

April 2003

Establishment and Disestablishment at the Founding, Part I: Establishment of Religion

Michael W. McConnell

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

Repository Citation

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003), <https://scholarship.law.wm.edu/wmlr/vol44/iss5/4>

ESTABLISHMENT AND DISESTABLISHMENT AT THE FOUNDING, PART I: ESTABLISHMENT OF RELIGION

MICHAEL W. McCONNELL*

TABLE OF CONTENTS

INTRODUCTION.	2107
I. THE LAWS CONSTITUTING AN ESTABLISHMENT	2110
A. <i>Establishment in England</i>	2112
B. <i>Establishment in the American Colonies</i>	2115
1. <i>Virginia</i>	2116
2. <i>New England</i>	2121
3. <i>Other Southern Colonies</i>	2126
4. <i>New York</i>	2129
C. <i>Elements of the Establishment</i>	2131
1. <i>Governmental Control Over the Doctrines,</i> <i>Structure, and Personnel of the State Church</i>	2131
a. <i>Doctrines and Liturgy</i>	2132
b. <i>Appointment of Bishops and Clergy</i>	2136
2. <i>Mandatory Attendance at Religious</i> <i>Worship Services in the State Church</i>	2144
3. <i>Public Financial Support</i>	2146
a. <i>Land Grants</i>	2148
b. <i>Religious Taxes</i>	2152
4. <i>Prohibition of Religious Worship in</i> <i>Other Dominations</i>	2159

* Circuit Judge, United States Court of Appeals for the Tenth Circuit, and Presidential Professor, S.J. Quinney College of Law, University of Utah. Support for this research was provided by the University of Utah College of Law Research Fund. The Author wishes to thank James Clayton, John Garvey, Philip Hamburger, Douglas Laycock, Mary McConnell, and John Witte for helpful comments on an earlier draft, and Charles Wentworth for research assistance.

5. <i>Use of the State Church for Civil Functions</i>	2169
a. <i>Social Welfare</i>	2170
b. <i>Education</i>	2171
c. <i>Marriages and Public Records</i>	2175
d. <i>Prosecution of Moral Offenses</i>	2176
6. <i>Limitation of Political Participation to Members</i> <i>of the State Church</i>	2176
II. RATIONALES FOR THE ESTABLISHMENT	2181
A. <i>Distinguishing Theological from Political Rationales</i> .	2181
B. <i>Theoretical Justifications for the</i> <i>English Establishment</i>	2189
C. <i>Post-Independence Justifications for</i> <i>American Establishments</i>	2193
III. REFLECTIONS	2205

INTRODUCTION

It has been so long—about 170 years—since any state in the United States has had an established church that we have almost forgotten what it is. When the words “Congress shall make no law respecting an establishment of religion”¹ were added to the Constitution, virtually every American—and certainly every educated lawyer or statesman—knew from experience what those words meant. The Church of England was established by law in Great Britain,² nine of the thirteen colonies had established churches on the eve of the Revolution,³ and about half the states continued to have some form of official religious establishment when the First Amendment was adopted.⁴ Other Americans had first-hand experience of establishment of religion on the Continent—of the Lutheran establishments of Germany and Scandinavia, the Reformed establishment of Holland, or the Gallican Catholic establishment of France. Establishment of religion was a familiar institution, and its pros and cons were hotly debated from Georgia to Maine.

When the Supreme Court began to decide cases involving claims about an establishment of religion in the 1940s,⁵ however, the Justices made no serious attempt to canvass the legal history of establishment—either in Europe, in the American colonies, or in the early American States—or to distinguish between the First Amendment and the various conflicts over establishment at the state level. The Justices focused instead on one event in one State—the rejection of Patrick Henry’s Assessment Bill in Virginia in 1785 and the adoption of Thomas Jefferson’s Bill for Establishing

1. U.S. CONST. amend. I.

2. See Act of Uniformity, 1662, 14 Car. 2, c. 4 (Eng.), reprinted in 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 543-46 (Carl Stephenson & Frederick Marcham eds. & trans., 1937).

3. See LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 5, 11 (1994).

4. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-33 (1998).

5. See *McColum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

Religious Liberty—on the assumption that “the provisions of the First Amendment ... had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”⁶

This truncated view of history made the establishment question seem too easy. In the Justices’ account, a “large proportion of the early settlers of this country came here from Europe to escape the bondage of laws that compelled them to support and attend government-favored churches,”⁷ and transplantation of established churches to these shores “became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence,”⁸ leading directly to the First Amendment. One would never know from the Justices’ careless description of history that no small number of the “freedom-loving colonials” considered official sanction for religion natural and essential, that the movement toward disestablishment was hotly contested by many patriotic and republican leaders, and that there were serious arguments—not mere “feelings of abhorrence”—on both sides of the issue. The Justices never analyzed any of the books, essays, sermons, speeches, or judicial opinions setting forth the philosophical and political arguments *in favor* of an establishment of religion, and relied on only one, perhaps unrepresentative, example from among the hundreds of arguments made *against* the establishment.⁹

To be sure, the Virginia Assessment Controversy of 1784-1786 was an important and illuminating event. But it was only one step in a series of legal developments moving from a formal, exclusive, and coercive state establishment to a system of free and equal religious freedom. It addressed only one of many issues raised by the establishment of religion. It took place in only one of many states that went through such a process; and it was not so much a debate about establishment as a debate about which of several possible arrangements should *replace* the “church by law established” in Virginia prior to the Revolution. To understand what an “establishment of religion” was and what disestablishment entailed,

6. *Everson*, 330 U.S. at 13.

7. *Id.* at 8.

8. *Id.* at 11.

9. *See id.* at 1; *McCullum*, 333 U.S. at 203.

it is necessary to broaden our sights. It is difficult to know what the Framers of the First Amendment opposed if we do not know what those who favored establishment supported. We cannot understand the depth of the argument for disestablishment without understanding why reasonable men and women might have thought that establishment was necessary to republican government.

Nor did the Court give serious attention to the process of *disestablishment*: whether to the gradual dismantling of existing church establishments in the states or to the debates about the Establishment Clause at the federal level. Contrary to popular myth, the First Amendment did not disestablish anything. It prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states.¹⁰ The First Amendment thus preserved the status quo. Even at the state level, where disestablishment actually occurred, it was not a simple, binary decision. The founding generation had to figure out what changes to make and what would take the place of the establishment. There were many plausible alternatives. Would they combine broad toleration with mild and noncoercive governmental support for religion, on the model still common in Western Europe?¹¹ Would they create a secular public culture—a “republic of reason”—along the lines later followed in France?¹² Would they introduce a pluralistic religious free-for-all? What would be the public function of religion, if any, in this new republic? Unlike many modern Americans, most members of the founding generation believed deeply that some type of religious conviction was necessary for public virtue, and hence for republican government.¹³ What institutional forms would disestablished religion take, and how would this affect education, poor relief, public decorum, republicanism, and the inculcation of virtue?

10. See AMAR, *supra* note 4, at 32-41; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1089-99 (1995); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 406-07.

11. See generally Guy Haarscher, *Freedom of Religion in Context*, 2 BYU L. REV. 269 (2002) (discussing religious freedom in European countries).

12. See *id.*

13. See *infra* text accompanying notes 562-81.

This Article is an attempt to describe the actual laws and debates over establishment and disestablishment in the United States, in the hope that a more thorough understanding of the issue faced by early Americans will help to foster a richer, and perhaps less brittle and bipolar, understanding of the issues we face today. The Article is divided in two Parts. The first Part, published here, is on the subject of establishment. It provides a legal history of established religion in England, the colonies, and the early states; catalogs the laws and practices that constituted an establishment; and sets forth the principal (and competing) rationales for the establishment. The second Part, which will be published in a subsequent volume of this journal, will be devoted to disestablishment. It will set forth the principal (and competing) rationales for disestablishment, provide a legal history of the process of disestablishment in the early American states, and discuss in greater detail the more controversial issues that faced the founding generation as it moved toward disestablishment of religion.

I. THE LAWS CONSTITUTING AN ESTABLISHMENT

At the time of the Founding, the period roughly from the beginnings of the Revolution through the formative years of the new Republic, the Church of England was the established church of the mother country, as it had been for centuries.¹⁴ Before Independence, the Church of England was formally established by law in the five southern colonies (Maryland through Georgia).¹⁵ It also held that status, without explicit legislative authorization, in four counties of metropolitan New York.¹⁶ In Massachusetts, Connecticut, New Hampshire, and Vermont, localized establishments were formed, where the majority within each town could select the minister and hence the religious denomination—usually but not always, Congregationalism (or “Puritanism”).¹⁷ The remaining colonies—

14. See Act of Uniformity, 1642, 14 Car. 2, c. 4 (Eng.), reprinted in 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 543-47.

15. LEVY, *supra* note 3, at 1.

16. See *id.* at 11-16.

17. See *id.* at 16-26.

Pennsylvania, Delaware, New Jersey,¹⁸ Rhode Island, and non-metropolitan New York—had no official establishment of religion.¹⁹ Rhode Island,²⁰ Pennsylvania,²¹ and Maryland²² were explicitly founded as havens for dissenters, though Maryland lost that status at the end of the 1600s. Although the laws of these colonies would not pass full muster under modern notions of the separation of church and state—they all had religious tests for office, blasphemy laws, and the like—they were, by the standards of the day, religiously tolerant and pluralistic. This Article will focus on England and the colonies and states where no one doubted that an establishment of religion existed.

No single law created the established church. Rather, it was constituted by a web of legislation, common law, and longstanding practice. When Thomas Jefferson began his legislative assault on the Virginia establishment in the early 1770s, his first step was to make a list of Acts of Parliament and the Virginia Assembly concerning religion. He found some twenty-three applicable English statutes (beginning in the days of Edward VI) and seventeen Virginia statutes (beginning in 1661).²³ Had he looked before those dates, he would have found many more. In 1661, when the religious laws of the colony had been systematically revised, the assembly members found that there had been “soe many alterations in the lawes, that the people knew not well what to obey nor the judge what to punish”²⁴

Nor was financial support from taxes a necessary hallmark of establishment. Even after dissenters were given the right of free

18. New Jersey is somewhat unusual in that no legislation establishing religion was ever adopted, but the instructions to royal governors maintained what one historian has called “the fiction of a tacit establishment.” SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY* 418 (Burt Franklin 1970) (1902).

19. See LEVY, *supra* note 3, at 11.

20. See *Plantation Agreement at Providence* (1640), reprinted in 8 *SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS* 353, 354 ¶ 2 (William F. Swindler ed., 1979).

21. See William Penn, *Frame of Government of Pennsylvania* (1683), reprinted in 8 *SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS*, *supra* note 20, at 261 ¶ XXXV.

22. See Maryland Act of Toleration of 1649, 1 Maryland Acts of Assembly 244, quoted in COBB, *supra* note 18, at 376.

23. See 1 *PAPERS OF THOMAS JEFFERSON* 539-44 (Julian P. Boyd ed., 1950).

24. 2 WILLIAM WALLER HENING, *THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS IN VIRGINIA* 41-42 (New York, R. & W. & G. Bartow 1823).

exercise of religion and the Church of England lost its tax-supported status, the Virginia Assembly continued to speak of it as the "church by law established."²⁵ By the same token, the Church of England is undoubtedly the established religion of the United Kingdom even today, but it does not receive governmental funding in that capacity.²⁶ To understand the meaning of the term "establishment," therefore, we must examine the historical development of the established church from a variety of sources and times.

A. Establishment in England

In the mother country, the established Church of England had ancient roots. It stood in the shoes of the Roman Catholic Church, which had been literally the only church of the realm, and inherited much of the Catholic Church's property,²⁷ its status, and many of its customary privileges.²⁸ Every British monarch since 1520 has held the title Defender of the Faith, and the Parliament legislates the official scripture (the authorized, or "King James" version of the Holy Bible), liturgy (the Book of Common Prayer), and dogma (the Thirty-nine Articles of Faith). The Archbishop of Canterbury and other high church officials were (and still are) appointed by the government.²⁹

Most ecclesiastical legislation can be traced back to the reign of Elizabeth I, when the royal government consolidated its control over the national religion. The Act of Supremacy, originally passed under Henry VIII in 1534, made the monarch the supreme head of

25. Mary Elizabeth Quinlivan, *Ideological Controversy Over Religious Establishment in Revolutionary Virginia 72-77* (1971) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with author).

26. David McClean, *State Financial Support for the Church: The United Kingdom, in CHURCH AND STATE IN EUROPE: STATE FINANCIAL SUPPORT, RELIGION AND THE SCHOOL*; 1992 PROCEEDINGS OF THE EUROPEAN CONSORTIUM OF CHURCH AND STATE RESEARCH 77, 79 [hereinafter *CHURCH AND STATE IN EUROPE*].

27. The portion of property not confiscated by Henry VIII, that is.

28. Supremacy Act, 1534, 26 Hen. 8, c. 1 (Eng.), reprinted in 1 *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY*, *supra* note 2, at 311-12.

29. See generally 1 BLACKSTONE, *COMMENTARIES* *364-83. For modern practice, see NORMAN DOE, *THE LEGAL FRAMEWORK OF THE CHURCH OF ENGLAND: A CRITICAL STUDY IN A COMPARATIVE CONTEXT* 161-66 (1996). During Edward VI's time there were forty-two articles of faith, which provided the source for the later thirty-nine articles. A time-line of this period is available at <http://www.britannia.com/history/reftime.html> (last visited Apr. 25, 2003).

the Church of England, and gave him "authority to reform and redress all errors, heresies, and abuses."³⁰ During the reign of Edward VI, Parliament enacted the Articles of Faith, which set forth the doctrinal tenets of the Church,³¹ and the Book of Common Prayer, which prescribed the liturgy for religious worship.³² The Acts of Uniformity required all ministers to conform to these requirements, making the Church of England the sole institution for lawful public worship.³³ Its purpose, as stated in the preamble to the 1662 version, was to effect "an universal agreement in the public worship of Almighty God."³⁴ The Test³⁵ and Corporation Acts³⁶ limited civil, military, ecclesiastical, and academic offices to participating members of the Church; the Act Against Papists³⁷ and Conventicles Act³⁸ prohibited unlicensed religious meetings; various penal acts punished dissenters for engaging in prohibited religious

30. Supremacy Act, 1534, 26 Hen. 8, c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 311. As reenacted under Elizabeth, the Act omitted the offensive phrase "supreme head," but did not diminish the monarch's power on any matters of substance. Act of Supremacy, 1559, 1 Eliz., c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 344-46. The monarch's official ecclesiastical title became "supreme Governour" of the Church. Act of Supremacy, 1559, 1 Eliz., c. 1, § 9, (Eng.), *reprinted in* 4 STATUTES OF THE REALM 352 (1963).

31. See G.R. ELTON, THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY 344-45, 397 (2d ed. 1982).

32. *Id.* at 402-03.

33. Act of Uniformity, 1662, 14 Car. 2, c. 4 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 543-46; Act of Uniformity, 1559, 1 Eliz., c. 2 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 346-48; Second Act of Uniformity, 1552, 5 & 6 Edw. 6, c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 326-27; First Act of Uniformity, 1549, 2 & 3 Edw. 6, c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 325-26. The Uniformity Act was repealed in 1974; now, the General Synod of the Church has authority to authorize multiple forms of liturgical service within certain limits. See DOE, *supra* note 29, at 284-91.

34. Act of Uniformity, 1662, 14 Car. 2, c. 4 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 543-46.

35. Second Test Act, 1678, 30 Car. 2, c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 556-57; First Test Act, 1673, 25 Car. 2, c. 2 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 555-56.

36. Corporation Act, 1661, 13 Car. 2, c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 542-43.

37. Act Against Papists, 1593, 35 Eliz., c. 2 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 355-56.

38. Conventicles Act, 1664, 16 Car. 2, c. 4 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 533.

worship.³⁹ Catholics and Puritans were particular targets, because both appeared to threaten the political legitimacy of the state.⁴⁰ The flavor of this persecution is indicated by the titles of the laws: "An Act to prevent and avoid dangers which may grow by Popish Recusants,"⁴¹ or "An Act to retain the Queen's majesties subjects in their due obedience."⁴²

During the brief Puritan and Presbyterian ascendancy under the Commonwealth the official orthodoxy changed, but the policy of religious uniformity generally did not.⁴³ With the Stuart Restoration in 1660, the full establishment of the Church of England returned,⁴⁴ though with increasing (but informal) toleration. In 1689, after the Glorious Revolution, the Toleration Act lifted criminal penalties for public religious worship by trinitarian Protestant dissenters.⁴⁵ This softened the coercive and exclusive character of the establishment, but fell far short of disestablishment. Moreover, it left penalties in place for Roman Catholic, Jewish, Unitarian, and other non-Protestant and non-trinitarian religious persuasions.⁴⁶ Writing shortly before the American Revolution, Blackstone reported that the penal laws against Catholics "are seldom exerted to their utmost rigor,"⁴⁷ but,

39. The most notable of the Penal Acts was the Clarendon Code, a series of statutes passed during the reigns of Charles I and Charles II: The Five-Mile Act, 1665, 17 Car. 2, c. 2 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 554-55; Conventicles Act, 1664, 16 Car., c. 4 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 533; Act of Uniformity, 1662, 14 Car. 2, c. 4 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 543-46; Corporation Act, 1661, 13 Car. 2, c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 542-43.

40. *See* sources cited *supra* note 39.

41. 1605-06, 3 Jam. 1, c. 5 (Eng.), *reprinted in* 4 STATUTES OF THE REALM pt. 2, at 1077 (1963).

42. 1581, 35 Eliz., c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 354.

43. *See* An Agreement of the People (1649), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 511, 514-15.

44. *See* Act of Uniformity, 1662, 14 Car. 2, c. 4 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 543-46.

45. Toleration Act, 1689, 1 W. & M., c. 18 (Eng.), *reprinted in* 2 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 607.

46. URSULA HENRIQUES, RELIGIOUS TOLERATION IN ENGLAND 1787-1833, at 11-13 (1961).

47. 4 WILLIAM BLACKSTONE, COMMENTARIES *57.

along with the Test and Corporation Acts, they remained on the books well into the nineteenth century.⁴⁸

The United Kingdom still has its established church. The Queen is still the supreme governor of the Church; the Archbishop of Canterbury and other high prelates are chosen by the Prime Minister; bishops sit in the House of Lords; Parliament continues, at least at a formal level, to have control over the doctrines, structure, and liturgy of the Church;⁴⁹ and the Church still plays a privileged ceremonial role in the life of the nation.⁵⁰ At the same time, Britain is one of the most tolerant nations in the world. Religions of all sorts are practiced freely; the government extends financial support to schools connected with all the large denominations;⁵¹ Roman Catholicism has now eclipsed the established Church in numbers of church adherents.⁵² In these days of constitutional change in the United Kingdom—witness the emasculation of the hereditary House of Lords⁵³—the establishment is undergoing renewed examination. The main victim of the establishment today, if there is one, may be the established church itself.

B. Establishment in the American Colonies

Established religion came to these shores with the earliest colonists. It assumed two principal forms: an exclusive Anglican establishment in the southern states and a localized Puritan establishment in the New England states other than Rhode Island.⁵⁴ Although equally coercive, the Anglican and Puritan

48. See HENRIQUES, *supra* note 46, at 136-259.

49. In practice, however, Parliament now defers to decisions made by the General Synod of the Church.

50. See James W. Torke, *The English Religious Establishment*, 12 J.L. & RELIGION 399, 410-27 (1995). For a detailed account of the legal structure of the Church of England today, see generally DOE, *supra* note 29.

51. See CHARLES GLENN, DEPT OF EDUC., CHOICE OF SCHOOLS IN SIX NATIONS: FRANCE, NETHERLANDS, BELGIUM, BRITAIN, CANADA, WEST GERMANY 109-42 (1989).

52. OFFICE OF NAT'L STATISTICS, GREAT BRITAIN, 30 SOCIAL TRENDS 219 (2000), available at http://www.statistics.gov.uk/downloads/theme_social/st30v8.pdf (last visited Jan. 26, 2003).

53. See House of Lords Act, 1999, c. 34 (Eng.) (restricting "membership of the House of Lords by virtue of a hereditary peerage").

54. The term "Anglican" did not come into contemporaneous use until the eighteenth century, but I use it here as a shorthand for the Church of England prior to Independence.

establishments were profoundly different in spirit: The New England establishments were based on the intense religious convictions of the people, in the teeth of opposition from the mother country, whereas the Anglican establishments enjoyed the support of the mother country and were designed in part to foster loyalty and submission to governmental authorities. I do not mean to imply that the Anglican colonials or their clergy were insincere in their Christian belief, but only that their motives for immigration were less focused on religion, their religious commitments were less intense, and their religious institutions and beliefs were more closely aligned with that of the British state.

These two forms persisted throughout the colonial period, and the New England form endured several generations longer.

1. *Virginia*

The prescription to the first Virginia charter, issued by James I in 1606, instructed colonial leaders to "provide that the Word and Science of God be preached, planted, and used ... according to the rites and doctrine of the Church of England."⁵⁵ The second charter reiterated the terms of the ecclesiastical establishment, and made the oath of supremacy a precondition to immigration.⁵⁶ This oath included recognition of the king or queen as head of the Church, thus barring non-Anglicans, and specifically repudiated belief in the Catholic doctrines of papal authority and transubstantiation.⁵⁷ Over

The term "Episcopalian" was sometimes used in reference to the Church of England prior to Independence, but I will reserve it to refer to the American successor to the Church of England after Independence. I will use the term "Puritan" to denote the congregational Reformed Protestantism of New England in the hundred or so years after settlement, and the term "Congregationalist" to denote the same church after the mid-1700s, when it had lost the theological and behavioral rigor that is associated with the term "Puritan." I will use the term "Calvinist" or "Reformed" to encompass not only Puritans and Congregationalists, but also Presbyterians, Dutch Reformed, Independents, and other denominations whose theology derives from the thoughts of John Calvin.

55. COBB, *supra* note 18, at 75 (quoting 1 JAMES S.M. ANDERSON, *THE HISTORY OF THE CHURCH OF ENGLAND IN THE COLONIES AND FOREIGN DEPENDENCIES OF THE BRITISH EMPIRE* 199 (London, Rivingtons 2d ed. 1856)).

56. *Id.*

57. The oath is set forth in "An act to make further provision for electing and summoning sixteen peers of Scotland to sit in the house of peers in the parliament of Great Britain; and for trying peers for offences committed in Scotland; and for the further regulating of voters

the next several decades, Virginia authorities repeatedly promulgated laws regarding religion, attempting to impose "a uniformity in our Church as near as may be to the Canons in England"⁵⁸ In theory, Puritans and Catholics were not permitted to enter and were punished if they did so. So successful was this policy that until after the Revolution, there was no Catholic Church and there were few, if any, Catholic individuals in the Commonwealth of Virginia.⁵⁹ Nor was there any open practice of any non-Christian religious faith, at least among the European settlers.

The English Civil War and the Puritan ascendancy during the Commonwealth period brought trouble for Virginians, who were more royalist and establishmentarian than the new authorities in England. When Charles I was executed, the colony declared his son, the future Charles II, king, and sent messengers to him in exile proclaiming their allegiance.⁶⁰ An emissary from the Commonwealth government insisted that the colony cease its persecution of Puritans and negotiated an uneasy compromise under which Virginians were permitted to continue to use the *Book of Common Prayer*, which was then banned in England, so long as they omitted the prayers for the King.⁶¹ With the Stuart Restoration, however, the colony reverted to full-throated establishmentarianism, adopting a comprehensive set of "rules to be observed in the government of the Church"⁶²

in elections of members to serve in parliament," 1707, 6 Anne, c. 23 (Eng.), reprinted in 2 DANBY PICKERING, *THE STATUTES AT LARGE, FROM THE SECOND TO EIGHTH YEAR OF QUEEN ANNE* 377-78 (London, Joseph Bentham 1764).

58. COBB, *supra* note 18, at 80 (quoting 1 HENING, *supra* note 24, at 149).

59. The first Catholic church in Virginia, St. Mary Church in Alexandria, was built in 1795. See Fr. Thomas Ferguson, *Part 1: Origins of the Church in Northern Virginia*, ARLINGTON CATHOLIC HERALD, July 15, 1999, at <http://cf.catholic.org/ach/articles/00articles/ferguson1.htm> (last visited Apr. 25, 2003).

60. 1 GEORGE MACLAREN BRYDON, *VIRGINIA'S MOTHER CHURCH AND THE POLITICAL CONDITIONS UNDER WHICH IT GREW* 121 (1947).

61. *Id.* at 123; COBB, *supra* note 18, at 89. Actually, the agreement only permitted use of the prayer book for a single year, but in practice this limitation was disregarded. *Id.* The experience of the Virginia Church under the Commonwealth is described in detail in 1 BRYDON, *supra* note 60, at 125-44.

62. 2 HENING, *supra* note 24, at 41.

These rules, the Diocesan Canons of 1661, warrant particular attention.⁶³ They constitute a catalog of the essential legislative ingredients for an established church as perceived at the time. The Canons required the erection of churches or chapels in every parish at public expense, together with glebe land⁶⁴ and housing for a minister; set forth rules for the selection, powers, and duties of vestries;⁶⁵ prescribed that ministers would be inducted only if they demonstrated ordination by an English bishop, approval by the colonial governor, and selection by the local vestry; prescribed the minister's salary at public expense (in tobacco, corn, or cash), and gave him a cause of action if the parish failed to pay; required liturgy, sacraments, and catechism to be performed only in accordance with the Church of England; prescribed observance of the Sabbath and various holy days (including a day of fasting in honor of martyred King Charles I), as well as weekly sermons and biannual celebration of the Lord's Supper; limited lawful marriage to ceremonies performed by ministers of the Church of England; authorized vestrymen to bring misdemeanor charges against persons caught swearing, Sabbath-breaking, skipping church, slandering, "backbiting," or committing the "foule and abominable sins of drunkennes fornication and adultery;"⁶⁶ required local churches to maintain official registers of births, burials, and marriages; and set aside public land for a college and free school "for the advance of learning, education of youth, supply of the ministry, and promotion of piety"⁶⁷ Subsequent legislation addressed such matters as the effect of baptism on slave status (none);⁶⁸ the punishment of "such ministers as shall become notoriously scandalous by drinkingnesse, swearing, ffornication or other haynous and crying sins ..."⁶⁹ and prohibition of unlawful

63. See *id.* at 41-48.

64. For definition and discussion of "glebe lands," see *infra* notes 260-72 and accompanying text.

65. "Vestries" are lay leaders of the local church. See *infra* notes 195-202 and accompanying text.

66. 1 BRYDON, *supra* note 60, at 464.

67. *Id.* at 478.

68. 2 BRYDON, *supra* note 60, at 470-71.

69. *Id.* at 473.

disturbances of divine service.⁷⁰ Of particular note was a 1662 law fining "scismaticall persons" who refused to have their children baptized,⁷¹ and laws passed in 1659-1660 and in 1663 prohibiting the immigration of Quakers and outlawing their religious assemblies.⁷² In short, the laws compelled religious observance, provided financial support for the ministry, controlled the selection of religious personnel, dictated the content of religious teaching and worship, vested certain civil functions in church officials, and imposed sanctions for the public exercise of religion outside of the established church. This was the model throughout the South, though in the Carolinas and Georgia there was much greater toleration of dissenters.⁷³

The Virginia establishment retained its compulsory form until the Revolution, but its exclusivity gradually broke down under the pressures of the Great Awakening, a popular religious revival that swept the colonies in the mid-eighteenth century and inspired many Americans to seek spiritual sustenance outside the confines of the established church.⁷⁴ It is significant that the establishment broke down not as a result of increasing secularism or rationalism, but as a result of evangelical religious revival. Partly as a result of the Awakening, first Presbyterians and later other Protestant dissenters won approval for public worship in the Virginia colony, though Baptist ministers were still being horsewhipped and jailed as late as 1774 for preaching without a license.⁷⁵

The Virginia establishment suffered its first major blow in 1776, with the enactment of the Virginia Declaration of Rights.⁷⁶ The religious liberty provision, hammered out in debate between James Madison and George Mason, declared:

70. 2 HENING, *supra* note 24, at 483.

71. *Id.* at 165-66.

72. 1 BRYDON, *supra* note 60, at 474-77.

73. *See infra* notes 117-27, 137-38 and accompanying text.

74. *See* COBB, *supra* note 18, at 111-12; THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 134-35 (1986).

75. *See* COBB, *supra* note 18, at 111-12; CURRY, *supra* note 74, at 134-35; Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 WM. & MARY Q. 3 (1973).

76. Virginia Declaration of Rights (1776), reprinted in MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 58-59 (2002).

That Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence: and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.⁷⁷

This effectively ended the persecution of Baptist and other preachers and granted all Virginians the right to practice religion freely. It was, indeed, one of the most expansive religious freedom guarantees of its day. But it did not disestablish the Church. The Virginia Assembly continued to legislate for "the church by law established," the Church continued to perform civil functions, and taxes continued to be collected for church purposes.⁷⁸ Disestablishment came in steps over the ensuing decade.⁷⁹ Compulsory taxes for support of religion were first suspended and then repealed.⁸⁰ The idea of a multiple establishment was debated and rejected.⁸¹ Finally, in 1786, the state enacted a Bill for Establishing Religious Freedom, penned by Thomas Jefferson and championed by James Madison.⁸² This marked the end of the Virginia establishment.

77. *Id.* For analyses of the debate between Mason and Madison, which produced the final text, see THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787*, at 17-19 (1977), and Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 844-45 (1998).

78. BUCKLEY, *supra* note 77, at 18; see also H.J. ECKENRODE, *SEPARATION OF CHURCH AND STATE IN VIRGINIA* 45-46 (1910); Quinlivan, *supra* note 25, at 78-81.

79. The process of disestablishment will be analyzed in detail in the second part of this Article to be published in a subsequent volume of the *William and Mary Law Review*. See generally BUCKLEY, *supra* note 77.

80. COBB, *supra* note 18, at 492-94; CURRY, *supra* note 74, at 131; Quinlivan, *supra* note 25, at 73-75.

81. BUCKLEY, *supra* note 77, at 73-172; CURRY, *supra* note 74, at 136-48; Quinlivan, *supra* note 25, at 73-75.

82. A Bill for Establishing Religious Freedom (1786), reprinted in MCCONNELL ET AL., *supra* note 76, at 69-71.

2. *New England*

The New England establishment had the same essential elements found in the Virginia diocesan canons, but broke from the established Church of England and substituted a localized establishment based on the religious convictions of majorities in the various towns.⁸³ In its instructions to the first colonists at Massachusetts Bay, the Massachusetts Bay Company noted that "we have been careful to have a plentiful provision of godly ministers."⁸⁴ In contrast to Virginia, however, there was no establishment of the Church of England: "For the manner of exercising their ministry, we leave that to themselves, hoping they will make God's word the rule of their actions."⁸⁵ This did not imply any lack of official organized support for religion, but recognized the fact that the early settlers of Plymouth and Massachusetts Bay were undertaking the colonial venture precisely because of their disagreements with the established church at home. The Pilgrims at Plymouth and Puritans at Massachusetts Bay, far more than the primarily economic adventurers in Virginia, were motivated by their desire to create a new Christian commonwealth along the lines they understood to be set by the Gospels.⁸⁶ New Hampshire, Connecticut, and later, Vermont, followed the Massachusetts pattern of local establishments.⁸⁷

It is important to distinguish the Puritans, who settled Massachusetts Bay and most of New England, from the Pilgrims, who settled Plymouth. Puritans initially were members of the Church of England and shared the Church's establishmentarian vision of church-state relations.⁸⁸ They believed, however, that the Church of England had been corrupted by non-Christian elements (mostly vestigial papism), and that it had to be "purified"⁸⁹—hence their name. The Pilgrims, by contrast, believed that the corruption of the Church of England was irremediable, and they separated

83. COBB, *supra* note 18, at 133.

84. *Id.* at 155.

85. *Id.* at 156.

86. *Id.* at 136-39, 150-56; John Witte, Jr., *How to Govern A City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, 46-47 (1990).

87. See CURRY, *supra* note 74, at 3-6.

88. COBB, *supra* note 18, at 151.

89. *Id.* at 136-39.

themselves from the Church, believing that it was sinful to join in worship with the unredeemed.⁹⁰ The Pilgrims can thus be seen as more radical and sectarian than the Puritans, and in a strictly *theological* sense, more intolerant. But there was a paradox. As separatists, the Pilgrims had little hope or expectation that they could reform the world, and focused instead on living a righteous life among themselves. The Puritans, by contrast, were reformers, and were willing to use whatever tools might be available to advance their understanding of the gospel.⁹¹ Thus, in practice, the Pilgrim colony was vastly more tolerant of dissent and protective of individual conscience. The Pilgrims resisted compulsory taxation for the ministry and never engaged in the persecution, let alone execution, of Quakers or other dissenters, which so stained the history of seventeenth-century Massachusetts Bay.⁹² Consider this eloquent statement by the Pilgrim leaders in 1625:

The French may erre, we may erre, and other churches may erre, and doubtless doe in many circumstances. That honour therefore belongs only to the infallible word of God, and pure Testamente of Christ, to be propounded and followed as the only rule and pattern for direction herein to all churches and Christians. And it is too great arrogancie for any man, or church to thinke that he or they have so sounded the word of God to the bottome, as precislie to sett down the church discipline, without error in substance or circumstance, as that no other without blame may digress or differ in anything from the same.⁹³

For their more tolerant posture, which was interpreted as a lack of zeal for the faith, the Pilgrims were sharply criticized by their Puritan neighbors in Massachusetts Bay, New Haven, and Connecticut.⁹⁴ By the end of the seventeenth century, however, the Pilgrim's Plymouth colony had been absorbed into the larger Massachusetts colony and ceased to have a separate identity.⁹⁵

90. *Id.* at 150-51.

91. *Id.* at 170-74.

92. *Id.* at 139-43.

93. JACOB C. MEYER, CHURCH AND STATE IN MASSACHUSETTS FROM 1740 TO 1833, at 5-6 (1930).

94. COBB, *supra* note 18, at 141.

95. *Id.* at 233; MEYER, *supra* note 93, at 6.

Although the Puritan establishments of New England were coercive and (at times) intolerant, they were committed to a kind of separation between church and state. Under the Calvinist doctrine of "two kingdoms," church and state were understood as two coordinate but separate covenantal associations for the discharge of godly authority. Government officials were barred from holding church office and from interfering in church affairs; church officials were barred from holding political office, serving on juries, or endorsing political candidates.⁹⁶ Neither church nor state was allowed to control the other.

The New England religious establishment was in a perpetually awkward position because the established faith in New England, Congregationalism, was a dissenting faith in the mother country. Members of the Church of England in New England were consigned to the unfamiliar role of dissenters.⁹⁷ At least partly to distract attention from this anomaly, statutes in Massachusetts after 1692 made no reference to any particular religious denomination by name, but simply required every town outside of Boston⁹⁸ to maintain an "able, learned and orthodox minister," chosen by the qualified voters of the town and supported by public taxation.⁹⁹ With very few exceptions, this was tantamount to a Congregationalist establishment, until Unitarian ministers began to win in the towns surrounding Boston in the nineteenth century.¹⁰⁰ The most famous exception was Swansea, in which Baptists constituted a majority as early as 1693, making Swansea the only Baptist established church in the world.¹⁰¹

The New England colonies, like the South, attempted to maintain religious homogeneity by banishing or punishing dissenters, a policy that gradually eased over the course of the eighteenth century. Largely because of the ability of the Anglican minority to garner political support back home, the New England colonies were forced to extend toleration to Protestant denominations outside

96. Witte, *supra* note 86, at 55-56.

97. COBB, *supra* note 18, at 151-52.

98. Churches in Boston were supported by voluntary contributions. LEVY, *supra* note 3, at 17.

99. MEYER, *supra* note 93, at 10.

100. *Id.* at 177-78.

101. LEVY, *supra* note 3, at 17.

the Puritan fold—first to Anglicans, and soon to Quakers and Baptists.¹⁰² The Massachusetts Charter of 1691 guaranteed a “liberty of Conscience ... to all Christians (Except Papists).”¹⁰³ Gradually, the system evolved into what we may call a “multiple establishment”: a system in which all residents are required to support, and perhaps to attend, religious worship, but within certain limits may choose which one.¹⁰⁴

During the Revolutionary period, the Calvinist clergy were seedbeds of support for the patriot cause, supplying much of the emotional fervor as well as intellectual justification for the fight.¹⁰⁵ This was due to a combination of theology and history. The Calvinist theory of authority in the “two kingdoms” of church and state has a strong tendency toward localism and republicanism, as illustrated by the Calvinist redoubt of Geneva. According to Calvinist ecclesiology, the Church is divided into semiautonomous congregations, governed by elected bodies of elders, deacons, and ministers. This is a form of church government inhospitable to centralized monarchical control, and favorable to the emerging ideals of the American Revolution.¹⁰⁶ Indeed, from the beginning, the New England Way was a rebellion against English authorities. Burke described their style of religion as “the dissidence of dissent” and “a refinement on the principle of resistance.”¹⁰⁷ This history of resistance to the Crown accustomed the people to the idea of

102. See COBB, *supra* note 18, at 234-35.

103. CURRY, *supra* note 74, at 82.

104. See Susan Martha Reed, *Church and State in Massachusetts, 1691-1740*, 3 U. ILL. STUD. SOC. SCI. 461, 461 (1914); Witte, *supra* note 86, at 53.

105. ALAN HEIMERT, *RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION* 18 (1966); NANCY L. RHODEN, *REVOLUTIONARY ANGLICANISM: THE COLONIAL CHURCH OF ENGLAND CLERGY DURING THE AMERICAN REVOLUTION* 5 (1999); HARRY S. STOUT, *THE NEW ENGLAND SOUL: PREACHING AND RELIGIOUS CULTURE IN COLONIAL NEW ENGLAND* 283-311 (1986). For a collection of sermons, see *THE PULPIT OF THE AMERICAN REVOLUTION* (John Wingate Thornton ed., Boston, Gould & Lincoln 1860).

106. See ELLIS SANDOZ, *A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING* (1990); STOUT, *supra* note 105, at 283-85; Alice M. Baldwin, *Sowers of Sedition: The Political Theories of Some of the New Light Presbyterian Clergy of Virginia and North Carolina*, 5 WM. & MARY Q., 52, 76 (1948); Joel A. Nichols, *A Man True to His Principles: John Joachim Zubly and Calvinism*, 43 J. CHURCH & ST. 297, 303-05 (2001); Witte *supra* note 86, at 59-62.

107. Edmund Burke, *Speech on Moving His Resolutions for Conciliation with the Colonies* (Mar. 22, 1774), in EDMUND BURKE: *SELECTED WRITINGS AND SPEECHES* 147, 160 (Peter J. Stanlis ed., 1963).

independence. The Calvinist ministers of New England and elsewhere can be called the "ideological commissars" of the American Revolution.¹⁰⁸

This was in marked contrast to the Tory tendencies of the Anglican clergy. According to the most thorough historical study of the issue, only twenty-seven percent of Anglican ministers nationwide supported independence, the vast majority of them being Virginians. Almost forty percent—approaching ninety percent in New York and New England—were loyalists. Out of fifty-five Anglican clergy in New York and New England, only three were Patriots, two of those being from Massachusetts.¹⁰⁹ In Maryland, of the fifty-four Anglican clergy at the beginning of the Revolution, only sixteen remained to take oaths of allegiance to the new government.¹¹⁰

Like the revolutionary sympathies of the Calvinists, the loyalist sympathies of the Anglicans stemmed from both theology and history. One of the Thirty-nine Articles of Faith of the Church of England is the supremacy of the monarch, and the Church stressed the virtues of loyalty and obedience. One American minister wrote:

The principles of submission and obedience to lawful authority are as inseparable from a sound, genuine member of the Church of England, as any religious principle whatsoever. This Church has always been famed and respected for its loyalty, and its regard to order and government. Its annals have never been stained with the history of plots and conspiracies, treasons and rebellions. Its members are instructed in their duty to government by Three Homilies on Obedience, and six against Rebellion, which are so many standing lessons to secure their fidelity.¹¹¹

108. On the revolutionary sympathies of Calvinist and evangelical ministers, see RHODEN, *supra* note 105, at 5-7. See also HEIMERT, *supra* note 105, at 407-12, 458-62, 473-94 (discussing the revolutionary sympathies of Calvinist clergy).

109. These numbers are derived from RHODEN, *supra* note 105, at 89 tbl.5.1.

110. NELSON WAITE RIGHTMYER, *MARYLAND'S ESTABLISHED CHURCH* 1189 (1956).

111. RHODEN, *supra* note 105, at 71 (quoting THOMAS BRADBURY CHANDLER, A FRIENDLY ADDRESS TO ALL REASONABLE AMERICANS, ON THE SUBJECT OF OUR POLITICAL CONFUSIONS: IN WHICH THE NECESSARY CONSEQUENCES OF VIOLENTLY OPPOSING THE KING'S TROOPS, AND OF A GENERAL NON-IMPORTATION ARE FAIRLY STATED 51 (Boston, Mills & Hicks 1774)).

To serve as an Anglican minister, a clergyman had to be ordained in England, take an oath of allegiance to the Crown, and swear to conform to established liturgy, which contained prayers for the king and the royal family. Many Anglican ministers found they could not, in good conscience, break this oath, even if their personal political sympathies lay with the Americans.¹¹² When states during the Revolution imposed oaths of loyalty,¹¹³ ministers with these convictions fled or retired; some suffered violence or were driven from their parishes.¹¹⁴ Anglican ministers who refused to violate their oaths were dunked, beaten, stripped, tarred and feathered, and driven from their pulpits.¹¹⁵ In light of these differences in loyalty, it is not surprising that the establishment in New England survived the Revolution with increased prestige, while that in the South was dismantled.

Establishment survived in New England well into the nineteenth century. Disestablishment came to Connecticut in 1818, but not until 1833 in Massachusetts. New Hampshire enacted a toleration act in 1819, but authorization for towns to support Protestant ministers remained on the books, unenforced, for the rest of the century.¹¹⁶

3. *Other Southern Colonies*

The establishment came more slowly to the Carolinas. In form, the Carolina establishment imitated that of Virginia, but it was never as carefully organized or executed, especially in North Carolina, which suffered from an extreme shortage of clergy, and

112. *Id.* at 1, 70-71.

113. For example, in Maryland, all citizens holding offices of trust were required to "sware that I do not hold myself bound to yield any allegiance or obedience to the King of Great Britain" RIGHTMYER, *supra* note 110, at 121. Georgia imposed a similar requirement, which led to the banishment and confiscation of the property of Georgia's most prominent clergyman, who had been a delegate to the Second Continental Congress but who could not swear the oath. REBA CAROLYN STRICKLAND, *RELIGION AND THE STATE IN GEORGIA IN THE EIGHTEENTH CENTURY* 141-45 (1939).

114. On the loyalist sympathies of the Anglican clergy during the Revolution, see RHODEN, *supra* note 105, at 6-7, 65, 67-78, 82-87. For an excellent account of these events in Georgia, see STRICKLAND, *supra* note 113, at 141-49.

115. RHODEN, *supra* note 105, at 1-2.

116. COBB, *supra* note 18, at 516.

was far more hospitable to dissenters.¹¹⁷ In the original Charter of 1663, the Proprietors of the colony were given full authority over religion,¹¹⁸ with "[s]uch Indulgences and Dispensations and with such Limitations as ... Proprietors shall think fit and reasonable."¹¹⁹ But for the first ten years of the colony at Charles Town, neither church nor minister existed.¹²⁰ Proprietors used their broad authority to attract religious dissenters to the colony.¹²¹ Many early governors were dissenters, Presbyterians or Quakers, as were roughly half of the inhabitants.¹²² An experiment in a tolerant establishment, the Fundamental Constitutions of Carolina,¹²³ from the pen of John Locke, was never implemented.¹²⁴ In 1704, however, the South Carolina colonial assembly formally adopted legislation recognizing the Church of England as the only established church in South Carolina, specifying that the Book of Common Prayer would be used as its liturgy, barring dissenters from serving in the legislature, refusing to recognize marriages performed by dissenting clergy, establishing seven Anglican parishes, and directing that the costs of clerical salaries and church construction be paid from public funds.¹²⁵ These provisions replicated the basic elements of

117. See JOHN WESLEY BRINSFIELD, *RELIGION AND POLITICS IN COLONIAL SOUTH CAROLINA* 12-15 (1983). For a discussion of the lack of churches and clergy in the Carolinas, see COBB, *supra* note 18, at 130.

118. See BRINSFIELD, *supra* note 117, at 5.

119. *Id.* at 6 (quoting the CHARTER OF CAROLINA (1665)).

120. *Id.* at 11. In 1679, the settlement moved to a new location across the river at Oyster Point, where a Church of England minister arrived in 1680 and a church was built. *Id.* at 11-12.

121. *Id.* at 6 (discussing the "extreme lengths" the Proprietors went to "in order to secure religious liberty as bait for dissenting settlers").

122. See *id.* at 9 (noting that in eighteen of the years between 1670 and 1693, the colony had dissenting governors and that "dissenters in Carolina equalled the Anglicans numerically by 1680 and were strong enough to have their voices heard").

123. 1 STATUTES AT LARGE OF SOUTH CAROLINA 42-56 (Thomas Cooper ed., 1836). The Fundamental Constitutions were in John Locke's handwriting, but it is unclear whether he was the author or merely the secretary.

124. BRINSFIELD, *supra* note 117, at 7-9. Brinsfield notes that the Fundamental Constitutions was "a rather liberal and philosophical document." *Id.* at 8. Rather than establish a particular church, the original document merely "affirmed in general deist terms ... that (1) There is a God, and (2) He ought to be publicly worshipped." *Id.*

125. *Id.* at 23-24. The legislation that barred dissenters from serving in the Commons House of Assembly was called "An Act for the more effectual Preservation of the Government of this Province." *Id.* at 23. The official establishment provisions made up the 1704 Church Act. *Id.* at 24.

the establishment already seen in Virginia's Diocesan Canons of 1661.¹²⁶ Nonetheless, dissenters continued to practice their religion in both Carolinas, enjoying far greater toleration than in Virginia.¹²⁷

Maryland was founded by a Roman Catholic nobleman, Cecil Calvert, Lord Baltimore, on principles of free exercise of religion. The colony served as a haven for Catholics fleeing oppression in England, although the majority of residents were Protestant.¹²⁸ During most of the seventeenth century, Maryland was probably the most tolerant and disestablishmentarian of the colonies, perhaps the most tolerant jurisdiction in the world.¹²⁹

Seventeenth-century Maryland was an "extraordinary example of Catholics and Protestants living together in relative harmony while freely and openly practicing their respective religions."¹³⁰ But the Glorious Revolution, which expanded the circle of toleration in the mother country, unleashed the forces of anti-Catholicism in Maryland.¹³¹ The Catholic Calvert family was removed from its proprietorship and the colonial assembly passed "An Act for the service of Almighty God and the Establishment of the Protestant Religion within this province," which established the Church of England and gave it exclusive powers and privileges, resembling those of the Church in Virginia.¹³² Maryland became one of the most intolerant and anti-Catholic of the colonies. Between 1692 and 1707, the colonial legislature passed successive acts to strengthen and secure the exclusive status of the Anglican Church, some of them so harsh that they were disallowed by the more tolerant

126. See *supra* notes 63-67 and accompanying text.

127. For responses by dissenters to the establishment acts, see BRINSFIELD, *supra* note 117, at 26-37.

128. See COBB, *supra* note 18, at 363-74. Cobb explains that as "a devout Roman Catholic," Lord Baltimore "desired to make a refuge for the persecuted brethren of his own faith, who in England were subjected to countless limitations, fines, and penalties." *Id.* at 365; see also RIGHTMYER, *supra* note 110, at 4-13; W. RUSSELL, *MARYLAND: THE LAND OF SANCTUARY* (2d ed. 1908); Kenneth Lasson, *Free Exercise in the Free State: Maryland's Role in Religious Liberty and the First Amendment*, 31 J. CHURCH & ST. 419, 423-34 (1989).

129. See CURRY, *supra* note 74, at 51-52. The other possible candidate for this distinction is Rhode Island. See COBB, *supra* note 18, at 423-40. For a discussion of Maryland's Act of Toleration of 1659, see Michael W. McConnell, *America's First "Hate Speech" Regulation*, 9 CONST. COMMENT 17 (1992).

130. CURRY, *supra* note 74, at 52.

131. COBB, *supra* note 18, at 381-86.

132. *Id.* at 386.

authorities in England.¹³³ Not only were all citizens taxed for support of the Anglican Church, as in Virginia and the other southern colonies, but Catholics were taxed doubly,¹³⁴ excluded from office, and forbidden to proselytize or to conduct public worship services.¹³⁵ Even at the eve of the Revolution, the right of Catholic inhabitants of Maryland—even so prominent a figure as Charles Carroll of Carrollton—to participate in public debate was contested.¹³⁶

In Georgia, the last of the thirteen colonies to be settled, the Church of England enjoyed a privileged position, but the Trustees encouraged immigration by welcoming and tolerating a wide variety of dissenters from throughout Europe, including Scottish Presbyterians, French Huguenots, Swiss Calvinists, Lutherans, Moravians, and even Jews, both Sephardim and Ashkenazi.¹³⁷ Catholics, however, were excluded.¹³⁸ Even so, eighteenth-century Georgia was by far the most tolerant and religiously diverse of the southern colonies.

4. New York

New York was a special case because of its original Dutch settlement. The Dutch West India Company, like the companies settling Virginia and Massachusetts, was charged by its government with responsibility for providing “good and suitable preachers” for settlers in New Amsterdam.¹³⁹ Although local congregations

133. See RIGHTMYER, *supra* note 110, at 14-54 (outlining the efforts of the Assembly to establish the Anglican Church in Maryland and detailing repeated rejections of statutes by English authorities); Lasson, *supra* note 128, at 434-35 (describing early-eighteenth-century restrictions on religious liberty and noting that a proposed Maryland law establishing Church of England practices as exclusive was rejected by the King).

134. THOMAS O'BRIEN HANLEY, *THE AMERICAN REVOLUTION AND RELIGION: MARYLAND 1770-1800*, at 10 (1971).

135. *Id.* at 19 (“[I]n eighteenth century Maryland ... no apologies were needed for excluding a Catholic from voting, holding public office and public worship.”); RIGHTMYER, *supra* note 110, at 54 (noting that a 1704 act prohibited both public celebration of the mass and proselytism); Lasson, *supra* note 128, at 435 (describing laws that were passed in early eighteenth century limiting the rights of Catholics).

136. See HANLEY, *supra* note 134, at 19.

137. STRICKLAND, *supra* note 113, at 36-43.

138. See *id.* at 43 (noting that “efforts taken to keep [Catholics] out of the colony must have been quite successful for the largest number reported to be in Georgia during the proprietary period was four in 1747”).

139. 1 JOHN ROMEYN BRODHEAD, *DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE*

were permitted to select their own ministers, the religious assembly in Amsterdam, the "Classis," controlled clerical qualifications and enforced doctrinal orthodoxy in accordance with Reformed Church beliefs.¹⁴⁰

When the English took control in 1664, they promised to protect the Dutch church in its freedom of worship.¹⁴¹ Indeed, the new rulers extended unusually broad toleration to dissenters,¹⁴² other than Catholics. Nonetheless, they instituted an establishment of religion. Under the new government, the Duke's Laws required each parish to elect overseers with responsibility to choose a Protestant minister and to collect taxes for "building and repairing the churches, provision for the poor, maintenance for the minister, as well as the more orderly managing of all parochial affairs"¹⁴³ The English rulers also continued to charter and support the Dutch Reformed churches of New York, creating an unusual form of dual establishment.¹⁴⁴ In 1693, under pressure from the Tory Governor Fletcher, the Assembly enacted the Ministry Act, which designated parishes in the four counties of metropolitan New York and required that "there shall be called, inducted, and established, a good sufficient Protestant Minister"¹⁴⁵ This was later interpreted by the Governor to mean an Anglican minister.¹⁴⁶ This interpretation was contested by other Protestant groups, and the ambiguity remained a source of confusion and conflict for the duration of the colonial period.¹⁴⁷ Outside of these counties, there was no official establishment in New York.

STATE OF NEW YORK 123 (Albany, E.B. O'Callaghan ed. & trans., Weed, Parsons & Co. 1856).

140. Elizabeth Mensch, *Religion, Revival, and the Ruling Class: A Critical History of Trinity Church*, 36 BUFF. L. REV. 427, 432 (1987).

141. COBB, *supra* note 18, at 325.

142. MICHAEL KAMMEN, *COLONIAL NEW YORK: A HISTORY* 157-58 (1975).

143. 1 ECCLESIASTICAL RECORDS OF THE STATE OF NEW YORK 570 (Hugh Hastings ed., 1901).

144. Mensch, *supra* note 140, at 438-39; *see also* KAMMEN, *supra* note 142, at 220-21 (noting that the Dutch Reformed Church in New York City was exempt from supporting the officially established Trinity Church and "thus enjoyed a special status above all other dissenters and therefore continued to give anomalous assent to an Anglican establishment").

145. 2 ECCLESIASTICAL RECORDS OF THE STATE OF NEW YORK, *supra* note 143, at 1076-77.

146. *See* KAMMEN, *supra* note 142, at 220-21; Mensch, *supra* note 140, at 444-47.

147. *See, e.g.*, Mensch, *supra* note 140, at 444-52 (describing struggles between Trinity Church and its political opponents over the church's land holdings and governance).

C. Elements of the Establishment

An establishment is the promotion and inculcation of a common set of beliefs through governmental authority. An establishment may be narrow (focused on a particular set of beliefs) or broad (encompassing a certain range of opinion); it may be more or less coercive; and it may be tolerant or intolerant of other views. During the period between initial settlement and ultimate disestablishment, American religious establishments moved from being narrow, coercive, and intolerant to being broad, relatively noncoercive, and tolerant. Although the laws constituting the establishment were ad hoc and unsystematic, they can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.

1. Governmental Control Over the Doctrines, Structure, and Personnel of the State Church

Modern constitutional doctrine stresses the "advancement of religion" as the key element of establishment, but in the Anglican establishments of America the central feature was control rather than advancement. As one historian of the Virginia establishment observed: "The ministers were generally under the control of a local oligarchy of hard-fisted and often ignorant squires, who were interested in keeping expenses down."¹⁴⁸ Even after churches lost any public financial support in Virginia, Maryland, and South Carolina, the state legislatures continued to exercise authority over them, including legislation addressing articles of faith. In Massachusetts, the leader of the Baptist opposition to establishment charged that the authorities were "assuming a power to govern religion, rather than being governed by it."¹⁴⁹

148. ECKENRODE, *supra* note 78, at 13.

149. Isaac Backus, *Government and Liberty Described*, in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS 1754-1789, at 351 (William G. McLoughlin ed., 1968).

The two principal means of government control over the church were laws governing doctrine and the power to appoint prelates and clergy.

a. Doctrines and Liturgy

In England, the doctrines and liturgy for public worship were set by act of Parliament. During the reign of Edward VI, Parliament adopted the Book of Common Prayer.¹⁵⁰ The Thirty-nine Articles of Faith of the Church of England were adopted in 1563, during the reign of Elizabeth I.¹⁵¹ The former included prayers for the King, and the latter included acceptance of the King as the Supreme Head of the Church.¹⁵² The Uniformity Act required all ministers to conform to both.¹⁵³ Although this act did not outlaw private worship in other denominations, it prohibited all public worship outside the established church. Additional legislation was enacted to penalize public worship by Catholics, Puritans, and Quakers.¹⁵⁴ As discussed above, the Anglican establishment was displaced during the Commonwealth decade by an establishment of Puritanism and Presbyterianism, but was restored in 1660 along with Charles II.¹⁵⁵

It is useful to distinguish two ramifications of the Uniformity Act: external and internal. The external consequence was to prohibit public religious worship outside of the Church of England. In effect, this was not much different from the enforcement of heresy laws, penal acts, conventicles acts, and other infringements of the free

150. See ELTON, *supra* note 31, at 397. The first version of the Book of Common Prayer was issued in 1549. This edition was replaced by the "much more Protestant Prayer Book of 1552" which was "enforced ... by a vigorous and penal Act of Uniformity, and supplemented by a formulary of faith in the Forty-two Articles of 1553." *Id.* (footnotes omitted). The Uniformity Act of 1559 established the third and final Book of Common Prayer. *Id.* at 398. For further information about the prayer books adopted during Edward VI's reign, see HENRY OFFLEY WAKEMAN, AN INTRODUCTION TO THE HISTORY OF THE CHURCH OF ENGLAND 274-82, 293-96 (7th ed. 1904).

151. See ELTON, *supra* note 31, at 398.

152. See RHODEN, *supra* note 105, at 70.

153. See *supra* notes 33-34 and accompanying text.

154. See *supra* notes 37-42 and accompanying text.

155. See *supra* notes 43-44 and accompanying text. For further information about the Commonwealth and the Restoration, see JOHN R.H. MOORMAN, A HISTORY OF THE CHURCH IN ENGLAND 243-53 (2d ed. 1967) and WAKEMAN, *supra* note 150, at 376-86.

exercise of religion.¹⁵⁶ The internal consequence was to maintain governmental control over the character and teachings of the Church of England itself. Like most large institutions, the Church tended to generate among its practitioners a diversity of views on matters theological, social, and political. Under the English system, the extent and nature of this diversity was a matter for governmental concern. During the years of Archbishop Laud, the power of the state was used to narrow the acceptable range of clerical opinion within the Church, to the exclusion of Anglican clergy with Puritan or Catholic leanings.¹⁵⁷ During the first half of the eighteenth century, it was used to foster latitudinarianism, a watered-down, rationalistic, nonsectarian style of religion, which generated the Great Awakening as a more evangelical, enthusiastic, and populist countermovement.¹⁵⁸ All churches must face the questions of what they stand for and how big a tent they should erect to balance the dangers of sectarian narrowness against those of broad-minded emptiness. As a result of the English establishment, however, these ecclesiastical questions were subjected to the control of political authorities rather than left to the internal deliberations of clergy and laity in the Church.

On this side of the Atlantic, the first preserved acts of the Virginia General Assembly, from 1623, included a colonial version of the Acts of Uniformity. In addition to requiring erection of churches and regular attendance at worship services, the Assembly enacted that "there [should] be a uniformity in our church as neere as may be to the canons in England; both substance and in circumstance"¹⁵⁹ The Assembly warned that "all persons" must "yeild readie obedience ... under paine of censure."¹⁶⁰ In 1629, the Assembly ordered that "all ministers ... shall conforme themselves in all things according to the canons of the church of England."¹⁶¹ No more latitude for special circumstances and no exceptions even for trinitarian Protestant dissenters, let alone Catholics, who were

156. See *supra* notes 39-42 and accompanying text.

157. See MOORMAN, *supra* note 155, at 230-32; WAKEMAN, *supra* note 150, at 368-69.

158. See MOORMAN, *supra* note 155, at 255-56; WAKEMAN, *supra* note 150, at 410-12, 427-28.

159. 1 HENING, *supra* note 24, at 123.

160. *Id.*

161. *Id.* at 149.

detested and generally excluded from the colony.¹⁶² As religious tensions in the mother country increased and turned to rebellion, royalist and establishmentarian Virginia passed more draconian Uniformity Acts in 1631¹⁶³ and again in 1642¹⁶⁴ and 1645,¹⁶⁵ tightening the screws against dissidents of all varieties, but especially Puritans.¹⁶⁶ This intolerance was more political than theological; Governor Berkeley justified it on the ground that "to tolerate Puritanism was to resist the king."¹⁶⁷ As a result, 300 Puritans fled the colony in 1649 to seek haven in Maryland.¹⁶⁸

In New York, the establishment dated from 1693, but applied only in the four metropolitan counties of New York, Westchester, Queens, and Richmond.¹⁶⁹ In those counties, the legislature required the calling of "a good, sufficient, Protestant minister"¹⁷⁰ to be supported by public taxation, the selection of wardens, and a vestry to be elected by the freeholders.¹⁷¹ Interestingly, the statute made no reference to the Church of England or to any particular doctrine or liturgy, leading some non-Anglican Protestants to claim an equal right to selection of a minister of their own persuasion.¹⁷² As late as 1766, New York authorities sought a judicial opinion whether the English Act of Uniformity was legally applicable in the province.¹⁷³ In practice, however, the New York establishment was Anglican. At the same time, the Dutch Reformed Church continued to exercise the privileges granted it in the Articles of Surrender in 1664.¹⁷⁴ New York authorities refused to charter any churches other

162. See COBB, *supra* note 18, at 82. Brydon writes that "[t]he Virginia people did not want Roman Catholics because they distrusted their loyalty to the crown, although an occasional Roman Catholic family did settle in the colony and was unmolested." 2 BRYDON, *supra* note 60, at 59.

163. 1 HENING, *supra* note 24, at 155-58.

164. *Id.* at 240-43.

165. *Id.* at 311-12.

166. See COBB, *supra* note 18, at 83-89 (describing the religious atmosphere for Puritans from 1640 through the Commonwealth era).

167. *Id.* at 86.

168. 1 BRYDON, *supra* note 60, at 120-21.

169. See *supra* note 145 and accompanying text.

170. See *id.*

171. COBB, *supra* note 18, at 338-39.

172. *Id.* at 339-40.

173. *Id.* at 342.

174. See *supra* note 144 and accompanying text.

than the Church of England and the Dutch Reformed, denying a charter to a Presbyterian congregation as late as 1775.¹⁷⁵

In New England, the legislatures could not enact a Uniformity Act because the New England Puritans were themselves dissenters. Either such an Act would outlaw the Church of England, thus creating an open conflict with authorities in London, or it would outlaw their own churches. Neither course was acceptable. Attempts to create religious uniformity were therefore more subtle. In seventeenth-century Massachusetts, the authorities barred any person from public preaching without the approval of the elders of the four neighboring churches, or of the county court.¹⁷⁶ Though superficially neutral, this effectively excluded anyone who departed from Puritan orthodoxy. Early in the eighteenth century, however, pressure mounted to recognize Anglican and other forms of worship. Connecticut and Massachusetts both legitimized Anglican worship services in 1727, and shortly thereafter extended this right to Quakers and Baptists.¹⁷⁷

Even after Independence, some states exercised the power to control articles of faith. The South Carolina Constitution of 1778 declared the "Christian Protestant religion" to be "the established religion of this state," but allowed churches to be "incorporated and esteemed as a church of the established religion of this State" only if they subscribed to five articles of faith:

- 1st. That there is one eternal God, and a future state of rewards and punishments.
- 2d. That God is publicly to be worshipped.
- 3d. That the Christian religion is the true religion.

175. COBB, *supra* note 18, at 342-43.

176. *Id.* at 208. The statute was enacted in 1653. *Id.*

177. In 1691, William III and Mary II issued the New Charter of Massachusetts Bay, available at <http://www.yale.edu/lawweb/avalon/states/mass07.htm> (last visited Apr. 25, 2003), which that granted religious freedom to all Protestants and ended the limitations on the franchise with respect to religion. COBB, *supra* note 18, at 233. Yet the entire population continued to be taxed to support the official Congregational Church until the passage of the "Five-Mile Act" in 1727, which directed funds collected from Anglicans to their Anglican Clergy. *Id.* at 234. The equivalent of the Five-Mile Act in Connecticut was the "Act for the Ease of such as Soberly Dissent," also passed in 1727. *Id.* at 270. Massachusetts extended the Five-Mile Act to include Baptists and Quakers in 1728. *Id.* at 235. Connecticut did the same in 1729. *Id.* at 271.

- 4th. That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice.
- 5th. That it is lawful and the duty of every man, being thereunto called by those that govern, to bear witness to the truth.¹⁷⁸

These articles bear less relation to the elements of Christian faith that might be thought essential for salvation than to what the South Carolina founders would deem essential for social utility. Citizens who believe in God and in a future state of rewards and punishments have an incentive to behave themselves, and the state has a substantial interest in ensuring that its citizens will be truthful when called to bear witness.

Another example of the lingering effects of establishment thinking occurred in Maryland after the Revolution. Although the Church of England no longer received public funds, the legislature continued to pass laws specifying in great detail how the church would be organized.¹⁷⁹ In 1783, clergy of that church thought it necessary to obtain legislative approval of changes in the liturgy eliminating references to the king and making other changes "to adapt the same to the Revolution."¹⁸⁰ The former established church of the state thus enjoyed no public benefits, but was the only church in the state that did not enjoy independence to control its own liturgy.

b. Appointment of Bishops and Clergy

The power to appoint and remove ministers and other church officials is the power to control the church. During the eighteenth century in England, the appointment of the ecclesiastical hierarchy became exceptionally political, partly because of the danger of Jacobitism (lingering support for the Stuart line) and partly

178. S.C. CONST. of 1778 art. XXXVIII, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

179. See CURRY, *supra* note 74, at 154.

180. RIGHTMYER, *supra* note 110, at 124; see CURRY, *supra* note 74, at 154.

because Prime Minister Walpole was dependent on episcopal votes for control of the House of Lords.¹⁸¹ As a result, loyalty to the Whig party exceeded spirituality as a qualification for preferment, a circumstance that did not enhance the standing or reputation of the Church during this crucial epoch.

On this side of the Atlantic there was no church hierarchy, but there were continual conflicts between clergymen, royal governors, local gentry, towns, and congregants over the qualifications and discipline of ministers. Congregationalists, Presbyterians, Baptists, Quakers, and other dissenting Protestant churches were non-hierarchical as a matter of ecclesiology, the Anglican churches as a matter of distance and circumstance. The Anglican churches of America were officially under the jurisdiction of the Bishop of London, but he was too far away to maintain effective control. From time to time, the Bishop would send commissaries or archdeacons to the colonies, but lacking episcopal authority they were unable to assume real control.¹⁸²

In New England, the principal point of conflict was between the freeholders of the town and the members of the church.¹⁸³ In cases of conflict, where the majority of the town differed from the majority of the church, who would prevail? For example, when Baptists obtained majority status, would they be able to select a Baptist minister? In accordance with Puritan theory, in which church and town were but two faces of the same society, the freeholders initially had this authority.¹⁸⁴ But it soon became apparent that this would produce unorthodox results. In 1693, after Baptists gained control in Swansea, the law was amended to reserve the right of selection of ministers to the members of the church, with the town having the power of ratification.¹⁸⁵ This was a recipe for stalemate. If church members chose a minister displeasing to the majority in the town, the pulpit would remain vacant. The solution was to refer cases of church-town conflict to

181. See ERIC J. EVANS, *THE CONTENTIOUS TITHE: THE TITHE PROBLEM AND ENGLISH AGRICULTURE, 1750-1850*, at 2 (1976).

182. See 2 BRYDON, *supra* note 60, at 272-73, 279-83, 325-35.

183. MEYER, *supra* note 93, at 10-11.

184. *Id.* at 10.

185. *Id.* at 10-11. Another strategy was to confine the right to vote to members of the church. See *infra* text accompanying notes 473-78.

councils made up of neighboring churches: an effective guarantee of Puritan orthodoxy, because dissenters might predominate in a town but were unlikely to predominate in a wider area.¹⁸⁶ When this arrangement proved insufficient to guarantee orthodoxy—Quakers obtained a majority in both church and town in two locations—the law was amended in 1702 to give county courts authority to determine which minister would receive public subvention.¹⁸⁷ When this too proved ineffective, the General Court itself, the central government of the colony, assumed the authority to appoint “learned and orthodox” ministers when the towns failed to do so and to pay them out of the taxes collected by the town.¹⁸⁸ This centralization of authority plainly contradicted to Congregationalist theory, and it did not last long.¹⁸⁹ Under pressure from the mother country, Massachusetts was forced to recognize the rights of Protestant dissenters to direct their taxes to support of their own churches.¹⁹⁰

The power to appoint and remove ministers is the power to control the church. In England, the appointment power, known as “advowson,” generally was vested in the donor of the church property, and thus generally was not in any political body; the power to discipline and remove was exclusively vested in the bishop.¹⁹¹ This gave a degree of autonomy to the church, at least from local control. In the American colonies, things were quite different. Ministers had to be ordained in England, approved by the governor, and selected by the local vestry. Local political bodies thus controlled appointments to the ministry.¹⁹² This was the principal point on which the colonial church differed from the canon law of the mother country.

Local control took different forms. Early in Virginia history, the governor asserted the authority to select ministers.¹⁹³ By 1642,

186. See MEYER, *supra* note 93, at 11.

187. *Id.* at 11-12.

188. *Id.* at 12.

189. *Id.* at 12-13.

190. *Id.* at 13-14. There were numerous obstacles to participation of Baptists and other dissenters in this scheme. See COBB, *supra* note 18, at 235.

191. Arthur P. Middleton, *The Colonial Virginia Parish*, 40 HIST. MAG. PROTESTANT EPISCOPAL CHURCH 431, 435-36 (1971).

192. See RHODEN, *supra* note 105, at 14.

193. COBB, *supra* note 18, at 87.

however, this power was wrested from the governor by the local vestries, who asserted this power as representatives of the people, from whom the property came.¹⁹⁴ The issue was whether the Church would be controlled by Crown appointees or by the local planter aristocracy. In neither case would the Church enjoy true independence. The local gentry ultimately prevailed.

Vestries, not clergy, were the heart and soul of the Virginia establishment.¹⁹⁵ In England, where bishops were close at hand, the vestry was a very different institution.¹⁹⁶ There, the term "vestry" was attached to the parishioners as a body, when they gathered to elect church wardens and hear their accounts.¹⁹⁷ The English vestry was open to any adult male parishioner. In Virginia, however, distances within a parish were so large and transportation so difficult that meetings of the parishioners were impractical. As a result, Virginia developed what is called a "closed" vestry system.¹⁹⁸ The parishioners—all the freeholders of the parish—elected twelve men to act on their behalf. In the event of a vacancy, the remaining members selected a replacement, except in cases of serious malfeasance, when central authorities were forced to intervene.¹⁹⁹ Thus, the vestries were self-perpetuating. Naturally, these offices tended to be composed of leading members of local society.²⁰⁰ The local magistracy, justices of the peace, and vestry were interlocking positions,²⁰¹ often held by the same few men, who formed a united, semifeudal, social authority. Vestries were the arm of the local gentry.²⁰²

194. 1 HENING, *supra* note 24, at 241-42. The governor retained power to appoint the minister in his home parish, "James-Citty." *Id.* at 242; *see also* 2 BRYDON, *supra* note 60, at 259.

195. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 89 (1991); Isaac, *supra* note 75, at 6; Middleton, *supra* note 191, at 431.

196. Middleton, *supra* note 191, at 433.

197. *Id.* The term "vestry" derives from the room in which the parishioners met, which was also the room where the clergy changed vestments. *Id.*

198. *Id.* at 433-34.

199. *Id.*

200. *Id.* at 435.

201. Isaac, *supra* note 75, at 3.

202. BUCKLEY, *supra* note 77, at 10; Isaac, *supra* note 75, at 6-7; Middleton, *supra* note 191, at 435.

Typically, ministers in Virginia were of a lower social class than their principal parishioners.²⁰³ Few sons of the planter aristocracy stooped to positions in the church. Because of poor pay and undesirable location, the Virginia parishes were unattractive to the abler and more ambitious clergy in the mother country. With exceptions, the colonies tended to get the dregs of the clerical profession. Poor pay was part of the problem. According to one minister: "A beggarly Clergy ... have been the Contempt and Derision of Mankind."²⁰⁴ Much of the church-state tension of colonial Virginia was a product of overbearing aristocratic vestrymen clashing with inadequate or insubordinate clergy.²⁰⁵ The flavor of this tension can be seen in a famous dispute, in which Landon Carter tried to evict the local minister from his church. According to the minister:

I had one wealthy, Great, powerful Colonel named Landon Carter, a leading Man in my Vestry, whom I could not reasonably please or oblige ... I soon perceived that he wanted to extort more mean, low, and humble obedience, than I thought consistent with the office of a Clergyman, all his houts and insults I little noticed, until he publicly declared that I preached against him (which I did not), cursed and attempted to beat me, saying my Sermon was aimed at him, because I preached against pride.... After this he was my implacable Enemy and swore Revenge, that if he ever got a majority in Vestry against me, he would turn me out of the parish and said he would do it, and not be accountable to the King, Bishop, Government or any Court of Judicature, and vowed he would clip the wings of the whole clergy, in this Colony.²⁰⁶

Landon got his majority and dismissed the minister, but the General Court decided the ensuing case in favor of the latter, many years after the offense.²⁰⁷

The effect of this system of church governance was to create a religious climate subservient to, and supportive of, the local

203. Isaac, *supra* note 75, at 6-7.

204. *Id.* at 7.

205. *Id.* at 6-7.

206. *Id.* at 8.

207. *Id.* at 8-9.

aristocratic order. Not infrequently, ministers selected under this system were less than zealous in their spiritual responsibilities and less than irreproachable in their personal morals, contributing greatly to popular discontent with the church establishment, especially on the part of parishioners most sincerely devoted to the Christian faith.²⁰⁸

Ministers were in short supply in the colonies, due to low pay, poor conditions, and isolation. Not infrequently, men called to the ministry in such remote locations proved less than satisfactory.²⁰⁹ A pamphleteer in 1656 commented that few ministers "of good conversation would adventure thither," and those who came tended to be of a type that "could babble in a Pulpit, roare in a Tavern, exact from their Parishioners, and rather by their dissoluteness destroy, than feed, their Flocks."²¹⁰ A century later, the clergy of the established church in Virginia were described as "useless Lumber," whose negligence, irreligion, and immorality had "sunk them into just Contempt."²¹¹

Outside of Virginia and Maryland—and particularly in the northern colonies—most Anglican ministers were supplied by the Society for the Propagation of the Gospel in Foreign Parts (SPG), the missionary arm of the Church of England. Typically, these non-Anglican parts of the country were unable to support their own ministers, and required the subvention and assistance of the Church in the mother country. These SPG ministers tended to retain loyalties to home, and during the Revolution were Tories almost to a man.²¹²

Discipline and removal of ministers was a serious source of contention in the colonial Anglican church. The power to remove an official is the power to control his conduct of office.²¹³ Under the canons of the Church of England, no settled minister could be removed except by act of the supervising bishop—no matter how incompetent, drunken, or immoral he might turn out to be.²¹⁴ This

208. *Id.* at 32-34; RHODEN, *supra* note 105, at 32-33.

209. RHODEN, *supra* note 105, at 93-95.

210. *Id.* at 95.

211. Quinlivan, *supra* note 25, at 16 (quoting the Virginia Gazette, Mar. 5, 1752).

212. See COBB, *supra* note 18, at 391-92.

213. See *Meyers v. United States*, 272 U.S. 52 (1926).

214. Middleton, *supra* note 191, at 436.

was a guarantee of independence from powerful parishioners; in theory it enabled ministers to preach without fear or favor. But as applied on this side of the ocean, where there was no bishop, the system protected not only clerical independence but also clerical incompetence, immorality, and dereliction of duty.²¹⁵ There seemed no good alternative. To adhere strictly to church canons of governance meant that churches would be saddled with improper ministers. To vest disciplinary authority in the vestry would empower the gentry; to vest it in the Governor would empower the Crown; to vest it in the Assembly (as was done in Maryland) made day-to-day governance of the Church a political affair.²¹⁶

For much of the colonial period, the solution in Virginia was to hire ministers on a year-to-year contract.²¹⁷ This facilitated removal of drunks, fornicators, and incompetents, but the price was subservience of the church to a local, self-perpetuating aristocratic body whose interests were not necessarily aligned with the gospel. Ministers complained that the purpose was to "make slaves of them."²¹⁸ "What ... would be the condition of the Church of England," one minister wrote, "when the preacher would be in danger of losing his bread, every time he had the courage and resolution to preach against any vices taken into favour by the leading Men of his Parish?"²¹⁹ In 1748, the Virginia Assembly sought to curtail this practice by enacting legislation giving a minister security of tenure when received into a parish, whether or not he was formally inducted by the Governor.²²⁰ In South Carolina, the colonial government created an ecclesiastical court of twenty laymen, charged with the duty of church discipline and empowered to remove ministers "for cause"²²¹—a flagrant violation of the episcopal governing structure of the Church of England, but one calculated to keep the clergy under control without empowering other existing political institutions.²²²

215. See *id.* at 436-37; COBB, *supra* note 18, at 391.

216. See COBB, *supra* note 18, at 391-92.

217. *Id.* at 88.

218. *Id.*

219. Isaac, *supra* note 75, at 10 (quoting Letter from Rev. John Camm to the Bishop of London (June 4, 1752)).

220. 6 HENING, *supra* note 24, at 90.

221. COBB, *supra* note 18, at 126.

222. *Id.* at 127-28.

For these and other reasons, as early as 1661, Anglican clergy petitioned the Bishop of London for appointment of a bishop to superintend the Church in America.²²³ This would give the Church of England in America greater discipline, organization, and political independence.²²⁴ Interestingly, Jonathan Swift, author of *Gulliver's Travels*, hoped to be appointed the first Bishop of Virginia.²²⁵ For more than a century, however, the request was ignored.²²⁶ By the 1760s, when the demands for an American episcopate became more insistent, opposition from other denominations had also grown.²²⁷ Non-Anglicans feared that a Bishop would bring with him the full panoply of the English established church.²²⁸ As John Adams wrote, the proposal "excited ... a general and just apprehension that Bishops, and Dioceses, and Churches, and Priests, and Tythes were to be imposed upon us by Parliament."²²⁹ If Parliament could install a Bishop, he argued, they could also impose a tax for support of the Church, "and if Parliament could tax us, they could install the Church of England, with all its Creeds, Articles, Tests, Ceremonies, and Tithes, and prohibit all other Churches as Conventicles and Schism-shops."²³⁰ Anglicans tried to explain that the appointment of a bishop was merely a matter of internal organization, and would not affect outsiders to the church, but in view of the legal status of the Church of England as an arm of the central government this was a difficult position to sustain.²³¹ The proposal also encountered resistance from some within the Church, especially in Virginia. Some clergy resisted a reorganization that might bring effective discipline, while the planter aristocracy resisted a diminution in their own authority.²³² One opponent—himself an Anglican clergyman—wrote that "a Clergy dependent upon Nobody besides their

223. *Id.* at 458. A bishop resident in America would also facilitate ordinations by eliminating the need for ordinands to travel to England to take vows. *Id.* For detailed accounts of the campaign for an Anglican bishop in colonial America, see RHODEN, *supra* note 105, at 37-62; see also Quinlivan, *supra* note 25, at 22-28.

224. COBB, *supra* note 18, at 458-59.

225. *Id.* at 463.

226. *Id.* at 464.

227. *Id.* at 467-72.

228. *Id.* at 470.

229. *Id.* (quoting John Adams).

230. *Id.*

231. *Id.* at 470-71.

232. Quinlivan, *supra* note 25, at 26.

Bishop, and that Bishop unconnected with the Civil Government of the Colony, would be a Restoration of the most obnoxious Part of Popery, a Means of inducing them to form an Interest separate from the rest of the Community."²³³ The House of Burgesses passed a resolution declaring the request for a bishop a "pernicious project."²³⁴ In any event, the ecclesiastical authorities in England did not act, and the paranoia generated by the proposal merged into the sundry grievances that led to the Revolution.²³⁵

2. Mandatory Attendance at Religious Worship Services in the State Church

In England, from the time of Elizabeth I, those who "absent[ed] themselves from the divine worship in the established church" were subject to a fine of one shilling for a single absence and twenty pounds for a month's absence.²³⁶ Similar laws compelling church attendance were enacted in America. The first set of written laws of the first colony, the "Martial Law Declared at Jamestown in 1610," provided that "everie man and woman" must "repaire unto the Church, to hear divine Service" twice a day upon the tolling of the bell.²³⁷ Penalties were harsh. Those who violated the attendance requirement would lose their "dayes allowance" for the first infraction, would be whipped for the second, and would be "condemned to the Gallies for six Moneths" for the third.²³⁸ In 1623-1624, Virginia's General Assembly enacted a more comprehensive religious code, including fines of one pound of tobacco for one Sunday's absence and fifty pounds for a month's absence.²³⁹ The Diocesan Canons of 1661 reiterated the requirement of weekly attendance, with particularly severe penalties for nonattendance by Quakers, the only significant dissenting group in the colony at that

233. THOMAS GWATKIN, A LETTER TO THE CLERGY OF NEW YORK AND NEW JERSEY, OCCASIONED BY AN ADDRESS TO THE EPISCOPALIANS IN VIRGINIA 19 (1772).

234. *Id.*

235. *Id.* at 479.

236. 4 BLACKSTONE, COMMENTARIES *51-52.

237. The Laws Dealing with Religion Under the Martial Law Declared at Jamestown in 1610, reprinted in 1 BRYDON, *supra* note 60, app. 1 at 412.

238. *Id.*

239. 1 BRYDON, *supra* note 60, at 84-85 (citing 1 HENING, *supra* note 24, at 123).

time.²⁴⁰ Over the next fifty years, required attendance was reduced to bi-monthly, and attendance at other dissenting Protestant services were deemed to excuse noncompliance.²⁴¹ These laws remained on the books until 1776.²⁴² There were similar compulsory religious attendance laws in other colonies with an established church. In 1646, the General Court of the Massachusetts Bay colony imposed a five shilling fine for nonattendance on divine services.²⁴³ Connecticut did the same.²⁴⁴

Although one might suppose that laws of this sort could not be rigorously enforced, it would be a mistake to imagine they were purely symbolic. In a study of grand jury presentments in Virginia between 1720 and 1750, missing church was the most common indicted offense in eleven of the twenty-two counties; it was the second most common offense in seven of the others.²⁴⁵ Histories of Baptist dissent in New England frequently report that Baptists were prosecuted for failure to baptize their children and for absence from worship services—meaning worship services in the Congregational establishment.²⁴⁶

Until 1833, the Constitution of the Commonwealth of Massachusetts asserted:

[The] people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers [of piety, religion, and morality], at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.²⁴⁷

240. 2 HENING, *supra* note 24, at 48.

241. 3 HENING, *supra* note 24, at 171, 360.

242. COBB, *supra* note 18, at 521.

243. *Id.* at 177.

244. *Id.* at 255.

245. A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810, at 141-42 (1981). Another study, based on records from Caroline County between 1740 and 1749, concluded that grand jury presentments for church nonattendance were "clearly routine," but not as common as those for some other crimes, such as charges of neglect against road surveyors. Isaac, *supra* note 75, at 4 n.2.

246. 1 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT 1630-1833, THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 15, 17 (1971).

247. MASS. CONST. of 1780, art. III, reprinted in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 178, at 957.

A similar law in Connecticut was not repealed until 1816.²⁴⁸ Though not explicitly favoring any particular denomination, and excusing conscientious objectors, these laws demonstrated a continuing commitment to the idea that the government can legitimately compel the citizens of the state to participate in divine services.

3. Public Financial Support

Churches cost money: for remuneration for the minister, upkeep for the building, and support for the mission. In England, the principal source of revenue for the Church was income from land holdings, most of them dating to before the Reformation. Edmund Burke, a penetrating observer of the constitutional role of the Church of England,²⁴⁹ explained that this means of support was essential to the independence of the Church and the ability of the minister to perform his function. If he were dependent on voluntary contributions, the minister would have to curry favor with the congregation, especially its wealthy members, and if he were dependent on Parliament, he would become a mouthpiece for the party in power.

The people of England think that they have constitutional motives, as well as religious, against any project of turning their independent clergy into ecclesiastical pensioners of state. They tremble for their liberty, from the influence of a clergy dependent on the crown; they tremble for the public tranquillity from the disorders of a factious clergy, if it were made to depend upon any other than the crown.²⁵⁰

This system was highly uneven in its effects. In a few English parishes the Church's holdings were highly profitable, in excess of £500 per year, but most yielded less than £50.²⁵¹ These revenues

248. COBB, *supra* note 18, at 513.

249. I quote Burke at various points because he was the most interesting and persuasive defender of the established church in England at the time our First Amendment was being adopted. See Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom,"* 1005 SUP. CT. REV. 393, 432 (1996).

250. BURKE, *supra* note 107, at 88; McConnell, *supra* note 249, at 432-33.

251. EVANS, *supra* note 181, at 3.

were supplemented by compulsory tithes. This was a chaotic and archaic system. Tithes were imposed only on certain agricultural products and were deeply resented by those who had to pay; but, they were neither sufficient nor reliable from the Church's point of view.²⁵² As early as the twelfth century, some tithes were appropriated by lay persons, either through purchase or otherwise.²⁵³ This became far more common as a result of the seizure of monastic property during the Reformation. Tithes owned by monasteries were granted or sold to wealthy individuals and court favorites. By the end of the eighteenth century, approximately one-third of all tithes were owned by lay persons.²⁵⁴ Nonetheless, tithe payments constituted the majority of most ministers' incomes in the eighteenth century.²⁵⁵ Despite its flaws, the system was especially difficult to reform because, in English law, the tithe was understood to be a property right attached to specific parcels of land, and could be bought and sold.²⁵⁶ Any reform was a taking of private property.

Beyond revenues from property, tithes, and other minor earmarked fines, Parliament did not appropriate general tax revenues for use of the Church of England, with the exception of modest assistance to low-income clergy, denominated "Queen Anne's Bounty."²⁵⁷ Today, the Church of England is the legally established church of the realm, but there is no general provision for state financial support.²⁵⁸

In the colonies, the established churches relied on essentially the same sources of revenue—land grants and tithes—though tithes in America were understood as taxes, rather than as a species of private property, thus making them subject to repeal without seeming to confiscate property. Tithes in America were also more

252. *Id.* at 16-17.

253. *Id.* at 17.

254. *Id.*

255. *Id.* at 16-17.

256. *Id.*

257. An act for making more effectual her Majesty's gracious intentions for the augmentation of the maintenance of the poor clergy by enabling her Majesty to grant in perpetuity the revenues of the first fruits and tenths; and also enabling any other persons to make grants for the same purpose, 1703, 2 & 3 Ann., c. 11 (Eng.), reprinted in 11 PICKERING, *supra* note 57, at 43; see also 14 HALSBURY'S LAWS OF ENGLAND ¶ 361 (Lord Hailsham of St. Marylebone ed., 4th ed. 1975).

258. DOE, *supra* note 29, at 474; EVANS, *supra* note 181, at 3.

rational, taking the form either of per capita or of property taxes. After the early period of colonial settlement, there were no appropriations from the public treasury for religious uses, except for the educational or charitable functions of religious institutions, such as colleges or orphanages.

a. Land Grants

Land grants were among the most important privileges of the established church. In New England, colonial governments granted public lands to churches for meeting houses, parsonages, day schools, orphanages, and other pious uses.²⁵⁹ In the Anglican colonies, parishes were required to construct a house of worship and a parsonage. Under Anglican canon law, each parish was required to set aside a certain quantity of land, called the "glebe," for support of the minister.²⁶⁰ The glebe was income-producing land, either farmed or rented by the minister, forming a kind of permanent endowment.²⁶¹ Because the revenues of glebes were deemed a freehold interest of the minister, rather than property of the vestry or other church authorities, and could not be taken away without formal disciplinary action before the Bishop, this form of support undergirded the independence of the minister.²⁶² This independence had the disadvantage, however, of insulating incompetent or scandalous ministers from effective discipline.²⁶³ If glebe revenues were controlled by the local vestry or by other colonial authorities, a wayward minister could be disciplined and effectively removed. Otherwise, the only way a congregation could rid itself of a wayward minister was through formal proceedings before the Bishop of London: an expensive, protracted, and uncertain procedure.²⁶⁴ In Virginia, vestries often evaded the force of this law by appointing

259. Witte, *supra* note 86, at 56.

260. 14 HALSBURY'S LAWS OF ENGLAND, *supra* note 257, at 171.

261. EVANS, *supra* note 181, at 6-7.

262. *Id.* at 8; Middleton, *supra* note 191, at 436.

263. See Middleton, *supra* note 191, at 436-38.

264. *Id.* at 437. During some periods, disciplinary authority was exercised by a representative of the Bishop resident in Virginia, called a "commissary," or by political authorities. 2 BRYDON, *supra* note 60, at 321-35.

ministers on yearly contracts rather than inducting them as rectors.²⁶⁵

The glebe system prevailed in all the southern colonies, as well as in pockets of Anglicanism in the North. In colonial Virginia, where the glebe system was best developed, statutes required that "there be a church decently built in each parish,"²⁶⁶ and that "there be glebes laid out in every parish & a convenient house built *upon them* ... for the reception and abode of the minister"²⁶⁷ The original plan of settlement in Virginia called for 100 acres of glebe land in each parish for the support of a minister;²⁶⁸ this later rose to 200 acres.²⁶⁹ In practice, however, these instructions were sometimes violated, and even when they were followed to the letter, the varying quality and value of glebe lands rendered the system less reliable in fact than in theory.²⁷⁰ The original plan of settlement in Georgia called for a 300-acre glebe for the support of a minister, schoolmaster, and other "religious uses."²⁷¹ In a unique twist, the Georgia Trustees even allotted 300-acre glebes to certain dissenting Presbyterian and Lutheran ministers on the condition that the Trustees would have the power of licensure and removal.²⁷²

In New York in the late 1690s, both Trinity Church (Anglican) and the Dutch Reformed Church received extensive land grants accompanying their charters.²⁷³ Early grants were made for the duration of the Governor's term of office, but in 1705 the Governor granted Trinity Church its lands in fee simple. This grant was confirmed by Queen Anne in 1714, but in such ambiguous terms that it generated more than a century of litigation and political controversy.²⁷⁴ Trinity Church became the largest landowner in Manhattan, owning "nearly all of Manhattan Island up to Houston

265. 1 BRYDON, *supra* note 60, at 100.

266. 2 HENING, *supra* note 24, at 44.

267. *Id.* at 45.

268. 1 BRYDON, *supra* note 60, at 41.

269. *Id.* at 385.

270. *Id.*

271. STRICKLAND, *supra* note 113, at 45-47. Interestingly, when the glebe lands were surveyed and set aside the minister in Savannah was John Wesley, the founder of Methodism. He "made plans to cultivate [a portion of the land] as a garden for poor relief." *Id.* at 49.

272. *Id.* at 70.

273. Mensch, *supra* note 140, at 448.

274. For a discussion on the history of Trinity Church's land holdings, see *id.* at 427.

Street, ... most of present-day Greenwich Village and a large tract on the Upper West Side."²⁷⁵ Even today, Trinity Church holds extensive property in New York, including at least twenty-seven commercial buildings worth millions of dollars.²⁷⁶

In most of New England, settlement proceeded through the creation of townships, generally six miles square, divided into sixty-three parcels. Sixty of these would be allotted to individual families: one would be reserved for the support of a "learned and Orthodox" minister, one for the support of his ministry, and one for support of a school.²⁷⁷ In Vermont, royal authorities fostered the spread of Anglicanism among the largely Puritan population by conditionally reserving lands for glebes if and when Anglican churches were established.²⁷⁸

So ingrained was the practice of land grants for the support of religion that when Congress set about to organize settlement of the Northwest Territory, its first two substantial grants specified that a section in each township would be set apart for the support of religion, along with one for education.²⁷⁹ Later, under Ohio law, revenues from these so-called Section 29 lands were divided among the various religious groups in the affected townships,²⁸⁰ a public subsidy to religion that continued well into the next century.²⁸¹ One untoward result of this seemingly fair allocation system

275. *Id.* at 428.

276. *Id.* at 566.

277. BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 36 (1924).

278. *See* *Pawlet v. Clark*, 13 U.S. 292, 292-94 (1815).

279. *See* BEVERLEY W. BOND, JR., THE CIVILIZATION OF THE OLD NORTHWEST: A STUDY OF POLITICAL, SOCIAL, AND ECONOMIC DEVELOPMENT, 1788-1812, at 11-12 (1934); 1 GEORGE W. KNIGHT, PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION, HISTORY AND MANAGEMENT OF LAND GRANTS FOR EDUCATION IN THE NORTHWEST TERRITORY 17-18 (New York, G.P. Putnam Sons 1885). The original congressional land grant for the settlement in the Connecticut Western Reserve did not contain the allotment for support of religion, but it was allotted for that purpose nonetheless. BOND, *supra*, at 14.

280. *See id.* at 477-86.

281. *Id.* at 486 n.40; *see also* Act of Feb. 20, 1833, ch. 42, 4 Stat. 618-19. The State of Ohio was authorized to sell

all or any part of the lands heretofore reserved and appropriated by Congress for the support of religion within the Ohio Company's ... purchases ... and to invest the money arising from the sale thereof, in some productive fund; the proceeds of which shall be for ever annually applied ... for the support of religion within the several townships for which said lands were originally reserved and set apart, and for no other use or purpose whatsoever

Id.

was that it gave an incentive for townspeople belonging to already-established churches to resist the formation of new ones. For example, Methodists attempting to meet for worship in Marietta, Ohio, which had been founded by Calvinists (combined Congregational and Presbyterian), were met with a shower of stones, a reaction fueled partly by theological antagonism and partly by a desire not to share the ministerial support.²⁸²

A draft of the Land Ordinance of 1785, precursor to the Northwest Ordinance, originally contained a similar provision setting aside one section for support of religion and one for support of education.²⁸³ The grant for religion, however, was deleted from the final legislation.²⁸⁴ The lobbyist for the Ohio Company, who supported the allotment, reported that the religion provision enjoyed the support of seventeen of twenty-three delegates present in Congress, and lost only because opposition from six delegates was sufficient to force deletion under the voting rules of the Articles of Confederation.²⁸⁵ It is interesting to observe that, four years before congressional passage of the First Amendment, there was so much support for so substantial a public subsidy to religion.

Later, the Northwest Ordinance itself, enacted in 1787 and re-enacted by the First Congress after ratification of the Constitution, set aside lands with these words: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."²⁸⁶ Thus, the reservation of lands specifically for religion ceased, with the vague aspiration that "religion" as well as "morality" and "knowledge" would be advanced by support of schools. In light of the religious character of the curriculum and the common practice of employing the minister as the schoolmaster, this aspiration was probably largely fulfilled.

282. BOND, *supra* note 279, at 486.

283. WILLIAM PARKER CUTLER & JULIA PERKINS CUTLER, *LIFE, JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D.* 124 (Cincinnati, Robert Clarke & Co. 1888).

284. *Id.*

285. *Id.* For further background on the proposed ordinance, see KNIGHT, *supra* note 279, at 11-14.

286. Northwest Ordinance art. III (July 13, 1787), reprinted in 1 *THE FOUNDERS' CONSTITUTION* 28 (Philip B. Kurland & Ralph Lerner eds., 1987).

b. Religious Taxes

In addition to revenues from land grants, all nine of the American colonies with established churches imposed compulsory taxes for the support of churches and ministers. After an early experience with voluntary support for religion, backed by the considerable force of community suasion, the General Court in the Massachusetts Bay colony voted in 1638 to tax all those who did not contribute voluntarily to the support of the town minister.²⁸⁷ Cotton Mather later explained that "Ministers of the Gospel would have a poor time of it, if they must rely on the free contributions of the people for their maintenance."²⁸⁸ Connecticut taxpayers were required to support the ministry from the beginning.²⁸⁹ New Hampshire followed suit no later than 1681.²⁹⁰ The typical arrangement in New England was to allow each town to negotiate a salary with the minister, and to impose the level of taxes necessary to comply with the contract.²⁹¹ In Connecticut, each male resident was required to declare the amount he was willing to pay for support of the minister; if he refused, he would be assessed by the authorities.²⁹²

In Virginia, the legislature fixed the salary of the parish minister at 16,000 pounds of tobacco per year, plus glebe and fees.²⁹³ Beyond that, the vestry was responsible for church maintenance, poor relief, and other civil functions.²⁹⁴ The vestry would total up these expenditures, divide this by the number of "tithables" (free males over the age of sixteen and all slaves, female as well as male, over the age of sixteen), and collect the tax.²⁹⁵ The sums were generally

287. MEYER, *supra* note 93, at 7.

288. COBB, *supra* note 18, at 234 (quoting Cotton Mather). Boston churches were exempt from this requirement. *Id.* at 232.

289. *Id.* at 248-49.

290. *Id.* at 294-95. Apparently, before this date taxpayers were expected to contribute to support of the minister, but there was no statute to that effect. *Id.* at 298.

291. *Id.*

292. *Id.* at 249.

293. *Id.* at 108. Originally, the tithe was 1500 pounds of tobacco and ten bushels of corn per year. *Id.* at 80 n.3.

294. See *infra* notes 422-67 (describing the civil functions of the vestry).

295. Middleton, *supra* note 191, at 437.

modest: between thirty and sixty pounds of tobacco per tithable per year.²⁹⁶

Because of the peculiar situation in New England, where members of the established church of the empire were dissenters at home, the New England colonies were forced relatively early to broaden the base of their establishments. While the Anglican establishments of the South retained their exclusive right to public subvention until the Revolution, the New England colonies moved gradually to what we may call a "multiple establishment": an arrangement under which more than one church receives state-compelled support. In Connecticut, after the founding of the first Anglican Church in the colony in 1723, members of that church were informally allowed to direct their ministerial taxes to their own minister.²⁹⁷ In 1727, the legislature enacted the "Act for the Ease of such as soberly Dissent," placing this practice on a statutory footing.²⁹⁸ The Act provided that if any person declared himself to be a member of the Church of England and lived close enough that he might "conveniently attend" services in that church, the tax collectors would deliver his taxes to the minister of that church.²⁹⁹ In the same year, the Massachusetts General Court enacted similar legislation, called the "Five Mile Act," because it limited the privilege to persons living within five miles of a church.³⁰⁰ Originally applicable only to Anglicans, the privilege was soon extended to Quakers and Baptists (at least in theory).³⁰¹ Because Quakers did not have a paid ministry, it was decided that they would be exempted from ministerial taxes altogether.³⁰² As early as 1692, New Hampshire exempted "conscientious" dissenters from ministerial taxes provided they "constantly attend the publick worship of God on the Lord's day according to their own per-

296. *Id.* at 437-38.

297. See COBB, *supra* note 18, at 268-70.

298. *Id.* at 270.

299. *Id.*

300. *Id.* at 234-35. This "Five Mile Act" should not be confused with the English Five-Mile Act of 1665, which forbade dissenting ministers from coming within five miles of towns where they had preached. 17 Car. 2, c. 2 (Eng.), reprinted in 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 554.

301. COBB, *supra* note 18, at 235.

302. *Id.*

suasion.”³⁰³ Perhaps on the theory that the authorities had no interest in supporting dissenting ministers, dissenters in New Hampshire were simply exempted from ministerial taxes, rather than being required to contribute to the support of their own, as were dissenters in Massachusetts and Connecticut. On the other hand, it was more difficult to win exemption in New Hampshire, because the authorities could, and often would, contest whether a taxpayer was a “conscientious” dissenter and whether he attended church services often enough to be entitled to the exemption.³⁰⁴

In South Carolina, churches and ministers were supported by voluntary contributions until 1696, when the legislature voted to pay a £150 annual salary to the “minister of the Church of England in Charles Town,” as well as providing him two slaves and four livestock animals.³⁰⁵ The Huguenot, Presbyterian, and Baptist churches in the state were not suppressed, but had to rely on the voluntary support of their members.³⁰⁶ In North Carolina after 1715, “all taxable persons” were assessed five shillings per year to support the ministry.³⁰⁷ But it was difficult to attract qualified ministers to the wilds of North Carolina. The first, and until 1721 the only, Anglican minister in the colony was a notorious drunkard. In most of the colony there were no ministers at all.³⁰⁸ North Carolina thus presented the oddity of a state with an established religion but almost no operating churches.

In Georgia, revenues for support of the church came from a tax on liquor.³⁰⁹ In Maryland and Virginia, tobacco served as currency, and ministerial salaries and taxes were computed in terms of tobacco.³¹⁰ The ministerial tax in Maryland, for example, was forty pounds of tobacco.³¹¹ The fluctuating prices of tobacco led, not surprisingly, to conflict between clergy and taxpayers.³¹² In 1758, a time of rising prices for tobacco, the Virginia Assembly enacted the

303. *Id.* at 298.

304. *Id.* at 298-99.

305. BRINSFIELD, *supra* note 117, at 14.

306. *Id.* at 15.

307. COBB, *supra* note 18, at 131.

308. *Id.* at 129-30.

309. CURRY, *supra* note 74, at 152.

310. See COBB, *supra* note 18, at 80 n.3, 108, 386.

311. *Id.* at 386.

312. *Id.* at 108-11; RHODEN, *supra* note 105, at 33-34; RIGHTMYER, *supra* note 110, at 59.

so-called "Two-penny Act," allowing ministerial salaries, which were set by law at 16,000 pounds of tobacco per year, to be paid at a fixed price of two pence per pound.³¹³ This was tantamount to a cut in pay. In ensuing litigation brought by disgruntled clergy, in which the future patriot hero Patrick Henry won his reputation, the clergy were successfully portrayed as grasping and materialistic.³¹⁴ Coming as it did during the ferment of the Great Awakening, the *Parsons' Cause* litigation brought the Church of England into disrepute, drove a wedge between the Church and the gentry, and contributed to the rise of religious dissent.³¹⁵

The Revolution was the final blow to the Anglican establishment. It made no sense to compel citizens to support a Church that was doctrinally committed to royal supremacy and whose clergy were predominantly Tory in their politics. In every colony—now we may shift to the term "state"—with an Anglican establishment, the system of public financial support was suspended.³¹⁶ But that did not mean that, as a matter of principle, Americans discarded the long-held view that religion was worthy of governmental support.

Throughout the new American states, with the exception of Rhode Island and Pennsylvania, where anti-establishmentarian traditions ran too deep,³¹⁷ and North Carolina, which was largely without churches,³¹⁸ statesmen debated whether and how their governments should lend support to religion. The most famous such debate occurred in Virginia between 1779 and 1786, where Patrick Henry (among others) championed a proposal that would have required every taxpayer to support the Christian denomination of his choice, or failing that, to direct his contribution to the general treasury for support of public education.³¹⁹ This was a more liberal

313. See COBB, *supra* note 18, at 108.

314. See *id.* at 109-11. Henry described the Virginia clergy as "rapacious harpies [who] would ... snatch from the hearth of their honest parishioners his last hoe-cake, from the widow and her orphan children their last milch cow! the last bed, nay, the last blanket from the lying-in woman!" 1 WILLIAM WIRT HENRY, *PATRICK HENRY: LIFE, CORRESPONDENCE, AND SPEECHES* 40-41 (New York, Charles Scribner's Sons 1891).

315. COBB, *supra* note 18, at 110-11; Isaac, *supra* note 75, at 144-46.

316. See generally LEVY, *supra* note 3, at 27-78 (discussing the suspension in each state).

317. See *id.* at 27, 77.

318. See *supra* notes 307-08 and accompanying text.

319. For descriptions of the debate, see BUCKLEY, *supra* note 77, at 73-172. See also ECKENRODE, *supra* note 78, at 74-115; Isaac, *supra* note 75, at 282-85; Quinlivan, *supra* note 25, at 89-153.

and evenhanded version of the New England system, and resembles that prevailing in a number of western European nations today.³²⁰ Opposing this proposal was a powerful and persuasive coalition of Baptists, Presbyterians, and disestablishmentarian statesmen, led by Madison and Jefferson, who succeeded in defeating the Henry proposal and enacting in its stead Jefferson's Bill for Establishing Religious Freedom.³²¹ This was the debate the Supreme Court would later treat as the central defining event of disestablishment.³²²

But Virginia was an outlier; it was the only state that squarely considered and rejected every form of support or official recognition of religion.³²³ The Maryland Declaration of Rights of 1776 authorized the legislature to "lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power" of determining which denomination would receive the tax, or whether it would go to the poor.³²⁴ This was substantially equivalent to the General Assessment proposal voted down in Virginia.³²⁵ After extensive debate in the legislature in the mid-1780s, however, this authority was never exercised.³²⁶ In Georgia, a bill "for the establishment and support of the public duties of religion," which resembled the New England model of support for the denomination favored by the local majority, passed the legislature in 1785 by a vote of forty-three to five.³²⁷ Apparently, however, it was never put into effect.³²⁸ South Carolina's Constitution of 1778 declared the "Christian Protestant religion" as "the established religion of this State," imposing five articles of faith as a precondition for any church to enjoy this status.³²⁹ At the

320. See generally CHURCH AND STATE IN EUROPE, *supra* note 26.

321. For the relevant documents, see MCCONNELL ET AL., *supra* note 76, at 58-71.

322. *Everson v. Bd. of Educ.*, 350 U.S. 1 (1947).

323. See WOOD, *supra* note 195, at 427 ("No State in the 1780's was willing to go so far [as Virginia] in the search for religious liberty.").

324. MD. CONST. of 1776, Declaration of Rights § XXXIII, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 178, at 819.

325. The legislation considered in Maryland differed slightly from the Virginia assessment proposal in that it exempted non-Christians from payment of the tax and allowed taxpayers to direct their payments to poor relief rather than to education. CURRY, *supra* note 74, at 155.

326. RIGHTMYER, *supra* note 110, at 117-18.

327. STRICKLAND, *supra* note 113, at 166.

328. *Id.* at 166-67.

329. S.C. CONST. of 1778 art. XXXVIII, *reprinted in* 2 THE FEDERAL AND STATE

same time, however, it provided that "[n]o person shall, by law, be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support."³³⁰ In South Carolina, therefore, there was an established church with state-specified articles of faith, but no financial support. This was a unique and unprecedented arrangement.

Even in the middle colonies, which, other than the four metropolitan counties of New York, lacked colonial religious establishments, legislatures acted favorably on establishmentarian proposals. The New York legislature declared in 1784 that "it is the duty of all wise, free and virtuous governments, to countenance and encourage virtue and religion."³³¹ The Delaware legislature declared in 1787 that it was their "duty to countenance and encourage virtue and religion, by every means in their power, and in the most expedient manner."³³² In 1789, the New Jersey legislature appointed a committee to "report their opinion on what may be proper and competent for the Legislature to do in order to promote the Interest of Religion and Morality among all ranks of People in this State."³³³ In 1788, the Continental Congress chimed in that "true religion and good morals are the only solid foundations of public liberty and happiness."³³⁴

Only in New England, however, did a system of compulsory financial support for religion actually survive the Revolution. There, the clergy emerged from the Revolution with renewed prestige. John Adams commented that "[w]e might as soon expect a change in the solar system, as to expect [that Massachusetts] would give up their establishment."³³⁵ Connecticut, one of two states (along with Rhode Island) not to adopt a new state constitution in the

CONSTITUTIONS, *supra* note 178, at 1626.

330. *Id.*

331. Act of April 6, 1784, ch. 18, 1784 N.Y. Laws 613.

332. An Act to enable all the religious denominations in this State to appoint Trustees, who shall be a body corporate, for the purpose of taking care of the temporalities of their respective congregations (1787), reprinted in 2 THE FIRST LAWS OF THE STATE OF DELAWARE pt. 1, at 878-79 (John D. Cushing ed., Michael Glazier 1981) (1797).

333. Journal of the Proceedings of the Legislative Council of New Jersey, Sept. 13, 1789, Oct. 30, 1789.

334. 12 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1001 (1908).

335. 1 MCLOUGHLIN, *supra* note 246, at 560.

aftermath of the Revolution, continued to govern itself under its royal charter, appropriately amended to reflect the new status of independence.³³⁶ No change was made in the ecclesiastical system until 1818.³³⁷ Similarly, New Hampshire left its old laws on the subject unchanged, despite adopting three new constitutions, and proposing and rejecting a fourth, between 1776 and 1784.³³⁸ Only in 1819 did the New Hampshire legislature adopt a "Toleration Bill," which provided that "[n]o person shall be compelled to join or support ... any congregation, church or religious society without his express consent first had and obtained," thus ending the system of compulsory support for religion in the Granite State.³³⁹ Vermont, which had the most genuinely evenhanded and nondiscriminatory general assessment system in the country, retained that system until 1807.³⁴⁰

Massachusetts experienced the most extensive debate over the relation of religion to government in the Nation, other than Virginia. The debate occupied several weeks of the convention that produced the Constitution of 1780.³⁴¹ Over vociferous opposition from Baptists and a few others, Massachusetts reaffirmed its system of localized establishments, indeed tightening the conditions under which dissenters could obtain exemption or direct their taxes to their own church.³⁴² Under this system, each taxpayer was taxed for the support of "public Protestant teachers of piety, religion, and morality."³⁴³ A taxpayer was permitted to direct his taxes "to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends." Otherwise, the proceeds were "toward the support of

336. COBB, *supra* note 18, at 481.

337. 2 MCLOUGHLIN, *supra* note 246, at 1043-62.

338. See COBB, *supra* note 18, at 500.

339. New Hampshire Toleration Bill (1819), *quoted in* 2 MCLOUGHLIN, *supra* note 246, at 894.

340. 2 MCLOUGHLIN, *supra* note 246, at 797-99, 810-11.

341. For a description of the debate, see John Witte, Jr., "A Most Mild and Equitable Establishment of Religion": John Adams and the Massachusetts Experiment, 41 J. CHURCH & ST. 213, 229-31 (1999).

342. *Id.* at 230.

343. MASS. CONST. of 1780 art. III (1780), *reprinted in* MCCONNELL ET AL., *supra* note 76, at 24-25.

the teacher or teachers of the parish or precinct in which the said moneys are raised.”³⁴⁴

In important respects, this system was more restrictive than that voted down in Virginia. On its face, the Massachusetts provision limited public support to Protestants, whereas in Virginia the system comprehended all “Christian” teachers. The specification of ministers of “piety ... and morality” invited state courts to draw the circle even more tightly. Were Unitarians, for example, sufficiently pious and moral? Moreover, in subsequent litigation the courts of the Commonwealth implied a limitation to religious societies that were incorporated, thus excluding many Baptists, Unitarians, and other unincorporated religious groups.³⁴⁵ Second, the Massachusetts provision permitted taxpayers to choose their own denomination only if they “attend” those services. If a taxpayer’s denomination were too small to support a minister, or if it refused to register or incorporate, as did the Baptists, the taxpayer would not be able to take advantage of this option. Third, the Massachusetts system offered no secular alternative. The default option, if a taxpayer did not or could not direct funds to his own church, was to support the church of the majority of the town. In Virginia, the default option was for the funds to be used for schools. The system was nonetheless adopted by the voters, and became part of Article III of the Massachusetts Constitution of 1780.³⁴⁶ It was to survive more than half a century, generating controversy and litigation all the time.³⁴⁷

4. Prohibition of Religious Worship in Other Denominations

Throughout western Europe, governments enforced restrictions on public religious worship outside of officially approved services. In pre-Elizabethan England, like most of Catholic Europe, the

344. *Id.*

345. *Barnes v. First Parish*, 6 Mass. 401, 415 (1810) (holding that “to extend this indulgence to a teacher of an unincorporated society, who is entitled to no support, would be to grant him a remedy where he has no right”).

346. A study of the 188 township returns (out of a total of 290 eligible townships) indicates that although the entire constitution was approved by a two-thirds vote, the ministerial support provision, Article III, fell short of that number, as did the religious test for office of Governor. Witte, *supra* note 341, at 232.

347. See 2 MCLOUGHLIN, *supra* note 246, at 1245-62.

instruments of choice were heresy laws. Prosecution generally involved conviction by an ecclesiastical court, excommunication, and relegation to secular authorities for execution.³⁴⁸ Under Elizabeth I, the emphasis shifted from private belief to outward conformity. The government cared less about what its citizens believed and more about what they said and did in public. Although heresy laws were not finally repealed until 1676, it became more common to prosecute dissenters for refusal to conform to the forms of worship recognized by the Uniformity Acts, or to adhere to the Act of Supremacy.³⁴⁹ The principal emphasis during this period was on purging the Church of clergy who persisted in supporting the authority of any "foreign power and authority spiritual or temporal."³⁵⁰ This was a not-so-subtle reference to the Pope in Rome. In addition, over the course of the seventeenth century, England adopted "a whole code of penal statutes," inflicting harsh sanctions on Catholics, Puritans, and others who attempted the open exercise of religious faith outside the official church.³⁵¹ Catholicism was identified with treason or sedition: a political crime more than a religious one.³⁵² The 1584 law against Roman Catholic priests asserted that they came to the country "not only to withdraw her Highness Subjects from their due obedience to her Majesty, but also to stir up and move Sedition, Rebellion, and open Hostility within the same her Highness Realms and Dominions."³⁵³ These concerns grew to hysteria after the Gunpowder Plot in 1605.³⁵⁴ During the tumultuous seventeenth century, the targets of persecution changed but the intensity of persecution remained severe.³⁵⁵

The Glorious Revolution of 1688 ushered in an era of increasing toleration for so-called "orthodox" dissenters (Protestant

348. HENRIQUES, *supra* note 46, at 5.

349. *Id.* at 5-6.

350. An Act to restore to the Crown the ancient jurisdiction over the estate ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same, 1558, 1 Eliz., c. 1, § 16 (1559) (Eng.), reprinted in 6 PICKERING, *supra* note 57, at 110.

351. HENRIQUES, *supra* note 46, at 6.

352. *Id.*

353. 1 EDMUND GIBSON, CODEX JURIS ECCLESIASTICI ANGLICANI 622 (London, J. Baskett 1713).

354. BRYDON, *supra* note 60, at 370; HENRIQUES, *supra* note 46, at 8.

355. HENRIQUES, *supra* note 46, at 8-10.

trinitarians, like Presbyterians, Independents, or Baptists, who dissented on matters such as infant baptism or the form of church governance), but it increased the severity of persecution of Catholics.³⁵⁶ On top of earlier disabilities, Catholics were barred from buying or inheriting land, were exposed to double taxation on land, and were excluded from the militia. By 1767 these laws were seldom enforced in England, but in Ireland they were enforced with severity.³⁵⁷ Burke called the penal laws against Catholics in Ireland worse than "any scheme of religious persecution now existing in any other country in Europe, or which has prevailed in any time or nation with which history has made us acquainted."³⁵⁸

Restrictions on public worship outside of the approved church were also common on this side of the Atlantic. Some of the colonies welcomed dissenters, either formally or de facto, as a means of promoting economic development or because of their founders' commitment to religious toleration. Georgia, North Carolina, and to some extent New Jersey, were in the first category; Rhode Island, Pennsylvania, Delaware, and seventeenth-century Maryland were in the second.³⁵⁹ Other colonies were less tolerant.

In 1646, Massachusetts Bay adopted an Act Against Heresy, which banished from the colony any person who denied the immortality of the soul, resurrection, sin in the regenerate, the need of repentance, redemption or justification through Christ, the morality of the fourth commandment, or infant baptism.³⁶⁰ The purpose of this law does not seem to have been so much the reformation of errant individuals, but protection of the Massachusetts experiment in godly commonwealth from corruption from others. Let them live elsewhere. As Nathaniel Ward, minister of the church at Ipswich and coauthor of the Massachusetts Body of Liberties, wrote:

I dare take upon me, to be the Herauld of *New-England* so farre,
as to proclaime to the world, in the name of our Colony, that all

356. *Id.* at 10; Jonathan A. Bush, "Include Me Out": Some Lessons of Religious Toleration in Britain, 12 CARDOZO L. REV. 881, 895-96 (1991).

357. HENRIQUES, *supra* note 46, at 10.

358. Edmund Burke, *Fragments of a Tract Relative to the Laws against Popery in Ireland*, in EDMUND BURKE: SELECTED WRITINGS AND SPEECHES, *supra* note 107, at 211.

359. See COBB, *supra* note 18, at 115-32, 362-453.

360. *Id.* at 176.

Familists, Antinomians, Anabaptists, and other Enthusiasts, shall have free Liberty to keep away from us, and such as will come to be gone as fast as they can, the sooner the better.³⁶¹

Massachusetts also limited preaching to authorized persons and authorized churches, thus prohibiting the public exercise of any religion other than what the Puritan authorities approved as orthodox.³⁶² Roman Catholics and Quakers, especially, were barred from conducting public worship in the colony.³⁶³ A comprehensive law against "Blasphemy and Atheism," enacted in 1697, while broadening toleration for Anglicans and other Protestants, authorized horrific punishments for "denying the true God."³⁶⁴

Motivated as it was to create a pure Christian commonwealth, seventeenth-century Massachusetts Bay engaged in some of the most notorious acts of religious persecution in American history: the inquisition and banishment of Roger Williams and Anne Hutchinson; the imprisonment, fining, and whipping of John Clarke and Obadiah Holmes, two early Baptist preachers; the whipping, mutilation, and banishment of Richard Ratcliff for uttering "scandalous speeches"; and, most notoriously, the hanging of four Quakers who insisted on returning to the colony after banishment.³⁶⁵

As already noted, the theologically more sectarian Pilgrims at the Plymouth Colony were far more tolerant than their Puritan brethren at Massachusetts Bay, whose zeal to "purify" the church and to set an example for the world may have inspired their more draconian response to heterodoxy.³⁶⁶ Connecticut, though less harsh in its treatment of dissenters in the seventeenth century, increased its severity early in the eighteenth century, when large numbers of Baptists arrived in the colony and a sect called "Rogerines" troubled

361. NATHANIEL WARD, *THE SIMPLE COBBLER OF AGGAWAM IN AMERICA* 3 (Lawrence C. Wroth ed., 1937) (1647).

362. COBB, *supra* note 18, at 174.

363. *Id.* at 176, 213-14.

364. *Id.* at 177.

365. Many sources detail these events. *See, e.g.*, JONATHAN M. CHU, *NEIGHBORS, FRIENDS, OR MADMEN: THE PURITAN ADJUSTMENT TO QUAKERISM IN SEVENTEENTH-CENTURY MASSACHUSETTS BAY* (1985); TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 48-49 (1998); CARLA GARDINA PESTANA, *QUAKERS AND BAPTISTS IN COLONIAL MASSACHUSETTS* (1991).

366. *See supra* notes 88-94 and accompanying text.

the orthodoxy of the community.³⁶⁷ In 1722-1723, the colony responded by enacting, or reenacting, serious fines and penalties against dissenters.³⁶⁸

The annals of Virginia religious history have fewer examples of brutal repression, perhaps because the southern colony was more effective in excluding dissenters from the outset. When Lord Baltimore, a Catholic, attempted to stop briefly in the Virginia colony on his way to visit his holdings in Maryland, he was unceremoniously expelled.³⁶⁹ Only after the mid-century did dissenters arrive in sufficient numbers to draw serious attention from the authorities. In 1659, Virginia enacted a law banning the "unreasonable and turbulent sort of people, commonly called Quakers."³⁷⁰ As in Massachusetts, Quakers were required to "adjure th[e] country," and if they were "so audacious and impudent as to returne," they were prosecuted and punished.³⁷¹ Unlike Massachusetts, however, Virginia did not employ the death penalty for the crime of exercising the Quaker religion.

The brunt of Virginia's legal proscription of religious heterodoxy fell on dissenting ministers, not laity. After 1660, "persons of different persuasions in matters of Religion" were permitted to "transport themselves" to Virginia, but no provision was made to permit them to engage in public worship.³⁷² The Diocesan Canons of 1661, as we have already seen,³⁷³ declared that no minister who had not "received his ordination from some Bishopp in England" was allowed in the colony.³⁷⁴ Virginia authorities resisted the notion that England's Toleration Act of 1689 applied to the colony, and no one was permitted to preach without approval by colonial authorities.³⁷⁵

367. COBB, *supra* note 18, at 265.

368. *Id.* at 264-68.

369. *See id.* at 82-87.

370. 1 HENING, *supra* note 24, at 532.

371. *Id.* at 533.

372. The King's instructions are quoted in COBB, *supra* note 18, at 92.

373. *See supra* notes 63-67 and accompanying text.

374. Diocesan Canons (1661), *reprinted in* 1 BRYDON, *supra* note 60, at 457.

375. An act for exempting her Majesty's Protestant subjects, differing from the Church of England, from the penalties of certain laws, 1688, 1 W. & M., c. 18 (Eng.), *reprinted in* PICKERING, *supra* note 57, at 19-25; *see also* COBB, *supra* note 18, at 98-99.

Beginning around 1729, Presbyterian Scots-Irish and Reformed and Lutheran Germans were allowed to settle in the western reaches of the state, where their nonconformity was a small price to pay for their service as a buffer against Indian attacks.³⁷⁶ The first dissenting minister to be authorized to preach openly in the settled region of Virginia was Francis Makemie, a Presbyterian of remarkable ability and character, who obtained a license without great apparent opposition.³⁷⁷ The Assembly also allowed a Huguenot parish in King William County, so long as the members would be responsible for the minister's salary.³⁷⁸ But others were not so fortunate. In 1722, two dissenting ministers were sentenced to thirty-one lashes for baptizing children without a license and Catholic priests were barred from the colony.³⁷⁹ Pressure to allow dissenting ministers grew more acute with the Great Awakening, especially because of the generally low quality and sometimes questionable morality of the settled ministers of the established church.³⁸⁰

In 1753, the Presbyterian minister Samuel Davies obtained an opinion in England from the Attorney General holding that the Act of Toleration applied throughout the Empire.³⁸¹ That meant that trinitarian Protestants, including Presbyterians and Baptists, had a right to preach even in Virginia. But there was continuing uncertainty about that proposition,³⁸² and as late as 1772, the House of Burgesses rejected a bill that would have made that extension explicit.³⁸³ Moreover, the Toleration Act did not place dissenting denominations on a plane of equality. Among other discrepancies, dissenting churches, unlike the Church of England, had no legal right to hold property or to receive legacies and donations. The Presbytery of Hanover petitioned the House of

376. COBB, *supra* note 18, at 100.

377. *Id.* at 97-98.

378. 3 HENING, *supra* note 24, at 478.

379. BRYDON, *supra* note 60, at 370; COBB, *supra* note 18, at 99.

380. COBB, *supra* note 18, at 106-07.

381. *Id.* at 106.

382. See RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740-1790*, at 152 (1982); see also COBB, *supra* note 18, at 98; Quinlivan, *supra* note 25, at 55-56.

383. ISAAC, *supra* note 382, at 201 (quoting VIRGINIA GENERAL ASSEMBLY, HOUSE OF BURGESSES, JOURNAL OF THE HOUSE OF BURGESSES Feb. 27, 1772). For a full account of the debate, see *id.* at 17-57 and BRYDON, *supra* note 60, at 373-85.

Burgesses in 1775 for extension of this privilege.³⁸⁴ Other issues included protection of their religious services from private disturbance, excusal of their clergy from "burdensome offices."³⁸⁵

But Baptists—especially Separate Baptists—experienced the most severe difficulties. Virginia authorities interpreted the Toleration Act narrowly: to allow a dissenting minister the license to preach at one fixed location only.³⁸⁶ This effectively outlawed itinerant preaching, the principal mode of spreading the gospel in the Awakening. Moreover, most Baptist preachers took the position, as a matter of conscience, that the state had no authority to license ministers of the gospel, insisting that God alone is governor of the church.³⁸⁷ Accordingly, although extension of the Toleration Act to Virginia resolved the problem for most Presbyterians, most Baptist ministers continued to preach under threat of legal punishment.³⁸⁸

And that threat was more than hypothetical. More than any other group, Baptists in Virginia were an affront to the social hierarchy. They were lower class, aggressive, "ignorant Enthusiasts,"³⁸⁹ who were poorly educated and disrespectful, at least in the perceptions of their neighbors.³⁹⁰ They were openly contemptuous of Anglican clergy, whom they decried as "unconverted."³⁹¹ Many Baptists shockingly insisted on preaching to slaves, converting them to Christianity and treating them as "brothers" and "sisters" in the faith.³⁹² They refused to apply for licenses to preach. As their numbers swelled after about 1750, they were met with mob violence and persecution by local authorities.³⁹³ Samuel Harriss, a Baptist

384. See COBB, *supra* note 18, at 491.

385. Quinlivan, *supra* note 25, at 61-63.

386. See COBB, *supra* note 18, at 98.

387. See ISAAC, *supra* note 382, at 173 (noting that Baptists considered preachers "qualified by a 'gift' of the Holy Spirit").

388. See COBB, *supra* note 18, at 112-14 (describing Baptist ministers who were imprisoned after refusing to stop preaching).

389. ISAAC, *supra* note 382, at 202.

390. See *id.* at 166, 174.

391. *Id.* at 148.

392. *Id.* at 171. For an in-depth description of Virginia Baptists in the several decades prior to the Revolution, see *id.* at 164-72. See also CHRISTINE LEIGH HEYRMAN, SOUTHERN CROSS: THE BEGINNINGS OF THE BIBLE BELT 16-22 (1997); Rhys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775*, 31 WM. & MARY Q. 345 (1974).

393. ISAAC, *supra* note 382, at 172-74.

minister, was driven out of Culpepper County and later beaten by a mob.³⁹⁴ In the confused and decentralized legal structure of Virginia, local magistrates did not hesitate to prosecute and imprison Baptist preachers on such charges as itinerant preaching or disturbing the peace.³⁹⁵ According to one Baptist leader, John Leland, about thirty ministers of his denomination were imprisoned in Virginia between 1768 and 1775.³⁹⁶ Some of this hostility reflected the clash between the religiously indifferent culture of the gentry establishment and the evangelical enthusiasm of the Great Awakening.³⁹⁷ One indictment charged that the Baptists "can not meet a man upon the road, but they must ram a text of scripture down his throat!"³⁹⁸

It was his experience of seeing Baptist ministers in jail that inspired the young James Madison, recently graduated from the Presbyterian College of New Jersey (now Princeton), to write his first impassioned encomium to religious liberty in a letter to his college friend William Bradford:

That diabolical, hell-conceived principle of persecution rages among some.... There are at this time in the adjacent county not less than five or six well-meaning men in close jail, for publishing their religious sentiments, which in the main are very orthodox.... I have squabbled and scolded, abused and ridiculed so long about it, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all.³⁹⁹

Catholics also remained a target of religious intolerance. The New England colonies (other than Rhode Island), South Carolina, and Georgia all maintained laws forbidding Catholic churches.⁴⁰⁰

394. ECKENRODE, *supra* note 78, at 37.

395. *See id.* (describing the flurry of prosecution and imprisonments during the rise of the Baptist movement).

396. *Id.*

397. *See id.* at 36.

398. COBB, *supra* note 18, at 113.

399. *Id.* at 490 (quoting Letter from James Madison to William Bradford (Jan. 27, 1774)); 1 WILLIAM C. RIVES, HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 44 (Freeport, Books for Libraries Press 1970) (1859).

400. *See* COBB, *supra* note 18, at 124, 276, 420, 437 (describing the sentiment against Roman Catholics in New England, the Carolinas, and Georgia).

Even without specific statutory authorization, when it was reported that several Catholic priests had entered the colony of Virginia, the Governor ordered their arrest.⁴⁰¹ It is also noteworthy that, under the pressure of war with France, the Virginia Assembly in 1756 enacted a law requiring all "Papists" to surrender their arms and ammunition.⁴⁰² Presumably, this incident was on the Framers' minds when they crafted the Second Amendment.

In New York, as late as 1777, anti-Catholic forces led by John Jay made repeated unsuccessful attempts to deny the right to practice the Catholic religion. This was the same John Jay, later the first Chief Justice, who in his first Federalist essay, *Federalist No. 2*, took "pleasure ... that Providence has been pleased to give this one connected country, to one united people; a people descended from the same ancestors, speaking the same language, professing the same religion"⁴⁰³ Evidently, he did not want to spoil this religious unity by the admixture of Catholics. Jay's first attempt was a proposal that read:

that free Toleration be forever allowed in this State to all denominations of Christians without preference or distinction and to all Jews, Turk, and Infidels, other than to such Christians or others as shall hold and teach for true Doctrines principles incompatible with and repugnant to the peace, safety and well being of civil society in general or of this state in particular[,] of and concerning which doctrines and principles the legislature of this State shall from time to time judge and determine⁴⁰⁴

If it had been adopted, this provision would have given the legislature discretion to determine which denominations teach "principles incompatible with and repugnant to" the well being of society.⁴⁰⁵ It was no secret who that might be: "Jews, Turks, and

401. 1 BRYDON, *supra* note 60, at 370.

402. 7 HENING, *supra* note 24, at 35.

403. THE FEDERALIST NO. 2, at 7-8 (John Jay) (Henry B. Dawson ed., 1863).

404. 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 541 (1906) (footnote omitted). The drafts quoted below and debates on these provisions can be found in 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK 844-46 (1842) [hereinafter PROVINCIAL CONGRESS].

405. 1 LINCOLN, *supra* note 404, at 541.

Infidels" might be tolerable, but Catholics were not.⁴⁰⁶ The New York constitutional drafting committee, however, rejected Jay's draft, proposing instead that "the free ... [t]olerance of religious profession and worship be forever allowed within this State to all mankind," without limitation.⁴⁰⁷ Jay then repeated his attempt on the floor of the Convention, in similar language, but it was again voted down.⁴⁰⁸

Perhaps on the theory that opposition came from other groups who feared application of the language to them, Jay then proposed to narrow the language expressly to Catholics. Under this proposal, "professors of the religion of the Church of Rome" would be denied the right to own real property or exercise civil rights in the state until such time as they "most solemnly swear, that they verily believe in their consciences, that no pope, priest or foreign authority on earth, hath power to absolve the subjects of this State from their allegiance to the same," and that they "renounce and believe to be false and wicked, the dangerous and damnable doctrine, that the pope or any earthly authority have the power to absolve men from sin described in and prohibited by the Holy Gospel of Jesus Christ."⁴⁰⁹ This, too, was voted down, by a vote of nineteen-to-ten.⁴¹⁰

Having been defeated in these attempts, the anti-Catholic faction shifted its focus to imposing a naturalization oath.⁴¹¹ At that point, Jay proposed an entirely different amendment to the New York free exercise clause, limiting the scope of the liberty but not restricting its availability: "provided that the liberty of conscience hereby granted, shall not be construed to encourage licentiousness, or be used in such manner as to disturb or endanger the safety of the State."⁴¹² Supporters of free exercise remained suspicious. Gouverneur Morris inquired whether it was the same as Jay's earlier efforts.⁴¹³ Only after the majority was persuaded that Jay's

406. See JONATHAN D. SARNA & DAVID G. DALIN, RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 64 (1997).

407. 1 LINCOLN, *supra* note 404, at 541.

408. PROVINCIAL CONGRESS, *supra* note 404, at 844.

409. 1 LINCOLN, *supra* note 404, at 544.

410. *Id.* at 545; PROVINCIAL CONGRESS, *supra* note 404, at 844.

411. JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 87 (1967).

412. PROVINCIAL CONGRESS, *supra* note 404, at 845-46.

413. See PRATT, *supra* note 411, at 88.

new proposal was not a restatement of the old was it seriously considered, and even then, the language was tightened to ensure that the proviso referred only to overt actions.⁴¹⁴

5. *Use of the State Church for Civil Functions*

An important but often forgotten aspect of the church establishment was the assignment of what would now be considered important civil functions, especially social welfare functions, to church authorities. At a time when there were no modern administrative institutions for local government, the institution of the church, which was present in every locality, was a convenient tool for administration.⁴¹⁵ The civil role of the church was an inheritance from England. Under canons of the Church of England promulgated in 1604, churchwardens, lay officials chosen annually by the vestry, performed a mixture of civil and ecclesiastical functions in the mother country.⁴¹⁶ This basic schema was transplanted to the colonies with an Anglican establishment, where the gentry-dominated system of courts and vestries reinforced the connection between church and state.⁴¹⁷ In Virginia, these administrative functions continued even after the Declaration of Rights, and were gradually eliminated in the process of disestablishment.⁴¹⁸

The following description pertains to Virginia, which had the most highly developed laws and practices of this sort; but Maryland and the other southern states adopted a similar course.⁴¹⁹ Perhaps because the church establishment in New England was of a dissenting theology and thus distrustful of, and distrusted by, central governing authorities in London, the New England colonies made far less use of the church for civil purposes, other than for education and poor relief. There, both the functions and the personnel of

414. Jay did succeed in adding anti-Catholic, but legally meaningless, language referring to "weak and wicked priests and princes" to the preamble of the religious freedom provision. N.Y. CONST. OF 1977 art. XXXVIII, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 178, at 1338; see also PRATT, *supra* note 411, at 88-89.

415. Middleton, *supra* note 191, at 444-45.

416. *Id.* at 432-33.

417. *Id.*

418. See ISAAC, *supra* note 382, at 280-85 (discussing disestablishment in Virginia).

419. See CURRY, *supra* note 74, at 30, 54-56 (describing the influence the Church of England had on southern state settlements).

church and state were distinct. Thus, paradoxically, the region with the most theocentric philosophy of social life had the greatest degree of church-state separation.

In Virginia and throughout the South, the parish was a defined geographical unit serving as local government for both church and state.⁴²⁰ Vestrymen and churchwardens exercised powers that, as described by one historian, "seem a curious mixture of the ecclesiastical and the civil functions."⁴²¹ As noted above, the colonial vestry, unlike that in the mother country, was a small, self-perpetuating body of local notables.⁴²² The vestry's ecclesiastical functions included the selection of the minister, the levying and collection of tithes for parish expenses, the administration of church finances, including pay for the minister, sexton, and other employees, the maintenance of church property, and the provision of prayer books, bibles, vestments, and other items used in divine worship.⁴²³ Other than taxation, these functions were not inconsistent with the separation of church and state and survived disestablishment. Their civil functions, however, were an important part of establishment of religion.

a. Social Welfare

In the early colonies, social welfare was rudimentary at best, and entirely entrusted to the church: The vestry was charged with "caring for the poor, the aged and infirm, the sick and insane, and for orphans and other homeless children."⁴²⁴ Unlike in England, where workhouses were the backbone of the welfare system, in America orphans and children of the poor were generally apprenticed or indentured; failing that, the poor were generally assisted in their homes or boarded out.⁴²⁵ Churchwardens also provided medical care to the aged and infirm, and assumed the burial expenses of paupers.⁴²⁶ Like all church expenses, these

420. Middleton, *supra* note 191, at 431.

421. *Id.*

422. See *supra* notes 196-202 and accompanying text.

423. See Middleton, *supra* note 191, at 432, 435, 437-39.

424. *Id.* at 435.

425. See *id.* at 441-42.

426. *Id.* at 437.

functions were financed by taxes imposed on the general population, as well as by some private contributions. Because the Anglican church bore the statutory responsibility for poor relief, this system greatly complicated the termination of compulsory religious taxes. For a few years after religious taxes had been suspended, Anglican vestries continued to exact taxes from the general population for support of these functions.⁴²⁷ No other church played this role.

b. Education

In the colonial and early republican periods, there was no such thing as public education in the modern sense.⁴²⁸ Primary education was haphazard and informal, usually a combination of home education, apprenticeship, and rudimentary schools.⁴²⁹ Although some schooling was provided by (often itinerant) schoolmasters or in dame schools, most schools were taught or directed by the local minister.⁴³⁰ There was little or no state involvement in finance or control. Even when the state became more involved, there was no sharp distinction between public and private, religious and secular schools, until well into the nineteenth century. The very term "public" meant only that schools were open to the general public; most of these were "private" in terms of ownership and control and charged fees, at least to those who could afford them.⁴³¹ And there was no such thing as a secular school; all schools used curriculum that was imbued with religion.⁴³² The *New England Primer*, of which some three million copies were printed, consisted largely of a hornbook and catechism.⁴³³

427. See ISAAC, *supra* note 382, at 283.

428. See, e.g., 1 BRYDON, *supra* note 60, at 388 ("[T]he public school as an institution established and supported by the state, to which all children ... are admitted free of charge, had not as yet been born.").

429. See Middleton, *supra* note 191, at 440.

430. See *id.*

431. See 1 BRYDON, *supra* note 60, at 388.

432. See generally CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860*, at 3-29 (1983) (describing the schooling of children of this era in detail).

433. BENJAMIN HARRIS, *THE NEW ENGLAND PRIMER* (P.L. Ford ed., 1962) (1690).

In England, parishes frequently paid the fees of poor children, but this happened only rarely in the American colonies south of New England. Education was primarily a family responsibility, occasionally assisted by charity. Those who could not afford it generally did without.⁴³⁴

The Puritan belief in every person's religious obligation to read and understand the Bible led to an early emphasis on education in New England.⁴³⁵ Male literacy rates in eighteenth-century New England were among the highest in the world, approaching universality, at a time when literacy rates in England and the other American colonies fell far short of that mark.⁴³⁶ This important matter was not just left to families and local option. Codifying earlier practice, Massachusetts law as early as 1647 placed an obligation on every town of fifty householders to provide education in reading and writing, and on every town of 100 to establish a grammar school.⁴³⁷ Financial responsibility for primary education of the poor in New England generally rested with the town, but the clergy generally were charged with conducting or controlling the schools. New Hampshire followed the same policy.⁴³⁸ In Connecticut, the responsibility for education was transferred from town to parish in 1712.⁴³⁹ The first teachers were also ministers, and even after these functions were separated, ministers had the power of certifying teachers and teachers often performed the duties of assistant minister and substitute preacher.⁴⁴⁰

Education in the middle and southern colonies was largely home-based, supplemented by charity schools and itinerant schoolmasters. For the most part, parents or masters were responsible for educating their children or apprentices. This responsibility was often discharged through payments to a schoolmaster, with fees

434. See Middleton, *supra* note 191, at 441.

435. DIANE RAVITCH, *THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS* 6 (1974).

436. See KENNETH A. LOCKRIDGE, *LITERACY IN COLONIAL NEW ENGLAND: AN ENQUIRY INTO THE SOCIAL CONTEXT OF LITERACY IN THE EARLY MODERN WEST* 72-101 (1974).

437. *RECORDS OF THE GOVERNOUR AND COMPANY OF MASSACHUSETTS BAY IN NEW ENGLAND* 203 (Boston, Nathaniel Shurtleff ed., William White 1853) (1647).

438. RICHARD J. GABEL, *PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS* 74-75 (1937). at 74-75.

439. *Id.* at 84-85.

440. *Id.* at 55-56.

based on the family's ability to pay.⁴⁴¹ As in New England, the roles of preacher and schoolmaster were often one and the same.⁴⁴² We know, for example, that when the responsibility to secure a new minister for the frontier Virginia parish of Leeds fell to Thomas Marshall, father of the future Chief Justice, one of his criteria for the job was that the minister would be able to serve as a teacher.⁴⁴³ An early historian of the Episcopal Church in Virginia wrote:

[A]n appreciable part of the great contribution made by the clergy of the Anglican Church as a class to the life and development of the colony of Virginia was the lessons in culture and refinement and the love of the finer things of life instilled by them through their labors as schoolmasters to the youth of their parishes.⁴⁴⁴

The largest system of schools in the colonial period was that established by the Society for the Propagation of the Gospel in Foreign Parts (SPG), the missionary arm of the Church of England, which supplied several hundred teachers/preachers to the American colonies, with free or subsidized rates for the poor.⁴⁴⁵ Some of the colonial governments, South Carolina, New York, and Connecticut, provided public funds to SPG schools.⁴⁴⁶ In New York, no one was permitted to be a schoolmaster without a license from the church.⁴⁴⁷

Even after disestablishment of religion, most schools in the United States were conducted under religious auspices.⁴⁴⁸ Governmental financial support for education, especially in the more religiously diverse big cities, typically took the form of grants to private schools for the education of the poor, with the choice of

441. Middleton, *supra* note 191, at 441.

442. In Virginia, Lawrence Cremin writes, "[c]hurches took on the function of schools." LAWRENCE CREMIN, *TRADITIONS OF AMERICAN EDUCATION* 20 (1977). The same was true in colonial New York. 1 LINCOLN, *supra* note 404, at 480.

443. JEAN EDWARD SMITH, JOHN MARSHALL: *DEFINER OF A NATION* 35 (1996).

444. 1 BRYDON, *supra* note 60, at 391.

445. LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL: 1825-1925*, at 8 (1987); see CREMIN, *supra* note 442, at 23-24; 1 LINCOLN, *supra* note 404, at 484-85.

446. JORGENSEN, *supra* note 445, at 8-9.

447. 1 LINCOLN, *supra* note 404, at 485.

448. See generally BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY* (1960) (discussing the close connection between religion and education).

schools left to the families involved.⁴⁴⁹ For example, in New York in 1805 there were schools conducted by Presbyterian, Episcopalian, Methodist, Quaker, and Dutch Reformed groups, as well as the "Free School Society," a nondenominational charitable group, with all receiving public support.⁴⁵⁰ Later these groups were joined by Baptists, Catholics, and Jews.⁴⁵¹ Early federal aid, which typically took the form of land grants, went to private as well as public schools, including religious schools.⁴⁵² Until 1864, education in the District of Columbia was provided entirely through private and semiprivate institutions, including denominational schools, partially at public expense.⁴⁵³

By the Civil War, most northern and western states had established public school systems, and most ceased to support nonpublic education.⁴⁵⁴ But public education was far from secular in character. In *Democracy in America*, based on his travels in the 1830s, Tocqueville reports that "[t]he greater part of education [in America] is entrusted to the clergy."⁴⁵⁵ Most early school superintendents were Protestant clergymen.⁴⁵⁶

In the South, rudimentary public school systems were created as part of Reconstruction.⁴⁵⁷ Most of the schools for the former slaves in the South, funded by Congress under the Freedmen's Bureau Act, were run by Protestant missionary societies, including Presbyterians, Methodists, Baptists, and Congregationalists.⁴⁵⁸

449. RAVITCH, *supra* note 435, at 6-7.

450. *Id.*

451. See JORGENSEN, *supra* note 445, at 1-19; KAESTLE, *supra* note 432, at 57, 166-67; RAVITCH, *supra* note 435, at 6-7. For the most comprehensive study of educational funding schemes in this period, see GABEL, *supra* note 438, at 147-470.

452. GABEL, *supra* note 438, at 174.

453. *Id.* at 173-79.

454. KAESTLE, *supra* note 432, at 182-83.

455. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (J.P. Mayer ed., 1969) (1835).

456. JORGENSEN, *supra* note 445, at 37-54.

457. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 365-66 (1988).

458. Act of Mar. 3, 1865, 13 Stat. 507; see also RONALD E. BUTCHART, *NORTHERN SCHOOLS, SOUTHERN BLACKS, AND RECONSTRUCTION: FREEDMEN'S EDUCATION, 1862-1875*, at 4-9, 33-52 (1980); GABEL, *supra* note 438, at 519. Congress instructed the Freedmen's Bureau to work through private benevolent associations whenever the latter provided suitable teachers. GABEL, *supra*, at 519.

c. Marriages and Public Records

In the Anglican colonies, such as Virginia, the settled minister, or "rector," had the responsibility by law to keep certain public records: births, burials, and marriages.⁴⁵⁹ If the minister failed in this duty, he was fined 500 pounds of tobacco.⁴⁶⁰ The principal purpose of these records was to ascertain the number of taxable units, or "titheables," in the parish and in the county.

In England, marriages could be lawfully performed only by ministers of the Church of England.⁴⁶¹ This authority was carried over to the Anglican colonies.⁴⁶² The law expressly declared illegitimate the offspring of marriages performed by ministers outside the established church.⁴⁶³ This was one of the most troubling features of the establishment to members of dissenting denominations. It was also inconvenient on secular grounds, because church pulpits were often vacant and it was therefore often difficult to find an official authorized to conduct the nuptials. Even after the Declaration of Rights in 1776, only Anglican ministers had a general right to perform marriage ceremonies in Virginia; other ministers required special licenses.⁴⁶⁴ In New York, shortly before the Revolution, ministers of the Church of England petitioned Governor Clinton to confirm their exclusive right to solemnize marriages, which they asserted as part of their claimed establishment privileges under English law. By that time, however, opposition was too strong, and the petition was denied.⁴⁶⁵

One of the more unusual record-keeping functions of the established clergy in Virginia was the periodic determination of private land boundaries.⁴⁶⁶ Each year, the vestry would appoint two men to pace the boundaries of landholdings in the parish, accompanied by the owners of the lands adjoining the boundaries.

459. 2 HENING, *supra* note 24, at 54. Baptisms were often recorded as well, but this was not required by law. *Id.*

460. *Id.*

461. COBB, *supra* note 18, at 476.

462. *Id.* at 49.

463. *Id.* at 49-51.

464. *Id.* at 494.

465. *Id.*

466. See Middleton, *supra* note 191, at 439-40.

The boundaries were determined by mutual consent and marked with a blaze or other symbol. Over a four-year cycle, all the boundaries in the parish would be confirmed in this way. This process, called "processioning," originally took the form of an ecclesiastical procession with crucifix, banners, bells, and full priestly regalia, not to mention drinking and celebration. In colonial Virginia, it became more sober and businesslike, and less obviously religious.⁴⁶⁷

d. Prosecution of Moral Offenses

Perhaps the most "governmental" of all duties of church officials in Virginia was the obligation of the churchwardens to make biennial presentments to the county court of certain misdemeanors, including swearing, profanity, sabbath breaking, absence from church, drunkenness, fornication, adultery, and slander.⁴⁶⁸

6. Limitation of Political Participation to Members of the State Church

A central feature of the establishment in England was the limitation of public office to members of the Church of England. The Test and Corporation Acts required that, in order to hold civil, military, academic, or municipal office, it was necessary to have taken communion in the established church within a certain period and to swear an oath against belief in transubstantiation, the Catholic doctrine that the bread and wine of communion are transformed into the body and blood of Christ.⁴⁶⁹ The right to vote for members of Parliament was limited to those who would take an oath forswearing the "ecclesiastical or spiritual" authority of any foreign prince or prelate, the belief in transubstantiation, or the veneration of Mary or the saints.⁴⁷⁰

467. *Id.*

468. 2 HENING, *supra* note 24, at 51.

469. First Test Act, 1673, 25 Car. 2, c. 2 (Eng.), reprinted in SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 555-56; Second Test Act, 1678, 30 Car. 2, st. 2, c. 1 (Eng.), reprinted in SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 556-57; Corporation Act, 1661, 13 Car. 2, st. 2, c. 1 (Eng.), reprinted in SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 542-43.

470. 6 Ann., c. 23 (1707) (Eng.), reprinted in 2 PICKERING, *supra* note 57, at 375-82.

Similar restrictions on officeholding were also common in America. In states where dissenters were successfully excluded, the issue would not arise. South Carolina presents a good example of the problem in the less intolerant colonies. In the seventeenth century, many dissenters had settled in South Carolina, and the colonial governors had mostly been dissenters—Quakers or Presbyterians.⁴⁷¹ In 1704, the assembly enacted legislation on the model of the Test Acts, barring from the legislature any person who could not swear an oath that he took communion in the Church of England. This Act was said to be necessary “to quell all factions which so much disturb’d the peace of the Government.”⁴⁷²

Religious restrictions on the right to vote were imposed in almost every colony.⁴⁷³ Sometimes these were affirmative, such as extending the franchise only to members of the Protestant religion, the Church of England, or some other defined denomination. Sometimes they were negative, such as denying the franchise to Catholics, Jews, Quakers, or others. Catholics were the most frequently excluded group.⁴⁷⁴ The strictest limitation was found in seventeenth-century Massachusetts, which limited the right to vote to those who were members of a recognized church and gave a public testimony of their personal religious experience of faith and regeneration.⁴⁷⁵ John Cotton explained that “[n]one are so fit to be trusted with the liberties of the commonwealth as church-members; for the liberties of the freemen of this commonwealth are such as require men of faithful integrity to God and the state to preserve the same.”⁴⁷⁶ By 1660, this excluded a large majority of the male population, creating irresistible pressure for reform of the franchise.⁴⁷⁷ Rather than separate the civil franchise from church membership, however, Massachusetts adopted the “Halfway Covenant,” which admitted individuals to full church membership (hence to the voting rolls) on the basis of mere baptism or profession of faith, without evidence of spiritual regeneration, thus watering

471. BRINSFIELD, *supra* note 117, at 9.

472. *Id.* at 23.

473. See generally ALBERT EDWARD MCKINLEY, *THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA* (1905) (describing voting rights in each colony).

474. *Id.* at 476 (quoting John Cotton).

475. *Id.* at 304-07.

476. *Id.* at 305.

477. COBB, *supra* note 18, at 208.

down purity of church membership to avoid breaking the link between church membership and voting rights.⁴⁷⁸

Even after Independence, every state other than Virginia restricted the right to hold office on religious grounds. Some excluded Catholics, some atheists, some non-trinitarians, and some Jews.⁴⁷⁹ Four states, Georgia, New Jersey, New Hampshire, and South Carolina, simply limited political office to "Protestants."⁴⁸⁰ North Carolina excluded those who "den[ied] ... the truth of the Protestant religion,"⁴⁸¹ opening a loophole under which a future Catholic governor served on the theory that although he did not affirm, neither did he "deny" that "truth."⁴⁸² Delaware required a belief in the Trinity.⁴⁸³ Massachusetts merely limited public office to Christians, a liberal policy that inspired over sixty towns to protest against the inclusion of Catholics.⁴⁸⁴ Even disestablishmentarian Pennsylvania demanded that officeholders profess a belief in God and in the divine inspiration of the Old and New Testaments.⁴⁸⁵

At the federal level, restrictions of this sort were barred by Article VI of the Constitution, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."⁴⁸⁶ This is the only explicit "religious liberty" provision of the original Constitution.⁴⁸⁷ It proved, however, to be one of the more controversial features of the document. Many Americans considered it too risky a proposition to allow Catholics or non-Christians to hold office. What if they introduced the

478. *Id.* at 210-11.

479. See Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 681 (1987).

480. CHESTER JAMES ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* 93-94 (1964); Bradley, *supra* note 479, at 681.

481. ANTIEAU ET AL., *supra* note 480, at 109.

482. *Id.*

483. *Id.* at 93.

484. *Id.* at 95.

485. *Id.* at 92.

486. U.S. CONST. art. VI.

487. One possible exception is the provision, also found in Article VI, allowing officeholders to bind themselves to the Constitution by "affirmation" as well as "oath." *Id.*

Inquisition?⁴⁸⁸ The provision ultimately proved acceptable less because of opposition to test oaths than to concerns that test oaths at the federal level might reflect the views of some other religious faction than one's own.⁴⁸⁹ As with so many matters, federalism offered a solution to otherwise deeply divisive problems.

At the state level, religious tests for office were ubiquitous, outside of Virginia.⁴⁹⁰ Religious tests were employed in states with, and in states without, any other substantial elements of religious establishment. They coincided with seemingly contradictory guarantees of free exercise and the rights of conscience.⁴⁹¹ They survived decades longer than any other aspect of religious establishment.⁴⁹² Indeed, Maryland's exclusion of atheists from the office of notary public remained on the books until 1961, when it was held unconstitutional by the United States Supreme Court.⁴⁹³

To the modern ear, denial of the right to hold office appears to be a classic and indisputable denial of a civil right on account of religious persuasion, and an obvious establishmentarian tool. As Jefferson wrote in his Bill for Establishing Religious Freedom:

[T]hat our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that, therefore, the proscribing of any citizen as unworthy of the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right.⁴⁹⁴

It was not so obvious to many of Jefferson's fellow Americans. I can offer two only partly helpful explanations. First, prior to the

488. This is an actual example. Speech of Rev. Thacher, in *DEBATES AND PROCEEDINGS OF THE COMMONWEALTH OF MASSACHUSETTS, HELD IN THE YEAR 1788*, at 251 (Bradford Pierce & Charles Hale eds., 1856).

489. SARNA & DALIN, *supra* note 406, at 74-75.

490. *See generally* Bradley, *supra* note 479.

491. *Id.*

492. SARNA & DALIN, *supra* note 406, at 63 (noting that Jews had gained full rights of political participation in most states by 1830, though New Hampshire held out until 1877).

493. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

494. A Bill for Establishing Religious Freedom (1786), *reprinted in* MCCONNELL ET AL., *supra* note 76, at 70.

twentieth century, voting and officeholding were not understood to be civil rights, but were privileges that society could regulate in the interest of maintaining its character and identity.⁴⁹⁵ Thus, in excluding Catholics, atheists, or non-Christians from office, the founding generation did not believe they were denying these fellow citizens their civil rights.

Second, few Americans at that time would have agreed with Jefferson that religion was no more relevant to political fitness than "physics and geometry."⁴⁹⁶ In particular, Americans were convinced that Roman Catholics were under a kind of spiritual submission to Rome that made them incapable of exercising the independent thought necessary to be a good republican citizen, let alone officeholder.⁴⁹⁷ John Adams wrote in *Novanglus* that "the Roman superstition" was "the worst tyranny, that the genius of toriyism, has ever yet invented."⁴⁹⁸ Indeed, this anti-Catholic stereotype flourished well into the twentieth century, subsiding only with Vatican II and John F. Kennedy's election to the presidency.⁴⁹⁹ In excluding Catholics from public office, Protestant Americans were not, in their own minds, engaging in bigotry or religious intolerance, but simply recognizing the political relevance of Catholic belief.⁵⁰⁰ Specifically, Protestants feared that if Catholics ever obtained a political majority, they would suspend religious freedom and persecute Protestants, as they had under Queen Mary and on the Continent.⁵⁰¹ Barring Catholics from office seemed a prudent means for averting that catastrophe; to wait for "overt acts" might be too late.

495. This is why the Fifteenth and Nineteenth Amendments were necessary to extend the franchise to blacks and women: the Fourteenth Amendment was generally thought to protect civil, but not political or social rights, and voting and officeholding were not "civil" rights. See *Minor v. Hepperset*, 88 U.S. 162 (1875); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 125-27 (1988).

496. See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 427 (1969) (describing Jefferson's views as "something of an anomaly").

497. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 201-13 (2002).

498. JOHN ADAMS, *NOVANGLUS* (Jan. 23, 1775), reprinted in MERRILL JENSEN, *TRACTS OF THE AMERICAN REVOLUTION: 1763-1776*, at 296, 302 (1967).

499. See John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97 (1997).

500. HAMBURGER, *supra* note 497, at 212.

501. *Id.* at 202.

It is harder to explain why, apart from mere bigotry, Jews would be excluded from public office. There was no reason to think that Jews, as a group, would be antirepublican; indeed, Jews had prominently supported the patriot cause in the Revolution.⁵⁰² Perhaps there were too few Jews in America for the Founders to form any clear opinion that might dispel the assumption that morality was dependent on Christianity.

II. RATIONALES FOR THE ESTABLISHMENT

To understand the basis for religious establishment in political theory, we must distinguish between two different, almost antithetical, rationales, which we may call the "theological" and the "political." Establishment, under the theological rationale, is intended to glorify God, to save souls, and to ensure God's providence for the nation. Under the political rationale, the purpose of a religious establishment is to shape public opinion and character in a way favorable to the regime. One is based on the primacy of religion, the other on the utility of religion to the state.

A. Distinguishing Theological from Political Rationales

The theological rationale for establishment rested on confidence regarding religious truth. As Boston Puritan minister John Cotton wrote: "[T]he word of God in such things [religious fundamentals] is so clear, that [a person] *cannot but be convinced* in conscience of the dangerous error of his way, after once or twice admonition wisely and faithfully dispenses."⁵⁰³ Thus, "[i]f such a man, after such admonition, shall still persist in the error of his way and be punished, he is not persecuted for cause of conscience, but for *sinning against his own conscience*."⁵⁰⁴ New England Puritans saw

502. In petitions from the Philadelphia synagogue to the Pennsylvania government and the Constitutional Convention, Jewish writers stressed the attachment of American Jews to the Revolutionary cause and their sacrifices in support of independence during the Revolution. See Letter from Jonas Phillips to the Federal Constitutional Convention (Sept. 7, 1787), reprinted in SARNA & DALIN, *supra* note 406, at 72-74.

503. JOHN COTTON & ROGER WILLIAMS, *THE BLOODY TENET, WASHED AND MADE WHITE IN THE BLOOD OF THE LAMBE* (1647), quoted in MCCONNELL ET AL., *supra* note 76, at 31 (alterations in original).

504. *Id.*

no inconsistency in arguing that magistrates had "no power against the laws, doctrines and religion of Christ," while asserting that they could use their power against those who teach false beliefs.⁵⁰⁵ To use state power against Christ would be wrong; to use it to support Christ and his church was only right. In Nathaniel Ward's vigorous prose, "God doth no where in his word tolerate Christian States, to give Tolerations to such adversaries of his Truth, if they have power in their hands to suppress them."⁵⁰⁶ Under this way of thinking, use of government power with respect to religion is legitimate if, and only if, it is in support of the true religion.

The political rationale treated religion as a means for promoting civic purposes of the state. It rested on the social utility rather than the truth of religion. Machiavelli, who called religion "the instrument necessary above all others for the maintenance of a civilized state," urged rulers to "foster and encourage" religion "even though they be convinced that it is quite fallacious."⁵⁰⁷ Truth and social utility may, but need not, coincide.

The political rationale for established religion was stated in its most forceful and candid terms by philosopher Thomas Hobbes:

[T]he right of judging what doctrines are fit for peace, and to be taught the subjects, is in all commonwealths inseparably annexed ... to the sovereign power civil, whether it be in one man, or in one assembly of men. For it is evident to the meanest capacity, that men's actions are derived from the opinions they have of the good or evil, which from those actions redound unto themselves; and consequently, men that are once possessed of an opinion, that their obedience to the sovereign power will be more hurtful to them than their disobedience, will disobey the laws, and thereby overthrow the commonwealth, and introduce confusion and civil war; for the avoiding whereof, all civil government was ordained. And therefore in all commonwealths of the heathen, the sovereigns have had the name of pastors of

505. WALTER H. BUGESS & JOHN ROBINSON, PASTOR OF THE PILGRIM FATHERS 152-54 (1920).

506. WARD, *supra* note 361, at 3.

507. NICCOLO MACHIAVELLI, THE DISCOURSES 139, 143 (Bernard R. Crick ed. & Leslie J. Walker trans., Penguin 1970) (1520).

the people, because there was no subject that could lawfully teach the people, but by their permission and authority.⁵⁰⁸

Note that Hobbes' argument is not dependent on the particular values that a regime might wish to inculcate. Hobbes was particularly concerned about national unity and prevention of civil war. Under other circumstances, regimes might emphasize other issues, and thus foster a different kind of religion. One regime might wish to foster an ideal of citizenship based on obedience to authority, military valor, and honor. Another might wish to develop citizens who sacrifice economic advantage for the good of the whole. One might emphasize the virtues of tolerance, equality, or environmental awareness, another the virtues of hard work and personal responsibility. Whatever the content, Hobbes would say that the government must be able to make use of the institutions of religion for formation and inculcation of values useful for civic ends.

From a political perspective, establishment of religion has essentially the same purpose as licensing of the press. Both enable the government to control the institutions for dissemination of opinions and ideas, to suppress ideas dangerous to the regime, and to encourage ideas supportive of the regime. By fostering the Church of England, in which the king is head of the church and the prelates of the church are integrated into the system of government, and by suppressing Catholicism and Puritanism, which presented threats to the legitimacy of the English state, the government could use religion as a supplementary means of social control, just as authoritarian regimes in our day use a government-controlled press.

Later, in republican America, it was easy to believe that spiritual as well as political authority rested with the people. Americans thus found it natural to associate Protestant forms of church governance with Americanism, and to be suspicious of Roman Catholics who accepted the spiritual authority of Rome.

It should not be surprising that governments would seek to control religious institutions in service of political ends. In late-eighteenth-century America, long before development of modern

508. THOMAS HOBBS, *LEVIATHAN* (1651), *quoted in MCCONNELL ET AL., supra* note 76, at 31-32 (alteration in original).

mass media, churches were the foremost institutions for the formation and dissemination of opinion.⁵⁰⁹ It is estimated that about eighty percent of the published political pamphlets in the 1770s were reprints of sermons.⁵¹⁰ Historian Harry Stout has estimated that New England churchgoers would have listened to about 15,000 hours of sermons over a lifetime. That compares to about 1500 hours of lectures in a four-year college education.⁵¹¹ This would have a significant impact. It makes a difference whether the churches harp on *Romans* 13: "Everyone must submit himself to the governing authorities,"⁵¹² or the fourth chapter of the *Acts of the Apostles*: "Judge for yourselves whether it is right in God's sight to obey you [meaning the authorities] rather than God."⁵¹³ Which teaching would you encourage if you were king?

Tocqueville observed that "[e]very religion has some political opinion linked to it by affinity."⁵¹⁴ When the King of England purported to rule by divine right in a hierarchical society, it was natural to adopt a form of church governance in which the King was the head of the church and authority emanated downward through bishops and higher clergy, ultimately to the parish priest.⁵¹⁵ During the revolutionary struggle in America, the divide between Whigs and Tories was in large part a division along religious lines. While not all Anglicans were Tories,⁵¹⁶ almost all non-Anglicans were Whigs,⁵¹⁷ and the most outspoken critics of the Revolution were Anglican ministers.⁵¹⁸ Across denominational lines, evangelicals

509. RHODEN, *supra* note 105, at 4-5.

510. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 141-42 (1988). For a sampling, see *POLITICAL SERMONS OF THE FOUNDING ERA, 1730-1805* (Ellis Sandoz ed., 1991).

511. See BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM* 216-40 (1994) (quoting STOUT, *supra* note 105, at 4-7, 135-36, 260, 317).

512. *Romans* 13:1.

513. *Acts* 4:19.

514. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 265 (J.P. Meyer & Max Lerner eds. & George Lawrence trans., Harper & Row 1966) (1835).

515. See generally JOHN NEVILLE FIGGIS, *THE DIVINE RIGHT OF KINGS* (2d ed. 1914) (describing doctrine of divine right of kings and its ramification).

516. Some of the most famous patriot leaders, such as Patrick Henry, Alexander Hamilton, and George Washington, were members of the Church of England.

517. RHODEN, *supra* note 105, at 5-6 (noting that Congregationalists, Baptists, and Presbyterians "shared an overwhelmingly patriot point of view").

518. *Id.* at 65 (noting that "many prominent loyalists, including five of the best Tory propagandists, were Anglican clergymen"); William Warren Sweet, *The Role of Anglicans in*

(the heirs to the Great Awakening) were overwhelmingly pro-Revolution, whereas rationalists and theological liberals were divided.⁵¹⁹ Congregationalists, Presbyterians, and Baptists were overwhelmingly in favor of Independence,⁵²⁰ as were Jews.⁵²¹ Loyalists were most likely to be found among Anglicans, Methodists, Roman Catholics, and Old Light Calvinists.⁵²² Mennonites, Moravians, Amish, and Quakers were most often pacifists, and avoided both sides in the conflict.⁵²³ These divisions were more pronounced among clergy than laity, and more in the North than in the South.

Governments responded accordingly, favoring those religions whose teachings were most congenial to the regime. Because religious belief often has political or worldly ramifications, governments are seldom indifferent about what religious beliefs are taught and held. Even today, it is at least convenient when the churches of America support basic public values, such as nondiscrimination, environmental responsibility, or obedience to the law, and it is readily seen that some religious views seem more closely aligned with one political party, and some with the other.

In the English and American colonial traditions, both theological and political rationales were present, and frequently intermingled. Consider the official title of the British monarch: "[B]y the Grace of God, King of *England, Scotland, France and Ireland*, Defender of the Faith."⁵²⁴ "Defender of the Faith," a title conferred by the

the American Revolution, 11 HUNTINGTON LIB. Q. 51, 55 (1947). For detailed studies of the participation of Anglican and Congregationalist clergy in the debates over Independence, see RHODEN, *supra* note 105, at 64-115 (Anglicans) and STOUT, *supra* note 105, at 282-311 (Ketormet Protestants).

519. RHODEN, *supra* note 105, at 6; see HEIMERT, *supra* note 105, at 2-15 (explaining these theological differences). Heimert writes that "the rationalist clergy were in the 1770's, nearly to a man, if not outright Tories, then praying that the magistrates and merchants to whose judgment they deferred would find some compromise solution to the lamentable controversy between Britain and her colonies." *Id.* at 17. On the other hand, some prominent rationalists, such as Thomas Jefferson, Thomas Paine, and Benjamin Franklin, were also prominent supporters of revolution, while many Methodists followed the Wesley brothers in opposition to revolution.

520. RHODEN, *supra* note 105, at 5-6.

521. EDWIN WOLF & MAXWELL WHITEMAN, *THE HISTORY OF THE JEWS OF PHILADELPHIA FROM COLONIAL TIMES TO THE AGE OF JACKSON* 77-97 (1956).

522. RHODEN, *supra* note 105, at 6.

523. *Id.*

524. FIRST CHARTER OF VIRGINIA, 1606, reprinted in 2 THE FEDERAL AND STATE

Pope in recognition of Henry VIII's opposition to the teachings of Martin Luther, represents the theological rationale. The king's job is to support and defend true religion. "By the Grace of God, King" represents the political rationale. If the people can be induced to believe that the king enjoys his power by the authority of God, a divine right of kings, they are more likely to be good monarchical subjects.

The theological rationale can be seen in the earliest colonial charters. The First Charter of Virginia in 1606 described the purposes of the colony in these terms: "[that] by the Providence of Almighty God, [it may] 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."⁵²⁵ The Fundamental Orders of Connecticut declared the purpose of the new colony to be "to maintain and preserve the liberty and purity of the gospel of our lord Jesus which we now profess, as also the discipline of the Churches which according to the truth of the said gospel is now practiced amongst us."⁵²⁶ Theological considerations were uppermost in the establishment of the New England system in the seventeenth century. The animating purpose of the Puritan migration to America was, after all, religious: to find a place where they could practice their religion without suffering harassment and persecution. Their congregationalist ecclesiology was a threat, not a support, to the regime. As James I commented, "No bishop, no King."⁵²⁷ There is no reason to doubt the sincerity of the Puritans' desire to be a City on the Hill, to create for the first time in history a commonwealth authentically committed to the truths of the gospel, as they understood them.⁵²⁸

There is good reason to suspect, however, that in most places at most times, the political rationale is generally more powerful, at

CONSTITUTIONS, *supra* note 178, at 1888-93.

525. *Id.*

526. TERCENTENARY COMMISSION OF THE STATE OF CONNECTICUT, THE FUNDAMENTAL ORDERS OF CONNECTICUT 3 (1934).

527. WILLIAM BARLOW, THE SUMME AND THE SUBSTANCE (Scholars' Facsimiles & Reprints, 1965) (1604).

528. See EDMUND MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 155 (1958) ("Their mission in the wilderness was ... to found a society where the perfection of God would find proper recognition among imperfect men."); Witte, *supra* note 341, at 46.

least to those in command of the government. Religion is a key determinant of the values and virtues of a people, and the ability to shape values and virtues is useful to anyone who wishes to rule. This is particularly evident in the teachings of the Anglican Church, which emphasized that loyalty to the crown and obedience to the government are religious as well as civic obligations.⁵²⁹ The very first Article of the Thirty-nine Articles of Faith of the Church of England affirmed the supremacy of the monarch in matters spiritual and temporal.⁵³⁰ The first provision of the 1604 Canons of the Church of England, which were carried over to the Anglican colonies, required ministers at least four times each year to deliver sermons teaching that the king "is the highest power under God."⁵³¹ This was to be done "purely and sincerely, (without any colour or dissimulation)."⁵³² In 1640, when civil war was looming in England, clergy were required on penalty of dismissal to "audibly read" this "explanation" of the royal power:

The most high and sacred order of kings is of divine right, being the ordinance of God Himself, founded in the prime laws of nature, and clearly established by express texts both of the Old and New Testaments. A supreme power is given to this most excellent order by God Himself in the Scriptures, which is that kings should rule and command in their several dominions all persons of what rank or estate soever For subjects to bear arms against their kings, offensive or defensive upon any pretence whatsoever, is at the least to resist the powers which are ordained of God; and though they do not invade but only resist, St. Paul tells them plainly they shall receive to themselves damnation.⁵³³

It is easy to see why an authoritarian state would find such a subservient church useful.

529. See Sweet, *supra* note 518, at 54.

530. See ELTON, *supra* note 31, at 398.

531. BISHOPS AND CLERGY OF CANTERBURY CONSTITUTIONS AND CANONS ECCLESIASTICAL, Canon 1 (1604).

532. *Id.*

533. DECREE OF THE CLERGY ON REGAL POWER (1640), reprinted in SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 2, at 491-92.

True to this heritage, Anglican ministers, especially in the middle and northern colonies, were the most prominent public advocates against the American Revolution.⁵³⁴ A Connecticut minister claimed that while there had been "most rebellious outrages committed, on account of the Stamp Act" in some parts of the colony, "those towns where the Church [of England] has got footing, have calmly submitted to the civil authority."⁵³⁵ According to Anglican doctrine, the duty of obedience to governmental authority stemmed from religious conviction. As Samuel Seabury, later the first Episcopal Bishop in America, proclaimed, "Our Duty to obey our Rulers and Governors arises from our Duty to obey God."⁵³⁶ An Anglican minister in 1774 urged his countrymen to be loyal to the mother country in these terms:

The principles of submission and all lawful authority are as inseparable form a sound, genuine member of the Church of England, as any religious principle whatever. This Church has always been famed and respected for its loyalty, and its regard to order and government. Its annals have been never stained with the history of plots and conspiracies, treasons and rebellions. Its members are instructed in their duty to government, by three Homilies on Obedience and six on Rebellion which are so many standing lessons to secure their fidelity.⁵³⁷

Anglican ministers based their pleas for greater support from the Society for the Propagation of the Gospel in London more on their ability to generate loyalty to the Crown than on their effectiveness in propagating the gospel.⁵³⁸

The establishment of religion in Puritan New England originally was more theological than political, but by the end of the eighteenth century, the theological rationale faded from view even there. New England's system of public support for religion came to be justified on the civic ground that public virtue is necessary to good govern-

534. *See supra* note 518.

535. RHODEN, *supra* note 105, at 71.

536. *Id.* at 68.

537. *Id.* at 17 (quoting THOMAS K. CHANDLER, A FRIENDLY ADDRESS TO ALL REASONABLE AMERICANS (1774)).

538. *Id.* at 71-72.

ment, and religion necessary to public virtue.⁵³⁹ We will return to this new, more republican, version of the political rationale below.

B. Theoretical Justifications for the English Establishment

In England, the monarch was the supreme head of the Church; Parliament controlled the liturgy and articles of faith; the government appointed the bishops; government offices were confined to members of the Church. This arrangement may fairly be called a union, or perhaps an "alliance," between church and state.⁵⁴⁰ But it was not a theocracy. Quite the contrary: the Church did not control the government, but the government the Church. The technical term for governmental control over the church in the English tradition is "Erastianism," so called after the sixteenth-century Swiss-German theologian Thomas Erastus, whose polemics against the ecclesiastical power of excommunication contained the seeds of the notion that the civil authority must control the Church.⁵⁴¹

Erastianism, by that name, came into full flower in England in the seventeenth century, but it had an ancient history in Europe, both in practice and in theory. After the Edict of Milan in 313, the Roman emperors assumed power to dictate the doctrine of the Christian Church, at times ruling in favor of Arian beliefs which later were deemed rank heresy. In the fifth century, Pope Gelasius charted a course of independence for the church, but the Middle Ages saw a continual struggle between pope and emperor for control.⁵⁴² Partly on theological grounds, as God's agent on earth,

539. See SHAIN, *supra* note 511, at 233-40.

540. This was the terminology adopted by William Warburton, Bishop of Gloucester, in his influential work, *THE ALLIANCE BETWEEN CHURCH AND STATE* (London, 1736). He argued that church and state were distinct and mutually independent, but allied in a joint enterprise of governance of society. Warburton's arguments were often borrowed by supporters of establishment on this side of the Atlantic. See A.W. EVANS, *WARBURTON AND THE WARBURTONIANS: A STUDY IN SOME EIGHTEENTH-CENTURY CONTROVERSIES* (1932).

541. For a thorough treatment of Erastianism, see Weldon S. Crowley, *Erastianism in England to 1640*, 32 J. CHURCH & ST. 549 (1990) [hereinafter Crowley, *Erastianism in England to 1640*]; Weldon S. Crowley, *Erastianism in the Long Parliament, 1640-1646*, 21 J. CHURCH & ST. 45 (1979) [hereinafter Crowley, *Erastianism in the Long Parliament*]; Weldon S. Crowley, *Erastianism in the Westminster Assembly*, 15 J. CHURCH & ST. 49 (1973). The term "Erastianism" came into popular usage at the Westminster Assembly in 1640. Crowley, *Erastianism in England to 1640*, *supra*, at 594 n.28.

542. See Brian Tierney, *Religious Rights: A Historical Perspective*, in RELIGIOUS LIBERTY

and partly on the basis of the phony "Donation of Constantine," which supposedly gave the papacy temporal authority in the western half of the Empire, the Roman pontiff asserted a right to superintend the selection and performance of secular rulers. At the same time, secular rulers asserted authority to control the Church within their borders, especially through control over the selection of bishops. Neither side imagined separation or mutual independence. This power struggle between pope and king/emperor was a leitmotiv of Medieval politics.

The fourteenth-century philosopher Marsilius of Padua set forth a comprehensive theoretical defense of the idea of political (i.e., imperial) control over the Church. In his great work *Defensor Pacis* ("The Defender of Peace"),⁵⁴³ Marsilius drew on Aristotelian and Biblical sources to argue that the "legislator," as representative of the whole body of the people, had rightful authority to select the bishops, to make laws for the Church, and to decide disputed matters of faith.⁵⁴⁴ In practice this meant the German, or "Holy Roman," emperor. According to Marsilius, the Bible provided no support for the claims of the papacy to control the doctrine and personnel of the Church, and the peace and unity of the state required that the Church be subordinate to the government.⁵⁴⁵ Marsilius' argument bears striking similarity to Hobbes' later claim that the sovereign has authority to "name ... pastors of the people, because there was no subject that could lawfully teach the people, but by [the sovereign's] permission and authority."⁵⁴⁶ It is perhaps not coincidental that an English translation of *Defensor Pacis* appeared in 1535, when Henry VIII was contemplating his break with Rome and establishment of royal supremacy over the Church of England.⁵⁴⁷

The idea of civil control over the Church was difficult to maintain during the days of a single universal Catholic Church with

IN WESTERN THOUGHT 29, 34 (W. Cole Durham, Jr. & Noel B. Reynolds eds., 1996).

543. 2 MARSILIUS OF PADUA, THE DEFENDER OF PEACE: THE DEFENSOR PACTS (Alan Gewirth trans., 1956).

544. See Brian Tierney, *Political and Religious Freedom in Marsilius of Padua*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT 59, 63-71 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996).

545. *Id.* at 70; see 1 MARSILIUS OF PADUA, *supra* note 543, at 260-65.

546. See *supra* note 508 and accompanying text.

547. Tierney, *supra* note 544, at 74.

its headquarters in Rome. Church-state relations in those days almost inevitably consisted of conflict and negotiation between two institutionally separate authorities: the Church in Rome and the civil power, usually the monarch, in the various nations of Europe. Neither could completely control the other. With the outbreak of the Protestant Reformation, however, governmental power over each national church became more feasible. Indeed, with the Peace of Augsburg in 1555, the principle that the prince had authority to determine the religion for his nation ("cuius regio, eius religio") became a staple of international relations.⁵⁴⁸

In England after the break with Rome, theologians and political theorists developed elaborate ecclesiological justifications for government control over the Church in England, combating the rival theories of the Catholic Church, which posited a worldwide, self-governing church based on apostolic succession, and of the Presbyterians, who argued that the Bible set forth a system of church governance based on elders or presbyters chosen by the people of local churches, with an ascending hierarchy of councils with authority over doctrine and discipline. Against the Catholics and the Presbyterians, the Erastian mainstream of the Church of England argued that civil and ecclesiastical functions were but two parts of a united society, both governed by the same authority.⁵⁴⁹ The common premise of all these views was that there had to be a single ecclesiastical authority with power to enforce uniformity; their disagreement was over where this authority lay.

Richard Hooker, the most authoritative of these mainstream Anglican theorists (Locke reverentially called him "the judicious Hooker")⁵⁵⁰ drew on biblical, scholastic, and common law sources to argue that no specific form of church government was required by scripture, and therefore the question of ecclesiastical authority must be determined by God-given reason and the longstanding practice of the nation.⁵⁵¹ Much like Marsilius, Hooker reasoned that

548. See RELIGIOUS PEACE OF AUGSBURG, SEPT. 25, 1555, reprinted in SELECTED DOCUMENTS 230-32 (E. Reich ed., 1905).

549. See Crowley, *Erastianism in England to 1640*, *supra* note 541, at 559-66.

550. JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND ESSAY 3 (Chicago, Henry Regnery Co. 1948) (1690).

551. 8 RICHARD HOOKER, THE LAWS OF ECCLESIASTICAL POLITY, in 3 THE WORKS OF THAT LEARNED AND JUDICIOUS DIVINE MR. RICHARD HOOKER: WITH AN ACCOUNT OF HIS LIFE AND DEATH BY ISAAC WALTON 340 (John Keble ed., 3d ed. 1845) (1836). My interpretation of

authority over the Church must be located in the whole body of the people of the Church, and that the people had consented to the exercise of that authority by their constitutional institutions, namely, the king in Parliament. As one Church historian put it, Hooker "made it clear that royal supremacy really meant the supremacy of that law which uttered the general consent of the nation itself."⁵⁵² Under the early Stuarts, however, Erastian theory shifted in the direction of the divine right of kings, in which the monarch was understood to have a divinely appointed prerogative to rule both church and state.⁵⁵³ This, coupled with increasing religious intolerance under Archbishop Laud, helped to bring on the English Civil War.⁵⁵⁴

In the eighteenth century, the Whig-dominated Church of England became more latitudinarian in its practice and theology, and less intolerant of dissenters. A general principle of toleration or free exercise was hardly embraced, but Parliament came to recognize that denominations outside the Church of England could be sufficiently loyal and virtuous that they should not be suppressed. First, trinitarian Protestants (Presbyterians, Baptists, Independents) petitioned for and received toleration; later, other denominations (Unitarians, and later Jews and Catholics) sought and received similar treatment. Each was debated on its merits. After the Glorious Revolution and the Hanoverian succession, the divine right of kings was understandably out of vogue, and the idea of a close "union" between church and state lost its appeal. Britain had evolved into a tolerant establishment, in which the state supported and controlled an official church but permitted a limited range of alternative faiths to worship publicly without penalty.

William Warburton, the Bishop of Gloucester and the leading eighteenth-century theorist of the Anglican establishment, argued that church and state were distinct and mutually independent, but allied in a joint enterprise of governing of society.⁵⁵⁵ The state

Hooker follows that of Crowley. See Crowley, *Erastianism in England to 1640*, *supra* note 541, at 559-66.

552. See H. HENSLEY HENSON, *STUDIES IN ENGLISH RELIGION IN THE SEVENTEENTH CENTURY* 144 (1903).

553. See Crowley, *Erastianism in England to 1640*, *supra* note 541, at 563, 566.

554. See Crowley, *Erastianism in the Long Parliament*, *supra* note 541 at 451.

555. See generally WILLIAM WARBURTON, *THE ALLIANCE BETWEEN CHURCH AND STATE* (1736).

needed the aid of the church to reinforce obedience to the laws and the performance of moral duties; the church needed the aid of the state for protection and financial support, in return for which it ceded its independence. Warburton's arguments were often borrowed by supporters of establishment on this side of the Atlantic.⁵⁵⁶

In the colonial Virginia establishment prior to the Revolution, there was little theorizing about the rationale for the establishment. There were strenuous church-state disputes, to be sure, but with few exceptions the disputants took for granted the legitimacy of the religious establishment. Thus, Landon Carter, a leading figure in Virginia gentry anticlericalism, could write of the "Necessity of Connection between the Religious and Civil Society,"⁵⁵⁷ while Robert Carter Nicholas, a defender of the establishment, wrote in similar terms of "that necessary, that friendly and amiable Alliance between Church and State."⁵⁵⁸ Church-state arguments in colonial Virginia were primarily over the locus of authority in the Church—some contending that ministers should receive a dependable and adequate income so that they could exercise independence in their preaching, and others contending that lay control was necessary for the discipline of the clergy.⁵⁵⁹ No one seriously disputed the close relation between government and the institutions of religion.

C. Post-Independence Justifications for American Establishments

In post-Independence America, Hobbes' idea took a republican cast. Observers then, and historians since, have stressed the close connection between republicanism, support for the cause of Independence, and the reformed Protestantism of the colonies, especially in the antihierarchical form that it took after the First Great Awakening. Anglicanism and Catholicism were associated with monarchism. Presbyterianism, Congregationalism, and Baptist ecclesiology were associated with republicanism and

556. See Quinlivan, *supra* note 25, at 10-11, 37-39.

557. *Id.* at 21 (quoting LANDON CARTER, A LETTER TO THE RIGHT REVEREND FATHER IN GOD 17-18 (1759)).

558. *Id.* at 34 (quoting Virginia Gazette, Supplement, May 20, 1773).

559. *Id.* at 19-20, 38-39.

varying degrees of localism and federalism.⁵⁶⁰ Burke pointed to the religious sensibility of America as a leading explanation for the Revolution:

Religion, always a principle of energy, in this new people is no way worn out or impaired; and their mode of professing it is also one main cause of this free spirit. The people are Protestants, and of that kind which is the most adverse to all implicit submission of mind and opinion. This is a persuasion not only favorable to liberty, but built upon it All Protestantism, even the most cold and passive, is a sort of dissent. But the religion most prevalent in our northern colonies is a refinement on the principle of resistance: it is the dissidence of dissent, and the protestantism of the Protestant religion.⁵⁶¹

Moreover, the reformed Protestant emphasis on rectitude, sobriety, thrift, and virtue marched hand in hand with the civic republican virtue to which the new nation aspired.

During the years immediately preceding enactment of the First Amendment, interest in some form of official support for religion was on the rise. After the heady rush of public spiritedness that accompanied the Revolution, many leaders became convinced that public virtue was seriously on the decline in the new nation. This conviction led in different directions: in some, it led to a loss of confidence in republicanism;⁵⁶² in some it inspired development of a new science of politics that would rely on the clash of interests rather than on virtue as the wellspring of good government;⁵⁶³ and in some it stimulated efforts to reinvigorate institutions of local self-government through which Americans would learn to place the public good above their individual concerns.⁵⁶⁴ But a common

560. See *supra* notes 518-22 and accompanying text.

561. Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), in EDMUND BURKE: SELECTED WRITINGS AND SPEECHES, *supra* note 107, at 159-60.

562. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION 393 (Max Farrand ed., 2d ed. 1966) (quoting Elbridge Gerry, a delegate at the Convention, who stated: "At the beginning of the war we possessed more than Roman virtue. It appears to me it is now the reverse. We have more land and stock-jobbers than any place on earth.").

563. See THE FEDERALIST NO. 51 (James Madison).

564. See generally AMAR, *supra* note 4, at 3-133 (arguing that the Bill of Rights protected those institutions necessary to ensure an educated and virtuous population); Frank I.

reaction was to attribute the decline in public virtue to the paucity of public religious worship and teaching, which was the result of the collapse of the established church, especially in the South.⁵⁶⁵ Throughout the South, pulpits were empty and resources to attract a learned and able ministry were lacking.⁵⁶⁶ During the Revolution, Virginia lost half of its Anglican clergy,⁵⁶⁷ and Connecticut a third.⁵⁶⁸ Forty Virginia parishes were bereft of a minister.⁵⁶⁹ The Anglican clergy—now calling themselves “Protestant Episcopal”—informed the Virginia legislature that houses of worship were in short supply and “in a ruinous or ruined condition; and the clergy for the most part dead or driven away and their places unfilled.”⁵⁷⁰ They needed resources to rebuild. That is why, with only a few exceptions, every state witnessed a movement to institute or strengthen a religious establishment, albeit on broadly inclusive lines.⁵⁷¹

The birth of modern republican government is popularly associated with a rise of secularism, or at least a decline in reliance on religion for civic ends. But that did not seem so obvious to the founding generation. To their minds, republicanism both presupposed and demanded a degree of public virtue exceeding that required in monarchical regimes. In a monarchy, obedience to the laws could be enforced through the apparatus of coercion. In a republic, where the people are self-governing, it was generally thought that coercion had to be replaced, or at least supplemented, with a regard to the public good. Gordon Wood explains: “In a monarchy each man’s desire to do what was right in his own eyes could be restrained by fear or force. In a republic, however, each man must somehow be persuaded to submerge his personal wants into the greater good of the whole.”⁵⁷² Thus, while creation of the

Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) (explaining institutions of collective self-government in America as a vestige of republicanism).

565. See BUCKLEY, *supra* note 77, at 73-74; RHODEN, *supra* note 105, at 134.

566. See BUCKLEY, *supra* note 77, at 81-82; RHODEN, *supra* note 105, at 118, 120-21.

567. 2 BRYDON, *supra* note 60, at 429.

568. RHODEN, *supra* note 105, at 133.

569. 2 BRYDON, *supra* note 60, at 429.

570. BUCKLEY, *supra* note 77, at 81.

571. See *supra* notes 317-47 and accompanying text.

572. WOOD, *supra* note 496, at 68.

American republic went hand-in-hand with dismantling establishment of the pro-monarchical establishment of the Church of England, it stimulated concern for religion that would promote republican virtue. As Tocqueville wrote:

Despotism may be able to do without faith, but freedom cannot. Religion is much more needed in the republic they advocate than in the monarchy they attack, and in democratic republics most of all. How could society escape destruction if, when political ties are relaxed, moral ties are not tightened? And what can be done with a people master of itself if it is not subject to God?⁵⁷³

Washington was thus articulating a common view when he stated in his Farewell Address: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.... And let us with caution indulge the supposition that morality can be maintained without religion." He went on to say that a "refined education" might instill morality in minds of a "peculiar structure," but that experience and reason alike showed that this would not be sufficient for the society at large.⁵⁷⁴ In a similar vein, Adams wrote that "religion and virtue are the only foundations not only of republicanism and of all free government but of social felicity under all governments and in all the combinations of human society."⁵⁷⁵ John Witherspoon, the only minister to sign the Declaration of Independence and Madison's professor at Princeton, wrote that "to promote religion is the best and most effectual way of making a virtuous and regular people."⁵⁷⁶ Madison's uncle, also named James Madison, the first post-Independence Episcopal bishop in Virginia, declared that a free and republican society, "[d]estitute of that coercive power, which compels obedience to civil laws," was forced to depend even more

573. TOCQUEVILLE, *supra* note 514, at 294.

574. George Washington, Farewell Address (1796), reprinted in MCCONNELLETAL., *supra* note 76, at 53-54.

575. Letter from John Adams to Benjamin Rush (Aug. 28, 1811), in *THE SPUR OF FAME: DIALOGUES OF JOHN ADAMS AND BENJAMIN RUSH, 1805-1813*, at 192 (John A. Schutz & Douglass Adair eds., 1966).

576. JOHN WITHERSPOON, *LECTURES ON MORAL PHILOSOPHY* 110 (Varnum Collins ed., 1912).

upon virtue and thus on religion.⁵⁷⁷ The Massachusetts Constitution of 1780 justified the compulsory support for religion by a similar invocation of social utility:

[As the] happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality, ... [and that] these cannot be generally diffused through a community but by the institution of the public worship of God and of public instructions in piety, religion, and morality....⁵⁷⁸

Advocates of the general assessment bill in Virginia offered much the same rationale: "Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers...."⁵⁷⁹

As these speeches and documents illustrate, the official justification for governmental support for religion, by the 1780s, had ceased to have any real theological component. There was no mention of the need to glorify or worship God or to promote the salvation of members of the Commonwealth. There was only the civic justification that belief in religion would preserve the peace and good order of society by improving men's morals and restraining their vices. As the Presbytery of Hanover declared in a position statement favoring the general assessment bill in Virginia: "Religion as a spiritual system is not to be considered as an object of human legislation, but may in a civil view, as preserving the existence and promoting the happiness of society."⁵⁸⁰ Indeed, Isaac Backus, a Baptist minister and leading advocate of disestablishment in Massachusetts, mocked the change in justification: "A little

577. RHODEN, *supra* note 105, at 134.

578. MASS. CONST. of 1780 art. III, *reprinted in* MCCONNELL ET AL., *supra* note 76, at 33-34.

579. A Bill Establishing a Provision for Teachers of the Christian Religion (Dec. 24, 1784), *reprinted in* MCCONNELL ET AL., *supra* note 76, at 60.

580. WILLIAM HENRY FOOTE, *SKETCHES OF VIRGINIA: HISTORICAL AND BIOGRAPHICAL*, FIRST SERIES 338 (1966) (commenting on the Presbytery of Hanover's 1784 position statement favoring the general assessment bill in Virginia).

while ago," he said, the establishment was "for religion," but now it is said to be "for the good of *civil society*."⁵⁸¹

The most thorough explanation of the rationale for religious establishment during the founding period was offered by Massachusetts Chief Justice Theophilus Parsons in the case of *Barnes v. First Parish* in 1810.⁵⁸² Because Parsons was the principal architect of Article III, the religion section of the Massachusetts Constitution of 1780, there was no better person to set forth its purposes and to defend it against the disestablishmentarian attack.⁵⁸³ For his day in Massachusetts, Parsons was an advocate of an unusually broad freedom of religion. One of his first public causes was to oppose the proposed state constitution of 1778 for its failure to provide adequate protection for the rights of conscience. In particular, he protested the limitation of free exercise rights to Protestants "when in fact, that free exercise and enjoyment is the natural and uncontrollable right of every member of the State."⁵⁸⁴ His defense of the Massachusetts establishment, therefore, should not be mistaken for a defense of religious intolerance.

Parsons began his opinion in *Barnes* on a civic note, observing the connection between the public good and the state of public morality:

The object of a free civil government is the promotion and security of the happiness of the citizens. These effects cannot be produced, but by the knowledge and practice of our moral duties, which comprehend all the social and civil obligations of man to man, and of the citizen to the state. If the civil magistrate in any state could procure by his regulations a uniform practice of these duties, the government of that state would be perfect.⁵⁸⁵

This was an utterly conventional articulation of civic republican principle: standard fare for his day and time.

581. Isaac Backus, *An Appeal to the Public for Religious Liberty*, in BACKUS, *supra* note 149, at 324.

582. 6 Mass. 401 (1810).

583. 1 MCLOUGHLIN, *supra* note 246, at 602.

584. *Id.* at 610-11; see THEOPHILUS PARSONS, *THE ESSEX RESULT* (Apr. 29, 1778), reprinted in *THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780*, at 330 (Oscar Handlin & Mary Handlin eds., 1966).

585. *Barnes*, 6 Mass. at 404.

More challenging was his argument that "it is not enough for the magistrate to define the rights of the several citizens, as they are related to life, liberty, property, and reputation, and to punish those by whom they may be invaded."⁵⁸⁶ This proposition directly contradicted Jefferson's dictum that "it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."⁵⁸⁷ In that opinion, Jefferson was not alone. Petitioners against the Virginia assessment bill from Montgomery County wrote:

Cannot it be denied that civil laws are not sufficient? We conceive it cannot, especially where the minds of men are disposed to an Observance of what is right and an Observance of what is wrong. And we Conceive also that Ideas of right and wrong, may be derived merely from positive law, without seeking a higher original.⁵⁸⁸

Parsons offered two reasons why law and subsequent punishment were not sufficient; these were based on the law's scope and its enforcement. First:

Human laws cannot oblige to the performance of the duties of imperfect obligation; as the duties of charity and hospitality, benevolence and good neighborhood; as the duties resulting from the relation of husband and wife, parent and child; of man to man, as children of a common parent; and of real patriotism, by influencing every citizen to love his country, and to obey all its laws. These are moral duties, flowing from the disposition of the heart, and not subject to the control of human legislation.⁵⁸⁹

586. *Id.*

587. A Bill to Establish Religious Freedom (1786), reprinted in MCCONNELLETAL., *supra* note 76, at 70.

588. Petition from Inhabitants of Montgomery County to the Honorable Speaker and Gentlemen of the House of Delegates (Nov. 15, 1785), quoted in Quinlivan, *supra* note 25, at 3.

589. *Barnes*, 6 Mass. at 404.

Second:

Neither can the laws prevent, by temporal punishment, secret offences, committed without witness, to gratify malice, revenge, or any other passion, by assailing the most important and most estimable rights of others. For human tribunals cannot proceed against any crimes, unless ascertained by evidence; and they are destitute of all power to prevent the commission of offences, unless by the feeble examples exhibited in the punishment of those who may be detected.⁵⁹⁰

Let us consider these arguments.

Drawing on the distinction between law and morality, which he terms “perfect” and “imperfect” obligation, Parsons argues that society has a strong interest in behavior that, by its nature, is not susceptible to legal definition and enforcement. He gives a number of persuasive examples of “imperfect obligation[s]” that “flow[] from the disposition of the heart, and [are] not subject to the control of human legislation,” including charity and hospitality, benevolence and neighborliness, familial responsibility, and patriotism. These are not merely “private” moral concerns; they affect the happiness of the community. Yet they cannot be legislated. If society wishes to influence its members to observe these imperfect obligations, it must attempt to inculcate the appropriate beliefs and habits. Moreover, he points out, even among those social duties that *are* susceptible to legal definition, the arm of the law falls short of full enforcement. He gives the example of acts committed in secret, without witnesses. Again, the remedy is to attempt to cultivate a spirit of obedience to the laws, as an alternative and auxiliary to coercion and after-the-fact punishment.

Hobbes claimed that “it is evident to the meanest capacity, that men’s actions are derived from the opinions they have”⁵⁹¹ In effect, Hobbes argued, it is too late to seek to control human behavior after bad acts have already taken place. A wise ruler will attempt to shape the habits, inclinations, and character of the people. As Burke argued, “it is the right of government to attend much to opinions; because, as opinions soon combine with passions,

590. *Id.*

591. *See supra* note 508 and accompanying text.

even when they do not produce them, they have much influence on actions."⁵⁹² Let us be hard-headed about this: Who was right? Jefferson or Parsons?

The next step in Parsons' argument is that the best way for the government to inculcate the civic virtue needed for community happiness is to support religion. That is a far more troubling claim from our modern disestablishmentarian point of view. But it is hard to dispute the fact that throughout most of history, religious teaching has been one of the most powerful means of inculcation of ideas of morality. As Washington warned, "let us with caution indulge the supposition that morality can be maintained without religion."⁵⁹³ If Washington is right, Parsons would argue, then it is the province of government to be concerned about the public teachings of religion, from a civil, even if not a spiritual, point of view. In this, Parsons was not breaking new ground. For almost a century, the established church had been defended on the basis of its social utility.⁵⁹⁴

But what about truth? Interestingly, Parsons' argument did not seem to rest on the truth of the doctrine being taught. The following passage is the only part of his opinion that even touches on the issue of truth:

In selecting a religion, the people [of Massachusetts] were not exposed to the hazard of choosing a false and defective religious system. Christianity had long been promulgated, its pretensions and excellences well known, and its divine authority admitted. This religion was found to rest on the basis of immortal truth; to contain a system of morals adapted to man, in all possible ranks and conditions, situations and circumstances, by conforming to which he would be meliorated and improved in all the relations of human life; and to furnish the most efficacious sanctions, by bringing to light a future state of retribution.⁵⁹⁵

592. Edmund Burke, Speech on the Petition of the Unitarian Society (1792), in EDMUND BURKE: SELECTED WRITINGS AND SPEECHES, *supra* note 107, at 315.

593. George Washington, Farewell Address (1796), reprinted in MCCONNELLETAL., *supra* note 76, at 53-54.

594. The leading defense of the English establishment was articulated by William Warburton. See generally WARBURTON, *supra* note 555, at 7.

595. Barnes, 6 Mass. at 406.

Christianity "had long been promulgated." Its "pretensions and excellences" were "well known." These words were carefully chosen. Parsons does not say that Christianity's pretensions were justified or that its excellences were truly excellent, only that these were "well known." The religion "was found"—by whom? on what basis? with what validity?—to "rest" on the basis of immortal truth. That is nothing more than a statement of sociological fact. In Massachusetts in 1780, the Christian religion had indeed been "found" to rest on immortal truth, but that is a far cry from saying that it was actually true. I do not mean to suggest that Parsons did not believe in the truth of the Christian religion; for all we know, Parsons was orthodox in his views and practices. But its truth was not a necessary element in his justification for the establishment.

At most, Parsons seems to be saying that it is convenient that the established religion happens to be true, or perhaps essential that it is commonly thought to be true. Actual truth does not seem to be necessary for social utility for Parsons any more than it was for the more candid Machiavelli.⁵⁹⁶ The essential fact is that the established religion's "system of morals" is well adapted to man and that its teaching of divine retribution serves as an effective sanction for good behavior. Parsons thus concludes this paragraph: "And this religion, as understood by Protestants, tending, by its effects, to make every man submitting to its influence, a better husband, parent, child, neighbor, citizen, and magistrate, was by the people established as a fundamental and essential part of their constitution."⁵⁹⁷ The great claim of the Protestant Christian religion, according to Parsons, is its tendency to make people better citizens.

By the time of the American Founding, then, supporters of religious establishments in this country had adopted the political rationale: that religion should be established to serve the interests of society by inculcating ideas that promote the public interest.

In his *Barnes* opinion, Parsons also addressed what he considered to be the three principal "objections [that] have at times been made to this establishment": that taxing people for the support of religion

596. See *supra* note 507 and accompanying text. Of course, we will never know whether advocates of religion on account of social utility also believed it to be true, because (except in extraordinary cases like Machiavelli) they need to maintain at least the pretense of conviction. Unless the religion is *thought* to be true, it will not be socially useful.

597. *Barnes*, 6 Mass. at 406.

is a violation of liberty of conscience, that it is unfair to force people to support religions they do not agree with, and that it is "anti-christian for any state to avail itself of the maxims of Christianity, to support civil government."⁵⁹⁸ Parsons responded that "the first objection seems to mistake a man's conscience for his money."⁵⁹⁹ Liberty of conscience, he reasoned, is fully satisfied by the right to exercise one's own religious opinions and to refrain from attending any religious instruction of which one "conscientiously disapproves."⁶⁰⁰ It does not include the right not to have one's tax dollars used to promote ideas one does not share. This is obviously contrary to the view taken by Jefferson and Madison that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."⁶⁰¹ But it bears strong resemblance to modern constitutional doctrine, which permits the government to extract money for promotion of the government's own messages (however abhorrent they may be to the taxpayer),⁶⁰² as well as for controversial expenditures such as abortions or indecent or blasphemous art.⁶⁰³ Although the government may not force an individual to speak or to carry the government's message,⁶⁰⁴ it may force him to pay for it. To be sure, modern constitutional doctrine makes an exception for specifically *religious* governmental expenditures,⁶⁰⁵ but it is noteworthy that Jefferson and Madison drew no such line. For the most part, Parsons' distinction between requiring a person to engage in an

598. *Id.* at 408.

599. *Id.*

600. *Id.*

601. Bill for Establishing Religious Freedom, reprinted in MCCONNELLE ET AL., *supra* note 76, at 69-70.

602. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Miller v. Cal. Comm'n on the Status of Women*, 469 U.S. 806 (1984).

603. *NEA v. Finley*, 524 U.S. 569 (1998); *Harris v. McRae*, 448 U.S. 297 (1980); see also Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991). Modern constitutional doctrine, however, does not permit the government to force people to contribute toward the speech of other private groups, except on a viewpoint-neutral basis. See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *United Food & Commercial Workers Union, Local 1099 v. S.W. Ohio Reg. Transit Auth.*, 163 F.3d 341 (6th Cir. 1998).

604. *E.g.*, *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

605. *Mitchell v. Helms*, 530 U.S. 793 (2000); *Flast v. Cohen*, 392 U.S. 83, 103 (1968).

objectionable activity and making him pay taxes for support of that activity, still seems to carry weight.

As for the second argument, Parsons argued that it is "wholly in mistake" to think that "it is intolerant to compel a man to pay for religious instruction, from which, as he does not hear it, he can derive no benefit."⁶⁰⁶ The benefits derived from the inculcation of religious principles of virtue, Parsons noted, are not enjoyed so much by the listener, as by the public at large. The object of the establishment is not to confer a benefit on those who wish to attend religious services, but to "form and cultivate reasonable and just habits and manners; by which every man's person and property are protected from outrage, and his personal and social enjoyments promoted and multiplied."⁶⁰⁷ Even unbelievers receive this benefit: "From these effects every man derives the most important benefits; and whether he be, or be not, an auditor of any public teacher, he receives more solid and permanent advantages from this public instruction, than the administration of justice in courts of law can give him."⁶⁰⁸ The argument is not dissimilar to the argument in favor of tax support of education: We all benefit when our fellow citizens are educated, even if we have no children in school.

The third argument to which Parsons responded is a religious objection: that it is "anti-christian" to use the Christian religion for state purposes. Parsons devoted many more words to this objection than to the others, but it is hard to escape the conclusion that his response to this is the weakest. The nub of his answer was that Christians should not object to having their religion used in this way because "from the genius and temper of this religion, and from the benevolent character of its Author, we must conclude that it is his intention that man should be benefitted by it in his civil and political relations."⁶⁰⁹ Perhaps; but, this is far from an obvious inference. Many would say—and in Parsons' day, many were saying—that it is an insult to God and an impious usurpation of the role of the church for the government to use religion for civil purposes and to presume to decide what religious truths should be taught to the people. As Elisha Williams, a Connecticut preacher

606. *Barnes*, 6 Mass. at 409.

607. *Id.*

608. *Id.* at 410.

609. *Id.*

and rector of Yale during the Great Awakening, put it: "[I]f Christ be Lord of the conscience, the sole King in his own kingdom, then it will follow, that all such as in any manner or degree assume the power of directing and governing the consciences of men, are justly chargeable with invading his rightful dominion."⁶¹⁰ Or, as James Madison put it in his *Memorial and Remonstrance*, for the state to "employ Religion as an engine of Civil policy ... [is] an unhallowed perversion of the means of salvation."⁶¹¹ Such arguments may have little *secular* force: Why should nonbelievers care whether the Christian religion is subjected to an "unhallowed perversion"? But they carried weight among Parsons' audience, and his response seems tepid and unconvincing. It is, indeed, a remarkable feature of the debates over establishment and disestablishment at the Founding that the advocates of the establishment tended to offer secular justifications grounded in the social utility of religion, whereas the most prominent voices for disestablishment often focused more on the theological objections.

III. REFLECTIONS

In the absence of more serious historical consideration of establishment and disestablishment at the time of the Founding, the Supreme Court has based its interpretation of the First Amendment on abstractions, such as "advancement of religion," "entanglement," "coercion," "endorsement," "neutrality," and above all the "wall of separation between church and state."⁶¹² While not entirely inaccurate, these abstractions are several steps removed from the actual experiences that lay behind the decision to deny the

610. ELISHA WILLIAMS & THOMAS CUSHING, *THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS* (Boston, 1744), reprinted in MCCONNELL ET AL., *supra* note 76, at 47, 48.

611. *Memorial and Remonstrance Against Religious Assessments* from James Madison to the Honorable General Assembly of the Commonwealth of Virginia (1785), reprinted in MCCONNELL ET AL., *supra* note 76, at 63, 65.

612. See *Lee v. Weisman*, 505 U.S. 577, 595, 601, 602, 609, 611 (1992). I will not focus in this Article on the concept of "separation," which has been critically addressed in recent scholarship. See, e.g., HAMBURGER, *supra* note 497 (analyzing the history of the concept of church-state separation in America). Other recent works that address key historical aspects of disestablishment include STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995) and JOHN WITTE, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* (2000).

government authority to erect or maintain an establishment of religion. At best they are oversimplifications; in some respects they are misleading.

For example, the presence or absence of a "secular legislative purpose" is said to be the first hallmark of an establishment.⁶¹³ At the end of the eighteenth century, however, advocates of established religion almost invariably justified the establishment on the basis of its social utility, not its religious truth or spiritual value. "[T]he happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality," according to the Massachusetts Constitution of 1780.⁶¹⁴ It was the *opponents* of the establishment, the proponents of *disestablishment*, who were more likely to offer religious or theological justifications for their position. Even Jefferson's Bill for Establishing Religious Freedom began: "Well aware that Almighty God hath made the mind free," and declared established religion "a departure from the plan of the Holy Author of our religion."⁶¹⁵ Should *disestablishment* be faulted for reliance on a "nonsecular purpose?"

Similarly, the Court has said that we must judge whether a challenged provision is an establishment according to whether it has the effect of "advancing religion."⁶¹⁶ But one of the principal arguments against establishment was that it was harmful to religion, and many sought disestablishment in order to strengthen and revitalize Christianity. Many observers of American history have concluded that disestablishment had precisely that effect: Disestablishment "advanced" religion. Tocqueville reported that religion was stronger in America than in any other country, and attributed this strength to the separation between church and

613. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). It is not entirely clear what "secular legislative purpose" means. In the most careful study of the issue, Professor Andrew Koppelman suggests that a law lacks a "secular purpose" when its justification is "based on the tenets of some religion." Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002).

614. MASS. CONST. of 1780 art. III pt. 1, reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 178, at 957.

615. A Bill For Establishing Religious Freedom (1786), reprinted in MCCONNELL ET AL., *supra* note 76, at 69.

616. *Lemon*, 403 U.S. at 612. To be more precise, the Court looks to a "primary effect" of either "advanc[ing] [or] inhibit[ing]" religion, but it has made clear that any substantial "advancing" effect is sufficient, and has never invalidated a law under the Establishment Clause on the ground that it "inhibits" religion.

state.⁶¹⁷ Madison similarly commented that "the number, the industry, and the morality of the Priesthood, & the devotion of the people have been manifestly increased by the total separation of the Church from the State."⁶¹⁸ Does the *disestablishment* of religion thus fail the test of the First Amendment?

At times, the Religion Clauses of the First Amendment are seen as a tug-of-war between a "pro-religion" Free Exercise Clause and an "anti-religion" Establishment Clause. The former is associated with dissident religious sects and the latter with the rationalistic Enlightenment, requiring the Court to perform a kind of balancing act between two clauses that are in "tension."⁶¹⁹ Yet the history of the founding period shows that free exercise and disestablishment were supported politically by the same people, with the strongest support for disestablishment coming from the most evangelical denominations of Americans.⁶²⁰ How can this be squared with the conventional explanation?

Almost lost in the Supreme Court's analysis is the issue of government *control* over religion, which is arguably the most salient aspect of the historical establishment.⁶²¹ The monarchy in England and the gentry in Virginia, who controlled the Church under the establishment, were often tepid in their religious zeal and parsimonious in their support for religious ministry. Religious motives and the advancement of religion were not often in the forefront of their ecclesiastical policy. But in one respect they were consistent

617. TOCQUEVILLE, *supra* note 514, at 271-77.

618. Letter from James Madison to Robert Walsh (Mar. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 1808-1819, at 432 (Gaillard Hunt ed., 1908).

619. See, e.g., Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) (treating the free exercise and establishment clauses as potentially in conflict); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 123 (treating this conflict as inherent).

620. See HAMBURGER, *supra* note 497, at 92.

621. An exception is the Court's line of cases guaranteeing the autonomy of churches with respect to their governing structure, which the Court has failed to integrate into its general First Amendment jurisprudence. See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952). *But cf.* *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (allowing states to override internal church judgments regarding institutional structure through "neutral principles"). For an influential article making this point, see Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

and insistent: the doctrines, personnel, and practices of the Church should support and reinforce the authority of the state, that is, their own authority. English kings would happily change their religious spots, as Henry VIII demonstrated, and the Virginia gentry would humiliate or impoverish an impertinent local minister, but neither would brook insubordination. The dominant purpose of the establishment was not to advance religious truth, but to control and harness religion in service of the state.

To a great extent, this impulse to control religion survived disestablishment. In the antebellum struggle to define what disestablishment would mean, the principal conflict was between those who wished the churches of America to be vigorous and autonomous, and those who wished the state to take over the function of shaping national character, and to foster a new, more secular ideal of republican virtue. That will be the subject of Part II.