text/319/624>; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). <https://www.oyez.org/cases/1940-1955/319us624>; *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). <https://www.oyez.org/cases/1940-1955/310us586>.

in assessing the employment of multiculturalism to justify overstepping the foundational perspectives on religious freedom in the United States.

The West Virginia Board of Education—like many others—required public schools to include a daily salute to the U.S. flag as a mandatory part of school activities.[1214] The salute was accompanied by the following declaration: "[*I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.*]"[1215] Parents of certain students were Jehovah's Witnesses, so they rejected the requirement, and their children were expelled for non-compliance.[1216] As the family's refusal was based on religious grounds, some legal scholars cling to this holding to suggest that every conceivable facet of free exercise under the 1st Amendment is an individual right that is beyond any degree of national or state-wide question, regulation, or vote.[1217] This position is often supported by Justice Jackson's now famous declaration:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy,...to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property,...freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[1218]

To recollect however, it has been established in previous chapters that—as a consequence of POGG—faith-based legal exceptionalism is beyond the scope of what early Americans or the Constitutional Framers envisioned by liberty; the freedom to worship; or the concept of free exercise included in the Bill of Rights. Likewise, it has been demonstrated that faith-based legal exceptionalism does not fit within the category of religious exemptions, as was understood by the Framers and/or is understood by Constitutional scholars today. It has also been demonstrated that faith-based legal exceptionalism is not akin to the constitutional concessions afforded those who possessed the North American continent before the United States was established. Returning to the Framers' perspective, it appears safe to suppose that unless or until faith-based forum shopping for *all* religious subgroups is acknowledged as an affirmative right that definitively extends from one's constitutional right of Free Exercise; universal human right of conscience or belief; or an

[1214] 319 U.S. 624 (1943). (n 1213).
[1215] 319 U.S. 624 (1943). (n 1213).
[1216] 319 U.S. 624 (1943). (n 1213).
[1217] American Bar Association (n 894).
[1218] 319 U.S. 624 (1943). (n 1213).

equally applicable religion-based exemption, then this aspect of Justice Jackson's holding is not germane.

It is important to comprehend that in this case the pledge of allegiance was devoid of any religious content. Its evaluation is for the primary purpose of determining whether the State had a compelling interest in legislative compulsion as an appropriate means to promote national cohesion.[1219] Specifically, the lesser appreciated aspects of Justice Jackson's opinion appear to speak to the heart of the implications of predicating faith-based legal exceptionalism on multiculturalism, or treating it as a natural extension of free exercise for some denominations when there is no constitutional or foundational support for it. Justice Jackson opines:

> National unity, as an end which officials may foster by persuasion and example, is not in question. The problem is whether, under our Constitution, compulsion as here employed is a permissible means for its achievement. Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good, as well as by evil, men. Nationalism is a relatively recent phenomenon [in the U.S.], but, at other times and places, the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity.[1220]

In other words, "the First Amendment cannot enforce a unanimity of opinion on any topic."[1221] The same appears to be no less true if you replace 'national unity' with 'multiculturalism'. By falling back on an expansive definition of multiculturalism to buttress this exceptional choice of law provision for Muslims, has not the same result been achieved as imposing the national pledge of allegiance upon public school students and their families? That is, it "prescribe[s] what shall be orthodox in…religion, or other matters of opinion, [by indirectly] forcing citizens to confess by word or act their faith therein."[1222] If compulsion is not a permissible means of achieving 'national unity', how can it be a permissible means of achieving multiculturalism?

If the United States is intent on setting aside the separation of church and state for the sake of Islam, then the United States appears to be intent on setting aside those foundational aspects that the Founders employed to define the direction of the nation.

[1219] 319 U.S. 624 (1943). (n 1213).
[1220] 319 U.S. 624 (1943). (n 1213).
[1221] 319 U.S. 624 (1943). (n 1213).
[1222] 319 U.S. 624 (1943). (n 1213).

Such a consequential move arguably deserves the voice of adherents of every denomination that is affected by this change in the nation's constitutional trajectory. The question of whether to sanction faith-based legal platforms for one religious subgroup or all of them demands a bit more than a defense centered in an overly-broad interpretation of multiculturalism. As the Islamic law inquiry demonstrates, the consequences have the propensity to affect all citizens' rights as Islamic law becomes involuntarily imposed upon them by juridical engagement, affirmation, or appeal. In other words, Islamic law exceptionalism could come to affect the constitutional foundation upon which the United States is built.

6.5 Conclusion

Disregarding what the Framers understood about faith-based legal exceptionalism at the point of colonial rebellion seems to be propelling the United States toward setting aside one of her most sacred constitutional pillars—*vis-à-vis* her separationist church-state arrangement. Such a consequential move suggests that faith-based legal exceptionalism is not an individual right that belongs to any one person or insular religious subgroup or denomination. As the Islamic law inquiry undertaken herein has demonstrated, it will be far more than the 1% of the U.S. population that espouses Islam who are subject to the dormant effects of nationally sanctioning interpretations of Islamic law or any other religious guidelines whose primary sources are religious texts.[1223] If America is not willing to heed and learn from what the Framers understood after 200 years of negotiating for religious equilibrium, then the nation may come to repeat the circumstances brought about by the first imperative of the POGG doctrine. Unlike the American Civil War and the morally debasing institution of slavery, the fight for retaining the freedom to co-exist free of faith-based legal exceptionalism, which has always emanated from the separation of church and state, may enlarge the rift in an already polarized nation.

Therefore, the question of faith-based legal exceptionalism appears to be the quintessential American conundrum that should fall within the purview of the federal or state legislatures to be put to a vote by the American people. Moreover, it should be a vote that affords the same rights to all religious denominations and encompasses as many religious texts and guidelines—*i.e.,* primary sources—as are akin to the Quran and Sunnah. To do otherwise is to suggest that there is something about Islam that makes its religious perspectives worthy of being imposed upon the whole of society without their consent. It

[1223] Mohamed (n 903).

has also been demonstrated that it is imprudent to allow faith-based legal exceptionalism or religion-based exemptions to be shielded under the umbrella of multiculturalism. Based on the present trajectory of national views on practices in furtherance of multiculturalism, the misalignment might do more harm to analyses concerning the political ideologies and choice of law preferences than it does good. As has been exemplified herein, there is no evidence that suggests promotion of the political ideologies or legal infrastructures of newer immigrants is a celebration of their culture, despite multiculturalists' suggestion to the contrary. Instead, this approach appears to buttress turning the U.S. judiciary into a smorgasbord of subjective legal platforms that will have the effect of destabilization the supremacy of the national rule of law.

CHAPTER 7
CONCLUSION & PRACTICAL IMPLICATIONS

"[W]hat has been will be again, what has been done will be done again;
there is nothing new under the sun."[1224]

This study has endeavored to expand the scope and application of the POGG doctrine by demonstrating that it was and is more than 'an unexplained constitutional clause' that suffers from a 'coherence deficit'.[1225] By focusing on the international conundrum created by requests for Islamic law exceptionalism, this study demonstrates that POGG was the catalyst for the establishment of three disparate church-state arrangements. Thus, it has become the basis for England's perception of a modern-day obligation to sanction faith-based legal exceptionalism, which is steeped in the legacy of Imperialism. For Canada, POGG was a lifeline for the retention of 'Britishness' during its colonial-era, which was transitioned into a constitutional basis for sound post-colonial decision-making concerning all faith-based legal exceptionalism. For the United States, POGG was the catalyst for rebellion and war as a response to Imperialism, which included faith-based legal exceptionalism in the promotion of Anglicanism supremacy. Likewise, it facilitated the establishment of legal constitutionalism, which set a post-colonial trajectory toward life, liberty, and the pursuit of happiness. However, it remains to be seen whether the cautionary tale associated with the foundational connection between POGG and the U.S. Constitution will be heeded. This is especially the case where it pertains responding to new expectations for Islamic law exceptionalism, which have been promoted under the guise of multiculturalism.

7.1 The Future Implications of England's Commitment to the Legacy of POGG

Although there have been recent assertions that the disestablishment of the Anglican Church from the rest of the English Government "would not be the end of the world," there appears to be little evidence that disestablishment has been contemplated in her soon-to-be post-EU existence.[1226] The unwillingness to consider disentangling the Church of England from the Government of England appears to be grounded in the fact that England is not actually post-Christianity or post-religion in general, despite claims to the contrary. Instead, it is more plausible that England has undergone a redistribution of religious

[1224] Ecclesiastes 1:9 (New International Version), (n 3).
[1225] Yusuf (n 103), 28.
[1226] Harriet Sherwood, 'Church and State – an Unhappy Union?' *The Guardian* (London, 7 October 2018) <https://www.theguardian.com/global/2018/oct/07/church-and-state-an-unhappy-union>.

subgroups and denominations with the redistribution of colonial inhabitants as a consequence of POGG. As migration to the British Isles from former colonies accounts for the lion's share of her post-war migration profile, imperial commitments concerning toleration made to colonial subjects while they remained on foreign soil have seemingly been transferred to the mainland. As a result of that transfer, obligations to 'tolerate' have now become obligations to 'accommodate'. Modernity has also brought about not-so flattering reassessments of Imperialism, which seems to be forcing England to make more overt attempts at accommodation, even if it results in condoning practices that neither further democracy nor promote equality. This is the case notwithstanding the fact that the approaches being adopted have previously been tested and failed in protecting the religious liberties and adjudicative rights of those not being afforded exceptional deference.

How these decisions will affect the future promotion of the nation's FSVs appears to be the essential question. As was evidenced in Chapter 2, the repeated introduction of parliamentary legislation to better regulate the substantive and procedural practices of Islamic law tribunals evidences that uniformity concerning the aims of sanctioning faith-based legal exceptionalism whilst also precluding the judgments from encroaching on the rights of non-Muslims is clearly lacking. Therefore, the practical implications of sanctioning faith-based legal exceptionalism in England appears to encourage three possible outcomes: (1) the establishment of incongruent, competing bodies of religious law that may foster greater division within British society; (2) the justification for the return to the more expansive role of ecclesiastical courts to attempt to balance the disparate adjudicative options for the surplus of religious preferences co-existing throughout Britain; or (3) the commingling of decisions applying religious law with England's national rule of law, notwithstanding the fact that it may result in imposing religion-specific legal precepts upon the whole of British society.

7.2 The Future Implications of Canada Remaining the Bastion of POGG

Canada's protracted relationship with the United Kingdom established a rebuttable presumption that the nation would not only comingle religion and government (analogous to that of England), but also establish Anglicanism as the national church throughout the provinces. However, Canada's extrication of religion from government and vice versa was fully evident after 1982. A benefit of full sovereignty coming late to Canada is that the breadth of her constitutional history under POGG embraces not only the commitments

made by her Founding Fathers but also the more recent Charter of Rights and Freedoms. The research undertaken herein suggests that Canada relied on that foundational history to draw distinction between two constitutional circumstances, which both have religious undertones. On the one hand, there is honoring foundational commitments made to the French-Quebecois and the First Nations by treaty and royal proclamation. On the other, there is enacting legislation or sanctioning competing legal platforms for various insular religious subgroups/denominations. The latter has the practical effect of potentially weakening the supremacy of Canada's legislative and juridical infrastructures, while the former has been a means of addressing the residual foundational issues that British Imperialism left unresolved. As a result of the marriage between POGG and federalism in Canada, faith-based legal exceptionalism has been deemed legally impermissible for all religious dogmas, as it runs afoul of several aspects of the BNA and Charter.

How this decision will affect future Muslim immigration to Canada from Islamic law nations is unclear. Future immigration notwithstanding, Canada's policy concerning faith-based legal exceptionalism sends a clear message that upholding the values of her national Constitution is the price of admission to Canada regardless of one's country of origin. If analyses of Canada's rankings on recent democracy indices are any indication of the significance of that message, the decision to retain one law for all Canadians has not affected her movement toward being one of the most democratically-inclined nations in the world. As was previously established, the same indices suggest that the United States' ranking continues to drop to the unfortunate status of being labelled democratically-flawed. Considering the two nations similar approaches to disestablishment, one could question whether the perception of the U.S.'s ambivalence toward certain fundamental constitutional determinations—*e.g.,* acquiescence to the accommodation of non-democratic political ideologies as well as a failure to reach national consensus concerning faith-based legal exceptionalism—might contribute to this outcome. Thus, Canada appears to have made the most constitutionally prudent decision since national patriation. Specifically, Canada opted to safeguard the national rule of law, which is available to all Canadians, thereby preserving the nation's accommodationist church-state arrangement.

7.3 The Future Implications of Heeding the Lessons of POGG in the U.S.

References to the American iteration of POGG are so far removed from the United States' collective memory that to suggest that America was once subject to POGG seems inconceivable. Instead, U.S. history is overly pregnant with references to LLPH. This is

largely attributable to the fact that by the time the U.S. Constitution came into effect on the 4th of March in 1789, POGG had been fundamentally disregarded as a mode of effective governance in the newly formed nation. As the research undertaken herein suggests however, POGG was not only an aspect of the American colonial experience, but the effects thereof led the U.S. toward her separationist church-state arrangement.

Therefore, the future implications of the U.S. not heeding her constitutional history can be found in the possible repetition of her past. Specifically, America's claim to religiosity is vested in the individual autonomy to espouse any one of the religious denominational parts that make up the whole. Thus, she should not become a nation that sanctions faith-based legal exceptionalism for the sake of favoring and bolstering certain religion-centric precepts to promote multiculturalism. This is the case notwithstanding whether exceptionalism is achieved directly, or by branches of the U.S. Government becoming conduits for religious states or communities to bring about such an outcome. As religious equilibrium—and by extension religious liberty—was utilized as a commodity to be negotiated to secure colonial obedience for two centuries during America's colonial period, there is no basis to the theory that separation of church and state was meant to designate that religion was unimportant to or absent from establishing the nation. The key distinction is that the nation was predicated on the U.S. Government's commitment to 'make no laws' that utilize the social contract between it and the multitude of denominations to again commoditize religious liberty or promote denominational exceptionalism by making extra-constitutional accommodations for one denomination over others.

A valid question is whether the U.S. has lost sight of that compact by allowing the concept of multiculturalism to be extended to encompass the political ideologies and religion-centric legal systems of migrants who hail from non-democratic nations, or nations that have not disentangled religion from government. Even before 9/11 created more religious division in America, there were endeavors to analyze the sustaining presence of America's religiosity phenomenon. Specifically, generalizations included first herding Christian denominations together like cattle, notwithstanding their ethnicity. Those making the generalization then attach the prefix 'Judeo' to the term 'Christian' to ensure to implicate not just the multitude of those who have made a subjective choice to espouse one faith over another, but also an entire ethnic group by historical association, notwithstanding the various denominations associated with that group. To make multiculturalism appear the proper response, this religious generalization has seemingly come to be pitted against

descriptors like *diaspora*, *marginal*, or *the other*, which are then attached to later arrived immigrants to ensure that even beneficial degrees of assimilation are an affront to the concept of multiculturalism. This is the case despite the fact that Islam as a world-wide subjective religious movement cannot be accurately included under any of the descriptors without fostering incongruity. The uncomplimentary connotations associated with these terms then aid in making constitutional questions appear socio-political so as to justify sidestepping constitutional history when seeking solutions.

To avoid repeating history in an effort to secure exceptional treatment for sharia guidelines or Islamic law, it is important to recall that the U.S. Constitution establishes the means for the expansion and/or contraction of religious denominationalism without individual compulsion or the national advancement of one sect over any other. As a result, there are no less than 236 religious subgroups and denominations that populate no less than 350,000 congregations in the United States.[1227] This includes Christian and non-Christian believers. As American citizenry, the national rule of law is applicable to them all. It is unlikely that this outcome would have been possible if the Framers had not made a concerted effort to remove the effects of the POGG doctrine to ensure that future generations did not repeat the same error that aided in losing the British Empire the American colonies—*vis-à-vis* compelling faith-based legal exceptionalism thereby playing comparative/superlative politics with religious liberty.

As later-stage immigration brings with it guidelines and laws that purport to be indistinguishable from the religious denominations to which they are attached, the individuals who espouse these dogmas make up discrete communities of believers to which those legal precepts apply. However, attempts to integrate those religious guidelines and laws with the national rule of law is arguably tantamount to forcing the religious precepts of those immigrants on the remainder of society in violation of their religious liberties and equal access to an impartial judiciary. When evaluated in light of those discrete denominations of colonial American non-Anglican dissenters, the effects of encroaching on religious liberties as a consequence of imperial-Anglicanism appear to be quite transparent. Thus, returning to America's founding era is integral to heeding the pitfalls associated with present requests for Islamic law legal exceptionalism specifically, and faith-based legal exceptionalism generally. Moreover, it will undoubtedly promote the future preservation of the Free Exercise Clause of the 1st Amendment; national and

[1227] Association of Statisticians of American Religious Bodies (n 957).

international respect for the American rule of law; and the supremacy of the U.S. Constitution.

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