

there was a better solution to the political aspirations of clergymen than a mischievous separation: "The way to check their ambition, and to give full efficacy to their administrations, is to consider them as *men* and *citizens*, entitled to all the benefits of government, subject to law, and designed for *civil* as well as *spiritual* instructors."²⁰ To avoid clerical tyranny, it was only necessary to give the clergy the rights and interests enjoyed by other citizens.

Far from threatening free government, a learned clergy supported it. "That clergymen ought not to meddle with politics, is so far from truth, that they ought to be *well* acquainted with the subject, and *better* than most classes of men, in proportion to their literary attainments." With such qualifications, they could sustain good citizenship by inculcating morality. Accordingly, "Religion and policy ought ever to go hand in hand; not to raise a system of despotism over the consciences, but to enlighten the minds, soften the hearts, correct the manners and restrain the vices of men."²¹ Webster hoped for a clergy fully integrated and even prominent in the life of their communities, and, from this perspective, he saw clerical exclusions as an irrational attempt to separate politics from the religion that was the basis of political and moral edification.

Thus, yet again, separation was an accusation. Richard Hooker and, much more recently, some American ministers had defended their different religious establishments by intimating that dissenters desired a separation of one sort or another. Drawing upon such accusations, Webster opposed clerical exclusions by hinting that they had been adopted in order to separate clergymen from politics and church from state. As in the establishment controversy, this was a mischaracterization, which reflected fears rather than facts. Neither the advocates of religious liberty nor the proponents of clerical exclusions appear to have sought a separation, and, if they ever did, they seem to have done so only rarely or in a most understated and elusive manner.

²⁰ "Miscellaneous Remarks on Divisions of Property," in Webster, *A Collection of Essays and Fugitive Writings*, 347.

²¹ *Ibid.*, 346.

Freedom from Religious Establishments

IF IN their struggle against the state establishments American religious dissenters did not demand a separation of church and state, what sort of liberty did they seek? Centuries have passed since Roger Williams dreamed of a separation between church and world, and since some later anticlerical writers, such as the Marquis de Condorcet, called for a sort of separation of church and state. So too, centuries have passed since establishment ministers attributed to dissenters a desire to separate religion from government, and since Noah Webster similarly discredited the supporters of clerical exclusions. After the passage of so much time, it should be possible to step back from all of these contentious assertions and to examine dispassionately the religious liberty sought by the late eighteenth-century Americans who struggled against establishments. If not separation, what did they request? An examination of their demands, as expressed in their own terms, will be seen to vindicate these dissenters not only from the aspersions of their opponents but also, ironically, from the accolades of their later admirers, who, with very different motives, have likewise attributed to them a desire for separation.

The Character of American Establishments

During the Revolution, American establishments lost their severity. Some colonies had once penalized religious dissenters with laws constraining unauthorized worship and preaching, but, in their struggle against Britain, the states abandoned what remained of their direct penalties on religion. As a result, such establishments of religion as still sur-

vived in America consisted mostly of legal privileges for the established religion in a state—most prominently, the privilege of the established clergy to receive salaries paid from state taxes.

The War of Independence left Americans largely free of direct penalties on religion. Prior to the Revolution various state governments not only gave financial and other privileges to their established denominations but also imposed penalties on the free exercise of religion by dissenters. In Connecticut in the 1740s, the Separates had been fined and imprisoned for preaching and meeting, and in Virginia, as recently as the early 1770s, Baptists had been incarcerated for such offences. Yet at the onset of the Revolution numerous evangelical dissenters (and even a few Quakers) found common cause with their fellow patriots and joined the Revolutionary armies. These dissenters fought for a regime in which they could attain equality within their own states as well as from Britain and, in the new atmosphere created by their participation in the Revolution, the states could no longer punish them merely on account of their religious differences. After 1776, therefore, all that plausibly remained of any American establishment were various forms of government support. In some states religious tests admitted only Christians or even only Protestants to public office. More troubling to most dissenters, the constitutions of some states allowed establishment ministers to collect salaries raised by state taxes and permitted laws that gave the established clergy the exclusive right to conduct marriages. Accordingly, privilege more than penalty now seemed to be at stake. Even the advocates of religious establishments often joined dissenters in praising religious liberty, seeking to defend establishment privileges by disclaiming any desire for penalties.

To be sure, establishment privileges might also be considered penalties on the free exercise of religion. For example, in Virginia in the 1780s, when Anglicans—now Episcopalians—proposed taxes in support of ministers' salaries, dissenters complained that the taxes not only would give privileges to establishment clergymen but would also penalize dissenters. Similarly, in Connecticut and Massachusetts, Congregationalists taxed individuals, including dissenters, for the salaries of ministers selected by Congregational majorities, unless the dissenters signed certificates attesting to their dissenting status. Dissenters often refused to sign such certificates and had difficulty recovering such taxes as were col-

lected.¹ All of these arrangements imposed burdens on dissenters, who frequently complained about them as penalties.²

Nonetheless, the remaining infringements on the religious liberty of evangelical dissenters consisted mostly of establishment privileges, and these seemed far less threatening than earlier persecutions. Establishment benefits and associated assessments or taxes paled in comparison with the fines and imprisonment that had once been imposed upon dissenters simply for meeting and preaching.³ During the Revolution, moreover, some southern states, such as Virginia, abandoned tax support for Episcopalian ministers, leaving dissenters to worry not so much about establishment privileges as about the revival of these benefits. Accordingly, by the end of the War of Independence, many dissenters felt they had largely achieved religious liberty. For example, in 1782 the General Association of Separate Baptists in Virginia concluded that they had "already secured their most important civil rights" and therefore decided that their next meeting should be their last.⁴ Only the 1784 Episcopalian proposal to restore tax support for ministers again concentrated the minds of Virginia Baptists and led them to resume their campaign for a constitutional or equivalent prohibition on an establishment.⁵ Thus, having already obtained constitutional guarantees against direct penalt-

¹ William G. McLoughlin, *New England Dissent, 1630–1833*, 1: 644–647 (Cambridge: Harvard University Press, 1971).

² Dissenters were particularly apt to complain about establishment privileges as "penalties" in states in which dissenters had obtained a constitutional guarantee of free exercise but not a prohibition on establishments. For this dynamic in Virginia, see Philip Hamburger, "Equality and Diversity: The Eighteenth Century Debate about Equal Rights and Equal Protection," *Supreme Court Review*, 347–355 (1992).

³ Moreover, even the penalties on religion in Virginia had not amounted to anything like what had been common in Europe. As Leland observed in 1790: "The dragon roared with hideous peals, but was not red—the Beast appeared formidable, but was not scarlet colored. Virginia soil has never been stained with vital blood for conscience sake." *The Virginia Chronicle* (1790), in *The Writings of the Late Elder John Leland*, 107, ed. L. F. Greene (New York: 1845).

⁴ Robert B. Semple, *A History of the Rise and Progress of the Baptist in Virginia*, 67 (Richmond: 1810). It was at their final 1783 meeting that, before disbanding, they petitioned on the relatively minor issues of vestries and marriages, requesting "that no law may pass, to connect the church, & State in the future." See Chapter 1, note 68.

⁵ In December 1784 Jefferson wrote, "I am glad the *Episcopalians* have again shown their teeth & fangs. The *dissenters* had almost forgotten them." Letter of Thomas Jefferson to James Madison (Dec. 8, 1784), in *Papers of James Madison*, 8: 178, ed. Robert A. Rutland et al. (Chicago: University of Chicago Press, 1973).

ies, evangelical dissenters increasingly struggled, more narrowly, for constitutional guarantees against establishment privileges.

The Demands of the Dissenters

In their attack upon the remaining establishments, dissenters and their political allies created an intellectually cohesive movement, which made relatively uniform requests for limitations upon government. The various evangelical dissenters who opposed establishments often cooperated across state and denominational lines and acted with an awareness that they were participating in a broader struggle for religious freedom. In so doing, they shared many assumptions about religious liberty, and, although they disagreed about numerous details, they made remarkably similar demands.⁶

Evangelical dissenters dominated the antiestablishment struggle that shaped the First Amendment. In New England, Baptists led the assault on the Congregational establishments with little help from Presbyterians, who shared deep theological sympathies with the Congregationalists. In the South, Baptists opposed the Episcopalian establishments with greater but not entirely uniform assistance from Presbyterians, Methodists, and some liberal-minded Episcopalians. Yet Quakers, Mennonites, and other nonevangelical sects increasingly took only a peripheral role in these struggles. In part, these nonevangelicals withdrew from the organized antiestablishment movement because they had already achieved a substantial freedom from the burdens of state establishments. By far the largest and most politically active of the nonevangelical sects, the Quakers, had concentrated their settlements in Pennsylvania and Rhode Island, where they and others had long ago determined that there would be no establishment. Moreover, in the states that levied taxes in support of establishment clergymen, Quakers often secured statutory exemptions. The events of 1775 and 1776, however, finally prompted these nonevangelicals to depart from the struggle against establishments.

In these years, as Americans began to quarrel with Britain, the

⁶ Extensive cooperation across denominations and far-flung colonies is documented by John Wesley Brinsfield, *Religion and Politics in Colonial South Carolina*, 84, 105, 107–108, 121 (Easley, S.C.: Southern Historical Press, 1983). For Baptists in Virginia and New England, see Thomas E. Buckley, "Evangelicals Triumphant: The Baptists' Assault on the Virginia Glebes, 1786–1801," *William & Mary Quarterly*, 45: 42 (1988).

Quakers and other nonevangelicals came to realize with new clarity that they needed a different sort of religious liberty than that demanded by evangelical dissenters. Prior to the Revolution, Quakers and most other dissenters could share a common cause against the state establishments. Yet beginning in 1775 evangelical dissenters took a route Quakers could not follow. The evangelical dissenters, having joined American demands for equal liberty against the British, similarly opposed American establishments with arguments that emphasized the need for equal rights. The evangelicals thereby began to insist upon the principle of equality in all rights and obligations, including the duty to fight and pay taxes. In this manner, the Quakers, who had conscientious objections to fighting and to paying taxes for war, were reminded that they needed a different, less egalitarian type of religious freedom. Unlike the evangelical dissenters who campaigned against establishments on the principle of equal rights under law, without respect to different religious beliefs, Quakers increasingly saw that they needed a religious liberty from law precisely on account of their distinct religious views. In particular, if the establishments were defeated on the egalitarian principles asserted by evangelical dissenters, the Quakers might lose any possibility of even legislative exemptions from law. Accordingly, the Quakers (and the other peace churches) largely dropped out of the organized agitation against establishments. For example, in New England many Quakers refused to sign an antiestablishment petition circulated by Baptists.⁷ In Virginia, although Quakers petitioned against an establishment on at least one occasion (in November 1785), the Quaker leadership more typically petitioned for conscientious exemptions from militia duty and from other legal requirements incompatible with Quaker beliefs.⁸ Thus, in the catalyst of the Revolution, Quakers and evangelical dissenters came to perceive that they needed distinctly different types of religious liberty, and as a result Quakers withdrew from the campaign against establishments, leaving evangelical dissenters to carry this struggle forward.⁹

⁷ McLoughlin, *New England Dissent*, 1: 277, 595, 607, note 33.

⁸ On November 14, 1785, some Quakers submitted two versions of a memorial against an assessment. The Memorial of the People Called Quakers (Nov. 14, 1785), Virginia State Library, Richmond, microfilm, Misc. Ms. 425. For the more typical Quaker petitioning, see Robert Pleasants, Letterbook and Bundle of Letters, Valentine Museum, Richmond, Valentine Shelf No. 289.6y F912, vols. 3 and 4 (typescript copy of originals in possession of Haverford College Library, on loan from Baltimore Orthodox Friends).

⁹ Philip Hamburger, "Religious Liberty and Constitutional Language" (manuscript).

The evangelical dissenters who worked against establishments in the late eighteenth century were united by some assumptions about the need to limit government. Most immediately, these evangelical dissenters hoped to secure constitutional provisions preventing civil government from legislating clerical salaries or other special privileges on account of religious differences. More broadly, underlying this goal were a host of beliefs drawn from earlier antiestablishment literature, such as that civil government could not give authority to a higher realm and that civil government lacked the jurisdiction to legislate over Christ's kingdom. Having these views, the late eighteenth-century dissenters who campaigned against religious establishments did not attempt to limit churches or to deprive government of the moral influence of Christianity. Instead, they hoped to constrain governmental and especially legislative power.

Specifically, the numerous demands of these dissenters can be understood as variations on two basic requests. Of course, in agitating for a freedom from establishments, dissenters relied upon far more than two arguments or principles. For example, dissenters reasoned from Biblical texts, natural rights, the limited purpose and power of government, economics, and prudence. Yet these were not the practical, legal ends demanded by the dissenters who struggled against establishments. Ultimately, notwithstanding their multitudinous arguments, these dissenters sought constitutional provisions securing their conceptions of religious liberty, and their demands for these provisions tended to fall into two categories, both of which limited government but in conceptually different ways. One type of demand, for equal rights, was a request for a freedom from laws that discriminated on the basis of religious differences. The other type of demand, for a freedom from legislation that took cognizance of religion, was a request that law take no notice of religion.¹⁰ In contrast to a separation of church and state, which con-

¹⁰ Of course, some constitutional clauses against establishments did not fit into either of the two general categories discussed here. Most notably, clauses in some state constitutions specified that government could not compel individuals to pay, without their consent, for the support of ministers and churches. Such clauses departed from the standard pattern of antiestablishment demands. Yet they did so for a reason. They were antiestablishment clauses that mimicked the logic of free exercise provisions. In effect, they portrayed establishment privileges as constraints on belief—an approach with obvious rhetorical advantages. This type of attempt to treat support for an establishment as part of the more basic religious freedom from compulsion is most clearly evident in the New Jersey Constitution

strained both institutions, these antiestablishment demands for religious liberty constrained only government.

Variations

Different evangelical dissenters opposed establishments in slightly different ways, and it is amid the variety of their demands that common patterns are discernible. Although some evangelical dissenters occasionally departed from their shared standards and few fully lived up to any professed standard, the vast majority made clear that the legal guarantees they sought embodied some version of either equal rights under law or a freedom from legislation taking cognizance of religion.¹¹

Dissenters often asserted their freedom against establishments in generic terms—such as “rights of conscience” or “freedom of religion”—even though they ultimately sought more precisely defined constitutional limitations.¹² For example, in the South Carolina Assembly, a Pres-

of 1776. In its article protecting the right of worship, this constitution also stated that no person shall ever “be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person . . . ever be obliged to pay tithes, taxes, or any other rates . . . for the maintenance of any minister or ministry, contrary to what he believes to be right.” N.J. Const., Art. 18 (1776). Only in the next article did the constitution declare “That there shall be no establishment of any one religious sect . . . in preference to another.” *Ibid.*, Art. 19.

¹¹ For more details, see Hamburger, “Equality and Diversity,” 346–353. Incidentally, Steven D. Smith points out that the late eighteenth-century politicians who drafted the U.S. Constitution may have shared only very limited assumptions about religious liberty and therefore may have drafted it with words that were conveniently imprecise. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*, 19–22, 26–27 (New York: Oxford University Press, 1995); Smith, “The Religion Clauses in Constitutional Scholarship,” *Notre Dame Law Review*, 74: 1040–1041 (1999). This is a valuable caution, which has some relevance for the eighteenth-century phrases that were used to refer to a generic religious liberty, the most common such phrase being “the rights of conscience.” As illustrated in the text, however, various other phrases were frequently used to allude to specific types of religious liberty and even to quite refined variants of these.

¹² According to a minority of the Pennsylvania ratification convention, “[t]he right of conscience shall be held inviolable.” “The Address and Reasons of Dissent of the Minority,” Merrill Jensen, ed., *Documentary History of the Ratification of the Constitution*, 2: 623 (Madison: State Historical Society of Wisconsin, 1976). Similarly, in 1780 Backus wrote: “Our Convention at Cambridge passed an act last Wednesday to establish an article in our bill of rights which evidently infringes upon the rights of conscience.” McLoughlin, *New England Dissent*, 1: 604. Also in Massachusetts, Joseph Hawley wrote: “Pray give over the impossible (task) of endeavoring to make a religious establishment, (consistent) with the unalienable Rights of Conscience.” Hawley, “Protest to the Constitutional Convention of 1780,” in Mary C. Clune, ed., “Joseph Hawley’s Criticism of the Constitution of Massachusetts,” *Smith College Studies in History*, 3: 50 (1917). According to Leland, “[t]he question

byterian who advocated equal rights on behalf of a coalition of dissenting groups, the Rev. William Tennent, argued that "[m]y first, and most capital reason, against all religious establishments is, that *they are an infringement of Religious Liberty*."¹³ Members of establishments and even many dissenters had often used this sort of phrase more narrowly to refer to a freedom from penalties. Yet then, as now, "liberty" had layers of meaning, and many dissenters such as Tennent also described themselves as seeking religious liberty when they condemned the unequal privileges enjoyed by establishments.

Although dissenters often argued in terms of the appealing rhetoric of liberty, they also enunciated their demands in more precise terms—most commonly in terms of some degree of equality. For example, many claimed equal liberty or an equality of religious liberty. Thus Samuel Stillman—a prominent Baptist with a fashionable Boston congregation—preached in a Massachusetts election sermon that the governor should secure to all peaceable Christians "the uninterrupted enjoyment of equal religious liberty." Even this language, however, could be ambiguous, for it could refer either to the equal natural right of free exercise (a freedom from government penalty) or to a broader, antiestablishment liberty involving equal legal rights (a freedom from both penalty and unequal privileges). Stillman, however, clarified that, for him, "equal religious liberty" was the latter—an equality of all rights held under civil law without regard to religious differences: "The authority by which he [i.e., the 'magistrate'] acts he derives alike from *all the people*, [and] consequently he should exercise that authority *equally* for the benefit of

is, 'Are the rights of conscience alienable, or inalienable?' *The Rights of Conscience Inalienable* (1791), in *The Writings of the Late Elder John Leland*, 180. Although Leland discussed rights of conscience as inalienable and natural, he had a broad view of them, apparently considering them a freedom from all legislation concerning religion, including taxes in support of religion. In many writings the significance attached to the phrase "the rights of conscience" is less clear.

¹³ William Tennent, *Mr. Tennent's Speech on the Dissenting Petition, Delivered in the House of Assembly, Charles-Town, South-Carolina, Jan. 11, 1777*, 5 (1777). Tennent made it clear that he understood religious liberty in terms of equality. See Brinsfield, *Religion and Politics in Colonial South Carolina*, 107–108, 116, 120–122. Incidentally, when recalling how he had collected signatures for the petition supported by Tennent, Colonel William Hill later wrote of himself that "in order to get as many names as possible—and not believing in the doctrine of the turks that women have no souls) he got the women to sign their names with the men." *Ibid.*, 111.

all, without any respect to their different religious principles." Indeed, Stillman wanted "*equal treatment of all the citizens*."¹⁴ As his fellow Baptist, Isaac Backus, boldly wrote: "I challenge all our opponents to prove, if they can, that we have ever desired any other religious liberty, than to have this partiality entirely removed."¹⁵

One version of the equality standard required an equality of "civil rights." For example, the Pennsylvania Constitution of 1776 declared: "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship."¹⁶ Similarly, at least with respect to a narrower class of individuals, the New Jersey Constitution stated "[t]hat there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect . . . shall fully and

¹⁴ Samuel Stillman, *A Sermon*, 29 (Boston: 1779). Stillman also said that "as all men are equal by nature, so when they enter into a state of civil government, they are entitled *precisely* to the same rights and privileges; or to an *equal degree* of political happiness." *Ibid.*, 11. Other uses of the phrase "equal liberty" or "equal religious liberty" to refer to equal rights under law are quite common. In Virginia, Baptists petitioned that "the full equal and impartial Liberty of all Denominations, may be indubitably secured." Petition of the Ministers and Messengers of the Baptist Denomination, Assembled at Noel's Meeting House in Essex County on May 3, 1783 (May 30, 1783), Virginia State Library, microfilm, Misc. Ms. 425. Baptists also told the legislature: "Your Memorialists have hoped for a removal of their Complaints, and the enjoyment of equal liberty; . . . And that in every Act, the bright beams of equal Liberty, and Impartial Justice may shine." Memorial of the Committee of Several Baptist Associations, Assembled at Dover Meeting House, Oct. 9, 1784 (Nov. 11, 1784), Virginia State Library, microfilm, Misc. Ms. 425. Similarly, the Presbytery of Hanover, Virginia, optimistically interpreted the 1776 Declaration of Rights as "declaring that equal liberty, as well religious as civil, shall be universally extended to the good people of this country." Memorial of the Presbytery of Hanover to the General Assembly of Virginia (April 25, 1777), in William Addison Blakely, ed., *American State Papers Bearing on Sunday Legislation*, 96 (Washington, D.C.: Religious Liberty Association, 1911). In contrast, the July 1789 House Committee Report on the Bill of Rights may have equated equal rights of conscience merely with the natural right of free exercise: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." House Committee Report of July 28, 1789, in Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress*, 30 (Baltimore: Johns Hopkins University Press, 1991).

¹⁵ Isaac Backus, *An Appeal to the People* (Boston: 1780), in William G. McLoughlin, ed., *Isaac Backus on Church, State, and Calvinism*, 396 (Cambridge, Mass.: Belknap Press, 1968).

¹⁶ Pa. Const. of 1776, Art. 2.

freely enjoy every privilege and immunity, enjoyed by others their fellow subjects."¹⁷ These pronouncements against discriminatory denials of any "civil right" were attractively simple. Yet they did not become popular because the term "civil rights" increasingly was understood to refer only to the natural rights held under the laws of civil government rather than to all rights held under such laws. In other words, it increasingly seemed to refer only to such freedom from government penalty as was permitted by law.¹⁸ Accordingly, the provisions that referred to equal civil rights did not prohibit unequal establishment privileges as clearly as they were designed to do.

Therefore, a more common variant of the equality standard deliberately employed the vocabulary of natural law to distinguish between natural rights and the privileges or benefits of civil government. Natural law theory posited a largely hypothetical condition, the state of nature, which was the condition in which individuals had no common superior—in which there was no civil government. Natural rights were portions of the liberty enjoyed in the state of nature—portions of the freedom from civil government and its constraints or penalties—and, as already observed, civil rights (at least as increasingly understood) were such natural rights as continued to be enjoyed after the imposition of the laws of civil government. In contrast to natural rights were the privileges, benefits, emoluments, or favors of government—rights that could exist only under government and that, presupposing government, could not exist in the state of nature. It was such privileges—notably, government-supported salaries for ministers—that distinguished American establishments. Therefore, to prohibit establishments in utterly unequivocal language, dissenters often sought constitutional provisions that required equality (or nondiscrimination) for both the natural right of religious liberty and any privileges.

¹⁷ N.J. Const. of 1776, Art. 19. The 1778 South Carolina Constitution provided that Protestants "shall enjoy equal religious and civil privileges." S.C. Const. of 1778, Art. 38. In this context the word "privileges" appears to have been interchangeable with "rights." The Presbytery of Hanover, Virginia, asked the legislature "to restrain the vicious and to encourage the virtuous, by wholesome laws equally extending to every individual." Memorial of the Presbytery of Hanover to the General Assembly of Virginia (Oct. 24, 1776), in *American State Papers*, 94; see also the same language in the Memorial of April 25, 1777, in *ibid.*, 97.

¹⁸ For the changing understanding of "civil rights," see Hamburger, "Equality and Diversity," 386.

This bifurcated approach, which specified that both the natural right and any privileges had to be equal, was very common. In particular, although many Americans used the words "liberty" and "privilege" interchangeably to denote either a natural right or a right existing only under civil government, they often employed these words to distinguish between the two types of rights and demanded not only the natural right of religious liberty but also equal privileges. For example, some dissenters in Virginia petitioned that, being "[f]ully Persuaded . . . That the Religion of JESUS CHRIST may and ought to be Committed to the Protection Guidance and Blessing of its Divine Author, & needs not the Interposition of any Human Power for its Establishment & Support[,] We most earnestly desire and Pray that not only an Universal Toleration may take Place, but that all the Subjects of this Free State may be put upon the same footing and enjoy equal Liberties and Privileges."¹⁹ For purposes of this bifurcated analysis, Americans also used the words "discrimination" and "preference." Thus in New York, where antiestablishment sentiment found strength in the state's religious diversity, the 1777 Constitution prohibited an establishment by requiring that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed."²⁰ Not only would the natural right be shielded from discriminatory restraints but also preferences based on religious differences would be prohibited.²¹

In contrast to these versions of the demand for equal rights was a

¹⁹ Petition of Divers of the Freeholders and Other Free Inhabitants of Amherst County (Nov. 1, 1779), Virginia State Library, microfilm, Misc. Ms. 425.

²⁰ N.Y. Const. of 1777, Art. XXXVIII. In 1790 South Carolina employed the same language as New York to prohibit an establishment. S.C. Const. of 1790, Art. 8, §1.

²¹ The bifurcated analysis had many variants. In 1788 New York's ratification convention proposed as an amendment to the U.S. Constitution: "That the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others." Helen E. Veit et al., eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress*, 22 (Baltimore: Johns Hopkins University Press, 1991). Virginia's proposal concluded with a similar guarantee: "[A]ll men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect of society ought to be favored or established, by Law, in preference to others." *Ibid.*, 19. In Delaware, section 3 of the Declaration of Rights stated that Christians "ought . . . to enjoy equal Rights and Privileges in this State, unless, under Colour of Religion, any man disturb the Peace, Happiness or Safety of Society." Del. Const. of 1776, Bill of Rights, §3. See also N.J. Const. of 1776, Art. 19, and proposal of 1788 North Carolina ratification convention. Jonathan Elliot, *Debates in the Several State Conventions*, 4: 244 (Washington, D.C.: 1854).

position that went further in limiting the legislative power of civil government—an approach that denied civil government any jurisdiction over religion. As put by a leading ally of dissenters in Virginia, James Madison, “in matters of Religion no mans right is abridged by the institution of Civil Society, and . . . Religion is wholly exempt from its cognizance.”²² Often the dissenters who took this approach emphasized not government in general, but civil law. Thus in 1791 the peripatetic Baptist, John Leland, entitled one of his most famous pamphlets *The Rights of Conscience Inalienable, and Therefore, Religious Opinions Not Cognizable by Law*.²³ In his struggle against the New England establishments, Leland continued to assert this standard, as when in 1794 he wrote: “The rights of conscience should always be considered inalienable—religious opinions are not the objects of civil government, nor any way under its jurisdiction. Laws should only respect civil society; then if men are disturbers they ought to be punished.”²⁴

²² James Madison, *Memorial and Remonstrance* (1785), in *Papers of James Madison*, 8: 78.

²³ Leland also wrote: “The principle, that civil rulers have nothing to do with religion in their official capacities, is as much interwoven in the Baptist plan, as Phydias’s name was in the shield. The legitimate powers of government extend only to punish men for working ill to their neighbors, and no way affect the rights of conscience.” *The Virginia Chronicle* (1790), in *The Writings of the Late Elder John Leland*, 117–118. According to Isaac Backus, in a case arising in Attleboro, Massachusetts, “[t]he chief pleas for the appellant were that RELIGION was prior to all states and kingdoms in the world and therefore could not in its nature be subject to human laws.” Backus, *A Door Opened for Christian Liberty* (Boston: 1783), in McLoughlin, ed., *Isaac Backus on Church, State, and Calvinism*, 432. In Virginia an antiestablishment petition urged: “Civil Government & Religion are, and ought to be, Independent of Each other. The one has for its object a proper Regulation of the External conduct of men . . . ; [the other] our internal or spiritual welfare & is beyond the reach of human Laws.” Petition from Botetourt County (Nov. 29, 1785), as quoted by Rhys Isaac, *The Transformation of Virginia 1740–1790*, 291 (Williamsburg: Institute for Early American History and Culture, 1982). Isaac interprets the word “independent” as suggesting “separateness,” but it seems to have referred to the traditional distinction between the jurisdictions of the two kingdoms.

²⁴ “Jack Nips,” *The Yankee Spy: Calculated for the Religious Meridian of Massachusetts, but Will Answer for New Hampshire, Connecticut, and Vermont, without any Material Alterations* (1794), in *The Writings of the Late Elder John Leland*, 228. Establishment ministers deliberately adopted rhetoric similar to that of dissenters but in ways that clearly had different implications. For example, in Vermont an establishment minister, the Rev. Peter Powers, preached in his election sermon: “Once more here, ecclesiastical power is wholly of a spiritual nature, and no ways connected with either civil or military power. Christ’s kingdom is not of this world, not of a worldly nature. The constitution is spiritual, the covenant of grace. The laws are spiritual, and the ordinances of a spiritual nature, given us in the word of truth, the great statutes of heaven; and the punishments are spiritual, being the sentences of Christ’s mouth, who is the only king, Lord and law-giver of his church, and pronounced against offenders in his name, by his ministers. Therefore the civil magistrate has nothing

The First Amendment

Among the many versions of the no-cognizance standard, the one adopted in the First Amendment to the U.S. Constitution was the most prominent. It also probably was the most carefully drafted.

Like some earlier constitutional provisions concerning religion, the First Amendment drew upon the bifurcated approach that distinguished between natural rights and government privileges. As indicated above, the bifurcated analysis took various forms. Some state constitutions, for example, protected the natural right in one clause and proscribed unequal privileges in a second. Other constitutional documents, including New Hampshire’s 1787 proposal to amend the U.S. Constitution and, later, the First Amendment, took a similar bifurcated approach but, in place of the clause prohibiting unequal privileges, more generally forbade legislation “touching” or “respecting” religion.²⁵

A prohibition, however, of all legislation with respect to religion may have been considered too broad by some dissenters. In particular, it might have precluded legislation protecting the free exercise of religion or otherwise concerning religion without establishing it. Americans of many persuasions, both dissenters and members of establishments, had argued that not only constitutions but also, more generally, governments should protect individuals in the free exercise of their religion.²⁶

to do with this government. Only the civil rights, privileges and properties of the church are to be secured and defended by the civil powers.” Powers, *Jesus Christ the True King and Head of Government: A Sermon*, 15 (Newburyport: 1778). Of course, these privileges and properties were neither equal nor negligible. They were the essence of the establishment. Thus, while conceding much to dissenting ideas, Powers justified the establishment in Vermont. Although he disclaimed any connection between civil and ecclesiastical power and held that “the civil magistrate has nothing to do” with Christ’s kingdom, he refrained from saying that the civil magistrate had nothing to do with the church, the civil benefits of religion, or the civil privileges and property of the Congregational churches.

²⁵ The New Hampshire ratification convention proposed that “Congress shall make no Laws touching Religion, or to infringe the rights of Conscience.” Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 17. Typically, as has been seen, it was dissenters who sought a prohibition of legislation with respect to religion, but, for purposes of the federal government, this position of dissenters may have also appealed to state establishments. See note 40 below.

²⁶ For example, the president of Princeton, John Witherspoon (who thought that “[t]he magistrates . . . have a right to instruct, but not to constrain”) argued: “At present, as the things are situated, one of the most important duties of the magistracy is to protect the rights of conscience.” Jack Scott, ed., *An Annotated Edition of Lectures on Moral Philosophy by John Witherspoon*, 160–161 (lecture XIV) (Newark: University of Delaware Press, 1982).

They thereby in effect added a caveat to the commonplace that government was created only to protect civil or temporal interests. In the words of some of Virginia's Presbyterians in 1785, "The end of civil government is security to the temporal liberty and property of mankind, and to protect them in the free exercise of religion."²⁷ Therefore, when, in opposition to establishments, various dissenters asserted that government should not make laws taking cognizance of religion, some of these dissenters—including many Presbyterians in Virginia—hastened to add in qualification that government should, of course, be able to provide protection for the free exercise of religion.

Presbyterians particularly emphasized this perspective, for it allowed them, even as they opposed an establishment, to persist in their belief that civil government should protect the church—albeit now by protecting the free exercise of religion rather than by granting special privileges.²⁸ For example, as early as 1777 a petition from the Presbytery of Hanover asked that "the civil magistrates no otherwise interfere [in

²⁷ Memorial of the Presbyterians of Virginia (Aug. 13, 1785), in *American State Papers*, 113.

²⁸ This was not exclusively a Presbyterian position. Thomas Paine wrote: "As to religion, I hold it to be the indispensable duty of all government, to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith." *Common Sense* (1776), in Paine, *Collected Writings*, 43 (New York: Library of America, 1995). A 1785 petition from Rockbridge, Virginia, requested: "Let the Ministers of the Gospel of all denominations enjoy the Privileges common to every good Citizen protect them in their religious exercises in the Person and Property and Contracts and that we humbly conceive is all they are entitled to and all a Legislature has power to grant." Petition from Rockbridge County, Virginia, in H. Eckenrode, *Separation of Church and State in Virginia*, 97 (Richmond: Superintendent of Public Printing, 1910). See also petition of October 16, 1776, in Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia*, 69 (Lynchburg: J. P. Bell Co., 1900).

In related language Americans could request that government equally protect individuals in their religious liberty. For example, the Presbytery of Hanover, Virginia, wrote that the legislature should be "[t]he common guardian and equal protector of every class of citizens in their religious as well as civil rights." Memorial of the Presbytery of Hanover to the General Assembly of Virginia (May 1784), in *American State Papers*, 103. An Antifederalist minority in the Maryland ratification convention proposed as an amendment to the Constitution: "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty" (April 21, 1788), Elliot, *Debates*, 2: 553. Of course, Federalists argued that, even without a bill of rights, the Constitution provided equal protection: "Partiality to any sect, or ill treatment of any, is neither in the least warranted by the constitution, nor compatible with the general spirit of toleration; an equal security of civil and religious rights, is therefore given to all denominations, without any formal stipulations; which, indeed, might suggest an idea, that such an equality was doubtful." Nicholas Collin, "Remarks on the Amendments to the Federal Constitution" (No. 9), in *Federal Gazette*, No. 42 (Philadelphia: Nov. 18, 1788).

religion], than to protect them all [i.e., 'every individual'] in the full and free exercise of their several modes of worship."²⁹ Similarly, in 1785 the Presbyterians of Virginia petitioned that "it would be an unwarrantable stretch of prerogative in the legislature to make laws concerning it [i.e., religion], except for protection."³⁰ Further north, where the proximity of the Congregational establishments kept alive more traditional Calvinist hopes for state support, some Presbyterians revealed a hope that government would protect not only the free exercise of religion but also religion itself—in particular, Christianity.³¹ In Virginia, however, many Presbyterians—at least many of the laity—felt their minority status and either specified that government should do no more than protect the free exercise of religion or else conveniently left unmentioned what sort of protection they had in mind.

This Presbyterian version of the no-cognizance standard or some-

²⁹ Memorial of the Presbytery of Hanover to the General Assembly of Virginia (April 25, 1777), in *American State Papers*, 97.

³⁰ Memorial of the Presbyterians of Virginia to the General Assembly (Aug. 13, 1785), in *American State Papers*, 114.

³¹ In particular, many Presbyterians in the New York and Pennsylvania regions wanted government to promote and, in this sense, protect religion rather than just the free exercise of religion—provided the government did not discriminate among Christian or at least Protestant sects. For example, the New York and Philadelphia Synod of the Presbyterian Church stated in 1792 that "Civil Magistrates may not assume to themselves the administration of the word and sacraments . . . or, in the least, interfere in matters of faith. Yet, as nursing fathers, it is the duty of civil magistrates to protect the church of our common Lord, without giving the preference to any denomination of Christians above the rest." *The Constitution of the Presbyterian Church in the United States of America*, 35 (1792). In the introduction to their 1787 draft, the Synod had revealed some sympathy for the more liberal position: "They do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and, at the same time, may be equal and common to all others." *A Drought of the Form of the Government and Discipline of the Presbyterian Church in the United States of America*, iii (1787). Indeed, earlier, in 1783, the Synod of New York and Philadelphia declared: "It having been represented to Synod, that the Presbyterian Church suffers greatly in the opinion of other denominations, from an apprehension that they hold intolerant principles, the Synod do . . . declare, and that they ever have, and still do renounce and abhor the principles of intolerance; and we do believe that every peaceable member of society ought to be protected in the full and free exercise of their religion." *Records of the Presbyterian Church in the United States of America*, 499 (1904), quoted in James H. Smylie, "Protestant Clergy, the First Amendment and Beginnings of a Constitutional Debate, 1781–91" in Elwyn A. Smith, ed., *Religious Liberty in the United States: The Development of Church-State Thought since the Revolutionary Era*, 116, 141–142 (Philadelphia: Fortress Press, 1972). Concerning Presbyterians in Virginia, see Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776–1787*, 177 (Charlottesville: University Press of Virginia, 1977). See also David Parsons, *A Sermon*, 13 (Boston: 1788). In general, see McLoughlin, *New England Dissent*, 1: 610.

thing similar to it seems to have caught the attention of James Madison. During the mid-1780s some Episcopalians in Madison's home state attempted to resurrect the Virginia establishment—no longer in a narrowly Anglican form but as an incorporation of the Episcopalian clergy and an ecumenical assessment in support of Christians in general. Some Presbyterians, especially the Presbyterian clergy, were willing to join Episcopalians in supporting a version of this nondenominational assessment, as the Hanover Presbytery revealed in its petitions of 1784. Significantly, these petitions refrained from taking the Presbyterian anti-establishment position that the legislature ought to make no laws regarding religion, except to protect its free exercise.³² Many other Presbyterians, however—mostly, members of the laity—and even substantial numbers of Episcopalians declined to support the coalition on behalf of a Christian assessment. Accordingly, in the struggle against the revival of an establishment on an ecumenical basis, Madison apparently found allies among most Baptists and many lay Presbyterians and Episcopalians.³³ In this context, in November 1784, when the House of Delegates considered an assessment bill that “comprehends Christians alone and obliges other sects to contribute to its maintenance,” Madison reported to Richard Henry Lee that there was opposition both on the ground that the bill violated the Virginia Declaration of Rights and “on the general principle that no Religious Estab[lishmen]ts was within the purview of Civil authority.”³⁴ Like the Presbyterian antiestablishment position, this

³² Memorials of the Presbytery of Hanover to the General Assembly of Virginia (May and October 1784), in *American State Papers*, 100–111.

³³ Buckley, *Church and State in Revolutionary Virginia*, 138–139. In 1810 Robert Baylor Semple—the Baptists' historian of their churches in Virginia—wrote: “The Baptists, we believe, were the only sect who plainly remonstrated. Of some others, it is said, that the laity and ministry were at variance upon the subject, so as to paralyze their exertions either for or against the bill. These remarks, by the by, apply only to religious societies, acting as such. Individuals of all sects and parties joined in the opposition.” Semple, *History of the Rise and Progress of the Baptist in Virginia*, 72–73.

³⁴ Letter of James Madison to Richard Henry Lee (Nov. 14, 1784), in *Papers of James Madison*, 9: 430. He continued by pointing out that the majority in favor of the assessment “was produced by a Coalition between the Episcopal & Presbyterian Sects. A Memorial presented since the vote by the Clergy of the latter shews that a Schism will take place. They do not deny but rather betray a desire that an Assessment may be estab. but protest ag[ain]st any which does not embrace all Religions, and will not coincide with the Decl[aration] of Rights.” *Ibid.*, 430–431. Later, Madison's letters recorded how the Presbyterian clergy came around to the position of the laity. Letter of James Madison to James Monroe (April 12, 1785), in *Papers of James Madison*, 8: 261; Letter of James Madison to James Monroe

general principle permitted some legislation concerning religion, and on this principle, at least according to Madison, his allies opposed the assessment.³⁵

Although Madison joined forces with dissenters who held that religious establishments were beyond the purview of civil authority, he apparently considered his own position to be slightly different. In his notes for the debates on the 1784 assessment bill, he more broadly wrote, “*Religion*: not within purview of Civil Authority.”³⁶ Similarly, when, a year later, Madison wrote his *Memorial and Remonstrance* in opposition to an ameliorated general assessment bill “establishing a Provision for Teachers of the Christian Religion,” he emphasized the unqualified character of his claim, maintaining “that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.”³⁷

Significantly, this unqualified prohibition was not what Madison proposed or what Congress included in the U.S. Bill of Rights. In June 1789, when Madison introduced the constitutional amendments that became the Bill of Rights, he proposed: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or any pretext infringed.”³⁸ This was a far cry from Madison's position in 1785 that religion was “wholly exempt” from the cognizance of civil society. In the months that followed, as the House of Representatives considered various phrases, only one, put forward by Congressman Samuel Livermore on August 15, came close to Madison's perspective in 1785. Livermore suggested: “Congress shall make no laws touching religion or the rights of conscience.”³⁹ Although a committee of the whole House approved Livermore's language, the House did not.

(May 29, 1785), in *ibid.*, 286; Letter of James Madison to Thomas Jefferson (Aug. 20, 1785), *ibid.*, 345.

³⁵ Of course, the position described by Madison and that taken by antiestablishment Presbyterians could have slightly different practical implications because one excluded religious establishments from the cognizance of government and the other defined the power of government in relation to religion more narrowly to include only the protection of the free exercise of religion.

³⁶ *Papers of James Madison*, 8: 198.

³⁷ *Memorial and Remonstrance* (ca. June 20, 1785), in *Papers of James Madison* 8: 299.

³⁸ James Madison's Resolutions (June 8, 1789), from *N.Y. Daily Advertiser* (June 12, 1789),

in Veit, Bowling, and Bickford, eds., *Creating the Bill of Rights*, 12.

³⁹ *N.Y. Daily Advertiser* (Aug. 17, 1789), in *Creating the Bill of Rights*, 150.

After considering other proposals, both the House and the Senate eventually adopted the words currently in the Constitution: "Congress shall make no law respecting an establishment of religion."⁴⁰ These words were similar to those Madison had used to characterize his allies in Virginia, and they identified a position from which he had once sought to distinguish his own.

Whatever Madison thought about the words finally adopted in the First Amendment, he clearly did not mind language less severe than that which he had used in 1785. Perhaps he did not think the precise wording mattered much. More certainly, he assumed that a federal bill of rights would be more valuable for political than legal reasons.⁴¹ Yet it is also possible that, in the years since 1785, Madison had slightly modified his views about the appropriate prohibition on establishments. In particular, he may have learned some moderation from religious minorities—whether his fellow opponents of establishments or the Quakers—who, in differing ways, had reason to fear a constitutional proscription so broad that it would stand in the way of all legislation taking cognizance

⁴⁰ First Amendment (1791) to U.S. Constitution. Prior to the adoption of this language, Congressman Fisher Ames proposed the words: "Congress shall make no law establishing religion." Marc M. Arkin, "Regionalism and the Religion Clauses: The Contribution of Fisher Ames," *Buffalo Law Review*, 47: 764, 789 (1999).

Incidentally, some scholars go so far as to argue that the words of the First Amendment about an establishment of religion merely precluded federal interference with state establishments. See, e.g., Joseph M. Snee, "Religious Disestablishment and the Fourteenth Amendment," *Washington Univ. Law Quarterly*, 371 (1954); Smith, *Foreordained Failure*, 22–26; Steven D. Smith, *The Constitution and the Pride of Reason*, 31–47 (New York: Oxford University Press, 1998); Kurt T. Lash, "The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle," in 27 *Arizona L. J.* 1085 (1995). Yet the establishment clause also clearly stood in the way of a federal establishment. The relations between civil government and religion had been discussed in jurisdictional terms since early Christian times, and therefore the jurisdictional wording of a provision prohibiting an establishment can hardly be taken to suggest that the provision was not substantive. As seen above in the text, the notion that civil government had no cognizance of religion—or at least no cognizance of establishments of religion—was understood as a substantive claim against establishments. Versions of the no-cognizance standard had been much discussed as barriers to state establishments, and it therefore is difficult to believe that when Americans employed such a standard in the federal constitution, they did not understand it to prohibit state establishments. As one might expect, there is no evidence that advocates of an enumerated right against a federal establishment felt that the First Amendment failed to accomplish this goal. On the contrary, Americans (including religious dissenters) were confident that the amendment prohibited a federal establishment of religion.

⁴¹ Paul Finkelman, "Madison's Reluctant Paternity of the Bill of Rights," *Supreme Court Review*, 301 (1990).

of religion. Even the evangelical opponents of establishments had no desire for an antiestablishment clause so strong as to forbid laws protecting their property or recognizing their marriages, and Quakers hardly wanted a guarantee that would have nullified legislative exemptions. Whatever the basis of his decision, Madison reconciled himself to language less sweeping than that he had used in 1785, and Congress adopted a moderated version of the no-cognizance standard, which did not forbid all legislation respecting religion.

Thus it is possible to ascertain the constitutional demands of dissenters and their allies with enough precision to observe that their demands typically had little to do with a separation of church and state. The religious dissenters who participated in the campaign against establishments and whose claims seem to have affected the wording of the constitutional guarantees against establishments made demands for a religious liberty that limited civil government, especially civil legislation, rather than for a religious liberty conceived as a separation of church and state. Moreover, in attempting to prohibit the civil legislation that would establish religion, they sought to preserve the power of government to legislate on religion in other ways. Accordingly, American constitutions, whether those of the states or that of the United States, said nothing about separation. Nor should any of this be a surprise. All of the dissenting denominations that struggled against establishments had clergy, structures of authority, and other conventional characteristics of institutional churches. Even highly decentralized denominations, such as the Baptists, typically deferred to their preachers and elders, consulted with their associations, and vigorously adhered to their congregational authority and discipline.⁴² Thus, while a few exceptional, anticlerical thinkers in Europe urged versions of a separation of church and state, and while some establishment ministers in America abused their opponents by attributing to them a desire for a sort of separation, the dissenters who campaigned against American establishments, including Baptists, usually revealed little desire for separation of church and state or any other concept that constrained clergy and churches. Instead, these dissenters typically sought constitutional limitations on the power of government, particularly on government's power to legislate an establishment.

⁴² Gregory A. Wills, *Democratic Religion—Freedom, Authority, and Church Discipline in the Baptist South, 1785–1900*, chapter 1 (New York: Oxford University Press, 1997).