The Second Disestablishment

Church and State in Nineteenth-Century America

STEVEN K. GREEN

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Introduction

During the 1800 presidential election, a group of conservative New England clergy, distressed at the prospect of Thomas Jefferson being elected president, produced a series of pamphlets attacking the vice president's heretical religious beliefs. Relying on rumor, suspicion, and excerpts from Jefferson's *Notes on the State of Virginia* (among other writings), the clergy accused Jefferson of being a "confirmed infidel" and a "howling atheist." Although the Federalist-leaning clergy were motivated largely by political considerations, the divines genuinely feared that Jefferson's election would bring down God's wrath upon the new nation. A "crisis of no common magnitude [would] await . . . our country," the Reverend John Mason wrote, through such "national regard or disregard to the religion of Jesus Christ" by Jefferson's election. "If there be no God, there is no law," echoed the Reverend William Linn, another Jefferson critic. "[G]overnment then is the ordinance of man only, and we cannot be subject for conscience['s] sake." Jefferson's deistic beliefs made him an easy target for his Calvinist critics. But his nonconforming theology represented only the surface of the ministers' complaints; more troubling for the clergy, Jefferson epitomized the nation's embrace of Enlightenment rationalism, which they believed had brought about a diminished role for religion in public life. Religious conservatives feared that rationalist principles were becoming integrated into the culture and government at the expense of evangelical Christianity.[1]

Jefferson and his allies were so concerned that the allegations could cost him the election that they mounted a defense of his character. In newspaper articles and pamphlets, Jefferson's supporters worked to rehabilitate the Virginian's religious credentials. Rather than being an atheist, Jefferson had "in his writings . . . spoken reverently of the christian religion," wrote Abraham Bishop, who carefully added that Jefferson had "for years supported at his own expense a preacher of the gospel."[2] More significant than this early attempt at political spin control is how the rebuttals revealed a decidedly different vision of the relationship between religion and the new republic than was proffered by Jefferson's opponents. "Government is an human institution, introduced for temporal purposes," wrote New York Republican lawyer Tunis Wortman. "[I]t was never intended to be the sovereign arbiter of religion, conscience, and opinion":

> Religion and government are equally necessary, but their interests should be kept separate and distinct. No legitimate connection can ever subsist between them. Upon no plan, no system, can they become united, without endangering the purity and usefulness of both—the church will corrupt the state, and the state pollute the church.[3]

In the end, the clerical attacks made little difference in the election outcome, with Jefferson and his running mate, Aaron Burr, winning by a comfortable margin in the electoral college, the only question being which of the two men would end up as president.

Even so, the episode troubled Jefferson. Early in his administration, he seized an opportunity to comment publicly on his understanding of the relationship between religion and government. In 1801, a Connecticut Baptist society wrote to Jefferson to congratulate him on his election. In its letter, the Danbury Baptist Association bemoaned its mistreatment as a minority religious community in a state that still maintained a religious establishment. Jefferson's response, in what has become known as the Letter to the Danbury Baptists, set out his perspective on church and state:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.[4]

Thirty-one years later, and only seven years after Jefferson's death, Supreme Court Justice Joseph Story published his influential treatise *Commentaries on the Constitution of the United States*. Second only to Chief Justice John Marshall for his contributions to nineteenth-century law, Story was the leading antebellum authority on the meaning of the federal Constitution. Writing about the First Amendment in his *Commentaries*, Story proffered a strikingly different view of the religion clauses. He remarked that, at the time of the adoption of the Constitution, "the general, if not universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as it is not incompatible with private rights of conscience, and the freedom of religious worship." In Story's view, the "real object" of the religion clauses was not to "level all religions . . . by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment." Not only was the government permitted to show preference for Christianity and to support its endeavors, the nation's customs and traditions all but obligated the government to do so.[5]

Jefferson's and Story's visions for church-state relations could hardly be more dissimilar. Although they were a generation apart in age, they were contemporaries during the formative years of the early nineteenth century, observing the same political and social conditions but disagreeing on many points. The model for church-state relations in a republic was one of their more significant disagreements.

For years, historians and jurists have debated whether Jefferson's or Story's vision of church-state relations represents the more accurate depiction of the attitudes and practices during the founding and early periods of the republic. This debate has been important for both historical scholarship and church-state adjudication. In the first modern establishment clause case, *Everson v. Board of Education* (1947), Justice Hugo Black pronounced Jefferson the winner, claiming that he (along with his fellow Virginian James Madison) reflected the early intentions and attitudes toward church-state relationships. Black insisted that their writings—represented in Jefferson's Act for Establishing Religious Freedom and Madison's *Memorial and Remonstrance*, both arising out of Virginia's struggle for disestablishment—provided the appropriate benchmark for interpreting the First Amendment religion clauses. Black restated the command of the act and *Memorial* in simple and stark terms:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any

> amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[6]

Black's belief in the singular importance of the founding period for interpreting the religion clauses and in Jefferson and Madison as the authoritative expositors of that early understanding was shared by the *Everson* dissenters. Justice Wiley Rutledge concurred on the significance of Jefferson's and Madison's works, writing that the documents from the "Virginia struggle for religious liberty . . . became [the] warp and woof of our constitutional tradition." Rutledge asserted, "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." For Rutledge and his fellow dissenters, Black had simply failed to place sufficient weight on the dictates contained in the documents or to see them as controlling in the church-state conflict being considered.[7]

Black's opinion also reflected a belief that religious disestablishment had been perfected at the national level during the founding period, with a majority of the states doing the same prior to or immediately following constitutional ratification. (Final political disestablishment would not take place until the last New England state, Massachusetts, succumbed in 1833.) More significantly, Black understood disestablishment to be a constitutional mandate required by the free exercise and establishment clauses, with the implication being that members of the founding generation understood it in a similar light. Black's analysis did not distinguish between various levels of potential disestablishment (e.g., political, legal, constitutional, cultural), creating the impression that, at the time of the drafting of the First Amendment, disestablishment had been consensual, comprehensive, and complete. The unanimity of support for Black's interpretation of history indicated that the justices believed that not solely political disestablishment but also legal and constitutional disestablishment had been achieved by the end of the founding period.

Despite receiving unanimous support on the Court, Black's historical analysis met with quick criticism. Legal scholars Edward Corwin, John Courtney Murray, James O'Neill, and Mark DeWolf Howe decried the Court's selective use of historical documents and the assertion of infallibility that accompanied that history, now revealed. Debate has continued to rage among jurists, historians,

and legal scholars about whether the framers of the First Amendment truly intended to create a regime of church-state separation and, if so, what that concept meant to the designers of the clause. Few constitutional concepts have been more powerful, revered, or hotly contested. Within the bench, bar, and academy, people have disagreed over the significance of the separationist writings of Jefferson and Madison, on one hand, and those early practices suggesting a potentially more accommodating regime, as represented by the writings of Story, on the other hand.[8]

Adherents and critics of the Black interpretation have generally agreed on one point, however: the founding period is the seminal event in understanding American church-state relations. Ever since Justice Rutledge's pithy observation about the significance of history for religion clause adjudication, lawyers, scholars, and judges have liberally relied on history to justify their arguments and holdings about the proper relationship between church and state.[9]

One twenty-first-century study indicates that, out of 115 church-state cases decided between 1947 and 2006, the justices cited Madison 189 times and Jefferson 112 times.[10] This is not surprising. The lure of capturing history for constitutional interpretation is irresistible. History legitimizes legal arguments and judicial decision making by offering an aura of authority and objectivity, if not a putative constraint on judicial subjectivity. History also promotes the legitimacy of an otherwise disputable position by providing a purportedly independent and apolitical source of information from which all parties can draw and upon which all people can agree. The ability to capture the historical essence of church-state separation thus provides the victor with commanding authority to shape public policy and opinion, and constitutional law itself.[11]

Understandings of the founding generation thus represent the gold standard of authority for lawyers and constitutional historians. According to Stanford University's Larry Kramer, modern constitutional theory can fairly be described as "'Founding obsessed' in its use of history." The founding has become that incomparable and seminal event in U.S. history, such that we treat it as "conclusive and sacred" and the Constitution's authors and ratifiers as "special and privileged" in their apparent understanding of its contents. Modern Americans are "held captive by the success of the eighteenth-century Founding Fathers."[12] Not only do we treat the founding as unique and special; we tend to see it as a static and completed event. It is as if all human knowledge and wisdom came together for one brief fifteen-year moment, that long-developing notions of democracy, freedom, equality, and civic virtue reached their apex between 1775 and 1790 and then ceased developing, particularly from the perspective of the founders. The founding, it seems, is that moment in time when the founders "bequeathed their values and deeds to the present."[13]

This perspective is triply flawed: first, it ignores the long development of ideas and the myriad experiences that shaped eighteenth-century Republican theory, including notions of religious freedom and equality.[14] Second, it suggests a past that was *unified* and *positive* rather than one facing competing ideological theories and social pressures. Finally, such a perspective is untrue to the founders themselves, who saw history and the political theories they were espousing as a process, not as something static. The founders' conception of church-state relations was heterodox, dynamic, and incomplete—and purposefully so. To the founders, the separation of church and state was an unfolding idea, not an accomplished reality. The founders did not believe that their recent struggle for religious freedom had been perfected through the political disestablishment at the national and state levels; they were willing to espouse ideas of disestablishment that would take time to be achieved. Multiple notions of church-state relations, constantly developing and being refined, informed the early discussions. It was only through the experiences of the nineteenth century that earlier notions of church-state separation found their awkward application and became a closer reality, which led to a second disestablishment, this time in the nation's civic institutions—primarily in education and the law. It was this second disestablishment, as much as the first, that would facilitate the constitutional disestablishment of the latter twentieth century.[15]

For years, the nineteenth century was the "forgotten century" for traditional reviews of American church-state relations. Casebooks and historical surveys commonly gave cursory coverage to the century. Reviews predictably started with a discussion of the Puritan theocratic experiment, fast-forwarded to the founding period, and then jumped to the incorporation of the First Amendment in the 1940s. Along the way, mention was sometimes made of a handful of late nineteenth-century Supreme Court church property disputes and Mormon polygamy cases, as if those events represented the sum of a century of constitutional development.[16]

More recently, constitutional historians have come to recognize what religious historians such as Robert Handy have known for a long time: the nineteenth century was the crucible for a religious identity that left an indelible imprint on the culture and its institutions, an identity that remains with us to this day. In 2002, Philip Hamburger wrote a comprehensive and influential, though thematically flawed, history of the period, *Separation of Church and State*.[17] Others, including Jon Butler, John Witte, Gaines Foster, Daniel Dreisbach, Mark McGarvie, Sarah Barringer Gordon, and Noah Feldman, have written on important church-state episodes of the century. As Kurt Lash has argued, one cannot appreciate the meaning of the religion clauses in the twenty-first century without understanding the important events during the

nineteenth century that transformed patterns, relationships, and attitudes. Both Hamburger and Lash recognize that disestablishment (and church-state separation) was a developing concept and dynamic force throughout the nineteenth century.[18]

The nineteenth century presents a rich paradox when one starts exploring church-state relationships. In 1800, the United States represented the only secular government on earth, revolutionary France excepted. Formal, political disestablishment was the rule at the national level and all but complete among the states. In 1879, the Supreme Court embraced Jefferson's metaphor that the establishment clause erected a "wall of separation between church and state." Yet, for most of the century, the "wall of separation" was more of an illusion than a reality; despite the Jeffersonian/Madisonian vision, the new republic that emerged in the early 1800s was popularly described as a "Christian nation," which was represented through revivals and reform associations, blasphemy and Sabbath laws, religious oath requirements, and state maintenance of a Protestant-oriented public school system. Religious historians have described the nineteenth century as a "Protestant empire" where Protestant/evangelical beliefs and values dominated the nation's culture and institutions. Despite this circumstance, the century was also a time of accelerating religious diversity, from within Protestantism and from without. Religious voluntarism, an expanding American frontier, and soaring immigration combined to produce vigorous competition for evangelical Protestantism: Mormonism, spiritualism, transcendentalism, and Catholicism were a few of the more familiar challengers. At the same time, people from various religious perspectives embraced the concept of disestablishment between religion and government as an American ideal. Throughout much of the century, versions of church-state separation served as competing paradigms to the Christian-nation motif. This competition reached its apex in an 1892 Supreme Court decision (*Church of the Holy Trinity v. United States*) which declared America to be a "Christian nation."[19]

Although the Christian-nation decision has been misunderstood and subsequently reviled even by Court conservatives, a handful of modern scholars have embraced a gentler version of the maxim as more accurately representing the historical interrelationship between church and state during the nineteenth century. In 1965, Mark DeWolf Howe wrote in *The Garden and the Wilderness* that the nation's founders fully understood that there was an "interdependence of law and religion," and "early state reports are full of cases in which decisions were affected, and sometimes controlled, by the thesis that Christianity is a part of the common law." Howe maintained that these decisions "constitute persuasive evidence that it was a common assumption in the first decades of the nineteenth century that state governments may properly become the supporters

and friends of religion."[20] Picking up on Howe's thesis, Harold J. Berman wrote extensively about the loss of the "moral dimension" of the American legal system while he advocated greater recognition of the religious bases of U.S. government and law. Relying on nineteenth-century cases that declared America to be a Christian nation, Professor Berman maintained that "[p]rior to World War I the United States thought of itself as a Christian country, and more particularly as a Protestant Christian country; since then it has ceased to do so." While never pleading for a return to the days of religious preferences, Berman nevertheless bemoaned the "irrevocable transition of twentieth-century America from a nation which had previously identified itself as Protestant Christian to a nation of plural religions," with the resulting loss of religious influences on government and law.[21]

Faced with these accounts, secular scholars have tended to cede the nineteenth century to the religionists, preferring to explain the period as an aberration, a dark age that preceded the renaissance of the 1940s when the Supreme Court rediscovered the "true" (i.e., Jeffersonian) meaning of church-state separation. In contrast, religionists prefer to read the non-separationist events of the nineteenth century as the best indicator of the founders' intentions for church-state relationships. This latter story becomes powerful ammunition for those who dispute the Supreme Court's decisions restricting public school prayer, religious school funding, and the government's use of religious imagery. In both instances, however, assumptions have been made about the nineteenth century without appreciating the diversity of views and the development of constitutional principles that gradually led to the secularization of American law and institutions.[22]

This book examines the development of church and state during the nineteenth century, primarily at the state level. It is a study of the political, legal, and institutional transformations of the principle of separation of church and state, transformations that served as a bridge from the founding period to the modern regime represented by *Everson* and its progeny. Contrary to what some scholars have asserted, a second disestablishment did not take place with the *Everson* decision but occurred during the nineteenth century, laying the foundation for the third, constitutional disestablishment of the mid-twentieth century.[23] Although it was slow and incremental, the second disestablishment of the nineteenth century was as important to constitutional development as the third disestablishment ushered in by *Everson*. In arguing for a second, gradual disestablishment, this book does not advocate a reinvigorated secularization thesis. That model, as advanced by Max Weber and Peter Berger, maintains that, over time, modernization and other social forces led to a decline of religious belief and religious authority in society. Secularization as a paradigm was

increasingly criticized in the 1990s by historians and religious sociologists as failing to acknowledge significant counter-trends over the past two centuries. Some aspects of a secularization model remain useful, however. Rather than seeking to explain wholesale societal shifts, secularization should be viewed simply as a decline in religious authority or affiliation in particular institutions and as a shift in attitudes from matters of ultimate concern to more proximate ones. In many ways, this describes the development of church-state relations during the century.[24]

The nineteenth century is thus a story of competing and interrelated forces and ideas, sometimes reinforcing religious authority but more frequently challenging that position. Throughout the century, religious affiliation and fealty grew steadily, and religious values continued to influence the culture and its institutions. For many leading figures—judges, lawyers, educators, politicians, and, of course, religious leaders—religion was a primary, if not constant, factor in the ordering of their world views. At the same time, people understood that their government, legal system, culture, and civic institutions were becoming secularized, i.e., being transformed in a way that deemphasized religious authority. Commentators during the latter half of the century frequently wrote about secularizing forces as a reality.[25] The point is that competing—or, better, intersecting—forces of religion and secularization coexisted throughout the century. Particularly during the second half of the century, religious and legal figures embraced aspects of secularization as a way to maintain if not perfect religious influences on the culture. The gradual secularization of civic institutions during the century—this book prefers to use the term "disestablishment"—did not mean that religion itself was on the decline. However, the undeniable disestablishing trend of the period would impact attitudes toward and understandings of church-state separation and lay the groundwork for the future diminution of religious influences in the law, government, civic institutions, and culture.

Part I of this book begins with a consideration of the founding period, when Americans at the national and state levels reworked both the legal and societal arrangements between church and state, resulting in the formal disestablishment of religion and the establishment of governments based primarily on secular, rationalistic principles. That political disestablishment coexisted—at least initially—with a culture that still prioritized religion and maintained religiously based laws and social conventions and a legal system that enforced those conventions based on religious grounds. Thus, the first period of disestablishment was in fact that: taking the first steps. The founding period established the framework of church-state separation and set in motion the forces that would

eventually lead to legal and institutional disestablishment. Part II examines the rise of the Christian-nation maxim as a reaction to political disestablishment and a counter to the Jeffersonian/Madisonian vision of church-state separation. Part III examines legal disestablishment during the nineteenth century, a process that gradually exchanged fealty to the maxim that "Christianity is part of the common law" with a reliance on secular, instrumentalist bases for the law. Part IV considers one of the more important episodes of the nineteenth century that affected popular notions of church-state separation: the rise of nonsectarian public schooling and the ensuing conflicts over Protestant religious practices and the funding of Catholic parochial schools. Finally, part V considers a second period of reaction to disestablishment and secularization following the Civil War, one that sought to recapture the vanishing notion of America's Christian nationhood. That part concludes with the triumph of institutional and legal disestablishment and the death of the Christian-nation maxim as an organizing concept. The history of the nineteenth century is thus one of initial political disestablishment leading slowly to a greater separation of religion from legal and civic institutions. This gradual second disestablishment laid the foundation for a third, constitutional disestablishment in the latter twentieth century, represented by the church-state decisions of the modern Supreme Court.

I

Revolutionary Disestablishment

[A government] founded on the most rational, equitable and liberal principles.

—Samuel Langdon, "The Republic of the Israelites: An Example to the American States"

No event in U.S. history has received more scholarly attention than the nation's founding. A leading area of study has concerned the intellectual foundations of the nation's republican system, as represented in the federal and state founding documents. Historians such as Gordon Wood and Bernard Bailyn have framed the modern-day inquiry by demonstrating a rich and varied compendium of impulses that informed the emergent republican ideology.[1]

Identifying the nation's intellectual origins has been at the center of the ongoing controversy over the ideological basis and meaning of the Constitution's religion clauses. In scholarly and popular writings, as well as in constitutional litigation, debate has raged over which intellectual traditions most influenced the attitudes of the founders and their generation toward matters of church and state: Calvinism, evangelicalism, Enlightenment thought, classical republicanism, Whig theories, or an amalgam of the foregoing. Overlaying this consideration of competing ideologies are the contemporary practices that indicated varying degrees of government patronage of religion. In simple terms, the debate breaks down along the lines of

whether the founders created a "Christian nation" or intended to have a "Godless Constitution."[2]

The men and women of the founding generation were keenly aware that they were witnessing a singularly important event in human history—that the still unfolding American republic truly represented a *novus ordo seclorum*. Not only were they creating a republic dependent on popular will—something never done before on such a grand scale—they also were designing a nation where all legitimacy and authority came from the very people to be governed and not from a supernatural source or divine-law principles. The risks were enormous: never before had a nation purposefully disassociated itself from religion or failed to assign to the prevailing religious sentiment a position of prominence. Many doubted whether a free government could exist without the sanction of God. That question—how to reconcile long-standing beliefs about the interdependence of the church and the state with developing notions of freedom of conscience, religious equality, and republican secularity—would underlie the debate over disestablishment in the late eighteenth and early nineteenth centuries.

Intellectual Foundations

Much of the initial success of this new experiment in government can be attributed to the intellectual preparation of the founders, many of whom had been developing the philosophical justifications for their actions long before the drafting of the Declaration of Independence. For approximately fifty years, gradually at first and then with greater urgency as the crisis with England loomed, colonists had been imbibing, debating, and refining theories of governance. Inspired primarily by classical and Enlightenment writers, emerging Whig theories, and their own experiences in self-governing, colonial leaders had by 1775 settled on the intellectual foundations for the state, concluding, in the words of John Adams: "there is no good government but what is republican." Ultimate authority for the state would rest on the consent of the people. Because "[a]ll men are naturally in a state of freedom, and have equal claim to liberty," John Tucker declared in a 1771 election sermon, "all government, consistent with that natural freedom, to which all have an equal claim, is founded in compact, or agreement between the parties."[3]

Out of this rich intellectual milieu emerged a secular theory of government, an assumption that would underlie the creation of the American republic. Theorists such as John Locke and Jean-Jacques Rousseau had written of governments formed by compacts of people, who were the ultimate sources of

authority and who delegated to government the responsibility to create an ordered society. Because government was of human origin and served chiefly to secure the property and happiness of the people, it had no inherent moral component, let alone a connection to divine sources. By refuting the doctrine of the divine right of kings, Locke's political theories challenged the notions of a government based on divine authority and that civil law was subject to religious mandates. In its place, he and other Enlightenment writers advocated a minimalist government with no responsibility for ensuring piety or conforming religious opinions. In his influential *Letter Concerning Toleration*, Locke wrote that "the whole power of civil government is concerned only with men's civil goods, is confined to the care of the things of this world, and has nothing whatever to do with the world to come." Because the "care of souls" was not the business of government, "the civil power ought not to prescribe articles of faith, or doctrines, or forms of worshipping God, by civil law." Such words were groundbreaking, in that they implied a commonwealth unconcerned with religious fealty or the maintenance of public virtue. But most important, Locke linked religious freedom and the separation of the religious and governmental realms to the perpetuation of free, legitimate governments.[4]

Other influential Enlightenment works included Baron Montesquieu's *Spirit of the Laws* (1748), which, among other matters, advocated toleration in religious belief and freedom of worship, and the writings of Henry St. John, Lord Bolingbroke, who discounted the divinity of the scriptures and a religious basis of the law. Montesquieu and Bolingbroke were read by the founding generation, particularly a young Thomas Jefferson. Writers of the so-called Scottish Enlightenment—David Hume, Francis Hutcheson, and Thomas Reid—with their moral "commonsense" philosophy also influenced many of the founders, including James Madison, John Adams, and James Wilson. In addition, the founding generation imbibed the works of the radical Whig philosophers, like John Trenchard and Thomas Gordon, the authors of *Cato's Letters* (1720–1723). Trenchard and Gordon were strong advocates of freedom of expression and government accountability and spoke out against corruption in the government and in the Anglican Church.[5]

Later opposition writers who advocated for reforms in politics and the church included John Cartwright, Richard Price, and Joseph Priestley. Priestley, who corresponded with many of the founding generation before fleeing to America in 1791, called for the repeal of the Test and Corporation Acts (which limited office holding to communicants of the Anglican Church) and the disestablishment of the Church of England, insisting on an even greater separation of the religious and secular realms than had Locke. Priestley criticized any "union of civil and ecclesiastical power" as an "unnatural mixture," thus

suggesting that Locke's notions of minimalist government and religious toleration could only exist under a regime of disestablishment. Nevertheless, Priestley believed that "religious motives may still operate in favour of the civil laws, without such a connection as had been formed between them in ecclesiastical establishments."[6]

The "key book" of the founding generation, according to Bernard Bailyn, was *Political Disquietations*, written by Whig schoolteacher and theorist James Burgh. Like many radical Whigs, Burgh spoke out against religious establishments, warning of "a church getting too much power into her hands, and turning religion into a mere state engine." In his book *Crito*, Burgh called for building "an impenetrable wall of separation between things sacred and civil. . . . the less the church and the state had to do with one another, it would be better for both," the former phrase later copied by Thomas Jefferson. Burgh's fans and subscribers included not only Jefferson but also George Washington, John Adams, John Hancock, John Dickinson, Benjamin Rush, Roger Sherman, and James Wilson, a "who's who" of the founding generation. Together, Burgh and Priestley brought their refinement of Locke and other Enlightenment and Whig theorists to the forefront of revolutionary thought.[7]

All of these authors were widely read by the founders and are generally considered by historians to be ideologically central to the founding of the nation. Their works informed the thought of revolutionary leaders as they began the process of creating republican states out of former British colonies.[8]

Philip Hamburger, in his book *Separation of Church and State*, dismisses such intellectual foundations for church-state separation, preferring to locate the principle in later events of the nineteenth century associated with anti-Catholic animus. Hamburger minimizes Locke's commitment to church-state separation by relying on inference and omission, arguing that, despite his statements in the *Letter*, Locke "made no direct objection to government support of religion" nor advocated disestablishment of the Church of England.[9] But Locke's writings must be viewed in their time, when notions of religious toleration and a division of ecclesiastical and civil functions were in their nascent stages. Locke's advocacy for any form of religious and civil separation was significant, even if his views pale in comparison to later conceptions. Even Hamburger acknowledges that Locke envisioned a church "absolutely separate and distinct from the commonwealth," a notion that would restrict the influence of each institution on the other. The "bounds of the church" cannot "in any manner be extended to civil affairs," Locke insisted, "because the church itself is a thing absolutely separate and distinct from the commonwealth and civil affairs." Other statements by Locke, while lacking in exactness, indicate his opposition

to enforced taxation for religion, with him remarking that no ecclesiastical officer "can deprive any other man who is not of his church or faith of life, liberty, or any part of his worldly goods on account of religion." The point is not whether Locke offered a complete model of church-state separation but whether he challenged existing regimes by advancing principles upon which the framers could build their own conceptions.[10]

The American revolutionary thinkers applied this theory of a minimalist state based on the consent of the governed to justify their resistance to the actions of the British government. To neutralize claims of the Crown's inherent power—at times cloaked in notions of divine delegation—colonists offered paradigms where earthly authority came not from some higher source but from natural rights of justice and liberty that resided in the people. In a republic, wrote Boston minister Gad Hitchcock in 1774, "rulers have their distinct powers assigned to them by the people, who are the only source of civil authority on earth." Based on this reversed ordering of the old lines of authority, the Crown and Parliament were under "the most sacred ties to consult for the good of society." Only to the extent they promoted "this valuable end, they are ordained by God, and clothed with authority by men."[11]

At times, American political writers justified their theories by arguing that their natural rights were endowed by the Creator. Boston lawyer James Otis, a leading pamphleteer, commonly combined higher-law claims with Enlightenment notions of preexistent natural rights to argue that the king and Parliament were equally subject to the law: "There must be in every instance, a higher authority, viz. GOD. Should an act of parliament be against any of his natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity and justice, and consequently void." Pennsylvania lawyer John Dickinson, another influential writer of the period, also used a natural rights version of higher law in his letters and pamphlets. He wrote in 1766 that the law came from a "higher source" than the king or Parliament: it came from "the King of kings, and Lord of all the earth." The law was thus "created in us by the decrees of Providence, which establish the laws of our nature."[12] However, Cornelia Le Boutillier has demonstrated that, when the founders wrote about natural law, they usually gave it a utilitarian meaning rather than a transcendental one, despite the religious-sounding rhetoric. Though possibly originating in a higher source, political authority had been instilled in individuals, who then relinquished it only through their consent. When patriot writers referred to the "laws of God," they usually did not depend on scripture or revelation as the content of natural law; rather, their sources were primarily Locke, Montesquieu, Hugo Grotius, and other Enlightenment thinkers.[13]

The preeminence of Enlightenment thought during the founding period does not mean that it served as the sole basis of revolutionary thought. Republican ideology derived from eclectic sources of values—classical liberalism, common law, evangelicalism, and Calvinism—in addition to Enlightenment and Whig theories. Patriot writers synthesized "these disparate strains of thought" into a shared political rhetoric. In spite of the inherent conflicts among the assumptions underlying various traditions (e.g., belief in the goodness of human nature, which was common in Enlightenment thought, was diametrically opposed to Calvinist thought), colonial leaders were able to extract consistent themes and to construct a rhetoric that reflected an amalgam of various ideologies.[14]

Religion—whether identified as Puritan, Calvinist, or evangelical—was one of the ideological sources that informed the nation's founding. As the unifying theological thread, Calvinism represented the "common [religious] faith" of Americans before the Revolution. But the late colonial expressions of Calvinism were diverse, informing Congregational, Presbyterian, Dutch Reformed, Baptist, and even Anglican thought. While still theologically orthodox, eighteenth-century Calvinist thought increasingly recognized the voluntary nature of belief and the need for the institutional separation of church and state structures. At the same time, Calvinist clergy approached the events of the Revolution and founding with their millennial and covenantal perspectives, often using biblical types to explain the political events.[15]

Protestant evangelicalism, arising out of the spiritual Great Awakening of the 1740s, was also a fertile source of the republican ideology informing the founding period. The awakening, with its emphasis on personal salvation, individual authority, and voluntary association, nurtured nascent democratic values of equality and freedom of conscience. The religious fervor of the period also rekindled dormant interest in the millennium and America's special destiny. Some religious historians, such as Alan Heimert and Ellis Sandoz, have stressed "the centrality of religious ideas" during the revolutionary era, insisting that historical evidence suggests "a substantial religious dimension to our founding." Modern popular writers have taken such arguments a step further, often attributing the origin of republicanism chiefly to religious impulses. One author has argued that "[t]he history of America's laws, its constitutional system, the reason for the American Revolution, or the basis of its guiding political philosophy cannot accurately be discussed without reference to its biblical roots." At this extreme, republican ideology is all but synonymous with Christianity; the founders are portrayed as divinely inspired pietists and the founding documents as based on Christian principles.[16]

Without question, a dynamic religious environment informed republican ideology by providing the Revolution with a greater, transhistorical meaning, one that explained events as part of a continuum reaching back to biblical times. In so doing, religion contributed directly to the rhetoric of the times. Yet no single value system dominated the period or controlled political discourse, despite Calvinism's claim to being the common faith of the people. Divergent streams of thought became intermeshed during the revolutionary period through a shared rhetoric as people reacted to tumultuous events. Religion's greatest influence was through the ability of its leaders to integrate Enlightenment and Whig theories under the cope of religious discourse.[17]

Early on, the war with France, the Intolerable and the Test and Corporation acts, the Quebec Act, and the controversy over the appointment of an American bishop politicized the clergy and led them to expand their understandings of good and evil. Enlightenment and Whig political terminology entered into the Calvinist and evangelical vocabulary as clergy began to speak in terms of equality and liberty. Citing "Mr. Lock's" *Treatise on Government*, Connecticut's Elisha Williams wrote in 1744 that "reason teaches men to join society . . . [and] to make a body of laws agreable to the law of nature. . . . It is they who thus unite together, *viz*, the people, who make and alone have right to make the laws that are to take place among them." Thirty years later, the Reverend Samuel Sherwood would use similar terminology, writing that all societies "have their beginning and origin in voluntary compact and agreement," which people "have entered into by consent and free choice." Because all people possess inherent natural rights, civil rulers were under "sacred obligations" to observe those "eternal rules of justice and righteousness" in their dealings with the colonists.[18]

Once the Revolution began, clergy used an amalgam of biblical imagery and Enlightenment thought to describe the conflict. Initially, the theme was one of a wayward people being punished for their transgressions. The Reverend Samuel Langdon, in a 1775 election sermon following the battles of Lexington and Concord, declared that the "true cause of the present remarkable troubles" was that the people had "rebelled against God. We have lost the true spirit of Christianity, tho' we retain the outward profession and form of it." Following the Declaration of Independence and the victories at Trenton and Saratoga, clergy seized on every "interposition of Divine Providence" on behalf of the colonial effort. In a 1777 sermon, the Reverend Nicholas Street compared the American states to the children of Israel while Great Britain became Egypt and King George, Pharaoh. Continuing the theme of redemption, Street argued that, though the colonists were blessed by God, like Israel, they risked ignoring God's commandments and becoming "sadly corrupted [in] their way" through their preoccupation with political matters:[19]

> For if public virtue fails and people grow vicious and profane, selfish and oppressive under the sorest judgments and calamities, we have reason to fear the worst; that God will multiply our distresses and increase his judgements, till we are brought to a repentance and reformation. We see that God kept the children of Israel in the wilderness for many years after he delivered them from the hand of Pharaoh, on the account of their wickedness.[20]

A similarly guarded view of America's chosen status is revealed in Connecticut divine Samuel Sherwood's widely circulated revolutionary sermon "The Church's Flight into the Wilderness." Though Sherwood proclaimed the "incontestible evidence, that God Almighty, with all the powers of heaven, are on our side," he too warned that the new nation could "be sorely rebuked and chastised for [its] woeful aposticies, declensions and backslidings."[21]

These and other sermons indicate the limits to the religious rhetoric among revolutionary clergy. As with Street's and Sherwood's sermons, most comparisons of America during the Revolution to Old Testament Israel appeared in calls for accountability and redemption, not in claims that America fulfilled some biblical ideal. While revolutionary clergy professed that God was on their side, they generally avoided claims that the new nation found its basis in Christian principles. Civil government was not "so from God, as to be expressly appointed by him in his word," wrote Boston minister John Tucker in an election sermon. Rather, it is "founded on the very nature of man, as a social being, and in the nature and constitution of things." All government, therefore, "consistent with that natural freedom, to which all have an equal claim, is founded in compact." Sherwood, too, writing in 1774, asserted that because "societies and communities have their beginning and origin in voluntary compact and agreement," all people had "their liberty and free choice to agree upon such a form of government." By this point, the clergy were too imbued with natural rights theories to resurrect a Puritan model professing that authority for government rested in God. Identifying a higher authority for the new nation would also have been inconsistent with those arguments that had denied a similar source of authority for the Crown. "The line, indeed, between one society, and another, is not drawn by heaven," declared Congregationalist Daniel Shute, "nor is the particular form of civil government."[22]

As America's victory appeared more attainable, allusions to the interworkings of Providence naturally increased. In a 1780 sermon preached before the Massachusetts legislature, the Reverend Samuel Cooper remarked on the "striking resemblance between our circumstances and those of the ancient Israelites; a nation chosen by God [is] a theatre for the display of some of the most

astonishing dispensations of his providence."[23] Following Yorktown, orthodox clergy celebrated the victory as a sign of America's fulfillment of a millennial destiny. In a 1783 election sermon before the Connecticut General Assembly, Ezra Stiles, later to become president of Yale College, identified the guiding hand of Providence in the recent victory over the British. George Washington was the "American Joshua" who had been "raised up by God and divinely formed by a particular influence of the Sovereign of the Universe for the great work of leading the armies. . . . And who does not see the indubitable interposition and energetik influence of Divine Providence in these great and illustrious events?" With the victory secure, Stiles referred to the United States as "God's American Israel" and predicted the "prophetick" destiny of the new nation.[24]

To a lesser degree, secular politicians were affected by the millennial and providential fervor of the times and often spoke in religious terms. John Adams wrote in his diary in 1765 that he "always consider[ed] the settlement of America with reverence and wonder, as the opening of a grand scheme and design of Providence." Years later, Adams attributed Washington's victory at Yorktown to the "great designs of Providence," writing that "[t]he progress of society will be accelerated by centuries by this revolution."[25] Even leaders with deist leanings, including George Washington, Thomas Jefferson, and Benjamin Franklin, used providential language and biblical imagery when describing the extraordinary events. Following Yorktown, Washington downplayed his own role in achieving victory, attributing success to a superintending Providence: "the praise is due to the Grand Architect of the Universe." Such rhetoric was common; even a cursory review of the speeches and correspondence of the founders reveals that they "were as vigorous in their pronouncements on America's providential destiny as any clergyman."[26]

Undue significance can be imputed to the founders' use of religious language and their willingness to speak in providential terms. In light of the extraordinary times and the prevalence of religious discourse, it would have been remarkable if the founders had *not* employed biblical terminology in their public statements. Although many of the founders ascribed a special quality to the nation's founding, few attributed more than an indirect providential influence in explaining the monumental events. Like the American clergy who for twenty years had been preaching about the consensual basis of government, the founders viewed the authority for the new nation in secular Enlightenment terms. More than anything, the founders were public figures who utilized contemporary modes of discourse that conflated various strains of thought popular at the time. As one commentator has noted, by the mid-1770s "religion was so deeply intertwined with Revolutionary ideology that it seems virtually impossible to distinguish between them."[27] All groups shared a millennial vision and

spoke in providential terms. The result, to use George Marsden's phrase, was that there was "no distinctly 'Christian' line of political thought" as opposed to secular political thought:

> Everything was Christian, and nothing was. Orthodox Calvinist American patriots accordingly shared a single political orthodoxy with the Thomas Paines, Thomas Jeffersons, and Ethan Allens of their day. Only when it came to narrowly restricted questions of "religion" did sharp differences appear.[28]

The modern emphasis on the disparate strains of revolutionary thought—particularly between a secular/rationalist and Calvinist/evangelical perspective—was not as evident to those of the founding period. As Gordon Wood has written:

> Whatever the differences that may have existed among the [revolutionaries], all those committed to revolution and republicanism in 1776 necessarily shared an essentially similar vision of the corporate commonwealth—a vision of varying distinctiveness fed by both millennial Christianity and pagan classicism. Enlightened rationalism and evangelical Calvinism were not at odds in 1776.[29]

This is not to say that Enlightenment and Whig thinkers failed to understand their differences with Calvinist orthodoxy, evangelical enthusiasm, or Anglican moralism. John Murrin is correct that Enlightenment rationalism, "civil humanism, classical liberalism and the Scottish Enlightenment all challenged Calvinist orthodoxy." But rather than being displaced, religious leaders were influenced by secular lines of thought and incorporated complementary strains into their political views. At the same time, secular political leaders employed the familiar and common language of religion. Still, the overarching perspective that tied together the founders' political theories—and the common discourse of statecraft—was that of Enlightenment rationalism.[30]

The Understandings of "an Establishment"

Before considering the religious disestablishment at the state and national levels in the last quarter of the eighteenth century, it is important to understand the variety of church-state arrangements that existed during the late colonial era. For most of the preceding 150 years, nine of the original British colonies had maintained mandatory tax support for ministers, religious teachers, church maintenance, and/or public worship. In addition to providing financial support

for the established denomination(s), these systems afforded legal and political benefits to those churches and their members while they disqualified nonconformists from holding public office, voting, or participating in important legal matters. In the southern colonies, primarily Maryland, South Carolina, and Virginia, the establishment was institutionally formal with the Anglican Church receiving tax support for its ministers, glebe land for its churches, and official preferences under the laws. Only Anglican clergy could officiate at certain domestic ceremonies, such as marriage; only Anglican churches received corporate protection and could own property; and only Anglican communicants could hold public office and, at times, vote. The "privileges" associated with the establishment flowed two ways, however. By virtue of awarding these legal preferences, colonial assemblies had a say in the operation of Anglican churches, such as the selection of clergy and the enforcement of church doctrine. In Virginia, for example, the General Assembly enacted laws in 1631 and 1632 that established the number of wardens per parish and set the number of sermons that Anglican clergy were to preach every year. In the South, dissenting churches and their ministers were tolerated at best, and at worst they were persecuted if the latter did not obtain licenses to preach.[31]

Religious strife was relatively rare in the southern colonies until the end of the colonial period. After 1750, the Anglican establishments came under pressure from an increasing religious pluralism produced by the Great Awakening and immigration from outside of England. The revivals emphasized both voluntarism and enthusiasm that challenged the staid Anglican establishment, leading to the break-off of American Methodism. With the influx of Presbyterians, Quakers, Moravians, and Baptists, among other sects, came increased religious dissent and conflict. Presbyterians agitated for greater parity with Anglican churches, including a share of tax revenues, while Baptists resisted the licensing requirements, landing several of their preachers in Virginia jails. Although an Anglican establishment existed in all of the southern colonies until the Revolutionary War, it was most effective in Virginia and the tidewater areas of Maryland and South Carolina.[32]

An Anglican establishment technically existed in New York after 1693, but Anglicans represented a distinct minority against the Dutch Calvinists, Presbyterians, Huguenots, and the growing heterodoxy of dissenting sects. The Ministry Acts (1693, 1705) afforded recognition of the Anglican Church and authorized vestrymen to raise taxes for the support of "good and sufficient Protestant ministers." Much of the money went to Dutch and Presbyterian churches, which in turn resisted Anglicans' efforts to assert their privileged status. In the years preceding the Revolution, religious dissenters—spurred by controversies over the appointment of an Anglican bishop in the colonies and

the favorable treatment given to Anglican-controlled King's College (later Columbia University)—mounted a campaign to repeal the laws establishing the Anglican Church. In 1769 and 1770, bills to exempt dissenting Protestants from ministerial taxes and to repeal the Ministry Acts passed the assembly, only to be tabled in the Anglican-controlled Governor's Council. New York, with its weak establishment and exploding religious diversity, was ripe for disestablishment.[33]

In New England, a less centralized system provided tax support for Congregational churches, which was assessed by each town. Towns and parishes were coterminous (except in Boston), and male residents elected a minister/religious teacher for the town/parish. After 1727, colonial officials in Massachusetts and Connecticut allowed Anglicans to have their assessments paid to their own churches, a privilege that was gradually extended to members of other dissenting faiths—Presbyterians, Baptists, and Quakers—provided the dissenting churches and their members made formal application for the exemption and support. Otherwise, dissenters and non-adherents were forced to support the dominant Congregational church. Although technically constituting a system of multiple establishments with each Protestant denomination or sect entitled to public support, the arrangement favored the Congregationalists by custom if not by default. Dissenters were required to file certificates of membership in their respective churches with the parish clerks; failure to do so (or affiliation with an unrecognized religious body) meant that they were assessed for the support of the Congregational church. The town's "settled" religious teacher—invariably a Congregationalist minister—was the presumptive recipient of public support and officiated at marriages and all public events, such as the offering of fast and election sermons. Even though officials in Massachusetts, Connecticut, and New Hampshire defended their church-state arrangements with their public support of religion, they equivocated about whether their systems constituted religious *establishments*, in part to diffuse Anglican charges of the latter's displacement from its entitled position.[34]

The remaining colonies—Delaware, New Jersey, Pennsylvania, and Rhode Island—never instituted systems of religious assessments nor officially recognized any church. This "failure" was due in part to the influence of William Penn and Quaker settlers in the first three colonies and the religious plurality of all four colonies.[35] All colonies, however, including those without religious establishments in the form of tax assessments, maintained a variety of laws requiring a belief in God and Jesus for office holding and excluding Catholics and non-Christians from being able to swear the oaths that were necessary for many legal functions. And all colonies, to varying degrees, imposed laws regulating behavior according to religious standards (e.g., prohibiting public

swearing, blasphemy, adultery, fornication, bastardy, and gambling) and regulated Sunday activities, even if they did not require church attendance. Tithingmen in New England and vestrymen in Virginia and South Carolina enforced Sunday church attendance, collected assessments, policed gaming and other entertainment on Sundays, and otherwise regulated public behavior deemed to be immoral.[36]

A religious establishment in mid-eighteenth-century America thus meant more than financial support of one or several Protestant faiths. It also included a host of preferences and laws that affected people's legal rights and status and regulated activities based on religious norms. Religious establishments also reinforced religious customs and practices that were integrated into daily life. And in the southern Anglican colonies, it meant the active regulation of church doctrines and functions by civil authorities.

At the time, however, Americans likely disagreed over what factors were characteristic of a religious establishment. Aside from a handful of notable persecutions during the seventeenth century, America lacked the history of religious persecution and corruption that colonists regularly associated with the Smithfield fires and the ecclesiastical hierarchies of Europe. Yet, colonists were sensitive to the religious preferences inherent in the American establishments and increasingly associated mandatory religious tax assessments with religious coercion. At the same time, the majority of colonists likely believed that public support of religion and worship, either financially or through official suasion, was important for the maintenance of civil society and the perpetuation of public morals and civic virtue. A similar number likely viewed laws restricting political and legal rights to Christians (or Protestants), moral codes of conduct, and official religious pronouncements as distinct from a coercive system of religious assessments, though not as inconsistent with a religious establishment. Society's dependence on religious norms and the state's reciprocal reinforcement of those norms had little to do with the growing opposition to the religious preferences represented by the religious taxes.[37]

In defining a "religious establishment," most colonists would have referenced the criteria associated with the Anglican establishment in England under the Test and Corporation Acts (and, to a lesser extent, with the situation in colonial Virginia and South Carolina): forced tax support for a single denomination; legal and financial preferences for that church alone; civil involvement in church governance; civil disabilities for religious nonconformists; and a climate of seeming toleration that often turned into persecution of dissenters and their churches. During the height of the crisis over the appointment of an American bishop in the 1760s, Boston Congregationalist minister Charles Chauncy used these criteria to distinguish an Anglican establishment from the

Standing Order in New England: "we are in principle against all civil establishment in religion. It does not appear to us that God has entrusted the State with a right to make religious establishments. . . . we claim no right to desire the interposition of the State to establish that mode of worship, [church] government, or discipline we apprehend most agreeable to the mind of Christ."[38] As is evident from Chauncy's statement, however, he and many New England colonists did not view a multiple establishment where taxes were distributed to Protestant churches according to taxpayer preferences as infringing on rights of conscience or as constituting an establishment. Writing from Boston in 1776, "Worcestriensis" insisted that establishments involved requiring dissenters to adhere to the prevailing religion and subjecting them to "pains, penalties and disabilities" for their refusal to conform. "Compulsion, rather than making men religious, generally had a contrary tendency," Worcestriensis argued. But this did not mean that legislatures were prohibited from encouraging "GENERAL PRINCIPLES of religion and morality":[39]

> It is lawful for the directors of a state to give preference to that profession of religion which they take to be true, and they have a right to inflict penalties on those who notoriously violate the laws of natural religion, and thereby disturb the public peace. . . . [*T*]*oleration*, will not disprove the right of the legislature to exert themselves in favor of one religious profession rather than another, . . . [for they] are BOUND to do their *utmost* to propagate *that* which they esteem to be true.
>
> If the greatest part of the people, coincide with the public authority of the State in giving the preference to any one religious system and creed, the dissenting few, though they cannot conscientiously conform to the prevailing religion, yet ought to acquiesce and rest satisfied that their religious Liberty is not *diminished*.

For Worcestriensis, even a forced assessment for support of the dominant church did not rise to the level of religious compulsion:

> This suggestion starts a question, which had caused much debate among persons of different religious sentiments, viz. Whether a minor part of a parish or other corporation, are, or can be consistently obliged to contribute to the maintenance and support of a minister to them disagreeable, who is approved by the majority. . . . [N]one can reasonably blame a government from requiring such a general Contribution, and in this case it seems fit it should be yielded

> to, as the determination of those to whose guardianship the minority have committed themselves and their possessions.[40]

The fact that Worcestriensis had to defend the system indicates that it was coming under attack by religious dissenters, particularly Massachusetts Baptists led by Isaac Backus.[41]

One of the more comprehensive statements indicating contemporary views about religious establishments is contained in a 1777 petition by Presbyterian minister William Tennent of Charleston, South Carolina, to that state's legislature as it was considering a new constitution.[42] Tennent represented a coalition of dissenting churches that objected to perpetuating the Anglican establishment under the new constitution. In his petition, he identified several levels of religious establishments, all of which, he claimed, "interfere[d] with the rights of private judgment and conscience." At the most extreme level were those establishments "which lay heavy penalties upon those who refuse to conform to them." There was no "more horrid cruelty exercised upon the rights of conscience" than a system "which imposes fines, imprisonment and death, upon those who presume to differ from the established church." Tennent did not claim that such an establishment had ever existed in America, but implied that tyranny "in greater or smaller degrees" was at the core of all religious establishments.[43] The "next kind of establishment," one that Tennent claimed had existed in South Carolina,

> makes a legal distinction between people of different denominations, . . . it taxes all denominations for the support of the religion [of] one; it only tolerates those that dissent from it, while it deprives them of sundry privileges which the people of the establishment enjoy. . . . The law knows the Clergy of the one, as ministers of the gospel; [t]he law knows not the Clergy of the other Churches, nor will it give them a licence to marry their own people. . . . The law builds superb Churches for the one—it leaves the others to build their own Churches. The law, by incorporating the one Church, enables it to hold estates, and to sue for rights; the law does not enable the others to hold any religious property . . . [but they are] obliged therefore to deposit it in the Hands of Trustees, to be held by them as their own private property, and to lie at their mercy.

Under such establishments, the state also set itself up "as a judge in church controversies," which encroached on the freedom of the established church. Tennent asserted that, like the first form of establishment, this second form was also inconsistent with "our first notions of justice and equality."[44]

A third idea of establishment being promoted by some in South Carolina was to maintain "the [current] Establishment, merely as a matter of religious superiority, without taxing other denominations." But Tennent disagreed with a system of legal preferences even in the absence of a religious assessment. The proponents of this idea "seem to forget, that every reason for which they desire the superiority by establishment, operates as an abridgment of Religious Liberty. . . . Still there remains injustice, and a foundation for dissatisfaction."[45] A fourth form of establishment being considered by the legislature was "to establish all denominations by law, and to pay them equally." Tennent believed such a system was also "absurd and impossible":

> [T]he establishment of all religions would in effect be no establishment at all. It would destroy the very end of an establishment, by reducing things just to the same state they would be in without it, with this disadvantage, that [those] who could not obtain Church officers, might be oppressed, by being obliged to pay that which they received no benefit from.[46]

Tennent's objection to this last form was not as strong as his petition indicates. His chief objective was for Presbyterians to receive the same legal privileges as the Anglicans, not to establish a regime of full religious liberty nor complete separation between religion and government. His opposition to a multiple assessment system lay more in its impracticality, rather than on principle. Although he insisted that he was "utterly against all establishments in this State," the petition suggests that Tennent was inclined to accept some of the more benign aspects of an establishment, though he likely would not have considered them as being included in that designation: "The State may give countenance to religion, by defending and protecting all denominations of Christians, who are inoffensive and useful. The State may enact good laws for the punishment of vice, and the encouragent [*sic*] of virtue. The State may do any thing for the support of religion, without partiality to particular societies."[47]

In the end, Tennent apparently believed that a truly equitable assessment for all churches, along with official recognition and protection of religion, did not constitute an establishment, at least not a coercive one. Still, by asserting Lockean notions of natural rights of conscience, Tennent's arguments had broader implications. "Religious establishments," Tennent wrote, "interfere with the rights of private judgment and conscience: In effect, they amount to nothing less, than the legislature's taking the consciences of men into their own hands, and taxing them at discretion."[48] Thus, religious assessments, particularly for the benefit of one church but not necessarily limited thereto, was the hallmark of a religious establishment, along with the legal benefits and

preferences the official church and its members received. As the final quarter of the eighteenth century progressed, however, Americans would expand their understandings of what practices implicated rights of conscience and were associated with a "religious establishment."

Disestablishment in the States

With the long history of colonial establishments and the ubiquity of religious imagery in popular discourse during the revolutionary period, it is remarkable that a majority of the founding documents were all but bereft of religious language. Instead, the documents took on secular or, at best, deistic overtones. Only a handful of the revolutionary constitutions contained acknowledgments of reliance on God or divine Providence and then did so in Enlightenment terms only. The preamble to the Pennsylvania Constitution of 1776 referred to the "blessings which the Author of existence has bestowed upon man," while the Vermont Constitution of 1777 acknowledged "the goodness of the Great Governor of the universe." Neither constitution—in good Enlightenment fashion—referred to God by name and neither invoked divine Providence for the task ahead. Even the vague acknowledgment of God was dropped in the 1790 Pennsylvania Constitution. Similarly, in 1779, the voters of New Hampshire rejected a proposed constitution that would have barred the legislature from enacting laws "contrary to the laws of God, or against the Protestant religion" and limiting voting to followers of the Protestant religion. Instead, in 1784, the New Hampshire legislature approved a constitution with no acknowledgment of God.[49]

Only the 1776 Maryland and the 1780 Massachusetts constitutions expressly acknowledged God and divine Providence by declaring the duty of all men to worship "God in the manner he thinks acceptable to him" (Maryland) or "publicly . . . to worship the Supreme Being, the great Creator and Preserver of the universe" (Massachusetts). Unique among all of the new states, Massachusetts declared that the authority for the "new constitution of civil government" came from "the goodness of the great Legislator of the universe." Even these acknowledgments of God were tempered by Enlightenment terminology (e.g., "the great Creator and Preserver of the universe"; "great Legislator of the universe"), likely provided by its author, John Adams, a remarkable feat for the old Puritan colony.[50] Most significant, though, is the absence of any acknowledgment of God or divine Providence in the remaining revolutionary constitutions. Georgia, for example, praised the "laws of nature and reason" as the source of inspiration for its new government. In addition, all of the early state constitutions affirmed that governmental power and authority "originates from the people."[51]

The preamble to the Delaware Constitution of 1792 demonstrated the subservient role of a Christian God to Enlightenment theory as the ultimate authority for state government. The Delaware preamble acknowledged that by "divine goodness" all men possess the "rights of worshipping and serving their Creator according to the dictates of their consciences," but went on to assert that "all just authority in the institutions of political society is derived from the people, and established with their consent." Even those state constitutions that initially provided financial support for public worship—Maryland, Massachusetts, New Hampshire, and Vermont—affirmed that "all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole."[52]

The minimal religious rhetoric in the revolutionary state constitutions can be explained in part by the prevalence of Enlightenment thought and the fact that religious matters were of secondary importance to the revolutionaries. With the possible exception of the controversies surrounding the Test and Corporation Acts and the appointment of an Anglican bishop for the colonies, religious issues took a back seat to more pressing social and political ones. The religious imagery helped to explain the conflict, but it had little application to the practicalities of organizing state governments.[53]

While the near-absence of religious rhetoric in the revolutionary constitutions is significant, it would be inaccurate to characterize them as manifestos of free thought and religious equality. All of the early constitutions incorporated provisions that indicated a favoring of Protestantism or Christianity over other faiths. Common were provisions that affirmed equal religious rights for Protestants (but not others) or that required religious (i.e., Protestant) belief for public office holding and religious oaths for court testimony. All states professed to guarantee religious free exercise, but too often the provisions merely granted toleration to dissenting faiths.[54] As Anti-Federalist "William Penn, No. 2" bemoaned in 1788:

> [W]e find it declared in every one of our [state] bill of rights, "that there shall be a perfect liberty of conscience, and that no sect shall ever be entitled to a preference over the others." Yet in Massachusetts and Maryland, all the officers of government, and in Pennsylvania the members of the legislature, are to be of the Christian religion; in New-Jersey, North-Carolina, and Georgia, the protestant, and in Delaware, the trinitarian sects, have exclusive right to public employments; and in South-Carolina the constitution goes so far as to declare the creed of the established church. Virginia and New-York are the only states where there is a perfect liberty of conscience.[55]

Several states barred clergy from public office holding or serving in their legislatures. A majority of the constitutions also referred to the importance of religion, morality, or piety in maintaining civic virtue. Finally, all states retained or reenacted laws regulating conduct according to a Christian standard, prohibiting Sabbath desecration, blasphemy, profane swearing, fornication, and bastardy.[56]

Although these laws and enactments could be interpreted as reaffirming the dependence of civil government on religion, most laws were not new creations but holdovers from the colonial charters. In many instances, the old laws and arrangements were the only references upon which the founders had to rely, and, while in tension with Enlightenment ideals, they offered a degree of stability in the tumultuous times. Hence, it is equally valid to view such laws as local attempts to maintain order and public virtue in a fragmented religious/political environment. The religious prerequisites for office holding and oaths gradually disappeared in later constitutional revisions. As discussed in later chapters, sumptuary laws died harder and were enforced well into the nineteenth century. These religious behavioral laws, based on colonial notions of the moral conduct necessary in a godly society, would serve as a major link between the colonial and antebellum eras and would help to perpetuate belief in America's Christian nationhood.[57]

Given the long history and variety of religious establishments in the colonies, as well as the diversity of thought as to what constituted an establishment, it is remarkable that several of the states quickly took steps to abolish their existing systems or to deprive their new governments of the authority to create such systems. With the advent of the Revolution, New York and North Carolina abolished any remnants of religious establishments by eliminating forced assessments, joining the ranks of New Jersey, Pennsylvania, Delaware, and Rhode Island. Granted, church establishments had never worked well in any of these former colonies (or not at all), so the prohibition on religious taxes and formal preferences was not difficult to accomplish. But the symbolism of these legislative actions should not be underestimated as they identified the states with an emerging principle. It is also significant that none of these new states considered moving in the opposite direction—toward increasing church-state ties—as a way of ensuring public morality and virtue in those troubling times, even though they were arguably free to do so.[58]

The remaining states (including Vermont after 1777) continued some form of tax subsidy and preference for religion. The early laws or constitutions of Massachusetts, New Hampshire, Vermont, Maryland, South Carolina, and Georgia provided for financial support of Christian ministers under what were

essentially multiple religious establishments. (Connecticut maintained its tax assessment system under its colonial charter until it abolished religious assessments in 1818.)[59] For example, the New Hampshire Constitution of 1784 provided:

> [M]orality and piety, rightly grounded on evangelical principles, will give the best and greatest security to the government, and will lay in the hearts of men the strongest obligations to due subjection; and . . . the knowledge of these, is most likely to be propagated through a society by the institution of public worship of the Deity, and public instruction in morality and religion.[60]

Under New Hampshire's system of multiple establishments, each town could select a Protestant "teacher" to be supported through a general assessment. Dissenting Protestants could have their taxes go for their own ministers, provided their churches were incorporated by the state; non-Protestants or uncooperative dissenters were forced to pay for the majority's denomination. Massachusetts went the extra step of requiring church attendance under the threat of arrest by the tithingman. Other states, including Connecticut, New Hampshire, and South Carolina, retained laws empowering tithingmen or church wardens to enforce assessments and prohibitions on working, amusements, or unnecessary traveling on Sundays.[61]

The most explicit religious establishment was in the South Carolina Constitution of 1778. Article 38 provided that the "Christian Protestant religion" was deemed, constituted, and "declared to be, the established religion of this State." Only believers in God and in a future state of punishments and rewards were entitled to the full enjoyment of civil and religious rights, including the ability to hold public office. Moreover, each Protestant church was required to petition for incorporation by the state legislature, upon a showing that the church adhered to five doctrines of faith:

> 1st. That there is one eternal God, and a future state of rewards and punishments.
> 2nd. That God is publicly to be worshipped.
> 3rd. That the Christian religion is the true religion.
> 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.[62]

South Carolina's political establishment sounded worse than it was. At the same time that Article 38 imposed a religious test for office holding, it extended

that privilege to all Protestants while it allowed a witness to swear "in that way which is most agreeable to the dictates of his own conscience," thereby including Quakers and Mennonites. Also, even though the incorporation requirement potentially put public officials in the role of evaluating church doctrine, it extended that protection to all Protestant churches, something that William Tennent had sought. But most significant, the same article went on to provide that "No 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." By substituting notions of voluntary support for that of forced taxation, the 1778 constitution transformed the state's earlier establishment into a paper tiger. Technically, Protestant churches still maintained a public role, but chiefly, South Carolina's "establishment" amounted to "a method of incorporating churches, and no church received public tax support."[63]

South Carolina's inconsistent constitutional language is indicative of the dynamic attitudes toward religious equality and disestablishment during the founding period. Maryland presents an interesting case study of the overlapping perspectives about protecting rights of religious conscience but maintaining the past tradition of public support for and reliance on religion. Founded by the Catholic Calverts with a higher degree of religious tolerance than existed in many colonies, Maryland had succumbed to an Anglican establishment in 1702 following the Glorious Revolution. Catholics were disenfranchised and subjected to other legal and financial disabilities.[64] With that mixed legacy, the Maryland Constitution of 1776 included four provisions that maintained aspects of an establishment while abolishing earlier infringements on religious dissenters. Article 33 proclaimed equal religious liberty to all professors of Christianity, a step that removed the legal disabilities that had been imposed on Catholics and other dissenters after 1702. The article went on to provide that no person "ought . . . to be compelled to frequent or maintain, or contribute, unless under contract, to maintain any particular place of worship, or of any particular ministry," a clause that appeared to abolish religious assessments and the earlier Anglican establishment. Inconsistently, the next sentence authorized the legislature, "in their discretion, to law a general and equal tax, for the support of the Christian religion," allowing each taxpayer to designate his assessment to a "particular place of worship or minister, or for the benefit of the poor of his own denomination." Here, Maryland accomplished the complete opposite of South Carolina: it renounced a religious establishment but then provided for one through assessments. Unlike the rationale advanced in New Hampshire and other New England states, this tax was not to support public "teachers" or to advance a common morality but was an assessment to maintain *churches*. Finally, Article 33 went on to guarantee Anglican churches all rights to their

earlier property, including glebe lands, and bound the legislature to honor its earlier obligations to raise taxes to build or repair Anglican churches. Additional articles required public officeholders to affirm a belief in the "Christian religion" and required an attestation of "the Divine Being" as a prerequisite for taking an oath. These last two requirements, though, were arguably liberalizations of earlier disabilities, with the latter allowing Quakers, Dunkers, and Mennonites to make a solemn affirmation in place of an oath. Maryland's establishment thus contained contradictory elements, indicating competing notions about religious freedom and equality and the need for public support of and reliance on religion. But these innovations did not remain static; despite creating the framework for a religious assessment, Maryland voters in 1785 rejected a proposed tax. No assessment system would ever be put in place, with the state formally repealing the provision in Article 33 in 1810. As elsewhere, attitudes toward disestablishment and church-state separation in Maryland were dynamic and evolving.[65]

The fact that the majority of new states initially retained religious establishments is thus not a fair indicator of the trend toward disestablishment. All of those state legislatures struggled to balance evolving notions of rights of conscience with older beliefs about the importance of public religion for the betterment of society. More significant than this initial hesitancy is the fact that, between 1775 and the drafting of the First Amendment in 1789, five of those states—Georgia, Maryland, South Carolina, Vermont, Virginia—rejected or effectively abandoned their systems of tax assessments.[66] Similar to the situation in Maryland, the first Georgia Constitution (1777) allowed for a religious assessment, although Article 56 provided that the tax could only be assessed "by consent" and then only for a minister of one's "own profession." Not until 1785 did the assembly pass an assessment bill that allowed each county to select a Christian minister who would receive the tax funds (apparently, dissenting families in a county could apply to receive a proportionate share for their ministers). Baptists objected to the passage of the law, and it is unclear whether the law was ever enforced. New constitutions in 1789 and 1798, respectively, removed a religious test for office holding and abolished all authority for assessments, further revealing the dynamic process of disestablishment.[67]

Disestablishment in Vermont took a unique path, with the state maintaining an "unconstitutional" establishment for several years. The Vermont Constitution of 1777 contained contradictory language regarding mandatory religious assessments. Article III initially affirmed the "natural and unalienable right [of people] to worship . . . according to the dictates of their own consciences and understanding." Borrowing from the Pennsylvania Constitution, it went on to affirm that "no man ought, or of right can be compelled to attend any religious

worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience." This clause should have guaranteed political disestablishment. However, the same article also provided that every denomination should observe "the Sabbath or Lord's day, and keep it up, and support, some sort of religious worship, which to them shall seem most agreeable to the revealed word of God." Vermont officials interpreted this latter provision as authorizing the existing practice of towns assessing religious taxes. In 1783, the legislature enacted a law that clarified how the assessments were to be collected and the manner of obtaining certificates of exemption by religious dissenters. In 1786, however, the Vermont legislature revised the constitution of 1777, adding a phrase in the first clause of Article III to emphasize that the right to worship according to the dictates of conscience was pursuant to "their opinion" and removing the obligation in the final clause to "support" religious worship. The same revision also removed a limitation on the rights of conscience as applying only to "profess[ors] of the protestant religion." At least on paper, these reforms forbade compulsory religious assessments and repudiated a legal preference for Protestantism in Vermont. But the following year, in a general revision of the laws, the legislature left in place the 1783 law authorizing religious assessments, which several towns continued to enforce over the objection of Baptists and other dissenters who asserted that the law was inconsistent with the 1786 constitutional revisions. Despite the complaints and petitions, the Federalist- and Congregationalist-controlled legislature resisted rescinding the unconstitutional law. Assessments continued sporadically, depending on the town and level of dissent. Not until 1807, with the rise of the Democratic-Republican Party in Vermont and an increase in Baptist adherents, did the Vermont legislature abolish all statutory authority for the collection of assessments. Despite this tortured path, disestablishment prevailed in Vermont, consistent with the general trend outside of New England.[68]

The early movement toward disestablishment at the state level and the diversity of attitudes toward the meaning of that concept are illustrated by the events in Virginia and Massachusetts, the two most important states in the new nation. Both colonies had long-standing and entrenched religious establishments. Despite those similarities, Virginia and Massachusetts went in starkly different directions.

Although too much can be made of the influence of the Virginia assessment controversy on the drafting of the First Amendment, its experience in disestablishing religion remains instructive. From its earliest days, Virginia had a formal establishment that granted privileges and financial support to the Anglican Church. The assembly also enacted laws regulating behavior, requiring church attendance, and prescribing that all religious practices conform to

the Church of England, though enforcement was relatively lax on the large and expanding Virginia frontier. Still, Virginia retained a fair degree of religious homogeneity and minimal dissent through the seventeenth and early eighteenth centuries. By the 1760s, however, the colony had experienced an influx of Presbyterians and Baptists, among other religious dissenters. The social stability provided by the Anglican establishment became strained, and public officials reacted to dissident attacks on Anglican hegemony. The 1774 imprisonment of several itinerant Baptist preachers for failing to obtain the necessary certificates grieved a young James Madison, who wrote to his friend William Bradford to "pray for Liberty of Conscience." "Is an Ecclesiastical Establishment absolutely necessary to support civil society in a supreme Government?" Madison asked rhetorically. "[And] how far is it hurtful to a dependent State?"[69]

In 1776, the Virginia legislature adopted the Declaration of Rights, which famously substituted James Madison's phrase "free exercise of religion" for George Mason's original language guaranteeing only "the fullest toleration in the exercise of religion." The declaration did not address the existing religious establishment, though Madison recommended a provision that "no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges." Madison and establishment supporters alike recognized that the provision would have effectively disestablished the Anglican Church, a radical step at that early and uncertain stage. The provision was rejected, though the declaration's free exercise guarantee created uncertainty about whether an enforced assessment would violate freedom of conscience. Adding to the uncertainty, the Virginia Assembly suspended religious assessments for several years during the war.[70]

In 1779, two competing bills brought the assessment issue to the forefront. Thomas Jefferson introduced his Act for Establishing Religious Freedom (Bill No. 82), employing a clever play on words. Jefferson's proposed act sought to make support of religion completely voluntary, providing that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever" and, further, that "noone shall be enforced, restrained, molested, or burdened in his body of goods, nor shall otherwise suffer on account of his religious opinions of belief." Drawing inspiration from Locke, Burgh, and Priestley, the act would have accomplished the most complete disestablishment of religion known to date while removing all legal disabilities on account of faith. The act was likely ahead of its time, particularly in the midst of a war effort that needed God's favor, and it was tabled. Jefferson later acknowledged that he "had drawn in all the latitude of reason and right" in his effort to make "protection of opinion . . . universal," but the bill "still met with opposition."[71]

About the same time, supporters of the Anglican Church introduced the Act Concerning Religion, drawn from Article 33 of the South Carolina Constitution, which declared that the "Christian Religion shall in all times coming be deemed, and held to be the established Religion of this Commonwealth." The bill would have recognized those denominations that followed five articles of faith and would have provided for their incorporation. But, unlike the South Carolina provision, the bill included an assessment for the support of ministers. Even though the weight of public opinion appeared to favor this latter bill, it was tabled after surviving two readings.[72]

The Act Concerning Religion and Jefferson's Bill No. 82 languished throughout the war. Uncertainty about the status of Virginia's establishment remained, causing several groups to petition the assembly in 1783–1784 to enact a "general and equal contribution for the support of the clergy." In 1784, Patrick Henry introduced a modest version of the 1779 assessment bill, Establishing a Provision for Teachers of the Christian Religion, to allow taxpayers to designate their Christian denomination of choice to receive their taxes and to allocate undesignated funds to "seminaries of learning." Henry's new bill removed the earlier reference to an establishment, possibly reflecting either discomfort with the term or the belief that a general assessment, with the ability to designate the recipient church, did not infringe on rights of conscience nor constitute a "religious establishment." Henry's bill received support from people who saw religion as necessary to ameliorate a decline in public morals: "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."[73]

The general assessment bill garnered considerable support, with a leading Presbyterian body reversing its earlier opposition to a religion tax. Alarmed that the bill would be enacted (a preliminary version passed the Virginia house acting as a committee of the whole by a vote of 47–32), James Madison orchestrated a postponement while he secured the election of Henry as governor, thus removing his rival from the assembly. In the interim, Madison and other assessment opponents organized a petition drive. To rally support for the petition, Madison penned his famous *Memorial and Remonstrance*, setting out various arguments against religious establishments in general and religious assessments in particular. The *Memorial* reflects the influence of both Enlightenment and Whig writers, but also contains a variety of practical arguments for opposing establishments. Several of Madison's arguments are notable. First, Madison viewed religious exercise and conscience as "unalienable right[s]" subject only to the "Creator." As such, religion was a private matter, "wholly exempt from [the] cognizance" of government. Borrowing a theme from

Locke's *Letter Concerning Toleration* and Jefferson's *Notes on the State of Virginia*, Madison made this argument in three places, equating claims of government authority over religious matters with a religious establishment: "If Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government?" Civil officials were "[in]competent Judge[s] of Religious Truth," Madison asserted. Second, the *Memorial* did not distinguish between exclusive and multiple establishments; all forms of religious assessments violated rights of conscience and constituted a religious establishment: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion to all other Sects?" Third, Madison used both history and logic to argue the dangers presented to civil society by religious establishments: they erected both "spiritual" and "political tyranny while inviting civil officers to "prever[t]" religion by turning it into "an engine of Civil policy"; they denied political and religious equality; and they undermined "moderation and harmony" among religious sects while inviting "Religious discord." Finally, Madison argued that establishments harmed rather than advanced religious principles: "experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had the contrary operation." Although Madison's *Memorial* was not the sole memorial opposing the assessment bill, it was the most influential and helped to turn the tide of public opinion. Opponents sent 1,500 petitions to the assembly, many signed by evangelicals—including Virginia Presbyterians who had a second reversal of heart—and the legislature permanently tabled Henry's bill. Taking advantage of the momentum, Madison reintroduced Jefferson's Act for Establishing Religious Freedom, which passed overwhelmingly.[74]

Before Jefferson's bill was enacted, however, conservative legislators sought to moderate some of the act's more sweeping language by inserting an acknowledgment of "Jesus Christ, the holy author of our religion" to the preamble. Madison opposed the amendment, as did several legislators who "were particularly distinguished by their reputed piety and Christian zeal." According to Madison's notes, these evangelical legislators argued that "the better proof of reverence for that holy name would be not to profane it by making it a topic of legislative discussion." The legislators also viewed the acknowledgment as inconsistent with the secular basis of government, arguing it would make "his religion the means of abridging the natural and equal rights of all men, in defiance of his own declaration that his Kingdom was not of this world." The amendment failed, in large part due to the opposition of the evangelical legislators. Championed through Madison's *Memorial*, Jefferson's act thus offered legislators a sharp contrast in church-state relations to Henry's assessment bill;

regardless of whether they agreed with all of Madison's arguments, everyone understood the significance, if not the scope, of disestablishment that Jefferson's act imposed. The act would serve as a model for a new era of church-state relationships.[75]

Critics of the *Everson* interpretation of the Virginia assessment controversy, unable to dispute the spacious language in Jefferson's act and Madison's *Memorial*, point to contemporaneous measures considered by the Virginia Assembly—including bills supported by Jefferson and Madison—to suggest that the two men intended a less expansive form of church-state separation than *Everson* claims. The first measure, a bill to allow for the incorporation of Anglican churches, was a companion to Henry's assessment bill and highly desired by the Anglican establishment. Madison reputedly opposed church incorporation, as he feared the accumulation of property and wealth by ecclesiastical bodies that incorporation would permit. Yet Madison supported its passage when it came up for a vote. Madison's strategy was transparent rather than being ideologically inconsistent; as William Lee Miller contends, it appeased the "old Anglican forces, and at the same time it frightened the Presbyterians and others about an Anglican resurgence."[76] It also reserved Madison's resources for the more important battle ahead: defeating the assessment bill. Madison wrote to his father in January 1785 that he assented to the incorporation bill "with reluctance at the time" in order to separate it from "the Genl Assesst [bill] which would otherwise have certainly been saddled upon us." He anticipated that it would be "unpopular among the laity" and "soon [be] repealed, and will be a standing lesson to them of the danger of referring religious matters to the legislature." Rather than indicating an inconsistency of position, Madison's support for the incorporation bill reveals his political acumen and willingness to prioritize the principles at stake.[77]

Critics Robert Cord and Daniel Dreisbach point to a series of other bills considered by the Virginia Assembly in 1785–1786, several of which were either written or supported by Jefferson and Madison. All of the proposed bills would reputedly have inaugurated a more accommodating regime of church-state relationships than that suggested by the *Memorial*. One bill would have preserved for the Anglican Church the property—real and personal property as well as glebe lands—it had previously held under the establishment; another bill, apparently drafted by Jefferson, punished "disturbers of Religious Worship and Sabbath Breakers"; still another, also written by Jefferson, would have authorized the governor to designate days of fasting and thanksgiving; a final bill would have nullified marriages "Prohibited by the Levitical Law." These bills, according to Cord and Dreisbach, reveal that the political leaders of Virginia, as well as Jefferson and Madison, were not committed to establishing a

regime of strict separation of church and state as claimed by the Supreme Court in the 1947 *Everson* decision.[78]

While all of these proposed laws are instructive of the political dynamic and developing attitudes of the time, they are distinct bills that do little to negate the significance of Jefferson's act or undermine Madison's arguments in his *Memorial*. One should be cautious about referencing a legislator's support for one bill as evidence of the meaning of a different piece of legislation. Although all of the bills dealt with religion in some respect, they paled in significance to the assessment issue, the unique importance of which all parties recognized. In the developing climate of disestablishment, it should not be surprising that attitudes toward particular applications evolved over time, even for Jefferson and Madison. Only the Sabbath bill was enacted, and that law can be seen simply as extending the long-standing custom of Sunday laws that were enacted in every state. Sabbath laws not only reinforced public morality; they also protected church worship from disruption by those who gathered in towns to shop, receive mail, and visit taverns. Sabbath laws had a chief purpose of protecting religious practice, which is consistent with the sentiments contained in Madison's *Memorial*. The annulment bill, despite its use of biblical terminology, did not require an ecclesiastically performed marriage but simply required couples to obtain a marriage license rather than cohabitating. Expanding the authority to perform marriages was a matter of particular importance to the clergy of dissenting faiths and was consistent with Jefferson's and Madison's advocacy of religious equality. Madison's support for the other two bills, also not enacted, likely shows his willingness to compromise on less immediate matters or is evidence of legislative logrolling. While the proposed laws used religious terms (e.g., "Sabbath," "Levitical"), little significance should be attached to such nomenclature considering the ubiquity of religious discourse in the eighteenth century. More than anything, these contemporaneous bills indicate that notions of disestablishment, like ideas of church-state separation, were slowly developing, with immediate attention being given to the more egregious manifestations of religious establishments.[79]

The events surrounding the adoption of the Massachusetts Constitution of 1780, which resulted in the formalization of the state's previously decentralized religious establishment, offers a complementary example of early understandings about disestablishment. Even though the outcome differed from that in Virginia and the majority of states, the Massachusetts experience demonstrates the increasingly controversial nature of religious establishments during the founding period. Opposition to an establishment was strong in Massachusetts, and supporters of the Standing Order had to reconcile their system with calls for greater religious equality and freedom of conscience.

Since 1692, Massachusetts had guaranteed religious toleration but maintained an establishment system whereby each town elected a public minister or teacher to perform religious and quasi-public functions. After 1727, religious dissenters could have their share of the tax assessment abated or have it allocated toward the minister of their own church, provided they secured an exemption certificate and the church had sought and obtained official recognition. In 1774, John Adams described the Massachusetts assessment system as a "most mild and equitable establishment of religion" when compared to the ecclesiastical establishments that existed in England and the southern colonies, a characterization shared by most supporters of the Standing Order.[80] The pamphleteer Worcestriensis wrote that the establishment in Massachusetts proceeded

> only from the benign frames of the legislature from an encouragement of the GENERAL PRINCIPLES of religion and morality, recommending free inquiry and examination of the doctrines said to be divine; using all possible and lawful means to enable its subjects to discover the truth, and to entertain good and rational sentiments, and taking mild and parental measures to bring about the design.[81]

Despite such assurances, a growing number of people, primarily followers of minority faiths, contended that the assessment system was neither benign nor equitable. Leading the charge against the Massachusetts system and the power of the Standing Order was Isaac Backus, the indefatigable leader of the Baptists. "God has appointed two kinds of government in the world, which are distinct in their nature," wrote Backus in 1773, and the two "ought never to be confounded together." Backus raised several objections to the assessment system that Madison would echo in his *Memorial:* the requirement of obtaining exemption certificates "implie[d] an acknowledgment, that the civil power has a right to set one religious sect up above another"; the system "embolden[ed] people to judge the liberty of other men's consciences"; it interfered with the ability of every man "to judge for himself, concerning the circumstances as well as the essentials, or religion, and to act according to the full persuasion of his own mind"; and it "evidently tend[ed] to destroy the purity and life of religion." Although Backus's chief concern was the corrupting effect that establishments had on religion, he did not limit himself to religious arguments in his broadsides, relying also on natural rights theories, including the works of "Mr Locke."[82]

In 1778, the revolutionary legislative council submitted a streamlined draft constitution for voter approval that contained two religion provisions: a requirement that high public and judicial officials be Protestants and a guarantee of "free exercise and enjoyment of religious profession and worship" for Protestants. Otherwise, the proposed constitution was silent on the matter of assessments

and legal preferences for religion. Voters rejected the proposed constitution, citing a host of faults with its structure and substance; the failure to address the assessment issue was not central to the draft's demise.[83]

Significant sentiment existed that a constitution should contain an explicit affirmation of the public role of religion and, for some, secure its public financial support. At the same time, the Standing Order faced growing opposition from evangelicals and deists. In a 1778 election sermon before the General Assembly following the demise of the proposed constitution, the Reverend Phillips Payson of Chelsea threw down the gauntlet by challenging those who would seek to weaken the existing religious establishment:

> The importance of religion to civil society and government is great indeed, as it keeps alive the best sense of moral obligation . . . hence, it is of special importance in a free government, the spirit of which being always friendly to the sacred rights of conscience, it will hold up the gospel as the great rule of faith and practice. Established modes and usages in religion, more especially the stated public worship of God, so generally form the principles and manners of people, that changes or alterations in these . . . may well be esteemed very dangerous experiments in government. For this, and other reasons, the thoughtful and wise among us trust that our civil fathers . . . [will] at all times guard against every innovation that might tend to overset the public worship of God, though such innovations may be urged from the most foaming zeal.[84]

As can be seen, Payson did not rest his support of the establishment solely on its salutary benefits to civil society but also on how it promoted public piety by "hold[ing] up the gospel as the great rule of faith and practice." Payson's sermon set off a two-year debate between pro- and antiestablishment forces through petitions and in newspapers. Isaac Backus responded to Payson's sermon in his pamphlet *Government and Liberty Described and Ecclesiastical Tyranny Exposed* (1778), which brought together the arguments he had been developing for several years. Backus disputed Payson's claim that a general assessment system respected rights of conscience merely because Baptists were eligible to receive a share of the funds. The existing system distributed tax moneys only to "orthodox" ministers and government-recognized churches, "impower[ing] the majority to judge for the rest about spiritual guides, which naturally causes envying and strife," Backus replied. "It is not the pence, but the power, that alarms us. How can liberty of conscience be rightly enjoyed, till this iniquity is removed? The word of truth says, why is my liberty judged of another man's conscience? Let every man be fully persuaded in his own mind."[85]

Backus also answered Payson's claim that a provision for ministers and public worship was necessary to ensure virtue and perpetuate civil society:

> I am as sensible of the importance of religion, and of the utility of it to human society, as Mr. Payson is. And I concur with him, that fear and reverence of God, and the terrors of eternity, are the most powerful restraints upon the minds of men. But I am so far from thinking, with him, that these restraints would be broken down, if equal religious liberty was established.[86]

Religious establishments had not brought about pure or "natural" religion, Backus insisted, but had had the opposite effect: causing "tyranny, simony, and robbery . . . to be introduced and to be practiced under the Christian name."[87]

Backus's understanding of an establishment thus included not only the power to impose religious taxes but the larger claim of a mutual interdependence between religion and government. His greatest objection, however, was with the assumption that God had ordained government with any authority over religious affairs. Even though civil government was anointed by God, it "is left to human discretion." (Backus, like many pietists, however, had few problems with laws that regulated behavior according to a Christian standard or that supported Sabbath worship.) Others supported Backus's understanding of establishments, including a writer using the pseudonym "Mentor." Mentor echoed Locke in arguing that civil magistrates had authority "to bind men only in cases which respect the well-being of society; and not at all in any case as it relates purely to the good of the kingdom of Christ." Civil authorities could not administer an assessment system, Mentor asserted, "without defining the character" of religion: "The civil magistrate cannot enact laws for the support of the gospel ministry, without determining what are its qualifications and characters, and what are the real, true doctrines of the gospel which its ministers are to preach."[88]

Backus's and Mentor's critiques, and the responses to them, demonstrate the diversity of opinion about what constituted a religious establishment. "Hieronymus" presented the primary defense of Payson and the Standing Order in the newspapers. "Mr. Backus's ideas of a *religious establishment* appear to be prodigiously obscure," Hieronymus wrote. "*A religious establishment by law is the establishment of a particular mode of worshiping God, with rites and ceremonies peculiar to such mode, from which the people are not suffered to vary.*"[89] This limited view of an establishment allowed Hieronymus to claim: "In our laws, which relate to the settlement and support of ministers, I am not able to find any thing that has the appearance of *establishment*. All of the various denominations of Protestants are treated alike. The churches of all denominations are rendered capable of holding estates."[90]

As for the mandatory assessment, Hieronymus insisted that the tax, with its exemptions for dissenters, was "perfectly reasonable, so long as no particular mode of worship is established by law. . . . Particular rites and ceremonies are left to be managed at the discretion of each church, so that every man is left at liberty to attend divine worship in the manner which he supposes most agreeable to the scripture." In other newspaper articles, Hieronymus distinguished between the ability of individuals to choose their own mode of worship and the "duty, which the Government is under a moral obligation to perform, to provide that the people shall have [religious] instructors."[91] The latter, which advanced only pure or natural religion and did not interfere with rights of conscience, did not constitute an establishment. This debate over the definition of a religious establishment and its ongoing necessity continued throughout the drafting of the Massachusetts Constitution and beyond, leading John Adams to remark that a "whole company of earthly hosts hath debated these heavenly things with an hellish intensity."[92]

In 1779, the Massachusetts legislature called for a new constitutional convention. In response, several towns directed their delegates to seek protections for individual rights, including rights of religion. The town of Pittsfield instructed its delegates to draw up a Bill of Rights to include:

> all those unalienable and important rights which are essential to true liberty and form the basis of government in a free State, . . . particularly that as all men by nature are free, and have no dominion one over another, and all power originates in the people, so, in a state of civil society, all power is founded in compact; that every man has an unalienable right to enjoy his own opinion in matters of religion, and to worship God in that manner that is agreeable to his own sentiments without any control whatsoever, and that no particular mode or sect of religion ought to be established, but that every one be protected in the peaceable enjoyment of his religious persuasion and way of worship.[93]

Other towns joined Pittsfield in identifying a compact or social contract as the basis of a free government and calling for freedom of worship and liberty of conscience to be included in the constitution. Although the instructions spoke only of opposition to the establishment of a "particular mode or sect of religion," they should be understood as expressing opposition to the status quo of multiple establishments, as legal preferences for a particular mode or sect technically did not exist in Massachusetts.[94]

The convention delegates selected a committee to draft the constitution, the committee in turn delegating the drafting to a subcommittee, which

appointed John Adams to write the document, which he completed in October 1779. The convention, which ultimately made few alterations to Adams's work, debated the constitution between November 1779 and March 1780. As submitted and ratified, the constitution contained as many as ten provisions concerning religion, including religious requirements for public office holding and the taking of oaths, as well as the acknowledgment contained in the preamble, discussed above.[95] Two provisions in the Declaration of Rights were of particular relevance, although some charged that they were internally inconsistent. Article II declared the "right" and "duty" of all men "to worship the SUPREME BEING," but proceeded to protect all persons from harm, molestation, or restraint in "worshipping God in the manner and season most agreeable to the dictates of his own conscience" or according to his "religious profession or sentiments." Despite Article II making a strong statement about freedom of conscience, Article III then addressed the issue of a religious establishment generally and assessments in particular. The article began with a prefatory clause asserting that, because "the good order and preservation of civil government, essentially depend upon piety, religion and morality," those values could only be diffused "by the institution of the public worship of God, and of public instructions in piety, religion and morality." Therefore, continued the article:

> [T]he people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, 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 cases where such provision shall not be made voluntarily.[96]

After setting up the assessment system, Article III then provided that every Christian denomination would be equal under the law and that "no subordination of any one sect or denomination to another shall ever be established by law." The controversial language of Article III cannot be attributed to John Adams, who wisely declined to draft the article, having previously noted that "we might as soon expect a change in the solar system as to expect they would give up on their establishment."[97]

Article III thus constitutionalized the previously informal assessment system set up by the law of 1692. But Article III dealt with more than religious taxes; it declared the government's reliance on piety, religion, and morality,

which could only be achieved through public worship and the support of Christian ministers, compliance with which the legislature could enjoin. The article also dropped the practice of exempting dissenters from paying the assessment, requiring instead that the taxes be paid to their own churches or, if not affiliated, to the minister elected by the town. Despite the inclusion of an antisubordination clause in the new constitution, the other provisions erased some of the gains Baptists and other dissenters had made over the previous decades. As a result, scholars have maintained that Article III was a step backward from the colonial practice and a rejection of the trend in other states toward greater disestablishment.[98]

The final language in Article III should not be construed to indicate a consensus on the issue of religious assessments, however. Professor Robert Taylor maintains that the article "was perhaps the most controversial one in the whole constitution." The significance of Article III was not lost on the delegates to the convention nor on those following its proceedings. Its provisions caused "rancorous debate" among the delegates, and efforts were made to drop the article entirely, while other delegates attempted either to expand or contract its provisions. The ensuing public debate over ratification also demonstrated the division of opinion that existed over the need for public support for religion.[99]

As before, Isaac Backus criticized the religious establishment to be constitutionalized in Article III. The question, he stated, was not the importance of religion to civil society but "whether that duty ought to be enforced by the secular arm, or only by the authority of the great lawgiver and head of the church."[100] In addition to Backus, criticism of Article III during ratification came from "Philanthropos," who authored several newspaper articles in an effort to sway opinion against the provision. Some of Philanthropos's arguments were religious, echoing those of the Baptists: religion was a personal matter between a believer and God, and "the support and maintenance of public worship and the teachers of religion is not a civil duty." But Philanthropos also disputed that free governments depended on public piety and that establishments promoted piety, morality, and civic virtue. Other states, including New York, New Jersey, Pennsylvania, and Virginia (at the time), promoted peace and civic virtue without religious assessments, Philanthropos noted. As a substitute for Article III, Philanthropos recommended adopting an article modeled after Jefferson's Act for Establishing Religious Freedom. Support for Philanthropos came from the town of Ashby, whose Return addressed the inconsistencies between Article II—guaranteeing rights of conscience and forbidding any restraint on account of religion—and Article III authorizing assessments. "The third Article lays a restraint: for those who cannot Concientiously [*sic*] or Covenantly attend upon

any publick teachers are under restraint . . . and so injured as to their Liberty and property."[101]

Assessment proponents had the advantage of the draft constitution being on their side. Still, they mounted a vigorous campaign setting out the necessity of a religious establishment. Led by the Reverend Samuel West, writing as "Ireneus," assessment proponents made several arguments that revealed their understanding of religious establishments and how they harmonized with rights of conscience. The multiple establishments of Massachusetts, by supporting all orthodox ministers and churches and the principles of virtue and morality, advanced "natural religion" only, not the religion of any sect, West wrote. Such natural religion promoted "peace, safety, and happiness" in society, goals that were the appropriate objects of free governments: "The civil good of society being the grand object of civil legislation, and public worship and the instructions of teachers of religion being necessary to promote civil good in society, it follows, that the support and maintenance of public worship, and the teachers of religion, is properly an object of civil legislation."[102]

The state support of public worship and religious teaching was thus a *civil*, not religious, duty within the realm of civil governments. The abolition of public worship, as advocated by Philanthropos, would lead to "impiety, irreligion and licentiousness."[103] West's argument was supported by the Return of Boston, which stated that the "preservation of civil Government essentially depends upon Piety, religion, and morality; and these cannot be generally diffused . . . but by the Publick Worship of God, and Publick Instructions in Piety, religion and morality." Also like West, the Boston Return could not resist resorting to hyperbole: rejection of the assessment would result in the "greatest disorders, if not the Dissolution of Society." "Remove the former by ceasing to support Morality, religion and Piety and it will be soon felt that human Laws were feble barriers opposed to the uninformed lusts of Passions of Mankind."[104]

As for the claim that an assessment violated rights of conscience, West had three responses. First, following on his claim about the necessity of public worship, West argued that "full liberty of conscience does not imply in it, that men shall have liberty to have no conscience at all, or that they may be as obstinately wicked as they please." Freedom of conscience involved the freedom to know God; without a mechanism to instill virtue and morality, man cannot realize this full understanding of conscience. West insisted that the "most abandoned wretch who has no conscience at all" would not be offended by simply paying a tax; moreover, he would not be constrained by conscience in demanding an exemption falsely. West charged that the freedom of conscience contained in Jefferson's bill "grants liberty to hypocrites and liars, and puts the most abandoned and profligate upon an equal footing with men of honor and

conscience."[105] Second, West insisted that, when read together, Articles II and III protected conscience:

> Here is the most ample liberty of conscience imaginable, granted to Deists, Mahometans, Jews and christians; for every person that owns the being of a God may chuse the manner and season for divine worship which suits him. . . . he is perfectly secure from harm, till he disturbs the public or bothers others in their religious worship.

And finally, West maintained that the abolition of public support for religion deprived its supporters of *their* rights of conscience. Assessment opponents were not contending for liberty of conscience, West argued; instead, "their real design was to deprive a respectable part of the community of what they esteemed a right of conscience, viz, the right of supporting public worship and the tender of religion by law."[106]

From all accounts, Massachusetts voters closely followed the newspaper debate over Article III and religious assessments. Voters considered each article separately, with Article III being the most contentious provision. Voters in several counties rejected it overwhelmingly. According to a study by Professor Samuel Morison, Article III received only 58 percent approval, short of the two-thirds required for ratification. Reputedly, those provisions requiring the governor to be a Christian and to swear a religious oath also failed to garner the necessary two-thirds vote. Despite these irregularities, the constitutional convention declared that the entire constitution had been approved, and it went into effect on October 25, 1780. Massachusetts had created a religious establishment, but it was not without a fight.[107]

As the above discussion demonstrates, ideas about religious freedom and disestablishment during the revolutionary period were fluid and evolving. Many people viewed religious establishments in a formal, political sense. Preferential tax assessments, legal disabilities on religious dissenters and constraints on their private worship, and, possibly, religious requirements for office holding were the sine qua non of establishments. In New England, people were divided over whether general assessments for the support of ministers and public worship equated with an establishment. Most New Englanders agreed in principle that infringements on rights of conscience were oppressive, but disagreed about whether the New England system violated such rights. Outside of New England, a substantial majority viewed rights of conscience more expansively to prohibit even a general assessment benefiting all Protestant or Christian sects. As historian Thomas Curry has written, in the 1780s, "The belief that government assistance to religion, especially in the form of taxes, violated religious liberty, had a long history."[108]

In contrast, government acknowledgment and encouragement of religion (e.g., thanksgiving proclamations) and government enforcement of religious/moral norms that promoted public order (e.g., Sabbath and blasphemy laws) were generally not viewed as indications of religious establishments. The framers were building on their own personal experiences where public encouragement of religion had been commonplace during the colonial period and not viewed as being particularly onerous when compared to other practices. But these ongoing practices should not obscure the fact that all of the new states, with the possible exception of Massachusetts, were moving toward more expansive understandings of disestablishment and church-state separation during the last quarter of the eighteenth century. By 1800, disestablishment in the form of the prohibition of assessments and of religious preferences would be the rule of law in all the states outside of New England, including the newly admitted states of Kentucky and Tennessee. The trend toward political disestablishment was unmistakable and, as will be discussed in a later chapter, the three remaining state holdouts (Connecticut, New Hampshire, and Massachusetts) would face mounting pressure to disestablish until they succumbed in 1818, 1819, and 1833, respectively.