

ported church, although non-Congregationalists in such towns were supposed to have an exemption from religious taxes if they had no church of their own. Some towns had a dual establishment, and the province as a whole had a multiple establishment, with free exercise for dissenters.⁵⁸

Thus, throughout New England there was no single provincial establishment supported by all, and the law of each colony allowed the possibility of multiple establishments. Americans of the colonial period thought of an establishment of religion mainly in terms of the classic establishment of the mother country, as Thomas Curry has shown,⁵⁹ but little congruence existed between thought and law or between thought and reality in some New England towns.

58. Kinney, *Church and State*, pp. 72–84; McLoughlin, *New England Dissent*, 2:840–43.

59. Curry, *First Freedoms*, p. 133.

2

State

Establishments

of Religion:

New England

The Revolution triggered a long pent-up movement for disestablishment of religion in several of the states, and condemnations of establishments in three states that had never experienced an establishment of any kind during the colonial period. A fourth state that had never had an establishment, Rhode Island, did not adopt a state constitution and therefore had no provision on the subject.

New Jersey provided in its constitution of 1776 that no person should “ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or

places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform."¹ Pennsylvania's provision in its constitution of 1776 was equally broad: "... 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 ministry, contrary to, or against, his own free will and consent."² But Delaware, another of the states that in their colonial experience had never had even the semblance of an establishment, used narrow language in its constitution of 1776: "There shall be no establishment of any one religious sect in this State in preference to another."³ In 1792, however, Delaware adopted a new constitution and substituted the much broader language used by Pennsylvania.⁴

In New York, where a multiple establishment had been maintained in New York City and three adjoining counties, the long history of insistence by the Church of England that it was rightfully the only established church influenced the writing of the clause against establishments in the constitution of 1777. The system of multiple establishments of religion was ended by the following words, reflecting the stubborn determination of non-Episcopalians never to admit, even by implication, that there had ever been an exclusive or preferential establishment of the Church of England: "That all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers . . . be, and they hereby are, abrogated and rejected."⁵

In six states proestablishment parties were forced to make concessions to the growing sentiment against any establishments. In those six states, the concessions took the form of a compromise: four states replaced single or exclusive establishments by authorizing multiple es-

tablishments, while two states substituted multiple establishments for dual ones. The evidence relating to each of the six proves that after the American Revolution an establishment of religion was not restricted in meaning to a state church or to a system of public support of one sect alone; instead, an establishment of religion also meant public support of several or all churches, with preference to none.⁶

Three of these six states were in New England. Massachusetts adopted its constitution in 1780. Article III of its Declaration of Rights commanded the legislature to authorize the "several towns, parishes, precincts, and other bodies politic, or religious societies, to take suitable provision, at their own expense, of the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality." In 1780 religion in Massachusetts was still synonymous with Protestantism, or, rather, Protestantism signified the religions that actually existed in Massachusetts; it had no synagogues or Roman Catholic churches, and the few Jews and Catholics, like the unchurched, were lawfully subject to taxation for the support of the town church. Clause 2 of Article III empowered the legislature to make church attendance compulsory. Clause 3 provided that the towns, parishes, and religious societies should have the right of electing their ministers. Clause 4 created a multiple establishment of all Protestant churches, because it provided that taxpayers could designate the Protestant church of their choice that would receive their enforced contribution: "And all moneys paid by the subject to the support of public worship, and all the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the

1. Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, 7 vols. (Washington, 1909), 5:2597.

2. *Ibid.*, 5:082.

3. *Ibid.*, 1:567.

4. *Ibid.*, 1:570.

5. *Ibid.*, 5:2636.

6. Thomas Curry, *The First Freedoms* (New York, 1986), is an excellent book that advances a different interpretation. We agree on major First Amendment issues, especially on the point that nonpreferential government aid to religion violates the First Amendment, but disagree about multiple establishments. Curry believes that the concept of a preferential establishment dominated American thinking even as late as the framing of the First Amendment (see p. 209).

said moneys are raised." A fifth clause additionally provided that "no subordination of any one sect or denomination to the other shall ever be established by law."⁷ In the context of Article III this clause against preference proves that in a constitutional sense, no church had a legal status subordinate to the Congregational church, and the various churches of the establishment were constitutionally equal, no one preferred over others. To state that the "theory of establishment by town disappeared in revolutionary America" ignores the Massachusetts experience, as well as that of New Hampshire, Connecticut, and Vermont.⁸

Several Massachusetts towns whose voters supported the voluntary maintenance of religion opposed ratification of Article III yet endorsed its fifth clause against subordination. They regarded the private support of religion as compatible with the principle of nonpreference or no subordination; that principle signified to those towns that religion should not receive government tax support. For example, Charlton, in Worcester County, rejected taxation for the support of religion as "coercive" and declared that every town should choose its minister "in a manner most agreeable to the dictates of their own Conscience; but no Person shall be compelled thereto by Law. And . . . no subordination of one Sect or Denomination to another shall ever be Established by Law."⁹ Thus, nonpreferential establishments showed that preference was not necessarily the core of an establishment of religion; and people who subscribed to nonpreference could be voluntarists or disestablishmentarians.

Massachusetts embodied in its fundamental law the principle of government aid to religion (Protestantism) without preference. Article III defined a system that allowed every town, and every parish and body politic within a town, to have an establishment of religion on a

7. Thorpe, ed., *Constitutions*, 3:1890-91.

8. Curry, *First Freedoms*, p. 210.

9. Oscar Handlin and Mary Handlin, eds., *The Popular Sources of Political Authority* (Cambridge, Mass., 1966), p. 819, for the town of Charlton. See also pp. 618-19 (West Springfield), p. 674 (Sherborn), pp. 727-28 (Berwick), p. 785 (Medway), and p. 855 (Petersham). Article III is on pp. 442-43.

local option basis. As a matter of law and theory, Baptist taxpayers who lived in a Congregational parish should have had their taxes for religion remitted to the nearest Baptist church they he attended.¹⁰ Moreover, as William G. McLoughlin has written, "a Baptist, Quaker, or Episcopalian church could become the established or Standing Church in a parish and the Congregationalists would then be 'the dissenters' who would have to provide certificates if they did not wish their religious taxes to go to the support of the parish majority."¹¹

Although its constitution of 1780 expanded the principle of nonpreferential aid to religion on a compulsory basis, Massachusetts was the only state whose laws failed to broaden religious liberty. Indeed, Massachusetts regressed, because Article III made no exceptions. Baptists and Quakers, who previously had enjoyed an exemption from religious taxes, came within the revised system, against their conscientious objections. They were forced to pay taxes for the support of their own worship. Congregationalists, who in most towns administered the system for rebating non-Congregational monies to non-Congregational churches, resorted to various tricks and technicalities to fleece them out of their share of the taxes. The multiple establishment in Massachusetts, though nonpreferential as a matter of constitutional law, was actually preferential in the sense that it favored Congregationalism as a matter of practice, which was the reason for the establishment's existence. But the fact remains that Baptist, Quaker, Episcopalian, Methodist, Unitarian, and even Universalist churches received public tax support under the establishment of 1780, as well as Congregational churches. As a writer in a Boston newspaper stated, in 1811, in the course of presenting the Baptist position on church and state, the "third article of the Constitution as effectively enacts a civil establishment of religion as any political constitution in existence." Because the majority in any parish could establish any form of Protestant worship

10. Jacob C. Meyer, *Church and State in Massachusetts, 1740 to 1833* (Cleveland, 1930), pp. 107-10.

11. William G. McLoughlin, "The Balcomb Case (1782) and the Pietistic Theory of Separation of Church and State," *William and Mary Quarterly*, 3d ser., 24 (Apr. 1967): 268-69.

that it pleased, "In one parish the Arian religion may be established, in another the Calvinistic, in a third that of the Universalists, &c., &c."¹² Clearly, establishment in Massachusetts meant government promotion of religion generally, that is, of several different Protestant churches.

However, most Congregationalist supporters of Article III probably did not understand it to create an establishment of religion, let alone a multiple establishment. Article III lacked some of the crucial features of the establishment in England or of any conventional European establishment, such as a prescribed religious creed or the supremacy of one denomination over others. The purpose of Article III was secular, not sectarian, in character; the government promoted religion not to further a true faith or protect the gates of salvation but to make good citizens, or, in the words of the article, to benefit "the happiness of the people" and "the good order and preservation of their government." Article II, cheek by jowl with Article III, guaranteed religious liberty, unlike a conventional establishment of religion, which merely tolerated dissenters. Indeed, those who believed in voluntarism in religious matters censured Article III for creating an establishment that conflicted with Article II.¹³ In their view religious liberty assumed that in matters of conscience and worship, the law, like God, made no distinctions among people, while toleration assumed that one denomination, possessing infallible truths, is superior to others. For the sake of public tranquility, toleration indulged the open worship by other denominations, granting them that which religious liberty asserted they have as a right. Article III, to its opponents, intruded coercion where private judgment should be sovereign, contrary to the free exercise of religion but consistent with an establishment of religion. As a writer in the *Boston Gazette* said, during the debate over ratification of the Massachusetts constitution, "The third article is repugnant to and destructive of

12. "Berean," *Independent Chronicle* (Boston), quoted in William G. McLoughlin, *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State*, 2 vols. (Cambridge, Mass., 1971), 2:1092.

13. For statements by town meetings, see Handlin and Handlin, eds., *Popular Sources*, pp. 482, 505, 510, 557-58, 597, 618-19, 633-34, 645-48, 672, 674, 682-83, 728, 785, 819, 855.

the second. The second says the people shall be free, the third says they shall not be free."¹⁴ Supporters of Article III answered that it explicitly repudiated the superiority or preferred status of any denomination and so little resembled an establishment that it allowed for the probability that some parish might elect a Baptist minister who would then receive the taxes of the congregation.¹⁵

Article III not only allowed for that possibility; it happened. In several towns the Baptists increased so rapidly that they attained a majority and took control, with the result that those self-professed enemies of an establishment of religion became the establishment and their ministers received their salaries from the town treasuries. In still other towns the Baptist churches also became the official churches after the Baptists ganged up on the Congregationalists by allying with other dissenters and even with dissatisfied Congregationalists.¹⁶ The Reverend John Leland, the great Baptist leader who was the only person to fight against establishments of religion in three states, Virginia, Massachusetts, and Connecticut, declared in 1794, "It is true that one sect of Protestant Christians has as fair an opportunity to be incorporated as another"; furthermore, all Protestant sects, if incorporated, might choose their own ministers, contract for the cost of their maintenance, and "assess it upon all within their respective precincts." In towns where Baptists formed a majority, wrote Leland, they might "tax all in the town or precincts to part with their money for religious uses." Leland added that to do so would violate Baptist principles.¹⁷ Some Baptist towns, including Swansea and Rehoboth, had considerable experience violating Baptist principles. The "ultimate irony," according to William G. McLoughlin, occurred where the official town churches were Baptist and "even paid their salaries out of town funds."¹⁸

14. McLoughlin, *New England Dissent*, 1:623; also see chap. 33, "The Debate over the New Definition of an Establishment of Religion, 1778-1783," pp. 613-35.

15. *Ibid.*, pp. 616-17.

16. *Ibid.*, p. 675.

17. John Leland, "The Yankee Spy" (1794), in *The Writings of John Leland*, edited by L. F. Greene (reprint, New York, 1969), pp. 225, 227.

18. McLoughlin, *New England Dissent*, 1:680, also see p. 690.

As a matter of fact, the ultimate irony, from the standpoint of orthodox Congregationalists, who espoused the doctrine of the Trinity, occurred when parish majorities elected Unitarian ministers even though majorities of church members were orthodox Congregationalists. Of course, on a town basis whatever denomination was supported by a majority became the exclusive establishment of that town, whether Baptist, Unitarian, or Congregationalist—at least until the creation of poll parishes in 1823, which allowed ten or more voters to establish a poll parish within the territorial parish and to pay taxes only for the support of the church of the poll parish (discussed below).

In towns where Baptists composed a minority, complained Leland, they “must either part with their money to support a religion that they do not believe . . . or get a certificate to draw it out of the treasurer’s hands.” Some had to resort “to the last mode, as being the best alternative” available.¹⁹ Leland meant that in order for Baptists to ensure that their taxes for religion went to their own church, they had to violate their conscientious belief that government had no jurisdiction over religion and had to comply with the laws controlling the demonstration of proof that one regularly attended a church other than the locally established church.

Article III made no reference to a need on the part of anyone to certify regular attendance at a church other than the church of the denomination preferred by a town or parish majority; yet court decisions upheld town authorities, invariably Congregationalists, who demanded such proof. They merely assumed that the old certification system of prerevolutionary days persisted, in harmony with Article III. Baptists and others who refused to obtain certificates lost their lawsuits challenging the certificate system. They found it discriminatory, as did other sectarians, including Shakers, Methodists, and Quakers, but they lived with it.

Baptist ministers, moreover, like other dissenting ministers, even of the deistic Universalists, sued for the recovery of ecclesiastical taxes paid into the town treasuries by their parishioners.²⁰ Although Article

19. Leland, “Yankee Spy,” p. 227.

20. John D. Cushing, “Notes on Disestablishment in Massachusetts, 1780–

III made no distinction between incorporated and unincorporated religious societies, the state supreme court made one. In 1785 it ruled that only ministers of incorporated religious societies were entitled to rebates of taxes paid for religion, but the decision of that year settled little; suits raising the same issue arose intermittently in the state’s courts, involving various dissenter churches, during the next fifteen years, without any consistency of judicial interpretation of Article III. A lawyer who opposed the necessity of incorporation for a church to receive the taxes of its members declared that in “many instances” members of unincorporated religious societies collected ministerial salaries from town assessments. That gave the system more of the character of a functioning, rather than a merely theoretical, multiple establishment. “And in cases where this has been refused,” wrote the lawyer, “actions have been instituted and maintained on the simple grounds of the Constitution. These cases are too well known as well as too numerous to be detailed.”²¹ Baptists divided on the question of whether to seek incorporation of each of their churches to qualify for tax rebates; but forty-one Baptist churches sought and received incorporation enactments from the state legislature between 1790 and 1810.²² Fifty Baptist churches remained unincorporated in 1810 when the issue was still being litigated. Universalist, Shaker, Methodist, Separate Baptists, and other Protestant churches also received the advantage of incorporation by the state legislature, but itinerant clergy, including Roman Catholic priests and Methodist ministers, were denied the taxes of their scattered flocks because those clergy did not serve incorporated societies.²³

Incredibly, some incorporated Baptist churches, contrary to their conscientious opposition to coercive taxation for religion, “sued their

1833,” *William and Mary Quarterly*, 3d ser., 26 (Apr. 1969): 169–90, covers the principal Universalist lawsuit, *Murray v. Gloucester* (1785).

21. *Independent Chronicle*, June 13, 1811, quoted in McLoughlin, *New England Dissent*, 2:1094.

22. McLoughlin, *New England Dissent*, 1:644; 2:1088, 1094.

23. Cushing, “Notes on Disestablishment,” pp. 182–83. Edward Buck, *Massachusetts Ecclesiastical Law* (Boston, 1866), p. 41.

own members in court," McLoughlin found, "and distrained their goods for failing to pay their duly assessed share of the minister's salary."²⁴ Distraining negligent or refractory congregants meant seizing their property to enforce payment of taxes and selling it at public auction if necessary to secure the cash value of assessments. Dissenters also squabbled with Congregationalists to win their rightful share of the ownership or use of town meetinghouses and the income from ministerial lands.²⁵ If an establishment of religion meant government promotion of religion chiefly by financial assistance to religious institutions, Baptists and other non-Congregationalists received that assistance in a variety of ways sanctioned by law after 1780.

A state supreme court decision of 1811 reaffirmed the 1785 ruling against the constitutional right of unincorporated religious societies to secure the rebate of members' taxes.²⁶ That decision could have had the effect of enhancing significantly the Congregational advantage over the numerous unincorporated non-Congregational churches. A Universalist minister sued the parish of Falmouth in Maine (then part of Massachusetts) for the monies paid by members of his unincorporated congregation. The Supreme Judicial Court sustained the claim of the parish that the state constitution authorized only the ministers of incorporated religious societies to obtain tax rebates. As a result, outraged opponents of the decision, whose churches were rapidly increasing in number, orchestrated a public campaign for relief; they fashioned an alliance with the Republican (Jeffersonian) party to defeat the Federalists, who backed the courts, in the state elections of 1811. The Religious Freedom Act of that year, which was the result, authorized any religious society, whether incorporated or not, to receive the taxes of its members.²⁷ The 1811 statute in effect confirmed Article III as it was originally understood, without any of the discriminatory refine-

24. William G. McLoughlin, "Isaac Backus and the Separation of Church and State," *American Historical Review* 73 (June 1968):1410.

25. McLoughlin, *New England Dissent*, 1:685-93.

26. *Barnes v. Parish of Falmouth*, 6 Mass. 401 (1810). See Cushing, "Notes on Disestablishment," pp. 184-85; McLoughlin, *New England Dissent*, 2:1086-88.

27. Meyer, *Church and State*, pp. 155-56; Cushing, "Notes on Disestablishment," pp. 185-87; McLoughlin, *New England Dissent*, 2:1088-1106.

ments and catches that had subsequently accrued to the benefit of Congregationalists. After 1811 the basic law of the state again created a multiple establishment of religion without preference to any denomination.

By 1820, when Massachusetts held a new constitutional convention that reconsidered church-state relationships, the mushrooming growth of the non-Congregationalists and a schism within Congregationalism foreshadowed the unviability of Article III. Awkward questions were being asked: "If," for example, "it is necessary to the support of good order in society and to the security of property that Religious establishments should be maintained," why were the cities of Boston, Salem, and Newburyport exempted from compulsory taxation for religion?²⁸ A Baptist periodical urged the election to the state convention of delegates who would end the establishment with its religious taxes and religious tests; in its place the periodical recommended an equivalent to the establishment clause of the First Amendment.²⁹ At the convention the Congregationalists staved off radical changes in Article III, even as fundamental differences cleaved them in two when old enemies did not unite them. The convention recommended modest changes in Article III: the use of "Christian" instead of "Protestant"—a concession to a growing Roman Catholic population; abolition of the requirement of compulsory public worship—already a dead letter; and constitutional recognition of the Religious Freedom Act of 1811—adding nothing to the existing rights of unincorporated religious societies. Resentful voters overwhelmingly withheld ratification, leaving Article III unchanged.³⁰ But a decision by the state's high court in early 1821 produced unforeseen results that transformed church-state relationships.

Baker v. Fales (1821) became notorious as "the Dedham case," by which a Unitarian court assisted the Unitarians in "plundering" the old

28. *Independent Chronicle*, Nov. 18, 1820, quoted in McLoughlin, *New England Dissent*, 2:1149.

29. *Christian Watchman*, Aug. 12, 1820, p. 3, quoted in McLoughlin, *New England Dissent*, pp. 1151.

30. Meyer, *Church and State*, pp. 184-200; McLoughlin, *New England Dissent*, 2:1160-85.

Congregational churches.³¹ The case resulted from the burgeoning of Unitarianism in eastern Massachusetts. It spread quickly and captured the venerable Pilgrim church in Plymouth in 1800 and within eight years the Harvard divinity department and all of Boston's colonial churches excepting one. The bitter controversy between Congregationalists divided them into two warring parties, Unitarian and Trinitarian. The Unitarians, who rejected the doctrine of the Trinity as unscriptural, believed that Jesus performed a divine mission but was a mere human being, not at all divine in his person. A legal question worsened profound religious hostilities: Which body constituted the true church when divided loyalties resulted in schism? The question was passionately contested because the victor's prize included the name, records, and property of many a wealthy "first" church. The controversy affected political control of the state and its establishment of religion. And the controversy drew the judiciary into the fray. When Chief Justice Isaac Parker of the Supreme Judicial Court responded to Trinitarian animadversions against his Dedham decision, he indiscreetly published his vindication of the court in the official Unitarian periodical.³²

The Dedham decision established a precedent that the judiciary maintained against furious Trinitarian assaults. Schism had ruptured the First Congregational Church in Dedham parish. A majority of the parish had become Unitarian. The orthodox majority of the members of the church had seceded when the parish implemented its changed religious views by electing a Unitarian minister. Two bodies within the parish claimed title as the true church in Dedham and to the property rights of that church.

The state's high court held unanimously that the exclusive constitu-

31. The Dedham controversy may be followed in Erastus Worthington, *The History of Dedham . . . to 1827* (Boston, 1827), pp. 112-15; "Letters on the Introduction and Progress of Unitarians in New England," *Spirit of the Pilgrims* (Boston) 3 (Oct. 1830): 507-9; *Christian Disciple* (Boston) 2 (July-Aug. 1829): 257-80 passim. A good secondary account is Charles Warren, *Jacobin and Junto* (Cambridge, Mass., 1931), pp. 286-311.

32. Isaac Parker, "Reply to the Reverend Parsons Cooke," *Christian Examiner* (Boston) 5 (July-Aug. 1828): 277-83.

tional right of the parish to elect its religious teacher created an organic relationship between parish and church. "A church," declared Chief Justice Parker, "cannot subsist but in connection with some corporate parish or religious society." Unconnected to some society, a church had no "legal qualities" and could not control property that it might have held in trust for the society or parish to which it had formerly been attached. Hence, when the Trinitarian majority of the members of a Congregational church separated from the parish, the remaining members of the church, even if a minority of Unitarians, constituted the church in that parish and retained the rights and property belonging to it.³³

The Dedham decision, which aggravated the clashes among the Congregationalists, resulted in an unprecedented political alliance between the orthodox Congregationalists, who had previously voted Federalist, and the non-Congregational denominations, who usually favored Democrats. With religion as a prominent issue in the state election of 1823, Unitarian-supported Federalist candidates lost to candidates supported by "Calvinists and Republicans" (Trinitarian Congregationalists and Democrats), newly allied. Thus, the orthodox descendants of the Puritans seceded from their churches and from the religious bloc that formerly bolstered the Federalist party. Because Unitarian victories depended on the relationship of a church to its territorial parish, the new reform legislature in 1823 provided that any ten or more legal voters might form a "poll" parish within a territorial parish and be relieved of the burden of supporting the territorial parish church. By a Unitarian estimate in 1830, nine-tenths of the parishes in the state were of the poll parish type, a grossly exaggerated figure.³⁴

33. *Baker v. Fales*, 16 Mass. 487, 505 (1820). An interminable semantic, historical, and legal exegesis of the case may be followed in sectarian debates. See "The Congregational Churches of Massachusetts," *Spirit of the Pilgrims* 1 (Feb. 1828): 57-74, and 1 (Mar. 1828): 113-40; the reply in "Review of the 'Vindication of the Rights of the Churches . . .,'" *Christian Examiner* 5 (May-June 1828): 298-316, and 5 (Nov.-Dec. 1828): 478-505; and the counterreply in "Review of the Rights of the Congregational Churches," *Spirit of the Pilgrims* 2 (July 1829): 370-403.

34. *Christian Examiner* 9 (Sept. 1830): 4-5. My count of the special statutes

The poll parish system made the operation of the multiple establishment of religion in Massachusetts as nonpreferential as it could be in practice. But it did not relieve the Trinitarian Congregationalists who lost their churches. By their own count, they lost eighty-one churches.³⁵ A writer in the *Puritan Recorder* charged Unitarians with legalized theft. He wrote, "Church after church was plundered of its property, even to its communion furniture and records."³⁶

Old-line Congregationalists began to realize that Baptists were also Calvinist and Trinitarian, and, like evangelicals, the orthodox began to regard Unitarians as little better than free-thinking oppressive infidels. Eventually those who had created the establishment of religion in Massachusetts and had long denied that it was an establishment in law or fact came to see it as the non-Congregationalists did. In 1828 the Reverend William Cogswell, the orthodox Congregationalist minister of South Dedham, opposed an alliance between church and state and declared that by having "a civil or ecclesiastical establishment in matters of faith" Massachusetts violated the genius of American government.³⁷

Ten years after the Dedham decision, the state's supreme court decided the Brookfield case, *Stebbins v. Jennings* (1830). During the preceding decade there had been at least thirty Congregational schisms, always resulting from Trinitarian secession; in most of the cases the seceders constituted the overwhelming preponderance of the church

creating poll parishes showed the incorporation of only sixty, twenty-seven of which were Trinitarian Congregationalist, one Unitarian, and the rest divided among non-Congregationalists.

35. "The Exiled Churches of Massachusetts," *Congregational Quarterly* (Boston) 5 (July 1865): 216-40. Although the number of the Trinitarian Congregational churches that became Unitarian varies with the study, George Punchard, *History of Congregationalism from about A.D. 250 to the Present Time*, 5 vols. (Boston, 1881), 5:686, gave the number as 126, and Albert Dunning, *Congregationalists in America* (Boston, 1894), p. 302, agreed. Dunning stated that of the 361 Congregational (orthodox) churches in Massachusetts in 1810, the meetinghouses and other property of 126 became Unitarian.

36. Quoted in George Ellis, *A Half-Century of the Unitarian Controversy* (Boston, 1857), p. 415.

37. William Cogswell, *Religious Liberty* (Boston, 1828), p. 17.

membership, and without exception they lost the properties of the churches involved. In 1830, with a new chief justice at the head of the court, the entire issue was reargued and redetermined. Chief Justice Lemuel Shaw, like Parker a Unitarian, reduced the church to a mere appendage of the parish and reaffirmed the principle of the Dedham decision.³⁸ Because the parish, territorial or poll, was a public corporation empowered to levy and collect taxes for public worship, it was a "body politic," a subdivision of the state; consequently, the subordination of church to parish in effect produced the closest amalgamation of church and state. Yet the Dedham and Brookfield decisions also had the inadvertent effect of advancing the cause of political and religious liberty even as they subordinated church to body politic. If the decisions had gone the other way, the losers would have been the parish majority who paid most of the taxes for the church yet were not even admitted as members. In a sense the democratic principle of congregationalism had fulfilled itself when the majority of parishioners had the power to govern the local church and be not merely attendants on it but members of it.

With local option prevailing and Unitarianism in control of the east, the Trinitarians finally understood that Article III worked against them. Shortly after the Brookfield decision they abandoned their historic position and united against any establishment of religion; the one that existed suddenly seemed Unitarian. In 1831 the Reverend Parsons Cooke of Ware, an orthodox stalwart among the Congregationalists, published a vehement *Remonstrance Against an Established Religion in Massachusetts*, excoriating Unitarianism as the "state religion." The ballot, he advised, remained a citizen's only way of securing religious liberty and equal rights.³⁹ *The Spirit of the Pilgrims*, which had been founded to explain the orthodox position among Congregationalists, arrived for the first time at a most belated conclusion. Isaac Backus and his Baptist arguments for disestablishment had been correct. The editor, writing

38. 10 Pickering 172 (1830). For details, see my article "Chief Justice Shaw and the Church Property Controversy in Massachusetts," *Boston University Law Review*, 30 (Apr. 1950): 219-35.

39. Parsons Cooke, *Remonstrance Against an Established Religion in Massachusetts* (Boston, 1831), pp. 20, 23-24.

on "The Third Article in the Declaration of Rights," discovered that it created "a legal, religious establishment" that was "repugnant . . . to the rights of conscience." He was not clear whether the establishment was a Unitarian one, a Protestant one, or a general Christian one, but he believed that it secularized true religion. The Congregationalists then threw their support on the side of overthrowing the "whole system of taxation, by which our laws require religion to be supported."⁴⁰

Although Calvin's progeny had finally adopted the reasoning of the Baptists and Quakers, even of Locke and Madison, a Unitarian writer correctly stated, "It was only when church property was given by the courts to the parish in preference to the church and when the 'standing order' churches had been repeatedly foiled in their effort to retain the old prerogatives, that a majority could be secured for religious freedom."⁴¹ The alliance between the Congregationalists and the non-Congregationalists against the Unitarians jelled in a widespread popular front movement for repeal of Article III. Public opinion favored a system of private voluntary support of religion, as in Boston, where such a system had always prevailed. On November 11, 1833, the voters, by a ten-to-one majority, ratified an amendment to the state constitution by which religion was disengaged as an engine of the state. Massachusetts was the last state to end its establishment of religion.

New Hampshire's establishment of religion after the Revolution differed from the one in Massachusetts but not significantly. New Hampshire entered the Revolution with a crazy-quilt pattern of public support for religion. In the words of Charles B. Kinney, Jr., the historian of the struggle for separation in New Hampshire: "One can find in some towns a pattern of church-state relations to substantiate almost any form he might approve. There were some towns in which there was a single establishment with free exercise for dissenters and not for others. There were some towns in which there was a multiple establishment with free exercise for dissenters. There were some towns in which there was a multiple establishment without free exercise for dissenters. There were some towns in which there was a single establishment other

40. *Spirit of the Pilgrims* 4 (Dec. 1831): 630-31, 635.

41. George W. Cooke, *Unitarianism in America* (Boston, 1902), p. 121.

than the predominant one, the Congregational."⁴² The New Hampshire experience, like that of Massachusetts, scotches the view that an establishment necessarily prefers one church over others and that aid to all would not constitute an establishment of religion.

The New Hampshire establishment, which lasted until 1819, had been perpetuated by the state constitution of 1784. Its Declaration of Rights, by Article VI, implicitly created a multiple establishment on a local option basis, with a guarantee, in law if not in fact, that no sect or denomination should be subordinated to another. Unlike Massachusetts, New Hampshire did not by its constitution provide that the taxpayers might designate the church that should receive their religious taxes; but the provision that no one should have to pay for the support of a minister not of one's choice allowed the compulsory support of a minister of the taxpayer's choice if the majority of a town voted for such a minister or if the taxpayer belonged to a recognized religious society that had been incorporated. The New Hampshire constitution merely authorized but did not require towns, parishes, or religious societies to maintain Protestant worship. The constitution seems not to have altered the existing system. Indeed, when the legislature got around to exercising its discretionary authority in 1791, it merely re-enacted the statute of 1719 that had governed the establishment before the Revolution. That statute, like Article VI of the state's Declaration of Rights, allowed each town to decide for itself whether to enact religious taxes, how to regulate their collection, and how to provide for exemptions so that dissenters from the locally established church would not have to contribute to its support.

In 1803 Chief Justice Jedediah Smith of New Hampshire, a Congregationalist (Unitarian), declared that the state had no union of church and state because "No one sect is invested with any political power much less with a monopoly of civil privileges and civil offices." According to Smith, "A religious establishment is where the State prescribes a formulary of faith and worship," which New Hampshire did not have. Although Smith referred to the fact that the state permitted

42. Charles B. Kinney, *Church and State: The Struggle for Separation in New Hampshire, 1630-1900* (New York, 1955), p. 79.

the existence of an Episcopalian town church, he was cloaking the fact that his own denomination benefited most from the system of public support of religion. He preferred to think of an establishment of religion exclusively in the European sense of a single state church, though he inconsistently condemned any New Hampshire citizen who sought to evade the obligation to pay taxes for religion. So long as the law preferred no particular denomination, Smith comprehended no establishment and so, like his counterparts in Massachusetts and Connecticut, he denied, in effect, that Congregationalism was the established church of his state. He was right in the sense that it was not the only established church of the state and in the sense that the law allowed each town or parish to choose its religion "at the expense of the whole" under terms that extended the same privilege "to all denominations" on the grounds that the state saw "all as equally good for the purposes of civil society." "All," according to Article VI, extended to mainline or conventional Protestant groups and, the court declared, to any new sects that might arise, though not to Deists or atheists. In some towns, however, the local establishment refused to exempt members of new sects, with the result that the Free Will Baptists, Shakers, Methodists, and Universalists, among others, had to seek legislative intervention on their behalf.⁴³

New Hampshire's Baptists, among other non-Congregationalists, sometimes sought the incorporation of their churches, as in Massachusetts, to ensure tax exemption of the congregants from a local Congregational church. But, says William G. McLoughlin, most of the petitions to incorporate "seemed to originate from the Baptists' desire to enable their congregations to levy religious taxes on their own members which could be binding in law," and Baptists as well as other non-Congregationalists also accepted from the state ministerial lands regardless of the demands of some of them for a separation of church and state.⁴⁴

43. *Muzzey v. Wilkins*, 1 New Hampshire Reports, 1-38 (1803).

44. McLoughlin, *New England Dissent*, 2:874, 886. Earlier McLoughlin made statements misconstruing Article VI. He thought that the omission of a clause entitling taxpayers to designate the church to receive their religious taxes "seems clearly to grant to dissenters the right of exemption from paying re-

The establishment of religion in New Hampshire fell victim to state politics, not to the drive to separate church and state. Democrats found that the path to power ran across the corpse of an establishment favored by the state's Federalists even as they denied its existence. Voters, increasingly non-Congregationalist, rallied around the Democrats' condemnation of the tax system as having promoted an establishment of religion that supposedly favored the prevailing denomination at the expense of the religious liberty of others. After the Democrats won the state, they passed a Toleration Act in 1819 that ended the system of tax support for religion. At that date half the towns in the state had already ended all taxation for religion. The demise of compulsory taxation for public worship received the applause of those who had condemned a union of church and state, even though the state's wall of separation did not eliminate a religious test for office; that did not occur until 1876.⁴⁵

Almost until the time of the adoption of the First Amendment, Connecticut was the state that most seemed to maintain a preferential establishment of religion. In effect, its state church was the Congregational church, although after 1784 Connecticut law did not name that church or in any way prescribe doctrines of belief or a mode of worship. Indeed, the law made possible a multiple establishment, if only in theory, because every town could choose its own minister and some might vote in favor of Baptists, other for Rogerines, still others for Methodists. But Congregationalists composed an even greater percentage of the population in Connecticut than in Massachusetts or New Hampshire. Before the Revolution, Connecticut had also ex-

ligious taxes at all" (p. 846). Yet he noted that William Plumer, "unquestionably the most significant figure in the religious history of New Hampshire from 1780 to 1820," who favored separation of church and state (pp. 850-51), in 1791 had proposed a constitutional amendment to clarify Article VI by allowing people to certify their dissent from the town church in order to receive exemption from its support (p. 853). Plumer would not have proposed that amendment, which the voters failed to ratify, if Article VI "clearly guaranteed exemption" from the payment of religious taxes to dissenters from paying religious taxes at all. Nor would Baptists have sought the incorporation of their churches in order to receive the taxes of Baptists.

45. *Ibid.*, 2:888, 899, 905, 907-8, 910; Kinney, *Church and State*, pp. 93-108; Curry, *First Freedoms*, pp. 185-88.

empted Quakers and Baptists from its compulsory tax for religion but required Anglicans to pay it for the benefit of their own church. A dual establishment had existed in the colony as a matter of law, though the sheer weight of numbers made Congregationalists the real beneficiaries of the system, which was the reason for its existence.

In 1784 Connecticut abandoned the Saybrook Platform; its comprehensive Toleration Act of the same year benefited "all denominations of Christians differing in their religious sentiments from the people of the established societies in this State." No one doubted that "the established societies" were Congregational, but the statute did not name the denomination that was established. It did, however, name Episcopalians, "Congregationalists called Separatists," Baptists, and Quakers as among those Christians who might publicly worship "in a way agreeable to their consciences" and be exempted from taxes for the town church if they produced certificates proving membership in their own churches and proving that they supported those churches. The administration of the certificate system produced bitter protests about religious persecution. Moreover, some Protestants believed that government had no right to prescribe laws governing religion or compel anything in religious matters, while nonchurchgoing Christians resented having to pay for the support of the local established church. So long as the establishment remained in force, nonchurchgoers received no relief, but Connecticut liberalized the certificate system for the benefit of churchgoers. In 1791 a new law required a justice of the peace to examine and then certify the claims of persons who dissented from a locally established church, attended a different church, and paid their share for its support.⁴⁶ Although Congregationalists defended the law as a way to trap tax evaders among inconstant Congregationalists and nonchurchgoers, it inconvenienced conscientious adherents to different denominations. Worse still, non-Congregationalists, especially Baptists, vehemently objected that government had no legitimate authority to inquire into matters of religious belief. Consequently, a tolerant Connecticut legislature passed a new law allowing nonconformists

46. Greené, *Religious Liberty in Connecticut*, p. 372; McLoughlin, *New England Dissent*, 2:926. The statute said "contributed," not "paid," but "contribute" did not then have the connotation of a voluntary donation.

to write their own certificates attesting membership in a different religious society which they supported, thus exempting them from the support of the town church.⁴⁷ John Leland, in a tract describing the evils of an establishment of religion, did not doubt that Connecticut had one, even though one's contribution to religion went to the church whose worship one attended.⁴⁸

Connecticut's leading jurist, Zephaniah Swift, a Unitarian Congregationalist, denied that his state maintained an establishment of religion, which he associated with exclusiveness rather than the comprehensiveness characteristic of Connecticut's support of religion. The abandonment of the Saybrook Platform in 1784 meant that Congregationalism had no preference in law, and Connecticut had neither a prescribed mode of worship nor an official creed. The law so respected religious liberty that a "Jew, a Mehomatan, or a Brahmin" could worship with impunity, although non-Christians had to pay religious taxes to the town church. "Every Christian," Swift proudly wrote, "may believe, worship, and support in such manner as he thinks right, and if he does not feel disposed to join public worship he may stay at home as he pleases without any inconvenience but the payment of his taxes to support public worship in the located society where he lives."⁴⁹ Swift sensed no contradiction between religious liberty and the compulsory support of public worship. He believed that everyone should support religion because it bulwarked state and society. Connecticut's law recognized the equality of all Christians, he contended; a town church, even if Congregationalist, received no legal favors because its members were dissenters in relation to a poll parish that maintained a church of some other denomination.⁵⁰ Because Swift could not conceive of a multiple establishment of religion, he denied that Connecticut main-

47. Greené, *Religious Liberty in Connecticut*, pp. 373-76; McLoughlin, *New England Dissent*, 2:937.

48. John Leland, "The Rights of Conscience Inalienable," in *Writings of John Leland*, p. 186. See Curry, *First Freedoms*, pp. 178-84, for another treatment of Connecticut.

49. Zephaniah Swift, *System of the Law of Connecticut*, 2 vols. (Windham, Conn., 1791-96), 1:146.

50. *Ibid.*, 1:144-45.

tained any establishment whatever. His view was probably the predominant one in the four New England states that maintained establishments of religion. In a legal sense, they were nonpreferentialist but in fact preferred the Congregational church, which professed not to be established by law.

Even anticlerical Congregationalists of Connecticut as well as advocates of separation of church and state saw an establishment of religion in a bill to pay clerical salaries from state funds. The Western Lands Bill of 1793 proposed to divide proportionately among all religious societies the interest on the principal of \$1,200,000 from the sale of public land, on condition that the money be used for ministerial support. One argument advanced to defeat this bill was that state aid to religion, even if on a nonpreferential basis, constituted an establishment of religion that violated religious liberty.⁵¹ The state used the money to support its public school system.

In 1802 the Baptists in Connecticut petitioned the legislature to repeal the system of compulsory religious taxes. The legislature rejected that petition on the grounds that religion, like schools and courts, deserved every taxpayer's support; therefore the state could tax everyone.⁵² A statewide Baptist convention then remonstrated against Connecticut's establishment because it favored the Congregationalists, and also because religion should be left to voluntary support. In 1804 a Baptist petition complained that the General Assembly had "fixed the laws so that no man can be taxed by the Baptists or Episcopalians &c. until he has said in a certificate that he belongs" to the taxing body.⁵³ The Baptists concluded that a Congregational society could not fairly tax anyone until the person produced a certificate proving he or she was a Congregationalist. If Connecticut's Baptists made any consistent argument it was that the existing church-state relationship preferred Congregationalism, despite Congregational denials, and that private donations should be the only source of support to religion, despite Baptist participation in the establishment's largesse.

In 1816, for example, when Connecticut expected a windfall repay-

51. McLoughlin, *New England Dissent*, 2:972.

52. *Ibid.*, 2:989-90.

53. *Ibid.*, 1:997-98.

ment from the United States of state costs incurred during the War of 1812, the state legislature passed "An Act for the Support of Religion and Literature." The act divided the money among the major denominations in proportion to their numbers, after reserving one-seventh to Yale. Even the Baptists, despite protests, accepted their share, proof again that state aid to religion in Connecticut showed the existence of a multiple establishment of religion.⁵⁴ In 1818 the Hartford Baptists announced that candor required recognition of the fact that in Connecticut "Religion is established and supported by law," but Baptists believed that one denomination enjoyed dominance. Voluntarism would protect religious liberty, a position conformable to that of the state's Toleration or Democratic party and to that of most non-Congregationalists, who were growing faster than the Congregationalists. A constitutional convention of 1818 scrapped the old charter of 1662 as revised during the American Revolution and wrote the state's first constitution. It disestablished church and state by providing that no one could be compelled to support any religious society, yet allowed any religious society to tax itself and privately collect the assessment from each member.⁵⁵

Vermont became the fourteenth state in 1791, and its vote was counted to determine whether enough states had ratified the Bill of Rights. Therefore its brief history with an establishment of religion merits notice. Vermont's constitution of 1777 guaranteed the free exercise of religion including the right of every person not to be compelled to support any place of worship or minister against his or her conscience, but inconsistently provided too that every sect or denomination of Christians "ought to . . . support some sort of religious worship . . . agreeable to the revealed will of God."⁵⁶ In 1783 the legislature enacted a statute described by William G. McLoughlin as "an elaborate

54. Greene, *Religious Liberty in Connecticut*, pp. 467-71; J. Hammond Trumbull, *Historical Notes of the Constitutions of Connecticut, 1639 to 1818, and Progress of the Movement which resulted in the Convention of 1818* (Hartford, Conn., 1901), pp. 35-36.

55. Richard Purcell, *Connecticut in Transition* (Washington, D.C., 1918), pp. 384-85, 400-403; Greene, *Religious Liberty in Connecticut*, pp. 423-96; Trumbull, *Historical Notes*, pp. 46-62; McLoughlin, *New England Dissent*, 2:1006-62.

56. Thorpe, ed., *Constitutions*, 7:3740.

attempt to create a general establishment of religion without giving preference to any particular group of believers and without obliging anyone who conscientiously objected to it to support the establishment."⁵⁷

As elsewhere in New England, the local option system prevailed. A two-thirds majority of voters in a town decided which church should be its established church, but anyone attending a different church could be exempted from paying a tax for religion. As a matter of law Baptists could benefit from the establishment in one town, Quakers in the next, and so on. Because the demography of Vermont favored Congregationalism, so did the establishment as a matter of practice, although non-Congregationalists dominated west of the Green Mountains. In 1786 Vermont adopted a new constitution that omitted a religious test for office, referred to "people" rather than "Christians," and also omitted the words "and support" from the clause obligating every sect in the matter of public worship. In the following year the legislature provided that whenever a religious society agreed to hire a minister or build a church, it could assess its members for costs and appoint collectors who should have the same powers as town tax collectors. Never did law create a more liberal establishment, aiding every religion in the state.

Baptists, however, pledged themselves to assess no rates and maintain their preachers and churches with free contributions only. A Baptist elder preached before the state assembly in 1792 on the theme that "religious establishment by law" damaged both church and state. He insisted that religion was always a private matter between God and individuals, yet he favored "friendly aids" to religion such as compulsory attendance, not enforced in Vermont, and Sabbath laws. An establishment, in his opinion, seemed to mean taxation for religion and any means used by government to enforce taxes for religion, such as certificate laws.⁵⁸ Baptists conscientiously opposed Vermont's certificate laws, although they were as liberal as possible; after 1794 dissenters from a town church could write their own certificates exempting them

57. McLoughlin, *New England Dissent*, 2:800.

58. *Ibid.*, 2:803.

from support of that church. In 1807, when the Jeffersonians controlled state politics and a Baptist was speaker of the house, Vermont repealed all laws concerning taxation for religion, thus separating church and state.⁵⁹

59. *Ibid.*, 2:789-832, is the best treatment of Vermont's establishment.