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1780 MASSACHUSETTS CONSTITUTION

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One Public Religion, Many Private Religions: John Adams and the 1780 Massachusetts Constitution

John Witte, Jr.¹

John Adams is gaining new respect today both for his political shrewdness and his religious wisdom. Both these talents were on full display in the 1780 Massachusetts Constitution that Adams largely crafted. Striking a via media between defenders of the traditional Congregationalist establishment and religious dissenters, Adams' constitution established one public religion but granted freedom to all peaceable private religions. This juxtaposition reflected Adams' political and religious philosophy. Every state and society, he believed, had to establish by law some common values and beliefs to undergird and support the plurality of private religions that it embraced. The notion that a state and society could remain neutral and purged of any public religion was, for Adams, a philosophical fiction. Absent a commonly adopted set of values and beliefs, politicians would invariably hold out their private convictions as public ones. But every state and society also had to respect and protect a plurality of forms of religious exercise and association. The notion that a state could coerce all persons into adherence and adherents to a single established religion alone was, for Adams, equally a philosophical fiction. Persons would make their own private judgments in matter of faith and conscience, even if they pretended to conformity.

JOHN ADAMS: LIFE AND LITERATURE, RELIGION AND POLITICS

“Popularity was never my mistress,” John Adams wrote glumly in 1787, “nor was I ever, or shall I ever be, a popular man.”² Two decades later, Adams remained pessimistic but stoic about his legacy: “Mausoleums, statues, [and] monuments will never be erected to me. I wish them not. Panegyric romances will never be written, nor flattering orations spoken, to transmit me to posterity in brilliant colors. No, nor in true colors.”³

¹ Portions of this article are drawn from my “A Most Mild and Equitable Establishment of Religion: John Adams and the Massachusetts Experiment,” in James H. Hutson, ed., *Religion and the New Republic: Faith in the Founding of America* (Lanham/New York/Oxford: Rowman & Littlefield, 2000), 1-40. I wish to thank Charles Hooker for his excellent research assistance.

² Letter to James Warren (Jan. 9, 1787), quoted by David McCullough, *John Adams* (New York: Simon & Schuster, 2001), 373.

³ Letter to Benjamin Rush (March 23, 1809), in John A. Schutz and Douglass Adair, eds., *The Spur of Fame: Dialogues of John Adams and Benjamin Rush 1805-1813* (Indianapolis: Liberty Fund, Inc., 1966), 151. See detailed discussion in Joseph J. Ellis, *Passionate Sage: The Character and Legacy of John Adams*, 2d ed. (New York/London: W.W. Norton, 2001), 19-83.

For a century and a half after his death in 1826, John Adams' fears about his legacy proved painfully prophetic. With some notable exceptions,⁴ historians tended to treat Adams sparingly, even grudgingly -- offering their dull pages about his life and work before moving to more colorful accounts of Benjamin Franklin, George Washington, Thomas Jefferson, and James Madison. To be sure, no serious historian denied Adams his impressive political resume. Noteworthy were his roles as legal counsel in the 1761 writs of assistance case; as "colossus" and "atlas" of independence and revolution in the Continental Congress; as chair of the committee that drafted the 1776 Declaration of Independence; as drafter of the 1780 Massachusetts Constitution; as first Vice-President and second President of the United States. Some biographers took further note of Adams' revealing correspondence with his beloved wife Abigail,⁵ and his late-life correspondence with Thomas Jefferson.⁶ Adams was certainly known and portrayed in "true colors." But just not in "brilliant colors."

No longer. While "masoleums, monuments, and statues" of Adams might still be wanting, writings of "brilliant color" are now in ample supply. Building on new critical editions of Adams' autobiography, papers, and letters, several recent studies have brought Adams to brilliant new light and life.⁷ A veritable Adams renaissance is now upon us, and Adams is emerging rapidly from the shadows of the other founders. David McCullough, Pulitzer-Prize winning biographer of Adams, offers a telling anecdote. Five years ago, McCullough had set out to write a joint biography of Adams and Jefferson, fearing that "Adams could not hold his own with Jefferson." By the end, McCullough worried that Jefferson could not hold his own with Adams. "[O]n virtually all points of comparison between the two men, Jefferson comes in second."⁸

In this spate of new writings, much has been made of John Adams' Puritan origins and Republican views of religion and government. Adams was born in 1735 in Braintree,

⁴ See, e.g., Catherine Drinker Bowen, *John Adams and the American Revolution* (Boston: Little, Brown and Company, 1950); Page Smith, *John Adams*, 2 vols. (New York: Doubleday, 1962); Gilbert Chinard, *Honest John Adams* (Boston: Little, Brown, 1933).

⁵ See collection in C.F. Adams, ed. *Familiar Letters of John Adams and His Wife Abigail During the Revolution* (New York: Hurd & Houghton, 1876); id., ed., *Letters of John Adams Addressed to His Wife*, 2 vols. (Boston: Little and Brown, 1841); Andrew Oliver, *Portraits of John and Abigail Adams* (Cambridge, MA: Belknap Press, 1967); Charles W. Aikers, *Abigail Adams: An American Woman* (Boston: Little, Brown, 1980).

⁶ See Paul Wiltstach, ed., *Correspondence of John Adams and Thomas Jefferson* (Indianapolis: Bobbs-Merrill Company, 1925); Lester J. Cappon, ed., *The Adams-Jefferson Letters*, 2 vols. (Chapel Hill, NC: University of North Carolina Press, 1959).

⁷ For primary texts, see L.H. Butterfield, ed., *Diary and Autobiography of John Adams*, 4 vols. (Cambridge, MA: Belknap Press, 1961); L. Kinvin Wroth and Hiller B. Zobel, eds., *Legal Papers of John Adams*, 3 vols. (Cambridge, MA: Belknap Press, 1965); L.H. Butterfield, et al., eds., *The Book of Abigail and John: Selected Letters of the Adams Family, 1762-1784* (Cambridge, MA: Harvard University Press, 1975). See also more recently Robert J. Taylor, et al., eds., *Papers of John Adams*, 2 vols. (Cambridge: Belknap Press, 1977); C. Bradley Thompson, ed., *The Revolutionary Writings of John Adams* (Indianapolis: Liberty Fund, 2000).

For recent studies, see, e.g., McCullough, *John Adams*; Ellis, *Passionate Sage*; C. Bradley Thompson, *John Adams & the Spirit of Liberty* (Lawrenceville, KS: University Press of Kansas, 1998); John Ferling, *John Adams: A Life* (New York: Henry Holt & Company, 1992); Peter Shaw, *The Character of John Adams* (Chapel Hill: University of North Carolina Press, 1976); John R. Howe, *The Changing Political Thought of John Adams* (Princeton, NJ: Princeton University Press, 1966).

⁸ Quoted in Pauline Maier, "Plain Speaking," *New York Times* (May 27, 2001): ____.

Massachusetts. His mother was a pious homemaker, his father a farmer, cordwainer, and deacon of the local Puritan Congregational Church. The Adams family sent their precocious first-born son to Harvard College in 1751 to prepare for a vocation as minister in the Congregational Church. During his college years, however, Adams grew disenchanted with theology and was drawn more to science and then to law. He was particularly put off by the caustic casuistry of some of the theologians and Congregational preachers of his day. He feared, as he later put, "that the study of Theology and the pursuit of it as a Profession would involve me in endless altercations and make my life miserable, without any prospect of doing good to my fellow men."⁹

Undecided upon his vocation after graduation, Adams took a one-year appointment as a Latin master at a grammar school in Worcester, Massachusetts. He continued to read theology and philosophy that year, but was drawn increasingly to the voracious study of law, history, and politics. In 1756, he resolved to pursue a legal career and took a legal apprenticeship as was typical for a budding lawyer of the day. As was typical for a Puritan of the day, Adams saw the law as a proper vocation for a Christian to pursue. "The Practice of the Law," he later wrote in his diary, "does not dissolve the obligations of morality or of Religion."¹⁰ To the contrary, a good Christian lawyer must be doubly vigilant to cultivate the habits of piety, prudence, industry, integrity, and learning. He must doubly resist the temptations to "cupidity ... avidity, envy, revenge, jealousy," and other "more ungovernable passions."¹¹ These were Puritan virtues to which Adams remained fiercely loyal throughout his long career.

Adams' firm rejection of the vocation of ministry, however, was part and product of his growing detachment from the strict Puritan worship patterns of his youth. Already in the later 1750s and 1760s, to the dismay of family and friends, Adams began to wander regularly into the sanctuaries of other churches and to read the writings of sundry Protestant and Catholic divines along with Hebrew materials. While in Philadelphia for the sessions of the Continental Congress, Adams attended services in Presbyterian, Anglican, Catholic, Quaker, Baptist, and Methodist churches alike.¹² After his ambassadorial tours of Europe, he wrote proudly to his friend Benjamin Rush: "I have attended public worship in all countries and with all sects and believe them all much better than no religion, though I have not thought myself obliged to believe all I heard."¹³ When Rush pressed him to be clear about his denominational affiliation, Adams preferred to describe himself generically as a "life-long church animal" who wandered freely among many religious pastures.¹⁴ "Ask me not ... whether I am a Catholic or Protestant, Calvinist or Arminian. As far as they are Christians, I wish to be a fellow-disciple with them all."¹⁵

⁹ Adams, *Diary and Autobiography*, 3:262-263.

¹⁰ *Ibid.*, 1:43.

¹¹ Quoted in Bernard Bailyn, "Butterfield's Adams: Notes for a Sketch," *William & Mary Quarterly* 19(2) (1962): 238-56, at 254-6.

¹² J.F. Adams, ed., *The Works of John Adams*, 10 vols. (Boston: Little & Brown, 1850-1856), 2:364, 378, 380, 382, 392, 393, 395, 400, 401, 404.

¹³ Letter to Benjamin Rush (April 18, 1808), in *The Spur of Fame*, 106-107

¹⁴ Letter to Benjamin Rush (August 28, 1811), in *ibid.*, 191-195, at 193.

¹⁵ Letter to Benjamin Rush (January 21, 1810), in *ibid.*, 9:626, 627.

Striking this balance between the right to wander in one's private religious worship and the duty to uphold the commonplaces of Christianity was axiomatic for Adams. It not only defined the essence of his personal theology. It also became the first principle of his political philosophy. For Adams, every state and society had to find a way to balance the freedom of many private religions with the establishment of one public Christian religion.¹⁶

On the one hand, Adams said, every state and society had to establish by law some form of public religion, some image and ideal of itself, some common values and beliefs to undergird and support the plurality of private religions that it embraced. The notion that a state and society could remain neutral and purged of any religion was, for Adams, a philosophical fiction. Absent a commonly adopted set of values and beliefs, politicians would invariably hold out their private convictions as public ones. It was thus essential for each community to define the basics of its public religion. And in Adams' day, the basics of this public religion were principally the commonplaces of the Christian religion.

In Adams's view, the creed of this public religion was honesty, diligence, devotion, obedience, virtue, and love of God, neighbor, and self.¹⁷ Its icons were the Bible, the bells of liberty, the memorials of patriots, the Constitution.¹⁸ Its clergy were public-spirited ministers and religiously-devout politicians.¹⁹ Its liturgy was the public proclamation of oaths, prayers, songs, and election and Thanksgiving Day sermons.²⁰ Its policy was state appointment of chaplains for the legislature, military, and prison, state sanctions against blasphemy,²¹ sacrilege, and iconoclasm, state sponsorship of religious societies, schools,

¹⁶ On the prevalence, and plasticity, of this theme in American history, see esp. Martin E. Marty, *The One and the Many: America's Struggle for the Common Good* (Cambridge, MA: Harvard University Press, 1997).

¹⁷ See, e.g., Letter to Zabdiel Adams (June 21, 1776), in Adams, *Works*, 4:194: "The only foundation of a free constitution is pure virtue." Letter to Benjamin Rush (February 2, 1807), in *The Spur of Fame*, 75-77, at 76: "I say then that national morality never was and never can be preserved without the utmost purity and chastity in women; and without national morality a republican government cannot be maintained." Letter to Benjamin Rush (August 28, 1811), in *ibid.*, 191-195, at 192: "I agree with you that in sentiment that religion and virtue are the only foundations not only republican and of all free government but of social felicity under all governments and in all the combinations of civil society." In the same letter, Adams defended the "inculcation of 'national, social, domestic, and religious virtues', 'fidelity to the marriage bed,' 'the sanctification of the Sabbath,' prohibitions 'against ardent spirits, the multiplication of taverns, retailers, dram shops, and tippling houses ... idlers, thieves, sots, and consumptive patients made for the physicians in those infamous seminaries....'" *Ibid.*

¹⁸ See, e.g., Letter to Benjamin Rush (February 2, 1807), in *ibid.*, 75-76: "The Bible contains the most profound philosophy, the most perfect morality, and the most refined policy that ever was conceived upon earth. It is the most republican book in the world. and therefore I will still revere it." See also Letter to Mrs. Adams (July 3 1776), in Adams, *Works*, 9:419-420 regarding the celebration of national symbols and events.

¹⁹ See esp. Massachusetts Constitution (1780), Art. XVIII and notes thereon in Adams, *Works*, 4:227-228.

²⁰ *Ibid.*, See also Letter to Benjamin Rush (June 12, 1812), in *Spur of Fame*, 224-226, at 224 on Thanksgiving sermons.

²¹ Late in this life, Adams expressed regret about blasphemy laws. In a letter of January 23, 1825 to Jefferson, he wrote: "We think ourselves possessed, or, at least, we boast that we are so, of the liberty of conscience on all subjects, and of the right of free inquiry and private judgments in all cases, and yet how far are we from these exalted privileges in fact! There exists, I believe, throughout the whole Christian world, a law which makes it a blasphemy to deny or to doubt the divine inspiration of all the books of the Old and New Testament.... In America, it is not much better; even in our own Massachusetts, which I believe, upon the whole, is as temperate and moderate in religious zeal as most of the States, a law was made in the latter end of the last century, repealing the cruel punishments of the former laws, but substituting fine and imprisonment upon all blasphemers.... I think such laws a great embarrassment, great obstructions

and charities.²² For Adams, this was to be only a "mild and equitable establishment of religion."²³ "[I]t can no longer be called in question," he wrote, that "authority in magistrates and obedience of citizens can be grounded on reason, morality, and the Christian religion, without [succumbing to] the monkery of priests or the knavery of politicians" — or other forms of "ecclesiastical or civil tyranny."²⁴

On the other hand, Adams argued, every state and society had to respect and protect a plurality of forms of religious exercise and association -- whose rights could be limited only by the parallel rights of juxtaposed religions, the concerns for public peace and security, and the duties of the established public religion. "[A]ll men of all religions consistent with morals and property," Adams argued, must "enjoy equal liberty [and] security of property ... and an equal chance for honors and power."²⁵ The notion that a state could coerce all persons into adherence and adherents to a single established religion alone was, for Adams, equally a philosophical fiction. Persons would make their own private judgments in matters of faith, for the rights of conscience are "indisputable, unalienable, indefeasible, [and] divine."²⁶

Moreover, the maintenance of religious pluralism was essential for the protection of religious and other forms of liberty. As Adams put it in a letter to Thomas Jefferson: "Roman Catholics, English Episcopalians, Scotch and American Presbyterians, Methodists, Moravians, Anabaptists [sic], German Lutherans, German Calvinists, Universalitists, Arians, Priestlyians, Socinians, Independents, Congregationalists, Horse Protestants and House Protestants, Deists and Atheists and Protestants qui ne croyent rien [who believe nothing] are ... [n]ever the less all Educated in the general Principles of Christianity: and the general Principles of English and American liberty."²⁷ "Checks and balances, Jefferson" — in the political as well as the religious sphere — Adams went on in another letter, "are our only Security, for the progress of Mind, as well as the Security of Body. Every Species of these Christians would persecute Deists, as [much] as either Sect would persecute another, if it had unchecked and unballanced Power. Nay, the Deists would persecute Christians, and Atheists would persecute Deists, with as unrelenting Cruelty, as any Christians would persecute them or one another. Know thyself, Human nature!"²⁸

to the improvement of the human mind.... I wish they were repealed. The substance and essence of Christianity, as I understand it, is eternal and unchangeable, and will bear examination forever...." Adams, *Works*, 10:415-16.

²² For Adams' earlier views on this, see esp. *A Dissertation on the Canon and Feudal Law* (1774), in *ibid.*, 3:448-464; and *Thoughts on Government Applicable to the Present State of the Colonies* (1776), in *ibid.*, 4:193-209. For later formulations, see Howe, *Changing Political Thought of John Adams*, 227ff.

²³ Adams, *Works*, 2:399.

²⁴ John Adams, *A Defense of the Constitutions of Government in the United States of America* (1788), preface, in Adams, *Works*, 4:290-297; and *id.*, *A Dissertation on the Canon and Feudal Law* (1774), in *ibid.*, 3:451.

²⁵ Letter to Dr. Price (April 8, 1785), in *ibid.*, 8:232. In Letter to Adrian van der Kemp (October 2, 1818), Adams again praised "freedom of religion" so long as it was "consistent with morals and property." Quoted by Howe, *The Changing Political Thought of John Adams*, 227n.

²⁶ Adams, *Works*, 3:452-456.

²⁷ Letter to Thomas Jefferson (June 28, 1813), in *Adams-Jefferson Letters*, 338-340, at 339-340.

²⁸ Letter to Thomas Jefferson (June 25, 1813), in *ibid.*, 333-335, at 334.

While Adams developed these views of religion and politics in numerous writings and actions over his long career, his most forceful expression of them came in the 1780 Massachusetts Constitution. This was the first state constitution of Massachusetts, which Adams in large measure drafted. The Constitution struck this balance between the establishment of one public religion and the freedom of all private religions. The Constitution's most controversial provisions on religious test oaths and tithes were outlawed by amendments of 1821 and 1833. The harder edges of religious establishment were further blunted by judicial interpretation and legislative innovation over time.²⁹ But Adams' basic model of establishing one public religion, while protecting many private freedoms, remained unchanged in its fundamentals until the twentieth century.

What follows is a summary of the development of the Massachusetts Constitution, and then a careful analysis of how its religion clauses reflect Adams' views.

RELIGION AND THE FORMATION OF THE MASSACHUSETTS CONSTITUTION

On September 1, 1779, 293 delegates gathered in Boston to draft a new constitution for the new State of Massachusetts.³⁰ On September 4, the constitutional convention elected a committee of 27 members — later augmented by four others — to prepare a draft declaration of rights and a frame of government. This committee, in turn, delegated the drafting to a three member subcommittee of James Bowdoin, Samuel Adams, and John Adams. John Adams, widely respected for his legal and political acumen, was selected to push the pen for the subcommittee. He completed his work in mid-October. First the three member subcommittee, then the full drafting committee made some modest alterations to Adam's draft.³¹ The committee's draft was submitted to the full convention for debate on October 28, 1779.³² The convention debated the draft constitution until November 12; Adams participated in this session of the debate, but set sail immediately thereafter for France. The convention completed its deliberations from January 27 to March 1, 1780, now without Adams.

Adams' draft constitution had a preamble and two main parts. Part One was a Declaration of Rights divided into Articles, Part Two was a Frame of Government divided into Chapters. The convention chose to vote separately on each Article of the Declaration of Rights, and each Chapter of the Frame of Government. Ten provisions of Adams' draft constitution touched on matters of religion and religious liberty -- the preamble, Articles I, II, III, VII, and XVIII of the Declaration of Rights, and Chapters I, II, V and VI of the Frame of Government. Five of these ten provisions were approved without comment, controversy, or change.

²⁹ See William C. McLoughlin, *New England Dissent 1630-1833*, 2 vols. (Cambridge: Harvard University Press, 1971); Jacob C. Meyer, *Church and State in Massachusetts From 1740-1833*, repr. ed. (New York: Russell & Russell, 1968).

³⁰ The delegates did not attend all sessions; the highest recorded vote on any issue was 247. Samuel Eliot Morison, "The Struggle over the Adoption of the Constitution of Massachusetts," 1780, *Massachusetts Historical Society Proceedings* 50 (1916-1917): 353-412, 356.

³¹ Letter to Edmund Jennings (June 7, 1780), in Adams, *Works*, 4:216.

³² The draft is reprinted in Adams, *Works*, 4:213-267.

Four of the remaining provisions on religion in Adams's draft garnered modest discussion and revision in the constitutional convention. In Article II, Adams had written: "It is the Duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and preserver of the Universe." After brief discussion, the convention amended this to say: "It is the *right as well as the* duty of all men" so to worship.³³ In Chapter I of the Frame of Government, Adams had stipulated that no person was eligible to serve in the House of Representatives, "unless he be of the Christian religion." The convention struck this provision — though it left untouched the next Chapter, where Adams imposed the same religious conditions upon the offices of Governor and Lieutenant Governor.³⁴ In the same spirit, Adams had proposed in Chapter VI that all state officials and appointees swear the same religious test oath: "that I believe and profess the Christian religion and have a firm persuasion of its truth." The convention insisted on a slightly reworded version of this oath that was to be applied only to elected executive and legislative officers. All other officials were required simply to declare their "true faith and allegiance to this Commonwealth." After several delegates argued for a more specifically Protestant test oath, the convention added to both oaths a transparently anti-Catholic provision, which Adams and others later protested without success: "I do renounce and abjure all allegiance, subjection and obedience to ... every ... foreign Power whatsoever: And that no foreign ... Prelate ... hath, or ought to have, any jurisdiction, superiority, pre-eminence, authority, dispensing, or other power, in any matter, civil, ecclesiastical or spiritual within this Commonwealth...."³⁵ Adams's draft oath had concluded: "So help me God," but had then made specific provision "that any person who has conscientious scruples relative to taking oaths, may be admitted to make solemn affirmation" by other means. After some delegates protested that so generic an exemption might be subject to abuse, the convention restricted the exemption to Quakers only.³⁶ An 1821 amendment to the Constitution expunged the religious test oath for political office altogether.³⁷

Article III, stipulating the payment of religious taxes in support of congregational ministers, was by far "the most controversial one in the whole draft constitution," occupying more than a third of the convention debate.³⁸ Given the heat of the religious liberty debate on the eve of the convention, the controversy was not unexpected. Adams chose not to draft Article III himself. "I could not satisfy my own Judgment with any Article that I thought would be accepted," he later wrote. "Some of the Clergy, or older and graver Persons than myself would be more likely to hit the Taste of the Public."³⁹ Adams

³³ Ibid., 4:221 (emphasis added).

³⁴ Chapter I, Section III. See Chapter II, Section II (requiring that the governor "shall be of the Christian religion"); Section III (requiring that the lieutenant governor "shall be qualified, in point of religion"). Ibid., 4:241, 242, 245, 251.

³⁵ See Chapter VI, Art. I and *Journal*, 97, 109-110 (summarizing debates on February 10, 14, and 15, 1780 about the same).

³⁶ Chapter VI, Article I, with drafts in Adams, *Works*, 4:260-266.

³⁷ Amendment, Art. VI (1821) required the following oath for all officers: "I A.B. do solemnly swear that I will bear true faith and allegiance to the Commonwealth of Massachusetts, and will support the Constitution thereof. So help me GOD." Quakers were again excused from the oath. Amendment, Art. VII (1821) underscored this: "No oath, declaration or subscription, excepting the oath of the previous Article," was required of executive or legislative officers.

³⁸ Robert J. Taylor, *Construction of the Massachusetts Constitution* (Worcester, MA: American Antiquarian Society, 1980), 331.

³⁹ Letter to William D. Williamson (February 25, 1812), in Adams, *Works*, 4:222n.

did, however, approve without reservation a draft that came out of the full drafting committee and, as we shall see, incorporated establishment provisions elsewhere in the constitution.

The first draft of Article III, submitted to the convention on October 28, 1779, read thus:

Good morals, being necessary for the preservation of civil society; and the knowledge and belief of the being of GOD, His providential government of the world, and of a future state of rewards and punishment, being the only true foundation of morality, the legislature hath, therefore, a right, and ought to provide, at the expense of the subject, if necessary, a suitable support for the public worship of GOD, and of the teachers of religion and morals; and to enjoin upon all the subjects an attendance upon these instructions, at stated times and seasons; provided there be any such teacher, on whose ministry they can conscientiously attend.

All monies, paid by the subject of the public worship, and of the instructors in religion and morals, shall, if he requires it, be uniformly applied to the support of the teacher or teachers of his own religious denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.⁴⁰

The first paragraph of this draft Article III, stipulating the necessity and utility of public worship and religious instruction, was a common sentiment and not particularly controversial. The second paragraph, however, mandating the collection of religious tithes to support the same, was a matter of great controversy.

It takes a bit of historical imagination and explication to appreciate the controversy over state collection of church tithes. Article III was designed to raise to constitutional status a colonial pattern of church-state relations, introduced by a law of 1692, and amended several times thereafter.⁴¹ This law blended church and state for purposes of taxation. It designated one territory as both a "parish" and a "township" under the authority of one city council. (In large townships that had more than one church, the multiple "parishes" were called "precincts," and each of these likewise was subject to the same council's authority.) To be a member of the township was automatically to be a member of a parish (or precinct). Each of the circa 290 parishes/townships in Massachusetts was required to have at least one Congregationalist "teacher of religion and morality" (that is, a minister). This minister would lead the local community not only in

⁴⁰ Reprinted in *ibid.*, 4:221-222; a slightly reworded version appears in the *Journal*, Appendix II, at 193.

⁴¹ *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* (Boston: Government Printer, 1869-1922), 1:62-63.

public worship but often in education and charity as well. The community was required to provide him with a salary, sanctuary, and parsonage. Funds for this came from special religious taxes (usually called tithes, sometimes called church, parish, or religious rates). These were collected from all subjects in the township, who were by statutory definition also members of the parish.⁴²

This tithing system worked well enough when all subjects within the same township were also active members of the same church. It did not work so well for persons who were religiously inactive, or were members of a non-Congregationalist Church, whether Baptist, Quaker, Anglican, or Catholic (the principal "dissenting" faiths in the state at the time). As the number of such dissenting churches grew within the townships of Massachusetts, so did the protests to paying these mandatory taxes in support of the Congregationalist ministers and churches.

During the eighteenth century, colonial courts eventually carved out exceptions for some religious dissenters, allowing them to pay their tithes to support their own dissenting ministers and churches. Such dissenters, however, were required to register each church as a separate religious society (or corporation), and to demonstrate their own faithful attendance at the same. Not all dissenting churches were able or willing to meet the registration requirements, and not all townships cooperated in granting the registrations or tithe exemptions.⁴³ If the dissenting church was too small to have its own full-time minister, registration was routinely denied or rescinded. If the dissenting church was conscientiously opposed to legal incorporation and registration, as were Baptists after 1773, their members could not be exempt from taxation. If a member of a registered dissenting church was too lax in his attendance of public worship, he could still be denied exemption from the Congregationalist tithe. And if a town treasurer was too pressed for revenue, or too prejudiced against a certain group, he could refuse to give dissenting ministers their share of the tithes. In many of these cases, the Massachusetts courts proved notably churlish in granting standing, let alone relief, to groups or individuals who protested such inequities.⁴⁴

It was this century-long system of religious taxes that the cryptic second paragraph of Article III was designed to perpetuate. And it was this feature of the inherited tradition of religious establishment that caused such controversy before and at the convention.⁴⁵ The initial reaction to the draft of Article III was so heated that convention members voted to put off debate until November 1. They also voted to suspend the rule that no member could speak twice to the same issue, without requesting special privilege from the chair. Rancorous debate over the Article broke out immediately on November 1. Some condemned the provision as a "too pale an approximation of a proper establishment." Others called for abolition of the Article altogether. Still others decried the insufficient

⁴² See sources and discussion in my "Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?" *Southern California Law Review* 64 (1991): 363-415, at 368-380.

⁴³ Morison, "The Struggle," 370.

⁴⁴ See details in John D. Cushing, "Notes on Disestablishment in Massachusetts, 1780-1833," *William & Mary Quarterly*, 3d ser. 26 (1969): 169-190; McLoughlin, *New England Dissent*, 547-565; Meyer, *Church and State in Massachusetts*, 32-89.

⁴⁵ The objections beforehand are summarized in my "Mild and Equitable Establishment of Religion," 4-9.

recognition of the concessions that dissenters had arduously won over the years. When matters deadlocked on November 3, the delegates appointed a seven member ad hoc committee of distinguished delegates to redraft the controversial Article III.⁴⁶

On November 6, this ad hoc committee put a new draft Article III before the convention that spelled out the prevailing religious tax system in more detail. This new draft was debated intermittently for the next four days, and modest word changes were approved.⁴⁷ On November 10, a motion to abolish the Article altogether was defeated. A slightly amended draft of the Article was passed the following day. The final text of Article III reads thus:

As the happiness of a people, and good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a Community, but by the institution of publick Worship of God, and of public instructions in piety, religion, and morality: Therefore, to promote the happiness and to secure the good order and preservation of their government, the people of this Commonwealth have a right to invest their legislature with power to authorize and require . . . the several Towns, Parishes precincts and other bodies politic, or religious societies, to make suitable provision, at their own Expence, for the institution of the Public worship of GOD, and for the support and maintenance of public protestant teachers of piety, religion and morality, in all causes which provision shall not be made Voluntarily.— And 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 aforesaid, at stated times and seasons, if there be any on whose instructions they can Conscientiously and conveniently attend— PROVIDED, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at times, have the exclusive right of electing their public Teachers, and of contracting with them for their support and maintenance.— And all monies, paid by the Subject of the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose institution he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said monies are raised— And every denomina[t]ion of christians, demeaning themselves peaceably, and as good Subjects of the Commonwealth, shall be equally under the protection of the

⁴⁶ *Journal*, 38-40. Included was Theophilus Parsons discussed *infra*.

⁴⁷ *Ibid.*, 43.

Law: And no subordination of any one sect or denomination to another shall ever be established by law.⁴⁸

This final text routinized, and raised to constitutional status, the traditional tithing system, and outlawed some of the hard-fought concessions that Baptists, Anglicans, and other dissenters had secured through litigation in the prior two decades. As Samuel Eliot Morison writes: "Article III was even less liberal than [the colonial] system, for instead of exempting members of dissenting sects from religious taxation, it merely gave them the privilege of paying their taxes to their own pastors. Unbelievers, non-church goers, and dissenting minorities too small to maintain a minister had to contribute to Congregational worship. The whole Article was so loosely worded as to defeat the purpose of the fifth paragraph [guaranteeing the equality of all sects and denominations]. Every new denomination that entered the Commonwealth after 1780, notably the Universalists and Methodists, had to wage a long and expensive lawsuit to obtain recognition as a religious sect.... [A] subordination of sects existed in fact."⁴⁹

Article III was not without its own concessions, however. The tithe collection system was now to be local and "voluntary" rather than state-wide — allowing Boston and, later, other townships to forgo mandatory tithing and have churches muster their own support through tithes, tuitions, or pew rents. Religious societies could now contract individually with their own minister — presumptively allowing them to pay their tithes directly to their chosen minister rather than to a potentially capricious town treasurer. Local townships and religious societies could now participate in the choice of their community minister, rather than be automatically saddled with a Congregationalist minister. This provision "had some unexpected results. Several of the towns and parishes, which thereby were given the exclusive right to elect their ministers ... were converted to Unitarianism and settled Unitarian pastors over old Calvinist churches."⁵⁰ And the provision that no religious sect or denomination was to be subordinated to another was the first formal statement in Massachusetts history of religious equality before the law not only for individuals but also for groups.

On March 2, 1780, the convention put the final draft of the constitution before the people for ratification. On June 16, 1780, James Bowdoin, the President of the Convention, announced, without caveat, that the entire Constitution had garnered the requisite two-thirds vote.⁵¹ On October 25, 1780, the Constitution went into effect, the first day after ratification that the General Court sat. Among the first acts of the General Court was to pledge its support for religious liberty: "Deeply impressed with a sense of the importance of religion to the happiness of men in civil society to maintain its purity and promote this efficacy, we shall protect professors of all denominations, demeaning

⁴⁸ Ibid., 45.

⁴⁹ Morison, "The Struggle," 371.

⁵⁰ Ibid., 375.

⁵¹ On the controversy surrounding the voting, see sources in my "Mild and Equitable Establishment of Religion," 14-15.

themselves peaceably and as good subjects of the Commonwealth, in the free exercise of the rights of conscience...."⁵²

JOHN ADAMS AND THE MASSACHUSETTS MODEL OF RELIGIOUS LIBERTY

John Adams was both eclectic and pragmatic in crafting the religion clauses of the Massachusetts Constitution. This was part of the reason for his success. Though a Christian believer of Puritan extraction, Adams eschewed rigorous denominational affiliation or rigid doctrinal formulation, as we saw. Though a fierce American patriot, Adams knew the value of history and comparative politics. Much of his three-volume *Defense of the Constitutions of Government in the United States of America* (1788), among other political writings, was devoted to sifting ancient, medieval, and early modern Western polities for useful lessons on the best construction of authority and the best protection of liberty. Many of his letters and other informal writings are chock full of favorable references to Greek, Roman, Catholic, Protestant, and Enlightenment writers alike. Though a vigorous moralist, Adams offered his constitutional formulations without "a pretence of miracle or mystery." Any persons "employed in the service of forming a constitution," he wrote, cannot pretend that they "had interviews with the gods, or were in any degree under the inspiration of Heaven." "[G]overnments [are] contrived merely by the use of reason and the senses." Constitutions "are merely experiments made on human life and manners, society and government."⁵³ There will always be "a glorious uncertainty in the law."⁵⁴

In his constitutional experiment, Adams chose to balance the establishment of one public religion with the freedom of many private religions. This was, in part, a pragmatic choice. Adams knew that the Congregationalists would insist on their establishment, and that the dissenters would insist on their freedom. He sought to respect and protect both interests by combining what he called a "tempered" religious freedom with a "slender" religious establishment.⁵⁵

This was also, in part, a principled choice. Adams was convinced that the establishment of one common public religion among a plurality of freely competing private religions was essential to the survival of society and the state. We must certainly begin "by setting the conscience free," Adams wrote. For "when all men of all religions consistent with morals and property, shall enjoy equal liberty, ... and security of property, and an equal chance for honors and power ... we may expect that improvements will be made in the human character, and the state of society."⁵⁶ But we must just as certainly begin by "setting religion at the fore and floor of society and government," Adams wrote. "Statesmen may plan and speculate for liberty, but it is religion and morality alone which can establish the principles upon which freedom can securely stand."⁵⁷ A common

⁵² Reprinted in Taylor, *Construction*, 162-165, at 164.

⁵³ Adams, *Works*, 4:297.

⁵⁴ Letter to Josiah Quincy (February 9, 1811), in *ibid.*, 9:629-632, at 630.

⁵⁵ Quoted by McLoughlin, *New England Dissent*, 560.

⁵⁶ Adams, *Works*, 8:232.

⁵⁷ Letter to Abigail Adams (1775), quoted and discussed in Edwin S. Gaustad, *A Religious History of America* (New York: Harper & Row, 1966), 127.

"religion and virtue are the only foundation, not only of republicanism and of all free government, but of social felicity under all governments and in all the combinations of human society."⁵⁸ "Without religion, this world would be something not fit to be mentioned in polite company — I mean hell."⁵⁹

THE LIBERTY OF PRIVATE RELIGION. In the 1780 Massachusetts Constitution, Adams dealt rather briefly with the liberty of conscience and the free exercise of religion. He had already stated several times his devotion to the protection of such private religious rights, calling them "indisputable, unalienable, indefeasible, [and] divine."⁶⁰ He had praised the sagacity and sacrifice of his Protestant forebearers in securing such rights for themselves and their posterity.⁶¹ And he saw both the necessity and utility of the continued protection of these rights for all religious groups. As he wrote in the spring of 1780 when the new Constitution was being planned: "our honest and pious Attention to the unalienable Rights of Conscience is our best and most refined Policy, tending to conciliate the Good Will, of all the World, preparing an Asylum, which will be a sure Remedy against persecution in Europe, and drawing over to our Country Numbers of excellent Citizens."⁶²

In the preamble to the 1780 Massachusetts Constitution, Adams spoke of "the power of the people of enjoying in safety and tranquility their natural rights, and the blessings of life," and "the right of the people to take measures necessary for their safety, prosperity and happiness." These words were largely repeated in Article I of the Declaration of Rights: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their Lives and Liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."⁶³

In Article II, Adams tendered more specific protections of religious liberty. "It is the [right as well as the] duty of all men in society, publickly, and at stated seasons to worship the SUPREME BEING, the great Creator and preserver of the Universe. No subject shall be hurt, molested, or restrained, in his person, Liberty, or Estate, for worshipping GOD in the manner and season most agreeable to the Dictates of his own conscience, or for his religious profession or sentiments; provided he doth not Disturb the public peace, or obstruct others in their religious Worship." Article III, at least tacitly, recognized the right to form religious associations, to select one's own minister, and to pay tithes directly to him. Chapter VI included within the ambit of religious freedom the right of Quakers to claim an exemption from the swearing of oaths to which they were "conscientiously opposed."

The freedom of private religion, as Adams defined it, was thus rather closely circumscribed. It was, in effect, the right of each individual to discharge divine duties —

⁵⁸ Letter to Benjamin Rush (August 28, 1811), in Adams, *Works*, 9:635, 636.

⁵⁹ Letter to Thomas Jefferson (April 19, 1817), in *ibid.*, 10:253 at 254.

⁶⁰ *Ibid.* 3:452-456.

⁶¹ *Ibid.* See also his long discussion of the rise of religious liberty among European Protestants, in the *Defense of the Constitutions*, bk. 2.

⁶² Letter to Isaac Smith, Sr. (May 16, 1780), quoted by Taylor, *Construction*, 333-334, n 32.

⁶³ Amendment, Art. CVI (1982) rendered "all men" as "all persons" and added: "Equality under the law shall not be denied or abridged because of ... creed".

which divine duties the Constitution helped to define. "It is the right as well as the duty" of each person to worship, Article II states. While a person could worship in "the manner and season most agreeable to the Dictates of his own conscience," such worship, per Article II, had to be directed to God, defined as "the SUPREME BEING, the great Creator and preserver of the Universe." Moreover, such worship, per Article III, had to include "conscientious and convenient" "attendance upon the instructions of ministers" "at stated times and seasons." If a person's conscience dictated another object, order, or organization of worship, it was by definition neither religious nor protected as a constitutional right.

This right to private religion was further limited by social demands. Neither the preamble nor Article I lists religion among the "natural rights," those rights held prior to society in the state of nature. Instead, Article II emphasized the social character of religious rights — they are held by "all men *in society*" and involve "*public* worship." Each individual's religious rights are limited by the needs of society -- by the need for public peace and for protection of the worship of others, as Article II put it. And each individual's religious rights are subject to the "rights" and "powers" of society -- to mandate church attendance, tithe payments, Christian affiliation, and oath swearing, as Article III and Chapters II and VI put it.⁶⁴

By comparison with other state constitutions of the day, the Massachusetts Constitution was rather restrained in its protection of private religious freedom. Other states defined liberty of conscience expansively to include the right to choose and change religion, to be free from all discrimination on the basis of religion, to be exempt from a number of general laws that prohibited or mandated conduct to which a religious party or group had scruples of conscience. Many states also defined free exercise rights expansively to include freedom to engage in religious assembly, worship, speech, publication, press, education, travel, parentage, and the like, without political or ecclesiastical conditions or controls.⁶⁵ Few such protections appear in the 1780 Massachusetts Constitution.

Adams, reflecting in part his self-imposed limits on religious wandering, was convinced that a more "tempered" form of religious freedom would bring the best "improvements to the character of each citizen."⁶⁶ On the one hand, he believed, following conservative conventions of the day, that to grant too much freedom of religion would only encourage depravity in citizens.⁶⁷ "Man is not to be trusted with his

⁶⁴ Ronald M. Peters, Jr., *The Massachusetts Constitution of 1780: A Social Compact* (Amherst: The University of Massachusetts Press, 1978), 51-52.

⁶⁵ See sources and discussion in my *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder/New York/Oxford, Westview Press, 2000), 23-56, 87-100.

⁶⁶ Adams, *Works*, 8:232.

⁶⁷ This emphasis on human depravity, and the need for its restraint, is especially pronounced in Adams' earlier writings, notably in his 1788 *Defense of the Constitutions*. Later in his life, Adams tempered this view. See, e.g., Letter to Thomas Jefferson (April 19, 1817), in Adams, *Works*, 10:253-255, at 254: "So far from believing in the total and universal depravity of human nature, I believe there is no individual totally depraved. The most abandoned scoundrel that ever existence, never yet wholly extinguished his conscience, and while conscience remains, there is some religion."

unbounded love of liberty," one preacher put it, "unless it is under some other restraint which arises from his own reason or the law of God — these in many instances would make a feeble resistance to his lust or avarice; and he would pursue his liberty to the destruction of his fellow-creature, if he was not restrained by human laws and punishment."⁶⁸ The state was thus required to "take mild and parental measures" to educate, encourage, and emulate a right belief and conduct.⁶⁹

On the other hand, Adams believed, following more liberal conventions of the day, that "[c]ompulsion, instead of making men religious, generally has a contrary tendency, it works not conviction, but most naturally leads them into hypocrisy. If they are honest enquirers after truth; if their articles of belief differ from the creed of their civil superiors, compulsion will bring them into a sad dilemma" of choosing between a feigned and firm faith.⁷⁰ The state was thus required to refrain from dictating the exact doctrines, liturgies, and texts of a right religion. This was the balance of religious freedom that Adams struck in crafting the Constitution.

THE ESTABLISHMENT OF PUBLIC RELIGION. Adams further balanced this "tempered" liberty of private religion with a "slender" establishment of public religion. Adams had nothing but contempt for the harsh establishments of earlier centuries -- those featuring state prescriptions of religious doctrines, liturgies, and sacred texts; state controls of religious properties, politics, and personnel; state persecution of religious heresy, blasphemy, and non-conformity. His 1774 *Dissertation on the Canon and Feudal Law* was a bitter invective against the "civil and ecclesiastical tyranny" of earlier Catholic and Protestant establishments. His 1788 *Defense of the American Constitutions* devoted several long chapters to digesting critically the horrors of religious wars, crusades, inquisitions, and pogroms, and the sorry plight of some of his Protestant forebearers.

The established public religion that Adams had in mind was much more "slender," "mild," "moderate" and "equitable" in form — tempered by its own provisions, and by the juxtaposed guarantees of private religious freedom for all. As Adams set out his views in the Constitution, the public religion was to be established (1) ceremonially; (2) morally; and (3) institutionally. It was only the third dimension of the public religious establishment, its institutionalization, that drew controversy.

Ceremonial Establishment. The establishment of public religious ceremonies is reflected especially in the preamble to the Massachusetts Constitution that Adams drafted. The preamble refers to the constitution as "a covenant" or "compact" between the people and God: "[T]he whole people covenants with each Citizen, and each Citizen with the whole people, that all shall be governed by certain Laws for the Common good." And again, "the people of the Massachusetts, acknowledging, with grateful hearts, the

⁶⁸ Simeon Howard, *A Sermon Preached Before the Honorable Council . . . of Massachusetts-Bay* (Boston: John Bill, 1780), reprinted in J.W. Thornton, *The Pulpit of the American Revolution* (Boston: Gould and Lincoln, 1860), 355-396, at 362-363.

⁶⁹ *Worcesteriensis IV*, in Charles S. Hynemann and Donald S. Lutz, eds., *American Political Writing During the Founding Era, 1760-1805*, 2 vols. (Indianapolis: Liberty Fund, Inc., 1983), 1:452.

⁷⁰ *Ibid.*, 450.

goodness of the Great Legislator of the Universe, in affording us, in the course of his Providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprize, o[f] entering into an Original, explicit, and Solemn Compact with each other; and of forming a New Constitution of Civil Government for ourselves and Posterity; and devoutly imploring His direction in so interesting a Design, DO agree upon, ordain and establish the following Declaration of Rights and Frame of Government...."

This is a covenant ceremonial liturgy, rooted in the Hebrew Bible and in a New England tradition going back to the Mayflower Compact of 1620.⁷¹ The nature of the constitution is made clear: it is a "solemn" covenant, with God invoked as witness, judge, and participant. The purposes of the covenant are set forth — to create and confirm the identity of the people (the "peoples" and "citizens of Massachusetts"), their common morals and mores (a devotion to the "common good"), and their cardinal institutions (their rights and frame of government). The ethic of the covenant is defined: it featured "gratitude," "peacefulness," integrity ("without fraud, violence, or surprize"), and prayerful devotion ("devoutly imploring His direction in so interesting a Design").

A variant of this covenant ceremony was the oath-swearing ritual of state officials. Adams wrote into Chapter VI of the Frame of Government the requirement that all state officials must swear a full oath to the constitution and the commonwealth — not just privately, but before the people and their representatives in full assembly. "I, A,B, do declare, that I believe the christian religion, and have a firm persuasion of its truth....; and I do swear, that I will bear true faith and allegiance to the said Commonwealth ... so help me God." Adams's insistence on such oaths reflected the conventional view that the oath was "a cement of society" and "one of the principal instruments of government" for it invoked and induced "the fear and reverence of God, and the terrors of eternity."⁷² This provision also reflected Adams' view that the oath of office was a public confirmation of the covenant among God, the people, and their rulers.

These preambulatory and oath swearing provisions were not merely a bit of hortatory throat-clearing that preceded the real business of constitutional government. They established favorite ceremonies of the traditional public religion of Massachusetts. In the minds of more conservative Puritan sermonizers and subjects of the day, they raised the traditional image of Massachusetts being "under a solemn divine Probation,"⁷³ and the image of the magistrate as God's vice-regent, called to exemplify and enforce a godly life. Traditionally, the New England Puritans stressed ambition, austerity, frugality and other virtues because the covenant rendered them agents of God, instruments of God's providential plan. For them to be lax in zeal, loose in discipline, or sumptuous in living

⁷¹ See esp. Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988). See also my "How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism," *Emory Law Journal* 39 (1990): 41-64 and my "Blest be the Ties that Bind: Covenant and Community in Puritan Thought," *Emory Law Journal* 36 (1987): 579-601.

⁷² See Phillips Payson, "Election Sermon of 1778," reprinted in *American Political Writing*, 523-538, at 529. This was also one reason that Adams wrote into his draft of Chapters I and II that every official must be "of the Christian religion."

⁷³ W. Stoughton, *New Englands True Interest: Not to Lie* (1670), in Perry Miller and Thomas H. Johnson, eds., *The Puritans: A Sourcebook of their Writings* (New York: Harper & Row, 1963), 243.

would be a disservice to God, a breach of their covenant with God. Such a breach would inevitably bring divine condemnation on the community in the form of war, pestilence, poverty, and other forms of force majeure. Traditionally, The New England Puritans' belief in a "solemn divine probation" also rendered the reformation of society a constant priority. They had to ensure that all institutions and all aspects of society comported with the covenantal ideal. Thus Puritan sermonizers urged their listeners: "Reform all places, all persons and all callings. Reform the benches of judgment, the inferior magistrates.... Reform the universities, reform the cities, reform the counties, reform inferior schools of learning, reform the Sabbath, reform the ordinances, the worship of God. Every plant which my Father hath not planted shall be rooted up."⁷⁴ It was this tradition, albeit in a less denominationally and doctrinally rigorous form, that Adams established in the constitution.

Beyond the preamble and the provisions on oath-swearing, the constitution had a few more scattered evidences of a ceremonial establishment. God is invoked, by name or pseudonym (the "Great Legislator of the Universe," and "Supreme Being") a dozen times. References to the "common" or "public good" appear four more times, as do two further references to divine "blessings" and "privileges." These provisions establishing the public religious ceremonies of Massachusetts are more overt and detailed than those of any other state constitution of the day. All these provisions, save the oath provision, were passed without controversy, or even recorded comment. And they remain unchanged to this day.

Moral Establishment. The moral dimensions of the public religious establishment, implicated by the use of covenant and oath-swearing ceremonies, are set out clearly elsewhere in the 1780 Constitution. Article II of the Declaration of Rights, as Adams formulated it, states: "It is the Duty of all men in society, publickly, and at stated seasons to worship the SUPREME BEING, the great Creator and preserver of the Universe." Article III follows with the reason for this duty: "the happiness of a people, and good order and preservation of civil government, essentially depend upon piety, religion, and morality; and ... these cannot be generally diffused through a Community, but by the institution of publick Worship of God, and of public instructions in piety, religion, and morality...."

Adams did not consider these constitutional endorsements of religious morality to be mere platitudes. In Article XVIII of the Declaration of Rights, he rendered adherence to these moral duties integral to the character of public offices and public officials:

A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their Officers and Representatives,

⁷⁴ Quoted in Harold J. Berman, "Religious Foundations of Law in the West: An Historical Perspective," *Journal of Law and Religion* 1 (1983): 3-46, at 30.

and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth.

For, as Article VII of the Declaration put it: "Government is instituted for the Common good; for the protection, safety, prosperity, and happiness of the people."

Adams rendered these same moral qualities essential ingredients of education within the state. Chapter V of the Frame of Government provides: "Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, [is] necessary for the preservation of their rights and liberties." It is thus "the duty of Legislatures and Magistrates in all future generations of the Commonwealth to cherish the interests of literature and sciences, and all seminaries of them; ... to encourage private societies and public institutions, rewards and immunities, for the promotion of [education]....; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humour, and all social affections, and generous sentiments among the people." The same Chapter V confirmed and commended the incorporation of Harvard College, since "the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the christian religion, and the great benefit of this and other United States of America."

None of these provisions establishing a public religious morality triggered much debate during the constitutional convention, and none of these provisions was amended or emended thereafter. Indeed, the famous Eleventh Amendment of 1833 that purportedly "disestablished religion" in Massachusetts simply repeated the mantra of the moral establishment: that "the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a Republican Government."

To this day, the Massachusetts Constitution on its face establishes both religious ceremonies and religious morality. To be sure, this language has become largely a dead letter in recent generations — its legal revival stymied by a political climate that is indifferent, if not hostile, to public religion, and by a First Amendment interpretation that discourages, if not prohibits, the state's implementation of these provisions. But even in this climate, the Massachusetts courts have recently used these provisions to uphold the constitutionality of state funding of legislative chaplains and of political oaths ending in "so help me God."⁷⁵

⁷⁵ *Colo v. Treasurer and Receiver General*, 392 N.E. 2d 1195 (1979), consistent with *Marsh v. Chambers*, 463 U.S. 783 (1983); *Commonwealth v. Callahan*, 401 Mass. 627 (1988). See also the reflections of an Associate Justice of the Supreme Judicial Court of Massachusetts, Herbert P. Wilkins, "Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution," *Suffolk University Law Review* 14 (1980): 887-930, at 891-897, 929-930.

Institutional Establishment. It was the third dimension of the established public religion — Article III's establishment of specific religious institutions supported by public taxes — that drew fire in the convention and ratification debates, and eventually was outlawed by the Eleventh Amendment in 1833. Here, critics charged, the balance between private religious freedom and a public religious establishment tilted too much toward the latter.

It was one thing for the Constitution to establish general public religious ceremonies and to define basic public morals and mores — to encourage "piety, religion, and morality," to endorse the public worship of God, to list the "moral virtues" necessary in a good ruler, to commend schools and colleges that offered religious and moral education, to limit breaches of the peace and interferences in another's religious right, all on the assumption that "the happiness of a people, and the good order and preservation of civil government" depended upon the same.⁷⁶ Such provisions at least left a good deal of religious expression and participation open to voluntary choice and individual accent. It was quite another thing, however, for the Constitution to institute religious practices by law — to require persons to attend a preferred form of public worship, to compel them to pay tithes in support of ministers and teachers, to force them to incorporate themselves into state-registered religious societies, and to require them to be faithful in their attendance at worship lest their tithes be diverted or their societies dissolved. For many, such an establishment crossed the line from gentle patronage to odious persecution.

John Adams had not drafted the controversial Article III. Though he voted for it in the convention, he offered little by way of apologia for it. A number of other theologians and jurists of the day, however, rose to the defense of Article III, offering arguments that appear quite consistent with Adams' views.⁷⁷ The most sustained arguments came from Massachusetts lawyer and later Chief Justice Theophilus Parsons, whom Adams respected well enough to encourage his precocious son John Quincy to clerk in his legal chambers.⁷⁸

Theophilus Parsons had been a member of the seven member ad hoc committee that had redrafted Article III during the heated convention debate in early November, 1779. He was later appointed Chief Justice of the Massachusetts Supreme Juridical Court, and had several occasions to enforce its provisions against detractors. In the case of *Barnes v. Falmouth* (1810), he offered "a diligent examination" of the "the motives which induced the people to introduce into the Constitution a religious establishment, the

⁷⁶ As Adams put it: "Happiness, whether in despotism or democracy, whether in slavery or liberty, can never be found without virtue. The best republics will be virtuous, and have been so; but we may hazard a conjecture, that the virtues have been the effect of the well-ordered constitution, rather than the cause. And, perhaps, it would be impossible to prove that a republic cannot exist even among highwaymen, by setting one rogue to watch another; and the knaves themselves may in time be made honest men by the struggle." Adams, *Works*, 6:219.

⁷⁷ See summary of other arguments in my "A Most Mild and Equitable Establishment," 24-8.

⁷⁸ Ferling, *John Adams*, 297. Cf. Letter to Benjamin Rush (May 14, 1812), in *Spur of Fame*, 238-240, at 239, where Adams grouped Parsons with such statesmen as Jefferson, Madison, Hutchinson, and Sewall as "equally honest, equally able, equally ambitious, and equally hurried away by their passions and prejudices."

nature of the establishment introduced, and the rights and privileges it secured to the people, and to their teachers."⁷⁹

Parsons first argued for the necessity and utility of maintaining religion in a civil society and government. In a nutshell, he argued that the happiness of citizens is the goal of government; morality and virtue are essential ingredients to the achievement of happiness; religion and faith are essential wellsprings of morality and virtue; and thus government must support religion and faith. "The object of a free civil government is the promotion and security of the happiness of the citizens," he wrote, invoking and discussing several provisions of the Constitution.

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. To obtain that perfection, it is not enough for the magistrate to define the rights of several citizens, as they are related to life, liberty, property, and reputation, and to punish those by whom they may be invaded. Wise laws, made to this end, and faithfully executed, may leave the people strangers to many of the enjoyments and of civil and social life, without which their happiness will be extremely imperfect. 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 of resulting from the relation of husband 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 of its laws. These are moral duties, flowing from the disposition of the heart, and not subject to the control of human legislation. Neither can the laws prevent, by temporal punishments, secret offences, committed without witness, to gratify malice, revenge, or any other passion by assailing the most inestimable 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.

Civil government, therefore, availing itself only of its own power, is extremely defective; and unless it could derive assistance from some superior power, whose laws extend to

⁷⁹ *Barnes v. Falmouth*, 6 Mass. 401, 404 (1810) (Barnes, C.J.), reprinted with revisions as Theophilus Parsons, *Defence of the Third Article of the Massachusetts Declaration of Rights* (Worcester, 1820).

the temper and disposition of the human heart, and before whom no offence is secret, wretched indeed would be the state of man under a civil constitution of any form. The most manifest truth has been felt by legislators in all ages; and as man is born, not only a social, but a religious being, so, in the pagan world, false and absurd systems of religion were adopted and patronized by the magistrate, to remedy the defects necessarily existing in a government merely civil.⁸⁰

Having demonstrated the necessity and utility of religion generally for civil society and government, Parsons then turned to the reasons for state support of Christian institutions in particular. "[T]he people of Massachusetts, in the frame of their government, adopted and patronized a religion, which, by its benign and energetic influences, might cooperate with human institutions, to promote and secure the happiness of the citizens, so far as it might be consistent with the imperfections of man. In selecting a religion, the people 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. 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."⁸¹

Parsons then moved to answer criticisms that the institutionalization of religion mandated by Article III was "inconsistent, intolerant, and impious."⁸²

First, Parsons argued, "the manner in which this establishment was made, is liberal, and consistent with the rights of conscience on religious subjects. As religious opinions, and time and manner of expressing the homage due to the Governor of the universe, are points depending on the sincerity and belief of each individual, and do not concern the public interest, ... the second article ... guards these points from the interference of the civil magistrate ... for every man, whether Protestant or Catholic, Jew, Mahometan, or Pagan."⁸³

It is perfectly consistent for the state to maintain these guarantees of liberty of conscience for all and to "provide for the public teaching of the precepts of Protestant Christians to all the people" by collecting tithes to support their ministers and churches. To object that this is a violation of conscience, Parsons wrote, is "to mistake a man's

⁸⁰ Ibid., 404-405.

⁸¹ Ibid., 405.

⁸² Ibid., 405, 408.

⁸³ Ibid., 405-406.

conscience for his money," and to deny the state the right of collecting taxes from those whom it represents.

But as every citizen derives the security of his property, and fruits of his industry, from the power of the state, so, as the price of this protection, he is bound to contribute, in common with his fellow-citizens, for such public uses, as the state shall direct. And if any individual can lawfully withhold his contribution, because he dislikes the appropriation, the authority of the state to levy taxes would be annihilated; and without money it would soon cease to have any authority. But all moneys raised and appropriated for public uses, by any corporation, pursuant to powers derived from the state, are raised and appropriated substantially by the authority of the state. And the people, in their constitution, instead of devolving the support of public teachers of on the corporations, by whom they should be elected, might have directed their support to be defrayed out of the public treasury, to be reimbursed by the levying and collection of state taxes. And against this mode of support, the objection of an individual, disapproving of the object of the public taxes, would have the same weight it can have against the mode of public support through the medium of corporate taxation. In either case, it can have no weight to maintain a charge of persecution for conscience' sake. The great error lies in not distinguishing between liberty of conscience in religious opinions and worship, and the right of appropriating money by the state. The former is an unalienable right; the latter is surrendered to the state, as the price of protection.⁸⁴

Second, Parsons argued, the notion that support for religious institutions was intolerant of the non-religious fails to recognize the great public benefits that support of religious institutions brings them. "The object of public religious instruction is to teach, and to enforce by suitable arguments, that practice of a system of correct morals among the people, and 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. From these effects every man enjoys 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 the public instruction, than the administration of justice in courts of law can give him. The like objection may be made by any man to the support of public schools."⁸⁵

Arguments such as these proved sufficient to defend Article III for more than half a century after ratification of the Massachusetts Constitution. This was the balance that

⁸⁴ Ibid., 407-408.

⁸⁵ Ibid., 408-409.

Adams's dialectical model of religious liberty seemed to demand. All faiths were free, and it was up to individuals to devise their own religious institutions and practices in a manner they found convenient. One faith was fixed, and it was up to the state to devise its religious institutions and practices in manner it found expedient. To leave private religious faiths uncontrolled would only encourage human depravity. To leave the public religious faith unsupported would only encourage social fragmentation. Hence the need to add to a ceremonial and a moral establishment a more robust institutional establishment of the public religion.

However convincing such arguments might have been in theory, they ultimately proved unworkable in practice. In the fifty-three years of its existence, Article III "was fruitful in lawsuits, bad feeling, and petty prosecution."⁸⁶ Both the casuistry and the clumsiness of the tithing and registration system were exposed in litigation. Resentment at Article III only increased as the religions of Massachusetts liberalized and pluralized — and the former Congregational churches were splintered into an array of Trinitarian and Unitarian forms.⁸⁷ Eventually, detractors so outnumbered proponents that the Massachusetts Constitution was amended. In 1833, Amendment, Article XI outlawed the institutional establishment of the public religion, even while explicitly preserving the ceremonial and moral establishment:

As the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a Republican Government;— Therefore, the several religious societies of the Commonwealth, whether corporate or incorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors of religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses: And all persons belonging to any religious society shall be taken and held to be members, until they shall file with the Clerk of such Society, a written notice declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract, which may be thereafter made, and denominations demeaning themselves peaceably and as good citizens of the Commonwealth shall be equally under the protection of the law; and no subordination of one sect or denomination to another shall every be established by law.

⁸⁶ Morison, *Constitutional History*, 24-25.

⁸⁷ See the careful sifting of this case law in McLoughlin, *New England Dissent*, 636-659, 1084-1106, 1189-1284, with summaries in William G. McLoughlin, "The Balkcom Case (1782) and the Pietist Theory of Separation of Church and State," *William & Mary Quarterly*, 3d ser. 24 (1967): 267-283; Cushing, "Notes on Disestablishment in Massachusetts."

Subsequent amendments of 1855, 1917, and 1974 closed the door tightly against any form of state fiscal and material aid to religious institutions and endeavors.⁸⁸

CONCLUSIONS

In the preface to his *Defense of the Constitutions of Government in the United States of America* of 1788, John Adams wrote boldly: "The people in America have now the best opportunity and the greatest trust in their hands, that Providence ever committed to so small a number, since the transgression of the first pair; if they betray their trust, their guilt will merit even greater punishment than other nations have suffered, and in the indignation of Heaven." "The United States have exhibited, perhaps, the first example of governments erected on the simple principles of nature; and if men are now sufficiently enlightened to disabuse themselves of artifice, imposture, hypocrisy, and superstition, they will consider this event as a [new] era in history. Although the detail of the formation of the American governments is at present little known or regarded either in Europe or in America, it may hereafter become an object of curiosity" for it is "destined to spread over the northern part of that whole quarter of the globe." Indeed, "[t]he institutions now made in America will not wholly die out for thousands of years. It is of the last importance, then, that they should begin right. If they set out wrong, they will never be able to return, unless it be by accident to the right path."⁸⁹

Two centuries later, such sentiments prove remarkably prescient. The American framers did begin on the right path of religious liberty, and today we enjoy a remarkable freedom of thought, conscience, and belief as a consequence. American models of religious liberty have had a profound influence around the globe, and their principles now figure prominently in a number of national constitutions and international human rights instruments.⁹⁰

To be sure, as Adams predicated, there has always been "a glorious uncertainty" in the law of religious liberty, and a noble diversity of understandings of its details. This was as true in Adams' day as in our own. In Adams' day, there were competing models of religious liberty more overtly theological than his —whether Puritan, Anglican, Evangelical, or Catholic in inspiration. There were also competing models more overtly philosophical than his -- whether Classical, Republican, Enlightenmentarian, or Whig in inclination. Today, these and other models of religious liberty have born ample progeny, and the rivalries among them are fought out in the courts, legislatures, and academies throughout the land.

⁸⁸ Amendment Art. XVIII (1855); Amendment, Art. XLVI (1917); Amendment, Art. CIII (1974). See Wilkins, "Judicial Treatment," 892-94.

⁸⁹ Adams, *Works*, 4:290, 292-293, 298.

⁹⁰ See generally John Witte, Jr. and Johan D. van der Vyver, eds., *Religious Human Rights in Global Perspective*, 2 vols. (The Hague/London/Boston: Martinus Nijhoff, 1996); John T. Noonan, Jr., *The Lustre of our Country: The American Experience of Religious Freedom* (Berkeley/Los Angeles/London: University of California Press, 1998) .

Prone as he was to a dialectical model of religious liberty and a federalist system of government, Adams would likely approve of our rigorous rivalries of principle -- so long as all rivals remain committed to constitutional ideals of democracy, liberty, and rule of law. But Adams would also likely insist that we reconsider his most cardinal insights about the dialectical nature of religious freedom and religious establishment. Too little religious freedom, Adams insisted, is a recipe for hypocrisy and impiety. But too much religious freedom is an invitation to depravity and license. Too firm a religious establishment breeds coercion and corruption. But too little religious establishment allows secular prejudices to become constitutional prerogatives. Somewhere between these extremes, Adams believed, a society must find its balance.

The balance that John Adams struck in favor of a "mild and equitable establishment" of Protestantism can no longer serve a nation so fully given to religious pluralism. But the balance that the Supreme Court has struck in favor of a complete disestablishment of religion can also no longer serve a people so widely devoted to a public religion and a religious public. Somewhere between extremes, our society must now find a new constitutional balance — with Adams's efforts serving as a noble instruction.