# 3 State Establishments of Religion: The South

In the five southern states, where the Church of England had benefited from an exclusive establishment in each colony, the Revolution spurred pent-up opposition.[1] Every one of the five states disestablished the Anglican church, but only North Carolina showed no temptation to create a general establishment that taxed people only for the church of their choice. By its constitution of 1776

1. Thomas Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York, 1986), pp. 134–58, covers disestablishment in the southern states during the revolutionary period.



North Carolina became the first southern state to separate church and state. Indeed, North Carolina did so easily, in contrast to the other southern states. Disestablishmentarians in Virginia, Maryland, South Carolina, and Georgia quickly broke the Anglican monopoly on religious privileges but needed at least a decade more to muster the necessary votes against nonpreferential state aid to religion. In North Carolina the Anglicans maintained what one historian called "the most unhealthily established church in the American colonies."[2] They had fewer than ten churches in 1776, still fewer ministers, and they suffered chronically from weakness and public hostility. In the generation before independence the population of North Carolina swelled in the central and western counties, where the nearly nonexistent Church of England confronted Scotch Presbyterians, German Moravians, English Quakers, a variety of evangelical sects, and possibly a majority of nonchurchgoers, if not nonbelievers. The governor of the colony during the controversy with Britain remarked, "Every sect of religion abounds here except the Roman Catholic," the only one more unpopular than the Anglican. Mecklenburg County, when adopting resolutions to instruct its delegates to a revolutionary provincial meeting, prefigured the shape of church-state relationships when demanding religious freedom and equality for all Protestants as well as severance of any union between church and state.[3]

A year later, in 1776, the new state constitution banned the "establishment of any one religious church or denomination in this state, in preference to any other." This language, which seemed directed against an exclusive establishment only, applied to even a nonpreferential one, because the next clause of the same section provided that "neither shall any person, on any pretence whatsoever, be compelled to attend any place of worship, contrary to his own faith or judgment, nor be obliged

2. Gary Freeze, "Like a House Built on Sand: The Anglican Church and Establishment in North Carolina," *Historical Magazine of the Protestant Episcopal Church* 48 (1979): 405, 430.

3. A. Roger Ekrich, *Poor Carolina: Politics and Society in Colonial North Carolina, 1729–1776* (Chapel Hill, N.C., 1981), pp. 30, 44; "Instructions for the Delegates of Mecklenburg County Proposed to the Consideration of the County," in *The Colonial Records of North Carolina*, edited by William L. Saunders, 10 vols. (Raleigh, N.C., 1886–90), 10:241.

to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship."[4] The phrasing against preference reflected the state's colonial experience with an exclusive establishment, not an authorization to support religion nonpreferentially. North Carolina never granted financial aid to religion after 1776.

In Maryland, Georgia, and South Carolina "an establishment of religion" as a matter of law meant very much what it did in the New England states that maintained multiple establishments. However, those three southern states merely permitted but did not create establishments. Maryland's constitution of 1776 provided that no person could be compelled "to maintain any particular place of worship, or any particular ministry," thus ending the former supremacy of the Episcopalian church, which had enjoyed an exclusive establishment in the colonial period. But that did not separate church and state because the same constitution provided for a new establishment of religion by a special enabling clause: "yet the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment of the money, collected from him, to the support of any particular place of worship or minister."[5] "Christian" rather than "Protestant" was used in Maryland because of the presence of a large Roman Catholic population, thus ensuring nonpreferential support of all churches existing in the state. The enabling clause showed that a constitutional provision against a "particular" or preferential establishment did not by itself empower the legislature to create a multiple establishment or to grant financial aid to all churches or denominations on a nondiscriminatory basis.

A proposal of 1780 to impose an "equal assessment and Tax" for the benefit of religion got nowhere. In 1783 the governor urged a measure

4. Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, 7 vols. (Washington, D.C., 1909), 5:2793, sec. 34.

5. Ibid., 3:1689, Article 33.



"placing every branch of the Christian Church upon the most equal and respectable footing."[6] In 1784 another such bill proposed a tax for the aid of all Christian churches with preference to none; the bill exempted from the tax anyone professing to be a "Jew or Mohometan, or [declaring] that he does not believe in Christian religion."[7] A Baltimore newspaper, seeing the "camel's nose" under the tent, censured the proposal as the reintroduction of an establishment. The legislature favored the bill but decided to leave its fate to the voters in their selection of representatives to the next legislative session. A blizzard of newspaper articles and petitions condemned the bill as a new establishment of religion and a violation of the Christian spirit, asserted that establishments harmed religion, and darkly warned about an Episcopalian conspiracy to regain supremacy. Opponents of the bill also argued that compulsory support of religion violated religious freedom.[8] The voters chose a legislature strongly opposed to a general assessment, because additional taxation for any purpose triggered public hostility. In 1785 the bill was voted down by a two-to-one majority.[9] Maryland never did implement its constitutional authorization for a multiple establishment of religion. In 1810 the power to enact a multiple establishment was taken from the legislature by a constitutional amendment that outlawed "an equal and general tax or any other tax . . . for the support of any religion."[10]

Georgia's constitution of 1777 tersely effected the disestablishment

6. Albert W. Werline, *Problems of Church and State in Seventeenth and Eighteenth Century Maryland* (S. Lancaster, Mass., 1948), p. 175.

7. Quoted in Curry, *First Freedoms*, p. 155. On Maryland, I have also used John C. Rainbolt, "The Struggle to Define Religious Liberty in Maryland, 1776–1785," *Journal of Church and State* 17 (1975): 445–58; Werline, *Problems of Church and State*, pp. 143–208.

8. Allan Nevins, *The American States during and after the Revolution* (New York, 1924), p. 431; Werline, *Problems of Church and State*, pp. 169–86; Rainbolt, "The Struggle to Define Religious Liberty," p. 448. Rainbolt said that the proposed measure would have inaugurated a "plural establishment" (p. 447).

9. The newspaper, cited by Werline, Rainbolt, and Curry, was the *Maryland Gazette or Baltimore General Advertiser*. See issues of Jan. 28, Mar. 4, and Mar. 25, 1785.

10. Thorpe, ed., *Constitutions*, 3:1705.

of the Church of England while permitting a multiple establishment of all churches without exception: "All persons whatever shall have the free exercise of their religion; . . . and shall not, unless by consent, support any teacher or teachers except of their own profession."[11] "This, of course, left the way open for taxation for the support of one's own religion," says one historian of eighteenth-century church-state relationships in Georgia, "and such a law was passed in 1785," although similar bills had failed in 1782 and 1784.[12] According to the general assessment act of 1785, all Christian sects and denominations were to receive tax support in proportion to the amount of property owned by their respective church members, but it is not clear whether this measure ever went into operation. What is clear is that an establishment of religion meant government tax support of all churches, with preference for none.

The state constitution in force at the time of the framing of the Bill of Rights was adopted in 1789. Its relevant provision declared that no persons should be obliged "to contribute to the support of any religious professions but their own," thereby permitting a multiple establishment as before. In the state constitution adopted in 1798, however, Georgia finally separated church and state in law as well as in fact by a guarantee that no person should be "obliged to pay tithes, taxes, or any other rate, for . . . any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged." The very next sentence redundantly prohibited the establishment of any religious society in preference over another, showing that a constitutional policy of no preference did not imply the constitutionality of nonpreferential measures in favor of religion generally. No preference in 1798 signified the abandonment of Georgia's previous constitutional regime of nonpreference.[13]

At the time of the framing of the First Amendment, South Carolina's constitution also permitted a nonpreferential or multiple establishment of churches. The temporary constitution of 1776 had left church-

11. Ibid., 2:784.

12. Reba D. Strickland, *Religion and the State in Georgia in the Eighteenth Century* (New York, 1939), p. 164; see also p. 166.

13. Thorpe, ed., *Constitutions*, 2:801, sec. 9.



state relationships unaffected, with the result that dissenters, who outnumbered Anglicans by a four-to-one majority, organized to obtain the disestablishment of the Church of England. In 1771 the Reverend William Tennent, a Presbyterian who framed "The Petition of the Dissenters," addressed the South Carolina General Assembly on the theme that "all religious establishments are an infringement of religious liberty" and that all Protestants should enjoy equal privileges, religious as well as civil. Tennent had heard of a proposal "to establish all denominations by law and pay them all equally," but the idea struck him as absurd, on the supposition that the establishment of all religions would contradict the idea of an establishment. Tennent could not grasp the concept of the multiple establishment because he thought in terms of the Anglican establishment in South Carolina; "only the Church of England is legal," he complained, "only its Ministers may perform legal marriages, only it has legal contracts."[14]

Charles Cotesworth Pinckney, a future member of the Philadelphia Constitutional Convention, introduced a plan for an establishment of all Protestant churches in South Carolina, but without mandatory tax support. Tennent, reversing himself, announced his "pleasure to find that a *general establishment*, or rather incorporation of all denominations is now thought of, and likely to be adopted." Pinckney's proposal, Tennent continued, "opens the door to the equal incorporation of all denominations, while not one sect of Christians in preference to all others but Christianity itself is the established religion of the state."[15] Tennent's use of "general establishment" shows how quickly he grasped the distinction between an exclusive establishment and a multiple one.

Pinckney's proposal became the basis of Article XXXVIII of the South Carolina constitution of 1778, which blueprinted a "general establishment," in Tennent's phrase, of the "Christian Protestant religion" as the replacement of the former exclusive establishment of Anglicanism. Every Protestant denomination received a guarantee of equality. Any religious society of a Protestant denomination might

14. John Wesley Brinsfield, *Religion and Politics in South Carolina* (Easky, S.C., 1983), pp. 115–18. For Tennent's remarks, see above, chap. 1, text connected with note 13.

15. Ibid., pp. 121–22; emphasis added.

therefore be incorporated and become "a church of the established religion of this State" on condition of subscribing to the articles of faith: a belief in God, a promise to worship Him publicly, profession of Christianity as "the true religion," and reliance on the Scriptures as divinely inspired. No person was obligated to pay toward the maintenance and support of a religious worship that he or she did "not freely join . . . or has not voluntarily engaged to support." Pursuant to these constitutional provisions, Protestant societies qualified as established churches.[16] Never before had an establishment been known that did not exact religious assessments and could not constitutionally do so. Although the legislature incorporated churches of various denominations, it did not enact a tax to support religion, despite proposals to that effect. In 1790 South Carolina adopted a new constitution that omitted the previous provisions for an establishment of religion and guaranteed the free exercise of religion—for Roman Catholics and Jews as well as for Protestants.[17]

The Virginia constitution of 1776 avoided the issue of an establishment of religion, although it guaranteed to every person equality in the "free exercise of religion," thanks to the efforts of young James Madison.[18] Madison failed, however, to win acceptance for his proposal, which would have ended any union of church and state, that no one "ought on account of religion to be invested with peculiar emoluments or privileges."[19] Baptists were disappointed with the inadequacy of the

16. Thorpe, ed., *Constitutions*, 6:3253–57.

17. Ibid., 6:3664.

18. Virginia Declaration of Rights, sec. 16, in ibid., 7:3814; William T. Hutchinson et al., eds., *The Papers of James Madison*, ser. in progress (Chicago, 1962–), 1:173–75.

19. *Madison Papers*, 1:174; Thomas E. Buckley, *Church and State in Revolutionary Virginia 1776–1787* (Charlottesville, Va., 1977), p. 19. James McClellan, "The Making and the Unmaking of the Establishment Clause," in *A Blueprint for Judicial Reform*, edited by Patrick B. McGuigan and R. R. Rader (Washington, D.C., 1981), p. 305, wrongly states that Madison's motion passed. McClellan's essay is littered with errors, great and small, some of them howlers. He grossly distorts history, gets nuances wrong, and says silly things. He scarcely understands what an establishment of religion is. He thinks Protestants had a preferred status over Dissenters, not knowing that Dissenters were Protestants,



new state constitution, which did not make religion "stand upon its own merits." They petitioned for freedom from the compulsion of having to support any clergy but their own, and they wanted to be free also from having to pay other clergy in order to "be married, buried, and the like."[20] Caleb Wallace, a Presbyterian clergyman who was a member of the General Assembly, declared that 10,000 freeholders signed that Baptist petition.[21] Baptists also demanded that the legislature should guarantee "equal privileges to all ordained ministers of every denomination" in order to break the Anglican monopoly on the administration of the sacraments, especially the rites of marriage.[22]

The Hanover Presbytery, in an imperishable document of October 1776, remonstrated against the establishment and advocated the separation of church and state in language remarkably like that of Madison and Jefferson. Caleb Wallace, for the Hanover Presbytery, regarded an establishment of religion as a violation of the free-exercise clause of the Virginia Declaration of Rights, of the natural rights of mankind, and of "freedom of enquiry and private judgment." Every argument favoring the establishment of Christianity, Wallace reasoned, was comparable to arguments favoring the establishment of the "tenets of Mahomet by those who believe the Alkoran." No magistrate could judge the "right of preference among the various sects which profess the Christian faith, without erecting a chair of infallibility, which would lead us back to the Church of Rome." Establishments, he argued, greatly injured "the temporal interests" of any community. And, because the kingdom of God was not of this world, the gospel needed only spiritual aid, none from state power. The only proper object of civil government was the protection of natural rights. The duty one owed to God and the manner of discharging it could only be directed by reason or conviction "and is nowhere cognizable but at the tribunal of the Universal Judge."

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and he thinks too that every state but Rhode Island rejected separation of church and state.

20. Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* (Lynchburg, Va., 1900), p. 66.

21. H. J. Eckenrode, *Separation of Church and State in Virginia* (Richmond, Va., 1910), p. 51.

22. Albert Henry Newman, *A History of the Baptist Church in the United States* (New York, 1915), p. 368.

Therefore, concluded the memorial of the Hanover Presbytery, "we ask no ecclesiastical establishment for ourselves, neither can we approve of them and grant it to others." The sole support of any church should derive from the "private choice or voluntary obligation" of its supporters.[23]

Evangelical demands for the separation of church and state, supported principally by Baptists and Presbyterians, ultimately prevailed in Virginia. But the disproportionate influence in the General Assembly of tidewater conservatives, who were greatly overrepresented, and the widespread belief that government and society could not flourish without subsidized religion as a prop, prevented decisive action except to relieve dissenters. As 1776 ended, the legislature repealed almost every statute that bulwarked the establishment of the Church of England. The repealed statutes had criminalized religious opinions that subverted Anglicanism, penalized failure to attend church, and discriminated against any but the Anglican mode of worship. The Anglican clergy still monopolized the administration of certain sacraments, particularly marriage rites. But the statute passed at the close of 1776 also provided that "dissenters from the church established by law" should be exempt from taxes for its support and suspended the collection of taxes even from members of the established church. An indecisive legislature expressly reserved for future decision the great question of whether to separate church and state or to create a general establishment by taxing everyone on a nonpreferential basis for the support of the churches of their choice: "And whereas great variety of opinions has arisen, touching the propriety of general assessments, or whether every religious society should be left to voluntary contributions . . . it is thought most prudent to defer this matter."[24] Subsequent events proved that the act terminated the union of the government with the

23. William Addison Blakely, ed., *American State Papers Bearing on Sunday Legislation*, revised and enlarged by W. A. Colcard (Washington, D.C., 1911), pp. 91–95, reprints the document under the heading "Dissenters' Petition."

24. "An Act for Exempting the Different Societies of Dissenters," in *The Statutes At Large . . . of Virginia*, edited by William Waller Hening, 13 vols. (Richmond, Va., 1809–28), 9:164–67.



"church established by law," because it received no government support after 1776. In 1777 and again in 1778 the legislature renewed the suspension of religious taxes even for Anglicans, and in 1779 it repealed the old colonial statute levying those taxes.

In 1779 two conflicting bills were introduced in the legislature. Jefferson's "Bill for Religious Freedom" provided in part "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[25] The principle underlying this provision was the belief that religion, as a personal matter between God and an individual, was not rightfully subject to the jurisdiction of the civil government. By contrast, "A Bill concerning Religion," which proposed a general assessment, declared the Christian religion to be the "established Religion" of Virginia and provided articles of faith to which church members had to subscribe in order to be incorporated as an established church. These articles were modeled on the comparable provision of the South Carolina constitution of 1778.[26] Each established church and its minister were to have their share of the tax proceeds assessed on tithable personal property collected by county sheriffs. All persons could designate the church of their choice as the recipient of their taxes; money collected from anyone who did not designate membership was to be divided proportionately among all the churches of the county.[27] Neither this bill nor Jefferson's could muster a majority in the legislature for several years. Then the Presbyterian clergy, attracted by the prospect of state support for their own church, reversed their position and endorsed the principle of a general assessment.

In 1784 Patrick Henry, who had a substantial Presbyterian constituency, introduced a new general assessment bill, entitled "A Bill Establishing a Provision for Teachers of the Christian Religion," whose purpose was to carry into effect a house resolution in favor of requiring a

25. Julian Boyd et al., eds., *Papers of Thomas Jefferson*, ser. in progress (Princeton, N.J., 1950–), 2:546. Hereafter cited as *Jefferson Papers*.

26. See above, this chapter, text connected with note 16.

27. Buckley, *Church and State*, pp. 47–62. Buckley reprints the general assessment bill of 1779 on pp. 185–88.

"moderate tax or contribution annually for the support of the Christian religion, or of some Christian church, denomination or communion of Christians, or for some form of Christian worship."[28] It retained the idea of a multiple establishment but was a far more secular version than the one of 1779. The bill declared the "liberal principle" that all Christian sects and denominations were equal before the law, none preferred over others. It did not speak of the "established religion" of the state, contained no articles of faith, and purported to be based on nonreligious considerations only—the furtherance of public peace and morality rather than of Christ's kingdom on earth or the encouragement of religion.[29]

The more secularized version of the general assessment, sponsored by the most popular and powerful man in the legislature and backed by Episcopalians, Methodists, and Presbyterians, commanded a majority in the legislature. Richard Henry Lee, who supported the bill, told Madison, "I fully agree with the Presbyterians, that true freedom embraces the Mahomitan and Gentoo [Hindus] as well as the Christian religion."[30] But Madison, who had earlier noted that the Presbyterian clergy favored "a more comprehensive establishm[en]t," angrily wrote to James Monroe that the Presbyterians "seem as ready to set up an establishmt. which is to take them in as they were to pull down that which shut them out."[31] Madison cleverly helped to get Patrick Henry out of the legislature by supporting his election as governor, thus depriving the general assessment forces of their charismatic leader. The bill passed to its third and last reading, however. The notes of Madison's speech in opposition show that he argued that the "true question" was not whether religion was necessary but "are Religs. Estabts. necessy. for Religion? no."[32] Madison won a postponement of the final vote until the next session of the legislature a year later so that the members could test public opinion on the issue. His opposition confidently agreed to the delay; they relished the prospect that public opinion would back the election of the general assessment supporters who would favor a "more comprehensive establishment."

28. See Eckenrode, *Separation of Church and State*, p. 86, for the resolution.

29. Buckley, *Church and State*, reprints the bill on pp. 189–91. Michael J. Malbin, *Religion and Politics: The Intention of the Authors of the First Amendment* (Washington, D.C., 1978), p. 23, purporting to describe the 1784 bill, confuses it with the 1779 bill.

30. Richard Henry Lee to James Madison, Nov. 26, 1784, in *Madison Papers*, 8:149.

31. James Madison to James Monroe, Nov. 14, 1784, and Apr. 12, 1785, in ibid., 8:137, 261. On the position of the Presbyterian clergy, see Buckley, *Church and State*, pp. 92–96.



In 1785 Madison took to the people his case against an establishment of religion—any establishment of religion. He wrote his famous "Memorial and Remonstrance against Religious Assessments," in which he argued that religion is a private, voluntary affair not subject to government in any way. Madison assumed, as had the Hanover Presbytery in 1776 and all other opponents of tax aids to religion, that a general assessment was in fact an establishment of religion. Any establishment, he contended, violated the free exercise of religion and threatened public liberty. The principle that government could create an establishment must be denied, Madison wrote; he did not care how mild or comprehensive an establishment of religion might be, because the same authority that created it might create a preferential one, favoring one sect over others. To Madison, religion was simply not an "engine of civil policy," and Christianity did not stand in need of government support, nor did the government need the support of religion. Establishments produced bigotry and persecution, defiled religion, corrupted government, and ended in spiritual and political tyranny. The proposed establishment, he declared, differed from the Inquisition "only in degree," not in principle.[33]

Many others also wrote against the general assessment. Over one hundred petitions and memorials, signed by over 11,000 Virginians, deluged the legislature when it met in the fall of 1785, and nine out of ten condemned the proposal. Some of the remonstrances against the assessment spoke for religious denominations—Presbyterians, Baptists, and Quakers. But a petition by an unknown author garnered the

32. Dec. 23–24, 1784, in *Madison Papers*, 8:198. For Madison's outline of the speech, see 8:195–99.

33. "Memorial and Remonstrance against Religious Assessments," June 20, 1785, in ibid., 8:298–304. For further discussion of the "Memorial," see chap. 4, below.

greatest number of signatories. It reflected the views of "evangelical Christians believing deeply in the principle of voluntary support."[34] The author of this petition was an active Christian who believed that the general assessment bill would not thwart the spread of Deism, despite arguments to the contrary by the bill's supporters. Its opponents relied mainly on religious arguments to buttress their position.[35] Yet the evangelicals' arguments did not substantially differ from those of the rationalists whom Madison represented. Rationalists and evangelicals differed in style and emphasis; the rationalists took a somewhat more secular view by stressing the harmful effects of an establishment on society and on government, while the evangelicals gave prime consideration to the effect on religion. Almost everyone who condemned an establishment, including the mild one proposed, found it hostile to the best interests of the gospel and violative of natural rights, especially of religious freedom.[36]

In one variant of a popular evangelical petition against the general assessment bill, inhabitants of Cumberland County declared "that the blessed author of the Christian religion not only maintained and supported his gospel in the world for several hundred years without the aid of civil power, but against all the powers of the earth," and, they added, because of the purity of the gospel, it succeeded against all opposition. However, after Constantine established Christianity as the official religion of the Roman Empire, the church suffered from superstition and error. History showed that "religious establishment has never been a means of prospering the gospel."[37] Another variant of the same petition urged that the Virginia legislature should leave people "intirely free in matters of religion and the manner of supporting it."[38]

A petition from the Presbyterian churches of Virginia, which again switched allegiance, argued that Christianity is most effective when left alone under God, "free from the intrusive hand of the civil magistrate." God did not think it necessary to render religion dependent on government, "and experience has shown that this dependence, where it has been effected, has been an injury rather than an aid." Religion and morality, the Presbyterians asserted, "can be promoted only by the internal conviction of the mind and its voluntary choice which such establishments cannot effect." Therefore, the subjects of Jesus Christ opposed the attempt of civil rulers to regulate or promote religious matter.[39] Evangelicals of Rockingham County agreed. They explained that the basis for opposing aid by government to religion derived from the separate spheres of the two: "Any legislative body that takes upon themselves the power of governing religion by human laws assumes a power that never was committed to them by God nor can be by man." The government's jurisdiction reached only "civil concernments." Exceptions to that principle were dangerous, because "if you can do any thing in religion by human laws you can do everything." The "pernicious consequences" of establishments of religion supplied the proof; persecution and denials of religious liberty invariably attended establishments. Consequently, governments should restrict themselves to "affairs of state." As for "the Church of Christ, be content to let it stand on its own gospel foundations regulated by its own laws."[40]

The foundation of this edifice of reasoning received expression in a petition against the general assessment by Virginia's Baptist associations: "As the Church of the Kingdom of Christ 'is not of this world' as himself declares; it appears an evident impropriety, to intrust in the

34. Buckley, *Church and State*, p. 149.

35. "Editorial Note on Madison's Memorial," in *Madison Papers*, 8:298; Curry, *First Freedoms*, p. 147.

36. Buckley, *Church and State*, pp. 149–51, and Curry, *First Freedoms*, pp. 143–47, analyze the various manuscript petitions, which are available on microfilm from the Virginia State Library, Richmond, in a collection entitled "Religious Petitions, 1774–1802, Presented to the General Assembly of Virginia." Curry made a typescript of the collection through 1787 and generously gave me a copy.

37. "Religious Petitions," Petition of Cumberland County, Oct. 26, 1785. The original capitalizes almost every noun. In quoting from these petitions I have modernized capitalization but have retained the original spelling and punctuation.

38. Ibid., Nansemond County, Oct. 27, 1785.

39. Ibid., Miscellaneous Petition of the Ministers and Lay Representatives of the Presbyterian Church, Nov. 2, 1785.

40. Ibid., Rockingham County, Nov. 2, 1784.

management of any of its proper interests offices which relate wholly to secular matters. And cannot therefore have any proper connection with a spiritual body." Thus, to compel support of the Christian religion even from the faithful "is inconsistent both with the generous and independent spirit of the Christian religion, and the custom of the primitive Church."[41] So too another fundamentalist petition declared, "But religion and all its duties being of divine origin and of a nature wholly distinct from the secular affairs of the public society ought not to be made the object of human legislation. For the discharge of the duties of religion every man is to account for himself as an individual in a future state and ought not to be under the direct of influence of any human laws."[42] Chesterfield County's various Christians agreed with the Baptists that because Christ had declared that his kingdom is not of this world, to legislate for his subjects in religious matters violates "his Kingly prerogative."[43] A Quaker memorial construed state aid to religion exacted from its believers to be "directly contrary to the doctrine of our Saviour."[44]

An evangelical petition contended that the general assessment bill, which its defenders advocated as a public support of religion, was "calculated to destroy religion."[45] Still another petition insisted that "Christ the head of the Church has left plain directions concerning religion, and the manner of supporting its teachers, which should be by free contributions" rather than by the "heavy yoke" imposed by a general assessment for religion.[46] And Washington County added that the general assessment bill was "big with empending danger" and "highly improper" because in the same way that civil policy "can never make us Christians, neither can Christianity be benefitted by the laws of the commonwealth but only by the constitutions of Christ."[47]

41. Ibid., Remonstrance and Petition of the Committees of Several Baptist Associations in Virginia Assembled in Powhatan County, Aug. 13, 1785, received by the Assembly on Nov. 3, 1785.

42. Ibid., Rockbridge County, Nov. 2, 1785.

43. Ibid., Chesterfield County, Nov. 12, 1785.

44. Ibid., Miscellaneous Petition, Nov. 14, 1785.

45. Ibid., Rockbridge County, Dec. 1, 1785.

46. Ibid., Westmoreland County, Nov. 2, 1785.

47. Ibid., Washington County, Dec. 10, 1785.



A petition from Dinwiddie County, populated mainly by Episcopalians and Methodists who previously had supported the general assessment bill, opposed it "as a measure injurious to the liberties of the people [and] destructive to the true religion."[48] Similarly, Amherst County, also dominated by Episcopalians and Methodists, switched its position by condemning the "General Establishment" bill because it threatened religious liberty and because Christianity "disclaims any dependence on human laws."[49] Seen in its context then, Madison's "Memorial and Remonstrance" more reflected public opinion than shaped it when he argued that religion must be left to private conscience, is exempt from civil governance, and would be damaged by the proposed establishment. He struck responsive chords when declaring that Christianity did not need civil support and that such support contradicted the Christian religion.[50]

Virginia's intensive and prolonged debate on whether to adopt a general establishment or leave religion to private conscience produced an upheaval in public opinion. Among religious bodies, only the Episcopal Church and the Methodists continued to endorse the general assessment, although their congregations divided on the issue. The rank and file of Presbyterians, unlike their clergy, probably never had abandoned their loyalty to private conscience and voluntary support; and their clergy during 1785 returned to the principles of the Hanover Presbytery of 1776. Madison surmised that the clergy feared the wrath of the laity and the possibility of an Episcopalian resurgence.[51] Presbyterian counties censured the general assessment bill and elected deputies who opposed it, while the Hanover Presbytery endorsed the enactment of Jefferson's bill for religious liberty, which provided for separation of church and state. Madison exulted that the "steps taken throughout the Country to defeat the General Assessment had produced all the effect that could have been wished."[52]

48. Ibid., Dinwiddie County, Nov. 28, 1785.

49. Ibid., Amherst County, Dec. 10, 1785.

50. "Editorial Note on Madison's Memorial," in *Madison Papers*, 8:298; Curry, *First Freedoms*, p. 147.

51. James Madison to Thomas Jefferson, Aug. 20, 1785, in *Madison Papers*, 8:345.

52. James Madison to Thomas Jefferson, Jan. 22, 1786, in ibid., 8:473. On

George Washington's reaction suggested the turnabout in opinion. He had originally supported the general assessment bill, and still found nothing alarming, he wrote, in making people pay for "the support of that which they profess, if of the denominations of Christians," so long as Jews, Mohammedans, and other professed non-Christians obtained proper relief. Yet the issue was so divisive that Washington regretted it had ever arisen. When George Mason sent him a copy of Madison's "Memorial" and asked Washington to subscribe, he replied, "As the matter now stands, I wish an assessment had never been agitated—and as it has gone so far, that the bill could die an easy death; because I think it will be productive of more quiet to the State, than by enacting it into a Law; which in my opinion, would be impolitic, admitting there is a decided majority for it, to the disgust of a respectable minority. In the first case the matter will soon subside; in the latter it will rankle, and perhaps convulse the State."[53]

The state elections of 1785 produced a legislature whose membership overwhelmingly opposed a general establishment of religion. The legislature, which let the assessment bill die unnoticed, by a vote of 60 to 27 enacted Jefferson's great emancipating bill instead. At the time, Jefferson represented the United States in Paris. Madison, then the most influential member of the state legislature, presented Jefferson's bill and managed the defeat of a motion to restrict its protections to Christians only. The Virginia Statute for Religious Freedom declared in its preface that to compel anyone to support religious opinions he did not share was tyrannical and "that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty" of giving his money as he pleased. The enabling provisions stated "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." The significance of the statute is not just that it broadened freedom of worship or

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the Presbyterians, see the memorial adopted at Bethel, Aug. 1785, in James, *Documentary History*, p. 240.

53. George Washington to George Mason, Oct. 3, 1785, in *The Papers of George Mason*, edited by Robert Rutland, 3 vols. (Chapel Hill, N.C., 1970), 2:831–32.



of opinion in matters of religion but that it separated church and state in the context of protecting religious liberty.

At the same time as Madison chaperoned Jefferson's bill for religious freedom through the Virginia legislature, Madison also introduced other measures proposed by Jefferson's committee on the revision of the laws. They recommended a bill to protect the property of the Anglican church; a bill to punish anyone who disturbed public worship and to punish violators of the Christian sabbath; and a bill for fixing a date of fasting and prayer, which was not enacted. Accordingly, at this date and at a state level, Jefferson and Madison were by no means absolutists on the question of separation of government and religion. On the other hand it is preposterous to regard the bill for the protection of church property as a bill that "advantaged a single sect," given the fact that "sect" was being disestablished. Jefferson had supported disestablishment as early as June 1776 when he drafted three versions of a state constitution, each including a clause guaranteeing that no person should be compelled "to frequent or maintain" any religious service or institution.[54] Moreover, the engine behind the bill to punish disturbers of the religious peace was the protection of religious liberty. Sunday laws were common throughout the country; and Jefferson himself, as wartime governor of Virginia, had proclaimed a day of fasting and prayer. In 1802, in his address to the Danbury Baptists, when he urged a "wall of separation between Church and State," he relied on the establishment clause to justify his refusal as president to recommend a day of thanksgiving prayers.[55] By then his views seemed to support separation more consistently even at a state level.

54. *Jefferson Papers*, 1:344, 353, 363.

55. Daniel L. Dreisbach, *Real Shadow and Mere Threat: Religious Liberty and the First Amendment* (Westchester, Ill., 1987), pp. 119–26, surveys Jefferson's views, although Dreisbach twists the data to support his nonpreferential beliefs, as when referring to the bill that advantaged one sect only. He insists that the other bills provide a context for the great Virginia Statute of Religious Freedom, but he ignores entirely the context of widespread evangelical support for a wall of separation that divided the spiritual and secular dimensions, discussed in this chapter, and he ignores Jefferson's "Query VII on Religion," in

Supporters of government aid to religion have contended that Jefferson advocated the use of public funds in Virginia for a school of theology for the training of clergymen; that he approved of elaborate arrangements for the students of private theological schools to share the facilities of the University of Virginia; that he recommended that a room in the university be used for worship; and that he did not protest against the use by Virginia of tax monies on behalf of education. The contention, in other words, is that Jefferson did not apply his own principle of separation in the field of education in Virginia.[56]

In matters of education, however, Jefferson was a secularist, compared with others of his time. In 1778 he submitted, in a "Bill for the More General Diffusion of Knowledge," a comprehensive plan for public education at the primary and secondary levels.[57] Religious instruction was completely absent from Jefferson's proposed curriculum at a time when it was a prominent feature in schools everywhere else. The omission was deliberate. Jefferson wrote in his *Notes on Virginia*: "Instead therefore of putting the Bible and Testament into the hands of children, at an age when their judgments are not sufficiently matured for religious enquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history."[58] Religion was also conspicuous by its absence from Jefferson's plan of 1817; his "Bill for Establishing a System of Public Education" enumerated only secular subjects. In an effort to eliminate possible religious influence in the public schools, Jefferson specified that ministers should not serve as "visitors" or supervisors, and provided that "no religious reading, instruction, or exercise, shall be prescribed or practised" in violation of the tenets of any sect or denomination.[59]

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Jefferson's *Notes on Virginia*, edited by William Peden (Chapel Hill, N.C., 1955), pp. 157–612. Dreisbach also slants the data on Jefferson and education, pp. 131–32, discussed below.

56. See, for example, James M. O'Neill, *Religion and Education under the Constitution* (New York, 1949), pp. 76–77, 205–6.

57. *Jefferson Papers*, 2:526–35.

58. Jefferson, *Notes on Virginia*, p. 147.

59. *The Writings of Thomas Jefferson*, edited by Andrew A. Lipscomb and Albert Ellery Bergh, 20 vols. (Washington, D.C., 1903–4), 17:425. Hereafter cited as *Jefferson's Writings*.



Clearly Jefferson opposed the use of public funds for the teaching of religion in public schools.

Jefferson made his first proposal on higher education in 1779. His "Bill for the Amending of the Constitution of the College of William and Mary" stated that the college consisted of "one school of sacred theology, with two professorships therein, to wit, one for teaching the Hebrew tongue, and expounding the holy scriptures; and the other for explaining the commonplaces of divinity, and controversies with heretics." There were six other professorships divided among a school of philosophy, one of classical languages, and another for teaching Indians reading, writing, and "the catechism and the principles of the Christian religion." Jefferson proposed to abolish both the school of theology with its professorships of religion and the school for teaching Indians. In place of the school for Indians, he proposed that a missionary be selected by a newly constituted faculty who would not teach religion but investigate Indian "laws, customs, religions, traditions, and more particularly their languages." Jefferson's missionary was to be an anthropologist charged with reporting his findings to the faculty and preserving his reports in the college library. In place of the school of theology and the professorships of religion, Jefferson proposed simply a professorship of "moral philosophy" and another "of history, civil and ecclesiastical."[60]

Jefferson's proposed bill of 1779 failed because of Episcopalian (Anglican) opposition. However, in the same year he and Madison as visitors of the college instituted such changes as could be made by executive authority without legislative approval. In 1821 he summarized those changes by writing: "When I was a visitor, in 1779, I got the two professorships of Divinity . . . put down, and others of law and police, of medicine, anatomy, and chemistry, and of modern languages substituted."[61] A comparable statement appeared in his *Notes on the State of Virginia* where he remarked that the school of divinity was "excluded."[62]

60. *Jefferson Papers*, 2:535–42.

61. Thomas Jefferson to Joseph C. Cabell, Feb. 22, 1821, in *Early History of the University of Virginia*, edited by Nathaniel F. Cabell (Richmond, Va., 1856), p. 207.

62. Jefferson, *Notes on Virginia*, p. 151.

Jefferson was never satisfied with the education offered by the College of William and Mary. Failing to achieve adequate reform of the college, he turned to the establishment of a new state university. He also attempted in 1814 to transform Albemarle Academy, a small private school. He wanted an enlarged institution offering instruction from the primary grades through college and postgraduate training that would be supported by public funds. At no point in the entire curriculum before the professional level was there any provision for religious education. However, one of the "professional schools" was to be devoted to "Theology and Ecclesiastical History," to which would come the "ecclesiatic" as would the "lawyer to the school of law."[63] Here is an inconsistency, indicating Jefferson's support of the use of tax monies on behalf of religious education, although only at the graduate level. Albemarle, though privately established and endowed, was to be aided by public funds. More to the point, Jefferson never renewed the proposal, which failed.

In 1818, for instance, his academic plan for the newly authorized state university included ten professorships and thirty-four subjects, none of them relating to religion. This curriculum, which was adopted, was laid out in a report, written by Jefferson as chairman of the commissioners for the University of Virginia, which stated: "In conformity with the principles of our Constitution, which places all sects of religion on an equal footing . . . we have proposed no professor of divinity. . . . Proceeding thus far without offence to the Constitution, we have thought it proper at this point to leave every sect to provide, as they think fittest, the means of further instruction in their own peculiar tenets." The report also stated: "It is probable, that a building . . . may be called for in time, in which may be rooms for religious worship . . . for public examinations, for a library."[64]

The conditional phrasing of this sentence suggests that Jefferson

63. Thomas Jefferson to Peter Carr, Sept. 7, 1814, in *Jefferson's Writings*, 19:212–21. See also Roy J. Honeywell, *The Educational Work of Thomas Jefferson* (Cambridge, Mass.), pp. 15–16, 39–42; the letter to Carr is reprinted in Appendix E.

64. Report of the Commissioners, in *Educational Work of Jefferson*, Appendix J, pp. 256, 249.



was seeking to fend off an anticipated barrage of criticism against the university as a "godless" institution. In fact he was under constant pressure from church groups to make suitable provisions for theological training and religious worship at the university. The "supposed probable" room that might in time be a place for worship was a concession to those who, as Jefferson reported in a letter to Dr. Thomas Cooper, used the absence of a professorship of divinity to spread the idea that the university was "not merely of no religion, but against all religion."[65]

Although he provided for no professor of divinity or theology, Jefferson expected the professor of ethics to treat "the proofs of the being of a God, the creator, preserver, and supreme ruler of the universe, the author of all the relations of morality."[66] A good deist, Jefferson believed that the natural rights of mankind derived from God. He was not hostile to theism, despite his anticlericalism and distaste for formal Christianity. However, opposition to the secular character of the university resulted in a postponement of instruction, forcing additional concessions to religious interests. In 1822 Jefferson, as rector of the university, and the Board of Visitors, among them Madison, reluctantly proposed to accept suggestions "by some pious individuals . . . to establish their religious schools on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University." This report noted also that the religious schools would offer places where regular students of the university could worship as they pleased, "But always understanding that these schools shall be independent of the University and of each other." The report concluded that if the legislature questioned "what here is suggested, the idea will be relinquished on any surmise of disapprobation which they might think proper to express."[67]

Jefferson explained that in order to silence the calumny that the

65. Thomas Jefferson to Thomas Cooper, Nov. 2, 1822, in *Jefferson's Writings*, 15:405.

66. Philip Alexander Bruce, *History of the University of Virginia*, 4 vols. (New York, 1920), 2:366, 369.

67. Minutes of the Board of Visitors, Oct. 7, 1822, in *Jefferson's Writings*, 19:414–16.

university was atheistic, "In our annual report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of encouraging the different religions to establish, each for itself, a professorship of their own tenets, on the confines of the University."[68] In 1824, shortly before the first classes, Jefferson and the Board of Visitors adopted formal regulations that provided that the "religious sects of this State" might "establish within, or adjacent to, the precincts of the University" schools for instruction in their own religion. Students of the university were "free, and expected to attend religious worship" at the "establishment" of their choice on condition that they did so in the mornings before classes, which began at half past seven. The same regulations also provided for the use of one of the university's rooms for worship as well as for other purposes, although the students were enjoined by the regulation of the previous paragraph to attend services in the theological seminaries surrounding the university.[69]

No part of the regular school day was set aside for religious worship. Possibly the proposal that a room belonging to the university be used for worship was intended originally as a makeshift arrangement until the various sects established their own schools of theology. Although none in fact did so for several decades, Jefferson did not permit the room belonging to the university to be used for religious purposes. In 1825 he rejected a proposal to hold Sunday services on university property. The Board of Visitors, he wrote, had already turned down an application to permit a sermon to be preached in one of the rooms on the grounds that "the buildings of the Univ. belong to the state, that they were erected for the purposes of an Univ., and that the Visitors, to whose care they are commd [commanded or committed] for those purposes, have no right to permit their application to any other." His position was that the legislature had failed to sanction a proposal to use university facilities for worship and that, consequently, an alternative plan had been adopted "*superseding* the 1st idea of permitting a room in the Rotunda to be used for religious worship."[70] The alternative plan

68. Jefferson to Cooper, Nov. 2, 1822, in ibid., 15:405.

69. Minutes of the Board of Visitors, Oct. 4, 1824, in ibid., 19:449.

70. Thomas Jefferson to A. S. Brockenbrough, Apr. 21, 1825, quoted in R. Freeman Butts, *The American Tradition in Religion and Education* (Boston, 1950), p. 129.



was the one permitting the different sects to establish their own divinity schools, without public aid, independently of the university.

The university did not even appoint a chaplain while Jefferson was its rector. "At a time when, in most colleges and universities of the country, ministers were presidents and common members of boards of control, daily chapel attendance was compulsory, courses in religion were required, and professors of theology and doctors of divinity had a prominent place on the faculties, the University of Virginia stood out sharply in contrast with its loyalty to the principle of separation of church and state."[71]

The struggle for separation of church and state in Virginia often dominates in accounts of the history of separation of church and state in America. No doubt historians focus their attention on the Virginia story because the sources are uniquely ample,[72] the struggle was important and dramatic, and the opinions of Madison, the principal framer of the First Amendment, and of Jefferson were fully elicited. As a result, the details of no other state controversy over church-state relationships are so familiar. If, however, the object is to understand what was meant by "an establishment of religion" at the time of the framing of the Bill or Rights, the histories of the other states are equally important, notwithstanding the stature and influence of Jefferson and Madison as individuals. Indeed, the abortive effort in Virginia to enact Patrick Henry's assessment bill is less important than the fact that five states actually had constitutional provisions authorizing general assessments for religion, and a sixth (Connecticut) provided for the same by statute. Had the general assessment bill in Virginia been enacted, it would simply have increased the number of states authorizing multiple establishments of religion from six to seven.

In no state or colony, of course, was there ever an establishment of religion that included every religion without exception. Judaism, Bud-

71. Ibid., p. 130.

72. In 1785, the same year the general assessment bill was debated in Virginia, both Maryland and Georgia, as noted above, also considered general assessment bills; little is known about their history.

dhism, Mohammedanism, or any religion but a Christian one was never established in America. In 1791, when the First Amendment was ratified, the addition of Vermont to the Union brought the number of states authorizing establishments of religion to seven. All seven authorized multiple establishments. In four of the seven, Protestantism was the established religion; in the other half, Christianity was. It may therefore be argued that the concept of a multiple establishment is fallacious and that every state establishment of religion was an exclusive one. Such a statement would be true so far as it goes, but alone it is a misleading half-truth.

In each of the seven states where multiple establishments existed, the establishment included the churches of every denomination and sect with a sufficient number of adherents to form a church. In general, where Protestantism was established, it was synonymous with religion, because there were no Jews and Roman Catholics or too few of them to make a difference; and where Christianity was established, as in Maryland, which had many Catholics, Jews were scarcely known. Where Jewish congregations existed, as in Savannah and Charleston, state law reflected obliviousness to their presence rather than deliberate discrimination, and no evidence exists to show that Jews were actually taxed to support Christianity.

Clearly, the provisions of these seven states show that to understand the American meaning of "an establishment of religion" one cannot adopt a definition based on European experience. In European precedents of an establishment, the religion established was that of a single church. Many different churches, or the religion held in common by all of them, that is, Christianity or Protestantism, were never simultaneously established by any European nation—excepting Transylvania. Establishments in America, on the other hand, both in the colonial and the early state periods, were not limited in nature or in meaning to state support of one church. An establishment of religion in America at the time of the framing and ratification of the Bill of Rights meant government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, all the churches.

Not one of the seven American states maintaining or authorizing establishments of religion at that time preferred one church to others in their constitutional law. Even in New England, where the Congregational church was dominant as a result of numerical superiority, constitutional and legal guarantees censured subordination or preference. Such an establishment can hardly be called an exclusive or preferential one, as in the case where only one church, as in the European precedents, was the beneficiary. The uniqueness of the American experience justifies defining an establishment of religion as any support, especially financial support, of religion by government, whether the support be to religion in general, to all churches, some churches, or one church.



On the other hand, the American multiple establishments were nonpreferential in law and theory but not necessarily in fact. In the four New England states that maintained establishments, the Congregationalists dominated overwhelmingly, as was expected when they adopted the system of tax-supported nonpreferential aid.

Moreover, most states, and not just those that had establishments, provided a variety of aids to religion that were not financial in character. All but two had religious tests for office, disqualifying Jews, Unitarians, and agnostics. Some states even refused to enfranchise them, so they could not vote. In some states, anyone refusing to swear or affirm the existence of God could not testify at a trial. Generally, anyone who rejected the doctrine of the Trinity suffered civil disabilities. Christianity was regarded by state jurists as part and parcel of the law of the land. Thus, to protect Christianity, the states punished both profanity and blasphemy. Profanity consisted of a statement calling upon God to damn or curse someone, or a statement taking the name of the Lord in vain by invoking his name in a situation not requiring it as a matter of law. Blasphemy consisted of any verbal comment aspersing or reproaching, even denying, Christianity, the Trinity, Jesus Christ, or the Bible. Prosecutions for profanity were common in all the states; prosecutions for blasphemy were unusual but they existed even in states that never had an establishment of religion, such as Pennsylvania and Delaware. The penalties actually administered, however, never approached the draconian punishments stipulated by the law on the books. Religion was also supported by laws enforcing the Christian sabbath, and prosecutions were fairly common. In schools, which were for the most part run by religious organizations, prayer and religious services were daily affairs. Finally, nontheists suffered legal discriminations that disallowed them from holding or conveying property in

trust; accordingly, they could not bequeath monies to orphanages, hospitals, or schools devoted to propagation of their beliefs. All these aids to religion were preferential in character.[73]

Nonpreferentialism existed only as a matter of law and theory with respect to financial aid for churches and clergymen. But nonpreferentialism as a matter of law and theory was a profoundly developed American characteristic. By contrast, as to nonfinancial aids to religion, Americans reacted reflexively, not having made an effort to explore the significance or implications of the principle of separation. Spending tax monies for religion was an old and controversial issue that inspired considerable thought; other aids for religion had not been the subject of controversy in the colonies or states and tended to be taken for granted.

73. On civil disabilities, see Morton Borden, *Jews, Turks, and Infidels* (Chapel Hill, N.C., 1984). On Christianity as part and parcel of the law of the land and on prosecutions for blasphemy and for disabilities relating to trusts and conveyances, see Leonard W. Levy, *Blasphemy: Verbal Offense against the Sacred, from Moses to Salman Rushdie* (New York, 1993). My characterizations of prosecutions for Sabbath breaking and profanity are impressionistic, based on extensive research in legal records when looking for blasphemy cases. On Sunday laws, see also the historical data in the opinion by Frankfurter in *McGowan v. Maryland*, 366 U.S. 420, 484–95, 543–59 (1961).

# 4 *The Constitution and Religion*

The Constitutional Convention of 1787, which framed the Constitution of the United States, gave only slight attention to the subject of a bill of rights and even less to the subject of religion. In contrast to the Declaration of Independence and to many acts of the Continental Congress, the Constitution contains no references to God; the convention did not even invoke divine guidance for its deliberations. Its finished product made no reference to religion except to pro-