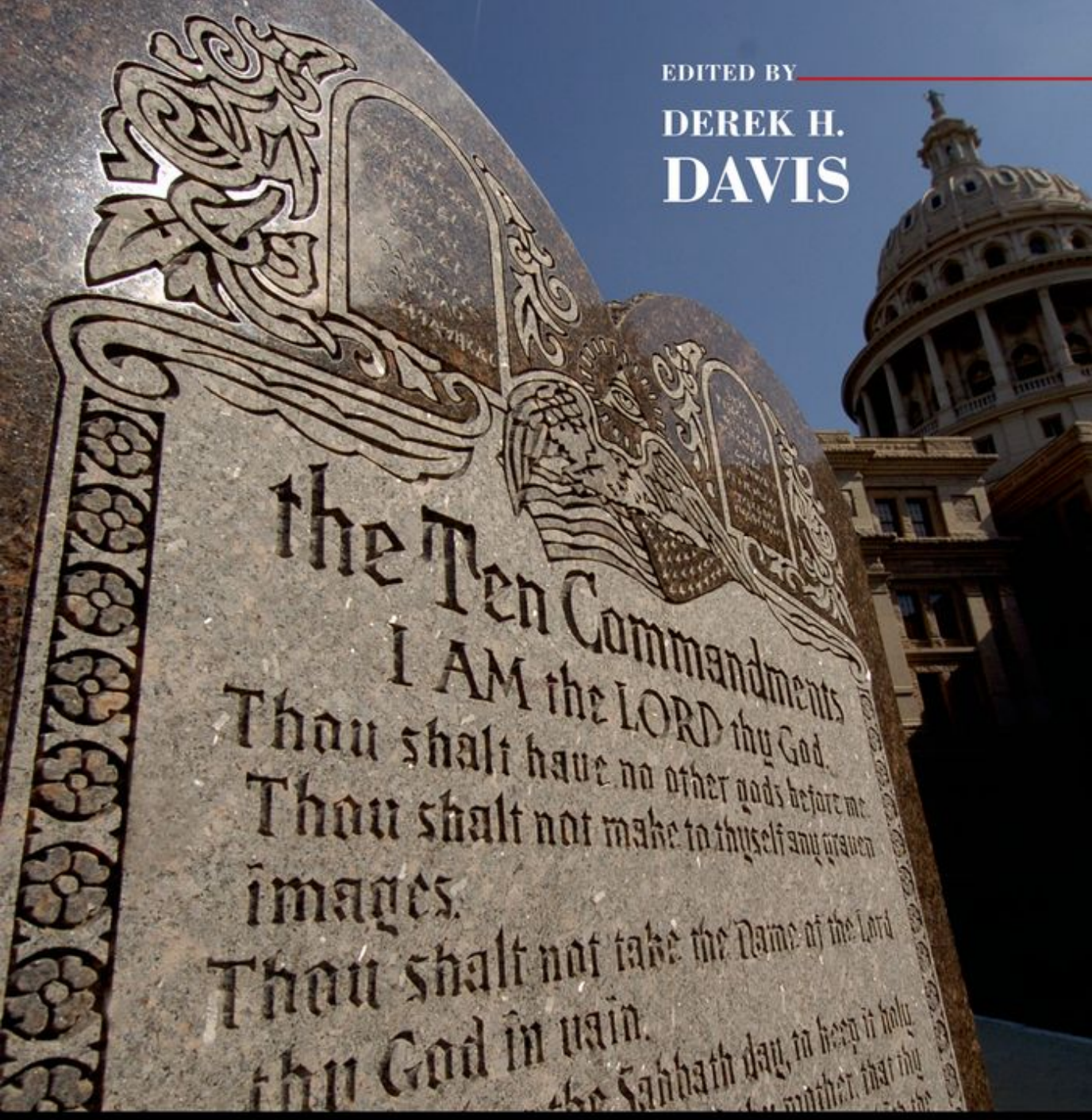

EDITED BY

DEREK H. DAVIS

The Oxford Handbook *of* CHURCH AND STATE IN THE UNITED STATES

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This volume is dedicated to my in-laws, Pat Jordan (deceased)
and Bob Jordan,
to whom I will always be grateful for their steady support
and encouragement shown in countless ways

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Contents

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THE OXFORD HANDBOOK OF

CHURCH AND STATE IN THE UNITED STATES

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INTRODUCTION: RELIGIOUS PLURALISM AS THE ESSENTIAL FOUNDATION OF AMERICA'S QUEST FOR UNITY AND ORDER

DEREK H. DAVIS

This *Handbook* provides an overview of how church and state interact in the United States. The term *church–state,* a distinctively Western term that emerged in sixteenth-century Europe, remains useful because it is so commonly used, in the United States and elsewhere, to describe generally the interaction between religion and government. However, "church" connotes Christianity, of course, which is why it was an altogether appropriate term for how church and state interacted in Christian Europe in the sixteenth century. But things began to change, first in Europe, then more dramatically in the United States in the seventeenth and eighteenth centuries. The principal change was a broad experiment with separating church and state to maximize freedom, not only for Christian groups, but for other religious groups as well. The past persecution, torture, and even slaughter of human beings because of religious differences was thought to be largely a product

Portions of this Introduction were drawn from Derek H. Davis, "Religious Pluralism and the Quest for Unity in American Life." *Journal of Church and State* 36 (Spring 1994): 245–259.

of government having too much power to dictate conformity to one particular religion. The United States led the way in the experiment with the separation of church and state; a formal separation seemed the best way to keep government out of religion and ensure religious freedom for adherents of all religious traditions.

However, the experiment created a host of difficult problems. The United States was profoundly Christian at its founding. Would Christianity really be placed on equal footing with all other religious groups in receiving no favors from government? How could government function without some recognized set of underlying theological commitments that placed it under divine authority in a way that made sense to a majority of the American people? Was not some kind of theological foundation really necessary to ensure a stable government? The need of a common religion to ensure social and political solidarity had been a bedrock principle for millennia. Under the Constitution, how should the United States be characterized in terms of political theory? Was it a secular state, a religious state, some kind of semireligious state, or perhaps something else? What would be the role of religion in determining law and public policy? Would non-Christian traditions really enjoy the same access to government decision making as Christian groups? And, importantly, would religious pluralism actually become a positive value, something to embrace and celebrate, rather than something to be looked upon as a source of disorder and chaos?

All of these questions weighed heavily on the minds of the Founders, although the final one, pertaining to whether the nation would embrace religious pluralism as a positive matter of government policy, was especially important. As it turned out, the United States was serious about embracing religious pluralism, and the nation soon became a haven for all kinds of religious groups that immigrated to America in unimaginable numbers. The tensions created by this commitment to religious pluralism were many. These tensions are detailed throughout this volume, but suffice it to say that perhaps half of American society today still does not accept the notion that the Founding Fathers really sought to separate church and state—at least not in the way that the U.S. Supreme Court sometimes claims. The emergence of the Christian Right in the latter part of the twentieth century, a powerful political movement, is directly attributable to a deepening sense that America is turning away from its Christian roots and needs the power and influence of government to restore those roots before it is too late. The Christian Right frequently targets religious pluralism as the key problem.

Yes, religious pluralism *was* and *is* the problem; but it is *also* the solution. It is a *problem* if Christianity is to be the essential foundation of unity and order in the American setting; but it is also the *solution* if religious freedom and equal treatment under the law of all religious groups is to be the foundation of unity and order. The United States has wrestled with this tension since the founding era. It is still unresolved. It will likely remain unresolved, and perhaps that is as it should be. These two competing forces—legalized pluralism and Christian majoritarianism—still create dissension in America, but their coexistence also promotes harmony. There are many, many dimensions to church and state in

the United States, and most of those dimensions are addressed in the chapters of this volume. In one way or another, all of the chapters address the underlying tension of America being culturally Christian, but constitutionally secular. Not all of the authors agree about how to find the proper balance in this ongoing tension; a presentation of different perspectives that in themselves illustrate this tension was a goal in the selection of contributors to this volume. To set the stage, I should say a bit more about this ongoing tension—the tension between Christianity as the culturally dominant religion in America and a constitutional order that treats all religions alike. Indeed, many of the church–state controversies in the United States really do center on religious pluralism and its accompanying problems.

Colonial Settlements

From the time of the earliest European settlements in the sixteenth century, America's face has been one of religious diversity. In the South and West, Spanish and French explorations resulted in the spread of the Roman Catholic faith. Along the eastern seaboard, English, German, Dutch, and Swedish settlements in the seventeenth century brought a diversity of Protestants, most of whom sought to escape the religious persecutions they had experienced in the Old World. By 1700, the colonies were dotted with Congregationalists, Separatists, Baptists, Quakers, Calvinists, Lutherans, Anglicans, Presbyterians, Moravians, Dunkers, Pietists, Huguenots, and Mennonites. Although Protestants commanded a majority in all of the colonies, Jews and Catholics increasingly made their presence felt, although by the time of Independence, neither represented more than l% of the total colonial population.

Although religious pluralism was rampant in the colonies, peaceful relations among the various religious groups generally was not. Most of the colonists who departed from the Old World to escape religious persecution had no intention, once they arrived in the New World, of tolerating any religion other than their own. They had ventured to America not to experiment, but to practice and preserve already fully developed systems of belief. Consequently, most of the colonies established their own churches and persecuted, to one degree or another, those outside the approved form of worship. Notable exceptions to this pattern were Rhode Island, Pennsylvania, and Delaware, which never had formally established churches. However, in the New England colonies, Puritans persecuted and sometimes banished Quakers, Baptists, and Anglicans, whereas in many of the southern colonies, Anglicans harassed and persecuted Baptists and Puritans. Huguenots were banished from Florida, Jews from New York, and Catholics from almost everywhere but Maryland, where they had been the first settlers.

Thus, although religious pluralism was a social reality in the colonies, it was not always looked upon as something that was desirable. Religious hostilities were everywhere, and peace among the various religious groups was often thought to be impossible. Gradually, however, this perception changed. At first, peaceful coexistence was mandated by various acts of toleration. Maryland's Act of Toleration of 1649, for example, encouraged friendly relations among the multiplicity of religions by punishing anyone who would profane another by calling that person such horribles as Brownist, Calvinist, Roundhead, Papist, Puritan, Separatist, Presbyterian, heretic, or schismatic. The English Act of Toleration of 1689, widely enforced in the colonies from the time of its passage, forced the colonies to decriminalize various modes of religious behavior and remove civil disabilities against all but Catholics, Unitarians, and atheists. Later in the colonial period, religious pluralism was increasingly tolerated because it was widely recognized that its effects were not uniformly bad. Gradually, many came to believe that all religions produced character and integrity in their adherents, and that these elements contributed to the common good, especially since free and democratic government required a virtuous citizenry for its survival.

It was the movement for independence from the mother country, however, that more than any other single factor made peaceful allies of the ever-increasing multiplicity of religions in America. Despite doctrinal differences, most religious revolutionaries seemed to share three separate but interrelated commitments. First, they believed that the American independence movement was in keeping with eternal principles of nature, liberty, good government, and justice. All human affairs, they believed, are imbedded in the natural order conceived on the pattern of creation and creator. Thus, Thomas Jefferson, a deist, could say that "the God who gave us life gave us liberty at the same time."[1] Second, many American patriots from all religious persuasions believed that God controlled history and that the colonial cause against the British held God's favor. Oliver Wolcott, a Congregationalist and member of the Continental Congress from Connecticut, held firmly to his belief that the "God who takes care of and Protects Nations, will take care of this People."[2] Elbridge Gerry of Massachusetts apparently agreed. In a letter to Samuel Adams, he wrote that "history could hardly produce such a series of events as has taken place in favor of American opposition. The hand of Heaven seems to have directed every occurrence."[3] Third, Americans representing a great variety of faiths shared a commitment to republican government. Greatly simplified, republican government was understood to represent a constellation of political ideas: government by the people, separation of powers, limited government without jurisdiction to interfere with the people's natural rights, and a dependence upon public virtue. Thomas Paine exclaimed in 1776 that it was only common sense for Americans to become republicans.[4] And in the view of John Adams, "There is no good government but what is republican."[5] Republicanism was widely thought to embrace biblical ideals, and was therefore a uniting force among most Americans with religious commitments. These three factors, then, were instrumental in forging new bonds of unity among the nation's medley of peoples.[6]

Unity and Nationhood

Some of the nation's earliest official acts reflected the people's desire to subdue their differences in the interest of unity. The Declaration of Independence was itself a compromise of sorts, a coming together of 13 autonomous states that had always prized their individual sovereignty. The Declaration also seemed to mask the people's religious differences, using generic references to the "Creator," "Nature's God," and "Providence" in identifying the One whom they believed backed the colonies' revolutionary cause. On the same day that it adopted the Declaration, July 4, 1776, the Continental Congress appointed a committee of Thomas Jefferson, John Adams, and Benjamin Franklin to devise an official seal for the newly formed nation. One of the committee's recommendations, the motto *E Pluribus Unum* ("Out of many, one"), became a part of "the Great Seal" as finally adopted on June 20, 1782. Although the motto pointed primarily to the unity of the 13 states, it also was, and remains, a normative description of America as a pluralistic society, not merely religiously, but politically, ethnically, and socially as well.

The spirit of elation that came with victory over the British soon subsided as a host of problems plagued the new nation. The problems centered on the central government's inadequate taxing power, its inability to formulate binding foreign policy, and its feeble status as a mere creature of the states. A Constitutional Convention was called in 1787 to remedy these problems, and a new Constitution was the result. A matter of special concern for the framers in writing the Constitution was the protection of religious liberty, a concern generated by the diversity of religious opinion that spread across America. The framers virtually assured the continuance of America's religious pluralism by placing no restrictions on the free exercise of religion and by refraining from giving preferential status to any particular form of religion. Although the Constitution, as drafted and presented to the states in 1787 was silent on these matters, the 55 delegates to the Constitutional Convention unanimously understood the document in this way. The people, however, wanting explicit assurances that these ideals would be realized, made their ratification contingent on the adoption of a constitutional amendment to this effect, which in final form appeared as the first 16 words of the First Amendment: "Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof."

The religion clauses rendered the federal government incompetent to make judgments regarding the truth or falseness of any citizen's religious beliefs. In short, the framers created a secular, or neutral, state, one which was in no way hostile to religion, but which would be required to maintain some distance between it and religious matters. Religious belief was to be a matter of private right. As James Madison wrote, "The Religion then of every man must be left to the conviction and conscience of every man. . . . We maintain therefore that in matters of Religion, no man's right is [to be] abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."[7] Moreover, Article VI of the Constitution

made one's religious faith irrelevant in terms of one's right to hold federal office. The requirement that "no religious test shall ever be required as a qualification to any office or public trust under the United States," was not only a profound acknowledgment of the secular character of the American state, it also indirectly encouraged religious pluralism because no person would be legally disqualified from public service on account of one's religious opinions.

These ringing pronouncements for religious liberty in the federal Constitution mirrored a simultaneous movement for religious liberty in the various states. One by one, the states ended long-held religious establishments in which one or more preferred Protestant denominations were given monetary and other forms of support from the state. When independence from Great Britain was declared in 1776, only four states—Rhode Island, Pennsylvania, Delaware, and New Jersey—were without religious establishments. By the time the Constitution and Bill of Rights had been ratified, New York, Virginia, North Carolina, and South Carolina had joined the list, and by 1833, the remainder of the original 13 states—Georgia, Maryland, Connecticut, New Hampshire, and Massachusetts—had also ended their establishments. The decision of the last holdout, Massachusetts, to end its Congregational establishment proved wrong the prediction of John Adams that it would be easier to "change the movements of the heavenly bodies as [to] alter the religious laws of Massachusetts."[8] The Constitution's emphasis on the protection of the free exercise of religion, moreover, was reflected in a growing tendency in the states to decriminalize religious acts. For example, there were removed during the founding period laws in Virginia that provided for whippings for disrespect shown to an Anglican minister; the death penalty for blasphemy, impious reference to the Trinity, or habitual cursing; and the suppression of Quakers as "an unreasonable and turbulent sort of people . . . teaching and publishing lies, miracles, false visions, prophecies, and doctrines. . . ."[9] One by one, the religious tests for holding civil office in the various states likewise vanished. Most of these tests, such as Maryland's requirement that an officer "profess a belief in the Christian religion," North Carolina's exclusion from office any person who denied the "divine authority" of the Bible, or Pennsylvania's requirement that one "confess a belief in God," were eliminated during the 50-year period following independence.[10]

Although it is true that Protestants far outnumbered non-Protestants in the colonial and founding eras, there is good evidence that the new emphasis on freedom of religious belief was intended as more than a tolerance among the Protestant denominations. Even in Connecticut in 1784, in which the Puritan heritage was especially strong and the Congregationalist Church still established by law, Zephaniah Swift, a prominent Connecticut lawyer and politician, acknowledged that "Jews, Mahomedans, and others" enjoyed perfect religious freedom on the ground that they could practice their religion within the state—even if they had to pay for the support of the Christian one.[11] Thomas Jefferson clearly sought religious freedom even for nontheists. He wrote, for example, that his Virginia Statute for Religious Freedom, written in 1779, but not enacted until 1786, was "to comprehend within the mantle of its protection the Jew and Gentile, the Christian and

Mahometan, the Hindoo, and infidel of every denomination."[12] He later added that he did not care whether his neighbors believed in one or twenty gods, so long as they kept the civil peace.[13] On the strength of pronouncements such as these, religious pluralism in the new Republic seemed assured.

The Expansion of Religious Pluralism

Given the legal framework of disestablishment and religious free exercise that was well in place by the 1830s, one might have expected an immediate explosion of religious diversity. This is precisely what occurred. Hundreds, if not thousands, of new religious groups sprang up everywhere. Most failed to distinguish themselves and are now forgotten chapters in American religious history. Others, such as the Church of Jesus Christ of Latter-day Saints (Mormons), Jehovah's Witnesses, Seventh-day Adventists, Christian Scientists, and the Shakers gathered large followings and found their place in the religious landscape. The new standard of tolerance likewise became an agenda for the rise of Unitarians, transcendentalists, atheists, and philosophical pragmatists such as John Dewey and Horace Kallen. Catholics by the millions, and later Jewish and Eastern Orthodox peoples found their way to American shores. Meanwhile, in the midst of these rapid changes, Protestantism experienced growth patterns unparalleled in American history. Groups that had held the controlling positions in American religious life before independence—Episcopalians and Congregationalists in particular—began to take back seats to groups that previously had been religious minorities. The changes became evident in the Second Great Awakening, which witnessed the rise of the Methodists, Baptists, and Presbyterians as the dominant forces of American Protestantism. So powerful was the Awakening that it allowed Protestants to maintain their *de facto* establishment in American life, a state of affairs that lasted, according to Robert Handy, until after World War II, when Protestant ideals lost their ability to control America's political, social, and religious destiny.[14]

During this period of unprecedented growth in the diversity of American religion, unity, always the goal of *E Pluribus Unum,* more often than not was cast aside. The nineteenth century is replete with examples of widespread bigotry toward Catholics and Jews as well as the host of newly emerging religious groups. Catholics in particular, whose numbers increased more rapidly than all other immigrants combined, experienced widespread religious discrimination, reinforced in many instances by repressive state laws.[15] The Nativists, or "Know Nothing" party, seized control of a number of state legislatures and passed countless laws specifically directed against Catholic immigrants. Mormons were successively run out of New York, Ohio, Missouri, and Illinois before finding a somewhat more peaceful haven in the uninhabited regions of Utah. From their beginning in 1872, Jehovah's Witnesses were the object of ridicule and persecution for their hostile attitude toward a government they believed was controlled by Satan.

At the beginning of the twentieth century, approximately 35% of the American populous was affiliated with a church or religious group; as the twenty-first century opened, the figure was 65%.[16] In 1800 there were fewer than 40 identifiable religious groups in America; there are presently more than 1,500 communities of faith—churches, sects, temples, synagogues—each claiming to possess the truth on religious matters. If the constitutionally mandated framework of religious freedom can make any claim whatsoever, it is that it gave official sanction to a phenomenal growth in religious diversity. Even Benjamin Franklin, who at the Constitutional Convention remarked, "Finally, we're going to turn religion loose,"[17] could never have anticipated the growth of religion in so many directions.

The most remarkable development in the last 25 years has been the arrival of sizable numbers of adherents of Eastern and Middle Eastern religions, especially Muslims, Buddhists, and Hindus. The number of Muslims in the United States is disputed, but in 2009 the estimates ranged from 1.5 million to more than 7 million. However, even if the lower estimates are accurate, they still represent a sizable increase in Muslim presence in the last few decades.[18] More than 100 different Hindu denominations have been planted in America since 1965 and more than 75 forms of Buddhism currently exist; each of these two communities now claims from 3 to 5 million adherents, and their rate of growth continues to be among the highest in the country.[19] Islam, Buddhism, and Hinduism provide the most complete alternative on the most basic issues to Christianity. Dismissed for many decades as illegitimate in the American context, these groups are now forcing the encounter with non-Asian Americans at every level of society.

During the twentieth century, the New Thought metaphysical churches (Religious Science, Divine Science, and the Unity School of Christianity) became familiar sights on American street corners. Now with numbers in the hundreds of thousands, their influence has permeated the mainstream of American culture through the spread of their literature. Occult religions, among the least understood religious options, are also on the rise. Spiritualism, for example, often thought of as a nineteenth-century fad, has experienced a revival, especially in urban settings. Theosophy, based upon teachings received by Helena Blavatsky by what she claimed were ascended masters of wisdom, has spawned more than 100 organizations and several tens of thousands of members. Astrology and belief in reincarnation also now reach a growing segment of the American public.[20]

Not to be forgotten in the massive pluralism so evident in American contemporary life is the continuance and revival of Native American religious traditions. Native American themes of oneness with the sacred land, shamanism, and the transformative power of Indian rituals such as peyote ingestion, have caused dramatic increases in the number of Americans returning to ancient Native American practices so long suppressed during the days of American expansionism.

Those who are without religious faith also contribute to America's diversity. The Religious Identification Survey (ARIS) sponsored by Trinity College in Hartford, Connecticut, released in 2008, reveals some interesting facts about the rise of unbelief in the United States. The survey suggests that Americans claiming no religious

ties have grown more than any other group surveyed. What the survey calls "Nones"—atheists, agnostics, humanists, secularists—now comprise 15% of the American public, up from 8.2% in 1990. Vermont is the state with the heaviest concentration of "Nones," 34% of its residents. The survey reveals that the religious landscape in the United States is changing dramatically in other ways as well. First, American citizens embracing Christianity are now only 76% of the population compared with 86.2% in 1990. Second, an increasing number of Christians identify with no particular denomination; rather than being Catholic, Baptist, Presbyterian or Lutheran, many Christians now want to be referred to more generally as "Christian" or "Believer." Third, the poll concludes what has already been generally stated: non-Christian religions such as Buddhism, Hinduism, Islam, Sikhism, Scientology, Daoism, Spiritualism, and other nontraditional religions have more adherents today than in 1990.[21]

Despite these interesting alterations to the religious landscape, the Christian community continues to dominate the American scene. Protestants now make up 55.2% of the total population, Catholics represent 28.6%; together they constitute a Christian majority—83.8% of the total U.S. population.[22] The number of Jews in America, about 6 million (2.4%), has remained roughly constant over the last 30 years. By all accounts, the spread of new and nontraditional religions in America is certain to influence the nation's future in a variety of ways. The reactions to these developments take many forms.

Responses to Religious Pluralism

One response to the rising religious pluralism of recent times has been the call for a return to "Christian America." Threatened by the loss of Christian hegemony and the realization that Christians are a shrinking culture group, there are movements today in America that actively seek to impose a particular theocracy on the rest of the nation. Theocracy, the direct rule of a nation by God through divinely selected spokesmen, has many exemplars in the modern world. Saudi Arabia and Iran are nations with obvious theocratic tendencies. In the United States, the Christian Reconstruction Movement proposes the purest form of theocracy. Reconstructionism, which claims 20 million members but probably is considerably smaller,[23] believes that the law given for the political and legal ordering of ancient Israel is intended for all people at all times; therefore, America is duty-bound to install a political system based entirely on biblical law. According to Rousas J. Rushdoony, the society that fails to do this "places itself on death row: it is marked for judgment."[24] The Reconstructionists' revamped polity would require capital punishment for adulterers, homosexuals, and incorrigible children.[25]

Installing a theocracy is one method of dealing with the problems associated with religious pluralism. Despite its commitment to bring America back to its senses, such a program fails in its efforts to unify America, however, because, as

Robert Booth Fowler has noted, it fails to deal with "the reality of pluralism in the modern United States."[26]

Meanwhile, others who have sensed that commonality among America's citizens is slipping have sought in a less particularistic way to find a set of core values around which all Americans can unite. In the 1960s, a group of social analysts and scholars, among them Sidney E. Mead, Robin Williams, Martin Marty, J. Paul Williams, and Robert Bellah, began a search for a common set of symbols to be transmitted across regions, generations, and peoples in America. The necessity for Benjamin Franklin's "public religion" came to be expressed in such terms as common faith, the religion of the republic, and the one that became most popular, civil religion. According to Bellah, the new search for a civil religion was caused by a crisis of meaning that produced a deepening cynicism among the American people, "and a good deal of anxiety about the future."[27] Moreover, the search became essential in a day of uncertainty about the nation's underpinnings, a condition exacerbated by a rapidly expanding religious pluralism. The search for the exact nature of America's civil religion continues until the present day. However, the reality of an American civil religion, albeit one that is imprecise in its dimensions, can hardly be denied.

The form of civil religion that exists today in the United States seems to embrace ideas from two distinct theological traditions. On the one hand, American civil religion consists of ideas derived from Puritanism such as the covenanted, millennial, and chosen nation. These ideas have been, and remain, inherently religious, and implicitly particularistic and coercive. On the other hand, ideas contributed from the American Enlightenment, such as the Declaration's affirmation that "all men are created equal," and are entitled to rights of "life, liberty, and the pursuit of happiness," are clearly more secular, and implicitly universalistic and persuasive in character. Both traditions have usually sought the aid of government for their advancement, which of course has created unique problems for the propagation of the more distinctly religious Puritan ideas because of the Constitution's church–state separation principle. Nevertheless, as Richard Hughes has rightly observed, most Christian patriots during the course of our nationhood have never perceived any tension between "the god of Puritan particularism and the god of universal liberties."[28] Even Bellah, the foremost scholar on the subject of American civil religion, uncritically fuses the two traditions in his description of that civil religion to which the nation should commit itself.

However, there are dangers in "constructing" any type of civil religion. Martin Marty noted more than 20 years ago that many seemed to be taking too seriously Robin Williams' assertion that "every functioning society has to an important degree a common religion," for Marty, an "observation that for many became an injunction: develop one."[29] If a civil religion must be developed, however, it should not intrude on, or offer itself as a substitute for, traditional religions. All religions should retain their autonomy and their freedom to proclaim their own understanding of truth. In short, any American civil religion should respect religious pluralism.

Religious pluralism, contrary to the assumption of many, does not threaten truth; in theory it only expands the possibilities of truth. A political framework that allows for religious pluralism is not committed to relativism, as it might seem. Rather, it is a policy fully open to truth, and entertains even the possibility of a final consensus on truth. What the Constitution does not permit is a governmental regulating and monitoring of the search for religious truth, or siding with any particular version of religious truth. This principle was clearly enunciated by the Supreme Court as early as 1872, in *Watson v. Jones,* when it declared, "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." Supreme Court Justice Anthony Kennedy, in the case of *Lee v. Weisman* (1992), insightfully offered the view that civil religion, whatever its merits, is religion nonetheless and therefore as unqualified as any traditional sect or dogma to receive official governmental endorsement.

It should be noted that, although the church–state separation principle prohibits an official governmental endorsement of civil religion, the same principle in no way prevents the development of a cultural civil religion. It is civil religion as a *legal* institution rather than as a *cultural* institution that the Constitution prohibits. Bellah is surely correct in saying that "the fact that we have no established religion does not mean that our public life has no religious dimension nor that fundamental questions of our national existence are not civil religious questions."[30] Thus the prospect that a unifying civil religion might develop in America remains intact, although the precise elements of such a common faith remain uncertain.

For the present, the more important goal, and one that should never be disparaged, is building a healthy respect for religious pluralism—and for the related commitments that make it possible, religious liberty and the separation of church and state. Religious pluralism, for all of American history, has never been perceived as a major obstacle to unity. Thus, unity rightly remains a national goal, but it should never be achieved at the expense of limiting the people's constitutional right to believe in and practice their diverse religious traditions. Religious pluralism is one of America's best, not worst, traditions. Now and for America's future, religious pluralism is not something to be condemned, but something to be celebrated.

Unity in the Face of Diversity

Americans will never agree on a common religion; but this is not necessary for constructing a healthy society in which various religious traditions can live together in peace and with mutual respect. What is most necessary is that all faith communities in America have equal access to participation in public discourse. As long as every religious person and group in the nation knows with confidence that they can enter public dialogue, can be players in the making of law and public policy, and can have a real voice in influencing the course and direction of the nation, then unity in the

face of diversity is possible. Although many in America are uncomfortable with this right of equal access to the public table, many are not and they accept it as principally the correct way to order American society, as central to religious freedom, and as a positive means to build mutual respect among the various religious traditions.

This framework of equal participation by all citizens and groups, religious and nonreligious alike, is central to the American political tradition. In theory and practice, religious arguments are as welcome and as potentially effective as any secular arguments that might be presented toward formulating public policy. This framework of equal respect accorded to all religious traditions in the public square is central to the very meaning of the separation of church and state. There are multiple dimensions to the separation of church and state, of course, and most of those dimensions are addressed in this volume. However, the separation of church and state in America has never been understood to exclude religious persons or groups from participating in public debate. This nondiscriminatory right to make genuine contributions toward the public weal, to have a bona fide voice in formulating policies that will affect all Americans, is a valuable tradition that forms a solid foundation for unity, respect, and tolerance among Americans in the face of their great diversity.

Conclusion

The American experiment in separating of church and state is, to say the least, highly controversial. The fundamental drive to merge church and state, to ground political life in the "other," a tendency feverishly characteristic of all societies throughout human history, continues to energize a large segment of the American population. Mostly conservative Christians, this segment of America has increasingly become a major political force in America since the 1970s. Often labeled the Christian Right, this sector of the U.S. citizenry frequently chafes at court rulings that restrict prayer in the public schools, limit public financial aid to religious institutions, permit abortions, allow homosexual couples to cohabit or marry, curb the display of religious symbols on public property, or otherwise challenge Christian hegemony in American culture. The Christian Right seeks merely to "unify" Americans around a common set of Christian beliefs and practices, but more liberal elements of the American population frequently criticize them for behavior that sometimes fails to respect and protect diversity. These more liberal critics also seek unity among American citizens, but they seek it under a different banner, under a different set of core beliefs that respects diversity of religious belief.

The "culture war," as it is sometimes called, is always at work, resulting in heated rhetoric and sometimes violent behavior. It is intense enough to draw as participants not just common citizens, but societal elites, including politicians, judges, and academicians. My own contention is that the culture war is fueled not

simply by politicians and judges who pander to the Christian Right for political reasons, but by politicians and judges who fundamentally agree with many of the views of the Christian Right. They too feel the tensions created by competing world views, and thus find themselves contributing, however unwittingly, to the culture war by their legislative agenda or court rulings. It is not uncommon, for example, for judges, lawyers, and legal scholars to comment on the state of disarray in which U.S. Supreme Court decisions on church–state issues find themselves. This is mostly an accurate assessment, for almost anyone, save experts in the field, is certain to be frustrated when trying to discover logic and consistency in the Court's church–state decisions. The Court was very separationist in its rulings until the 1980s, when the Court began to make a more conservative turn after several conservative justices were appointed by Republican presidents. Church–state cases are now hotly contested and usually confusing in their outcomes to many American citizens. But however one analyzes the appointments to the Court, the anomalies, inconsistencies, and sometimes confusing rulings of the Court are mostly a reflection of disagreements among the justices generally about how religion, state, and law should interact, and specifically the extent to which Christian values and traditions should be legally protected.

This volume, in the final analysis, is a description of the many controversies pertaining to religion that make unity in American life seemingly impossible or at least improbable, but simultaneously, because of a Constitution that mandates equal respect for all religious traditions, eminently possible. Indeed, the contributors to this volume fall into different camps about how to resolve these controversies. However, vigorous debate is healthy. Controversy in any society is good, provided the discourse it engenders remains civil and free of violence. Democracy in America does not always succeed because agreement is reached on all points of controversy, but rather because peaceful disagreement, understood as essential to the system, is somehow usually achieved. A vibrant democracy never permanently enthrones a particular viewpoint; those who disagree remain hopeful that their ability to participate equally in pubic discourse might make them able to eventually champion a new perspective, a new law, a new policy. This is the beauty of a healthy democracy. It keeps citizens engaged, vigorously advocating change according to their own perspectives, believing that they can make a difference for good in their nation and in the world. If controversy over the merits of the separation of church and state helps fuel democracy, as I believe it does, then separation of church and state is a positive force in society.

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PART I

HISTORICAL DIMENSIONS

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CHAPTER 1

THE FOUNDING ERA (1774–1797) AND THE CONSTITUTIONAL PROVISION FOR RELIGION

JOHN F. WILSON

The United States formed as a nation when the 13 colonies in North America that comprised it first rebelled against Great Britain and then secured their independence. Collaboration through a Continental Congress (1774) accompanied concerted military action. However tenuous their early prospects, they worked together through a weak Articles of Confederation (finally ratified in 1781). Its shortcomings stimulated pressure for a more centralized, if still limited, federal government. In the process of adopting that constitution (1789), many calls were made to strengthen it further. Amended in 1791 with a "Bill of Rights," the United States was fully "constituted" by the close of the eighteenth century. This period of rebellion, revolution, and nation-founding is central to understanding how it was initially configured, including the place accorded to religion. This chapter explores and explains how religious belief and practice related to governmental authority in founding the American nation.

The subject is framed in this way to establish a fundamental point, namely, that the founding generation necessarily confronted a range of daunting issues. Among the most pressing were how the former colonies would govern themselves and what kind(s) of relationship they would have with each other and external powers. Concrete issues such as regulation of overseas (as well as intercolonial) trade, taxation, and means of common defense necessarily trumped more abstract considerations, however important, such as definitions of citizenship or stipulation of legal rights

and privileges. Accordingly, the provisions they made for what we loosely term "matters of church and state" were developed among powerful cross-currents of opinion and interest in a dynamic setting. Although many of its influential political leaders were exceptionally widely versed in history, and benefited from unusually broad experience, their sense of priorities was determined by the urgency of immediate tasks. Especially with respect to any policies and provisions having to do with religion, the founders' ability to improvise by crafting effective responses to challenges counted for as much as abstract principles and/or doctrines that they might (or might not) wish to promote. Searching for a singular intention concerning religion on the part of the founders, or assuming that they subscribed to fully enunciated principles about it, will obscure more than it discloses how the new United States dealt with the ancient problem of relating politics and religion. For those preoccupied with birthing the nation, settling church–state issues was necessarily secondary.

This chapter uses three focal points: (1) how separate colonies dealt with religion as they became states; (2) the minimalist provision crafted for the Constitution proper; and (3) the immediate amendment of the Constitution to include explicit assurances about religion among other concerns. Doubtless related subjects also merit extensive discussion, such as reviewing how independence affected separate American religious communions, noting their relationships to those of European lands and observing the range in claims of authority advanced by various religious groups. Nevertheless, although these and other related inquiries are interesting and fruitful, it concentrates on the preceding topics.

First, as the colonies moved into rebellion against British rule, they were faced with the necessity of self-rule; each colony became a "state." Although two took the expedient step of projecting their existing royal charters into the era of independence, most were very explicit in forming their governments through new constitutions. Whatever the path, one question each faced was the status that should be accorded to religion—necessarily addressing it if only by omission. In some respects the experience of colonies turning themselves into states anticipated the effort that would be required to craft an effective constitutional basis for the nation. Reviewing how the various colonies provided for religion introduces the issues that would inevitably challenge the nation. One advantage of this starting point is that it highlights both the range and variety of religious life in the colonies as they became independent while also indicating some common elements among them.

Next attention turns to the topic of the religious policy that was embedded in the draft constitution. In conceiving of a national government adequate to secure the nation's independence, the framers necessarily faced a challenge about what (if any) provision should be made for religion—in terms of both its practice among citizens and its existence as the source and sanction for movements and institutions. The Constitution as drafted devoted virtually no attention to religion. The Philadelphia Convention operated without public scrutiny and with few records about its deliberations. Participants' occasional reflections or reminiscences about exchanges in the Convention provide limited access to their thinking about

religion. We are better served with respect to understanding opinions in the individual states as in turn they considered whether to ratify the proposed document. Numerous opinions were expressed in these conventions about the place that should be given to religion.

The concluding section discusses the steps taken, once the Constitution became effective, to amend it in response to the wide-ranging recommendations that had been offered, especially in certain states. The eventual "Bill of Rights" (i.e., the first 10 amendments) is so closely linked to the Constitution proper that its provisions are typically considered integral to it. Especially this may be the case with respect to the provision(s) relating to religion. However, if in law the First Amendment properly operates as wholly "constitutional," in the perspective of writing critical history these clauses stand apart and are markedly distinguished from the text of the original document.

The Colonies Become States

The Continental Congress, meeting in several sessions, received inquiries from the collaborating states about instituting their own governments. Actually some thought was given to recommending a model state constitution that each might adapt. In the end, however, individual states acted independently. New Hampshire effectively led the way in 1776 followed soon by South Carolina and New Jersey. Over that summer and fall, Virginia, Delaware, Pennsylvania, Maryland, and North Carolina followed suit, whereas Georgia and New York ratified their instruments in the spring of 1777. (Vermont, which comprised another potential state, separated itself from New York and New Hampshire, ratifying its constitution in the summer of 1778.)[1] Although Massachusetts had turned to the project early in this span of years, it succeeded in ratifying its constitution only in 1780. Connecticut and Rhode Island took the different approach of converting their existing royal charters into republican constitutions. (They adopted new constitutions in 1818 and 1842, respectively.[2]) In this process, self-governing and independent former colonies collaborating in the Continental Congress became states that completed ratifying the Articles of Confederation in 1781.[3]

Each of the states adopted provisions for religion that varied as widely as their separate paths to independent constitutions. Their courses of action reflect the complex status of religion in the revolutionary period. The most noteworthy developments with respect to religion took place in Virginia and Massachusetts; fuller attention will be given to them while noting the provisions made by others.[4] South Carolina's 1778 constitution effectively "established" Christianity, restricting legal incorporation to those bodies that subscribed to broadly Protestant beliefs. Although support for religion was not mandated, office-holding was restricted to "Protestants." With its second constitution (1790), only clergy were barred from holding office and the "free exercise and enjoyment of religious profession and worship"

was extended to all.[5] When it had been a colony North Carolina favored the Church of England—however marginal its actual presence. With its 1776 constitution, nonetheless, no church was preferred, nor was any religious requirement placed on citizens—but office-holding was at least nominally limited to Protestant Christians.[6] Georgia's constitution of 1777 took a generally similar course—although it did permit assessment of citizens for the support of their own ministers. Successive Georgia constitutions (1789, 1798) eliminated the religious restrictions on office-holding and authorized assessments for support of religion.[7]

If this southern-most group of states manifested little apparent conflict about the status of religion, Virginia presented a contrasting picture. Wide-ranging religious revivals (often identified with the "Great Awakening") roiled relatively prominent Church of England parishes in the settled regions. Religion was contentious because it displayed deeper "fault-lines" in the society.[8] With Baptist preachers and Presbyterian clergy widely active, and proving to be effective in gathering new congregations, conflict with established prerogatives (such as the authority to issue preaching licenses) became virtually inevitable. For much of the decade after 1776, the religious situation in Virginia operated essentially within the old framework of a privileged body (namely, the former Church of England) having authority to license "dissent" on terms it set. Under these circumstances the central issue was whether there should be a general assessment to support religion and if so what that implied about freedom in its practice. Numerous petitions, chiefly from aggrieved dissenters of several stripes, explored the many dimensions of a larger question: What should the religious policy of Virginia look like? This was the context in which Thomas Jefferson proposed a bill for "Establishing Religious Freedom."[9]

The conclusion of the War of Independence (1783) leant urgency to resolution of the basic issue: How should Virginia support organized religion (primarily the former Church of England)? The obvious answer seemed to entail one among several versions of assessment. At this point James Madison crafted a "Memorial and Remonstrance" that rallied opposition to any government support for religion because that necessarily would entail subordinating religion to political ends.[10] The outcome in 1786 was adoption by the Assembly of the substance of Jefferson's earlier draft bill *including* explicit repudiation of all links between religion and office-holding and *excluding* any public responsibility for supporting religious institutions. One mark of the degree of separation between religion and government in Virginia is that legal incorporation was not extended to religious groups. In effect, religious bodies were denied recognition by the state.[11]

Precisely because this extended, extensive, and contested consideration of many issues involved in delineating a policy toward religion took place in Virginia, its political history has become a conventional reference point for interpreting "the American way in Church and State."[12] However, it is misleading to assume that Virginia's course of action was necessarily paradigmatic for the nation because it was only one among a number of states confronting these issues, no matter how extensively it did so.

Other colonies-becoming-states had their own, different, struggles with these issues, and they also contributed to constitutionalizing religion in the United States. Among settlements situated along the mid-Atlantic coast, Maryland went through the most direct—if confused—recasting of its provisions for religious life. At the outset of the Revolutionary period it was the most explicit among all of the colonies in sanctioning the Church of England as the established body. Nevertheless, with independence the remedy it took moved in directions that, although not necessarily coherent, flowed from an impulse to subordinate the religious life of the colony to political control—an approach technically termed "Erastian."[13] Office-holding was restricted to Christians—a provision formally repudiated only in the mid-twentieth century. Declaring it a civic duty to worship God in a manner individuals deemed "most acceptable," even though no one was compelled to practice it, religious liberty was assured to Christians. This raised the specter of requiring general assessments for support of Christian institutions. In the next years the legislature several times prescribed how the now-Protestant Episcopal Church should be organized.[14] At least in retrospect there are at least two reasons the Maryland experience is noteworthy. For one, in spite of giving explicit attention to religious affairs, there was little intellectual clarity about the basic issues that might be involved (such as was manifest in Virginia and Massachusetts). For another, of all the colonies Maryland was the traditional home to significant numbers of Roman Catholics. This posed the question of what status non-Protestant Christians would hold in the states' political charters.

The nearby colonies-becoming-states of Delaware, Pennsylvania, and New Jersey enacted comparatively few provisions relating to religion.[15] None of them supported an established church or required tax support of religion or religious ministries. All restricted office-holding to Christians who were effectively Protestants—although in Pennsylvania (and under Benjamin Franklin's influence) the 1790 constitution included a formula that made Catholic and Jewish citizens eligible for office-holding.[16] For its part New York presented no consistent pattern in addressing provisions for religion. At least in some counties the Church of England had held a favored position; any such privileges were lost in this period. Anti-Catholicism was more explicitly present in New York than in other middle-Atlantic states, and the young John Jay led a movement to deny Catholics religious liberty. In spite of its strongly Protestant ethos, however, and although it explicitly endorsed public support for religion, New York as a state did not legislate tax assessments to support ecclesiastical institutions.[17]

Among the New England colonies Massachusetts most directly addressed issues entailed in the relations between religion and government.[18] Congregationalists effectively comprised a privileged religious body that benefited from various forms of public support such as mandated tax support for ministers—although exemptions were permitted. Especially Baptists formed a phalanx of dissenters intent on embarrassing—and eventually seeking to overturn—this ecclesiastical system. After failing to gain approval from the towns in 1778 for a constitution (that did not include specified rights or guarantee free exercise of religion), a special convention produced a new constitution in 1780. Two articles provided for religion.

One stipulated the "right as well as the duty of all men in society" to worship a "supreme being," while guaranteeing the "free exercise of religion" to all who did not "disturb the peace" or "obstruct others." Another addressed support for religion and, in the interest of the common good, empowered the legislature to require citizens to attend services. It also assured religious liberty to Christians while effectively excluding Roman Catholics from office-holding.[19] Not surprisingly, this system failed to assuage those like the Baptists who did not accept its premises. One scholar captures the irony that the 1780 constitution "stood . . . Puritan ancestors on their heads" by proposing that religion should be used to support "good government" rather than receiving the protection the latter should afford.[20] Although these provisions engendered widespread discussion, and not a little continuing dissension, they effectively comprised the legal framework governing religion in the Bay State until 1833.

Although many of the same elements were present, none of the other New England states displayed such contentious exploration of religious policy.[21] Although ideally New Hampshire might share commitment to public support of religion with Massachusetts, Congregationalists never held a dominant position there. Located on the frontier, the colonial government was not as tightly knit, and increasingly Baptists, Quakers, and Presbyterians populated many of the settlements. Early state instruments did not mention religion. The 1784 constitution assured freedom of worship to its citizens, but failed to require the towns to provide support for religion, an arrangement that was central to the Massachusetts constitution. The state finally dropped this limited religious system in 1819 without the fanfare that accompanied its demise a year earlier in Connecticut or later in Massachusetts (1833). Vermont asserted self-government in a 1777 constitution that addressed many of the issues about religion agitating other states. For example, office-holders were required to affirm Protestant beliefs, and Protestants could not be deprived of civil rights. However, it did not include any thoroughgoing mandate for support of local religious institutions. Like New Hampshire this sparsely settled region lacked sufficient density of population for an ecclesiastical system to be feasible, and in any case as towns grew the percentage of Congregational adherents dropped. The revised 1786 constitution retained a religious test for office-holders and legal incorporation of worshipping religious communities was permitted in the next year.[22]

Connecticut—which shared general presumptions about religious matters with Massachusetts—converted its royal charter into a continuing instrument of government. Because no new constitution was drafted, none was subject to ratification. Here early opposition took the form of "Separates" who distanced themselves from the settled Congregational churches. Continuing resistance led to growing Baptist presence and influence. This system formally remained in place until 1818. Rhode Island was the other colony that became independent through reinterpreting its existing charter. However, the old charter's explicit commitment to religious liberty and the absence of any governmental provision for religious practice made this transition unproblematic.[23]

These independent and diverse paths from colonial status to independent statehood are the critical back story to how the United States formed as a new nation under a constitution. A summary of the religious significance of these separate strands of this first period will prove useful. Taking markedly different routes the different colonies/states developed their own provisions, and as independent units they arrived at charters that incorporated elements that varied significantly. However, these struggles over how to provide for religion suggest the salient challenges that would face the new nation as it sought to secure a constitution. Certain issues entailing religion were contentious, whatever specific resolution each received in the separate states or would receive in the nation.

First, were there to be guarantees for a broad religious liberty—including freedom for those wishing *not* to be religious? Second, were there to be any links between citizenship and religious profession, and specifically would religion be a factor in eligibility for public office? Third, would public support for religious ministries be required? If so, were there limitations with respect to eligible groups? Were exemptions to be granted for individuals and groups, and if so, on what grounds? Fourth, would a new national government guarantee rights relating to religion against possible violations by constituent states? Finally, would there be explicit religious sanction for the new American nation? And by extension, would there be collective religious observances?

The experience of the colonies in providing for religion as they became independent states suggests the conjecture that at least some of these possible elements might well have been incorporated into a new constitution for the United States of America.

A Constitution for the New Nation

In September 1786 commissioners from five states—Virginia, Delaware, Pennsylvania, New Jersey, and New York—assembled in Annapolis. They were charged with recommending a federal plan to improve regulation of commerce under the Articles of Confederation. Missing representation from the other states, the commissioners proposed that the Continental Congress call for a convention of delegates from all 13 states (Vermont was not included) to address a broader range of shortcomings in the Articles. In mid-May 1787 the Constitutional Convention assembled in Philadelphia (without representation from Rhode Island). Its serious work began at the end of that month, and by mid-September it completed a draft constitution that it transmitted to the Continental Congress. This document was then sent to the various state legislatures with instructions that it be submitted for ratification to special conventions of delegates representing the people of each state.[24]

The sessions of the Philadelphia Convention had been closed to observers and remarkably little information about its deliberations leaked out—although James

Madison did publish his notes half a century later.[25] However, the larger (some might say intentionally subversive) strategy was to present a carefully constructed and complete instrument of government—a wholly new constitution—for the United States rather than to propose adjustments to the existing Articles of Confederation; and it was a meticulously crafted document. Beginning with a preface that located the foundation of government in "the people . . . ," seven "articles" addressed in turn the composition of the new venture in three branches of government, implications for the constituent states, provisions relating to its adoption and subsequent amendment, including ratification by at least nine of the states. Article I stipulated a bicameral legislature and in relatively detailed sections delineated the respective procedures and powers of the two "houses." Article II vested executive power in a president and specified the conditions and terms of office as well as means of selection. Article III proposed that judicial power rest in a Supreme Court augmented by "such inferior courts as the Congress may from time to time ordain and establish." Article IV addressed relations among the existing states and the possibility of adding new states as well as federal authority over new territory. Article V set the terms for amendment of the document, while Article VI explicitly stipulated that the authority of this government would be supreme, assuming responsibility for the nation's debts and "engagements" made under the Articles. Finally, Article VII provided that the Constitution would take effect following its ratification by at least nine of the states.[26]

What role did the Constitution delineate for religion? The remarkable conclusion is that, for all of the controversy with regard to religion that had attended constitution-making in the colonies as they became states, the Philadelphia Convention seems largely to have passed over this subject in silence. One very specific provision is embedded in Article VI. Its third paragraph specifies that all officers of the new federal government, as well as those in the several states, "shall be bound by oath or affirmation to support this constitution." Coupled with this requirement, the article declares that "no religious test shall ever be required as a qualification to any office or public trust under the United States." Such a blanket prohibition dramatically contrasts with the struggles that took place in many of the states, especially to retain religiously based restrictions on office-holding. In brief, the document crafted in Philadelphia entailed a strong premise that religion should not be a factor in constitutionalizing the new nation. There is no evidence that this position was thought to be an attack on religion any more than that—through silence—it might in some convoluted sense indicate support for it. Rather, the meaning seems to have been that the new nation's government was to be independent of religion, including any institutions expressing it and/or associated with it. Contemporary testimony from the first Treaty with Tripoli (1797) sustains this view, for it represented the United States as "not founded on the Christian religion," a clause actually omitted in the 1805 revision.[27]

Several associated points call for comment. One is the confluence of interests that led the "conspirators" in the Philadelphia Convention to proceed in this fashion with respect to religion. Taking their construction of the Constitution

as a whole, it is evident that they sought to be as "economical" as possible, especially with respect to contentious issues. They understood that the new nation was in a critical passage with possibly only one clear chance to "get it right" in terms of a government for the United States that would prove to be adequate—as the Confederation under the Articles had failed to be. *With unrelieved focus on what they believed to be necessary provisions, they strategically ignored any divisive issues that had the potential to frustrate their objective.* A dramatic example is how they assiduously avoided taking a stand on slavery, a subject that had sufficient potential to forestall ratification of any constitution. This approach was manifested in Article I, where the apportionment of representatives included the notorious provision that their number would be based on considering any who were not free to count as "three fifths of all other persons." Article IV, concerning reciprocal rights and privileges among the citizens of the several states, also stipulated that anyone "held to service or labor in one state" who escaped to another should be returned. Within several generations Amendments XIV and XIII, respectively, replaced these provisions, but only following the North's victory in a bloody civil war. It may help moderns to comprehend why the framers passed over religion as a contentious topic if they recognize that it held the potential to engender divisions that would decisively frustrate their larger objective.

A second point relates to modern interpreters who have occasionally claimed to discover secondary or even hidden allusions to religion in the text of the Constitution, a point that might serve to prove that the United States was formally based on the Christian religion. One such reference is in Article VII, where the concluding paragraph dates the completion of the Philadelphia Convention and transmittal of its work to the Congress as "the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven. . . ." That the framers used the conventional (Gregorian) calendar (itself a product of the sixteenth century) hardly seems to comprise evidence that they understood their work to be founded on Christianity, especially because the document also immediately dates their work in the "twelfth" year of the independence of the United States of America. This observation does suggest, however, that any claims about the new nation's place in the scope of world history should be grounded not so much in the Constitution as a manifestly practical document, but in the Declaration of Independence that had inaugurated and framed the preceding course of events.

Another point at which some have argued that a Christian commitment underlay the Constitution is in the stipulation (already noted) that federal as well as state office-holders were to be bound by an "oath"—which would implicitly invoke a higher power. However, alternatively the delegates were permitted to "affirm" their support in place of taking an oath. Affirmations entailed no reference to a higher power and thus addressed sensibilities such as those of the Quakers. In any case the next following clause explicitly declares that "no religious test shall ever be required as a qualification" for federal or state office holding.[28]

Religion as an Issue in Ratification of the Constitution by the States

As the states reviewed the Constitution to ratify it (or withhold support), the question of provision for religion's formal relationship to the new government was discussed and criticized, eliciting numerous suggestions.[29] Each of the states devised its own procedures for review of the proposed Constitution. Some chose to use largely self-contained conventions that entailed little or no outside consultation or influence. In other states, however, it is clear that substantial "intelligences," or reports about the reviews taking place elsewhere, were shared among them. Individuals supporting ratification were united by the conviction that the proposed Constitution was the "last, best hope" for the new nation. An influential set of essays arguing that case in compelling terms was written by Alexander Hamilton, John Jay, and James Madison; they are known as *The Federalist Papers*.[30] Following the draft Constitution these essays passed over the subject of religion in virtual silence. One exception is a passing observation by Madison in the tenth of the papers that sectarian religion was a leading source of faction comparable to other divisive passions such as a rage for paper money.[31] That point is entirely consistent with the Philadelphia Convention's effective silence about religion.

Those who opposed ratification of the Constitution are usually labeled Anti-federalists.[32] As a disparate group of critics of the proposed government they were united by a deep distrust of the powers they thought the draft document would invest in the new national government. Many believed that this untried regime would necessarily limit the newly independent and constituent states. Numerous suggestions to improve the draft constitution (probably at least several hundred) were offered in the course of the states' reviews. Many concerned explicit guarantees about citizens' rights against the enlarged powers of the proposed central government. The Antifederalists argued that enumerating explicit rights over against the government would comprise one effective means to limit its reach and secure both the states and their citizens from possible abuse of its powers. Anti-federalism has come to be appreciated less as obstructionist by design and more as genuinely motivated by deep concerns about the balance of the proposed Constitution. A central contention was the document's failure to make more extensive provision for guaranteeing citizens' rights under the regime. Their intense interest in these rights was rooted in skepticism about the adequacy of the proposed mechanisms for separating powers and creating checks and balances, provisions that lay at the heart of the framers' design for a federal system. Ironically, its supporters' confidence in this frame for the new government was one basis for their conviction that an explicit enumeration of rights would be superfluous.

Among specific criticisms of the proposed draft Constitution that were voiced in the state conventions, concerns repeatedly emerged that inadequate attention was given to religion. This point was not necessarily made in consistent ways and several chief themes regarding it may even seem to be contradictory. As an example, the explicit prohibition of a test oath (Article VI, Section 3) apparently seemed ill

advised to some who would have preferred that religious loyalties be positively mobilized to support the new regime. On the other hand, numerous concerns were voiced about the absence of a guarantee concerning the rights of conscience. These were not necessarily mutually exclusive positions, but in the main they do suggest that critics' concerns diverged markedly about how religion references might be incorporated into the Constitution. Those who were involved in ratifying it did not necessarily accept the position that had been taken by the Convention, and codified in the Constitution, namely, that formally defining provision for religion would be detrimental to creating an effective government for the United States.

Among concerns identified by critics of the draft Constitution, a number relating to religion were frequently formulated in terms of rights that it would be desirable to secure. Antifederalist critics especially insisted that religious liberty should be guaranteed against federal abuse. They also sought more explicit assurances that the new national government could not *either* privilege one church or religious body *or* deny such an arrangement to the states in which it might already exist. These concerns among many others (including the desirability of guaranteeing rights to free speech, unhindered assembly, etc.) were strongly advanced. Increasingly, proponents of the Constitution became obliged to promise enactment of some such "rights" if ratification of the draft Constitution was to be achieved. Thus a major driving force behind the religion clauses eventually incorporated in the First Amendment was a broad and deep—but not necessarily well-focused—consensus that limitations ought to be placed upon the proposed federal government to protect citizens against possible abuses of its powers. Most emphatically, however, it was generally thought that any such provisions should be designed primarily to limit the reach of federal authority and power rather than to protect the people against abuses at the hands of the state governments.

Pennsylvania held the initial state convention (in Harrisburg) to consider endorsing the proposed federal Constitution. The primary concern about religion expressed in it centered on the draft Constitution's failure to offer a guarantee regarding liberty of conscience. The overriding importance of "bills of rights" was to secure the authority of the people as the foundation of the government. Religious liberty was construed as one among these desirable basic rights. However, in this convention it certainly did stand alone, separated for example from protection for freedom of assembly and the press. James Wilson had been a central figure in the Convention proper and he forcefully argued that the proposed new federal government had no power to diminish the rights of citizens in the states.[33] His assurance proved insufficient, however, to persuade the delegates. The Harrisburg ratifying convention did eventually call for including liberty of conscience among the rights that should be protected under the new government of the United States. Another less prominent theme in the Pennsylvania convention was failure of the Constitution to provide for those who might be "conscientiously scrupulous of bearing arms." This issue arose, not surprisingly, in a state profoundly shaped and infused by traditions of the Society of Friends.

Massachusetts' review of the draft Constitution began in January 1788. Here concerns about religion centered on the provision that there was to be no religious test for federal office-holding. Not surprisingly, strong opinions were expressed on

both sides of this issue. Only a very limited report exists about the debates in the Connecticut ratifying convention, also held in January 1788. Like Massachusetts, the concern about religion in Connecticut seems to have focused on the single relevant provision in Article VI. South Carolina's review also took place in January but gave relatively minor attention to religion.

Maryland's convention met in late April 1788 and explicitly considered proposing amendments to the Constitution. It is noteworthy that one relating to religion was compound—like the eventual text of the First Amendment. It included both a barrier to any national religion (i.e., a nonestablishment clause) and support for religious liberty (a guarantee of free exercise). However, none of the proposals finally endorsed by this convention pertained to religion. New York's convention met in Poughkeepsie in June at mid-month and effectively completed its work in 4 weeks, recommending that a bill of rights be appended to the Constitution but directing little attention to religion.

Virginia's convention met throughout the month of June 1788 and included well-known participants: Patrick Henry (who resolutely opposed it), James Madison, Governor Randolph, John Marshall, and James Monroe. At least in the setting of the ratifying conventions, Randolph likely provided the most sustained discussion of any conceptual basis for relating religion and regime that underlay the general absence of religious provisions in the draft Constitution.[34] Virginia's convention eventually ratified the Constitution while recommending a series of amendments that should be considered by the first Congress that might assemble under its authority. Twenty draft provisions addressed specific sections of the document, or subjects implicit in them. The Virginia convention additionally proposed that "there be a declaration or bill of rights. . . ." Among the 20 lengthy provisions that might be included in this "bill of rights"—most stipulated rights to be granted to freemen—only the last two explicitly concerned religion. At least with respect religion, the extensive discussion that took place in the Virginia convention effectively carried over into North Carolina's deliberations about ratification.[35]

North Carolina's delegates assembled toward the end of July 1788. This gathering seems to have debated questions raised by religion at least as widely as any of the conventions. Richard D. Spaight had been a delegate in Philadelphia and delineated the point of view taken at the Constitutional Convention: "As to the subject of religion. . . . No power is given to the general government to interfere with it all. Any act of Congress on this subject would be a usurpation."[36] In the end North Carolina declined to ratify the Constitution, but its discussion did lend impetus to the strategy of asking that any government formed under it should propose appropriate amendments to the original document. Indeed, virtually identical proposals were introduced in North Carolina—both for a "declaration of rights" and separate "amendments"—that had been proposed by Virginia's convention. Although not part of an endorsement of the Constitution, the recommendations from North Carolina did add weight to those coming forward to the First Congress from the other states.

Do any conclusions follow about the proposed place of religion in the new United States in light of the ratifying conventions? In the ratification process overwhelming attention centered on the perceived necessity to construct an effective alternative to

the inadequacies the Articles of Confederation manifested. Taking the reports of the Philadelphia gathering at face value it had been a "conspiracy" to seek only the authority or power absolutely necessary to address the perceived failures of the Articles of Confederation; and the states essentially received it in these terms. From this point of view, what we would term cultural subjects, such as making provision for religion under the new government (or providing for education, which was not mentioned), were systematically avoided. Most emphatically, however, failure to make provisions for religion did not mean they thought the issue was insignificant. Rather, any attention given to such a matter was capable of generating deep divisions *among* the states not to speak of *within* many of them. Had sustained consideration been given to such issues that could be so divisive the likely effect would have been entirely to subvert their fundamental and overriding objective. Simply, this had been to achieve an effective framework for the government of the nation. *Stating the point most directly, had the framers of the draft Constitution chosen to stipulate more fully the role(s) to be accorded to religion, it is altogether likely that their entire effort to supersede the Articles of Confederation would have collapsed*. Effectively the judgment seems to have been that aggressive attention to provisions about religion, however desirable some might think it, would frustrate their basic objective. Indeed, those disparate and opposed ideas that were voiced in the ratifying conventions about how religion and regime might be related reflected the different and not necessarily coherent provisions operating in various states.

This analysis and discussion makes much of the diversity of both convictions and practices relating to religion in the several states. The relatively "advanced" ideas voiced in Virginia were as unlikely to gain assent in New England (except on the part of Rhode Island) as the practices of the latter in privileging particular bodies would prove acceptable within the middle or southern states. An additional factor rendering the situation even more complex was the rapidly changing distribution of religious "proto-denominations" across the states and regions. Furthermore, many religious bodies were undergoing far-reaching transformations, and in turn they were struggling with the new condition of national independence. Moreover, many religious prophets and leaders were generating new religious groups. In this dynamic situation, no principle or set of principles other than a resolve to leave such matters entirely to the states had any realistic chance of securing the loyalty and allegiance of "the people" for the federal government; and the people were, in the end, its reference point and ultimate ground.

Framing a Federal Bill of Rights

The Constitution was declared formally ratified by the necessary three fourths of the states on July 2, 1788. Although adding a "bill of rights" had not been strictly a condition of approval, the First Congress lay under a moral obligation to consider

that step. Bills of rights had been recommended in several state conventions. James Madison again took the lead, even as he had played a critical role in preparation for the Philadelphia Convention. He may not have personally thought that a federal bill of rights was required, but he had promised to work for one when standing for election to the House of Representatives. To this end he digested the recommendations from the state conventions and consolidated as many as 200 possible provisions into 19 proposals organized into nine possible amendments.[37] These were submitted to a select committee of the House. Two considerations should be highlighted.

First, Antifederalists, fearing that the new national government would claim more power than necessary, had issued calls for specification of rights. They thought inclusion of rights would comprise an additional limit on powers ceded by the states to the federal regime. The reservations shared by Madison and some other framers derived from the conviction that the new government was one of delegated powers only. In this perspective stipulating rights seemed contradictory to the basic division of labor that underlay the document—for specifying federal rights might appear to reduce further the power of the constituent states.

Second, although providing for its own amendment, the Constitution did not specify the form for that eventuality. Madison envisioned that its amendment would entail inserting newly ratified provisions at appropriate locations in the original text. Because the Constitution's organization was self-evidently federal, adding provisions at definite locations would manifestly reinforce rather than potentially compromise the structure of the new national government. Thus in form Madison's draft proposals underscored the fundamental objective of creating a limited national government rather than possibly seeming to set up rights against an already existing "state."[38]

Particulars of the legislative account pertaining to the provisions concerning religion in the First Amendment became insignificant when its final text was ratified. However, charting the stages of its evolving composition is critical for understanding how that text came to be. Certain key details should not be obscured in abridging a long story. Madison's initial draft included four distinguishable elements relating to religious interests, three to be embedded in Article I, Section 9 that detailed limitations on legislative power in the new nation. It stipulated that Congress had no authority to deal with certain subjects—such as importation of slaves (at least for two decades), bills of attainder, direct taxation, preferential relations among the states, and titles of nobility. These potential areas of action had simply been placed "off limits" to legislation. Madison thought further notice of, and protection for, religion should be located here; his proposed draft reads: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[39] (He also offered parallel but independent sets of clauses concerning speech, press, assembly—really the substance of rights enumerated primarily in the First Amendment.)

First, these provisions would be limitations on the legislative power of Congress only—so there was no implication that they pertained to the several states. As such they would not apply to either the executive or judicial branches of the federal government—in which the exclusion of religious tests was assured. However, for substance this formulation entailed three quite separate provisions with respect to religion, that: (1) religious practices (including both belief and worship) would not entail adverse civil consequences; (2) no national religion could be "established"; and (3) "the full and equal rights of conscience" would not be "infringed." Such an explicit set of limits on legislative action indicates that in Madison's thinking the federal government would have nothing to do with religion. This position accorded with his conviction that for *idealistic* reasons religion should be free and unhindered. However, as important, these clauses also directly expressed his theoretical understanding of the nature of the republican experiment that entailed a *realistic* view of religion. These provisions would prove to be an additional means to stabilize the polity because religion was a classic source of "faction"—which he most feared as threat to any republican regime (the argument he set out in *Federalist 10*).[40] The complete and entire independence of religion from the federal regime would assure that no action of the government—however well-intentioned—could reduce the possibility for counterbalancing factions to arise. Thus Madison had gathered proposals from the Antifederalist critique of the draft Constitution to craft a set of limitations on the Congress that embodied both explicit protection for religion and an opportunity to strengthen the "constitutional system" on the federal model.

Madison's formulation also envisioned a fourth provision about religion that would be located in another part of Article I, where Section 10 addressed the "other side" of the division of duties between the new federal government and the states. This section prohibited states from making treaties or alliances (presumably with other states as well as foreign nations), the coining of money, granting titles of nobility, etc. These provisions enumerated limitations on their sovereignty that the states must accept for the federal regime to succeed where the government under the Articles had proved to be inadequate. Madison proposed that a new clause be inserted immediately after the initial statement of limitations upon the states. It would read: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[41] So in Madison's original proposal, the "rights of conscience" would also have been protected against conceivable actions by the states, as would freedom of the press and trial by jury.

Madison's proposal thus incorporated language that responded to the concerns that had been voiced in the Antifederalist critique of the draft Constitution. The texts he devised indicate that he had brought together four separate concerns that, although standing independently of each other, also reinforced each other. First, the assurance that no civil rights be abridged on account of religion enlarged the previously ratified provision that excluded religious tests for those holding federal offices. Madison's phrasing "because of religious belief or worship" may suggest that for him worship was the form taken by religious action. Second, excluding

any national religion likely implied there would be *neither* direct support by the federal government for one church, *nor* indirect support by means of the federal government *requiring* state or local governments to provide for a church or churches. The third provision, that rights of conscience would not be infringed or limited, was a constraint on the federal government. Fourth, the states would also have been forbidden from violating "equal rights of conscience." This set of four separate guarantees is markedly broader and more sweeping than the religion clauses that were eventually ratified in the First Amendment, and beyond limiting the federal regime, the states necessarily would have accepted constraints. Although the select committee of the House made some changes in Madison's language, its work largely endorsed both the conceptual framework and substantive elements he had introduced.

The House itself began its review in mid-August 1789. Here several members proposed numerous changes, and the interests of their states were often evident. Throughout the discussion, Madison appears to have graciously accepted many verbal adjustments and even substantive changes. Most significant may be his passing comment that he thought the proposed limitation on the states with respect to treatment of religion was more "valuable" even than guarantees against federal action.[42] The House proposed that any ratified rights should be grouped at the end of the Constitution rather than inserted into the existing text. Their repositioning has likely been more significant for modern generations after the serial legal "incorporation" of specific "rights" began because it has led them to imagining the "bill of rights" as *a set of separate claims against the government* rather than as itself *an expression of its federal structure*. For its part, the Senate completed its work on the proposed amendments expeditiously, reducing 17 articles in the House's version to the 12 eventually sent out to the states for ratification.[43] The hallmarks of its work were essentially the rearrangement and consolidation of the proposed elements.

The committee of conference—on which Madison sat—did significantly revise the amendments. In this final revision, language of the proposed Amendment 3 assumed the form in which it was eventually ratified: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[44] Specific shifts in terminology have occasioned extensive discussions; one example concerns the significance "respecting" should carry. More important is that the explicit federal reference remained; this was only a limitation on Congressional power to legislate; thus no provision remained that in any respect touched on state prerogatives. (This observation also applies to the associated provisions relating to speech, the press, etc.) With respect to religion, the evident interests of the New England states in preserving a privileged position for their churches seems to have gained most from the work of the Congress. Finally, the "First Amendment" as ratified was actually the third that was proposed to the states. It emerged as primordial in the constitutional fabric of the nation only by the contingency that the proposed First and Second Amendments failed to be ratified. They concerned the distribution of Congressional seats and adjusting payments to the members of Congress.[45]

Conclusion

The foregoing account traces several stages through which formal provisions regarding religion in the new nation eventually became the constitutional framework governing "Church and State" in subsequent American history. In the founding era, regulation of religion and its practice varied widely among the states and included elements such as respect for individuals' liberty of conscience, restrictions on office-holding, privileged positions for particular groups, and mandated support for one or more religious bodies. Such provisions would continue to operate among the states without check or supervision. This was because the framers of the original Constitution—which was immediately amended by the Congress (and ratified by the states)—opted that the national regime should be independent of religion. They took this position because their overriding concern was to secure an effective national government. This path directly contrasts with that taken by France in its contemporaneous revolution, in which the essential effort was to abolish traditional religion because it was integral to the old order. By contrast, the United States was committed to permit religion to develop freely at the state level where incremental adjustments did take place and new religious groups and movements soon flourished. Permeating society, religious ideas and practices necessarily proved important in shaping culture and influencing politics—locally, regionally, and nationally. In turn, this meant that religious institutions might well be employed to serve federal purposes—such as educating native peoples. It meant that the Houses of Congress could and did appoint chaplains, and that religious language would be appropriated by national leaders—occasionally even for highly partisan purposes. Actions such as these, whether advisable or not, were possible because in designing a federal regime to be independent of religion, religious impulses and institutions were left unconstrained in working directly among the people.[46] And insofar as the people of the United States were manifestly religious (and with increasing variability in its expression) they assumed that their government could not be antithetical to their practices.

Through two intervening centuries, Americans have not understood very well the contingent origin of the Constitutional provisions for making religion and government independent. They have too readily used Thomas Jefferson's overly simplistic characterization of the national ideal as a "wall of separation between church and state."[47] Madison's phrasing would have been preferable; he thought that the burden of "tracing a line of separation between the rights of religion and the Civil authority" would be more appropriate.[48] A more exact—if wholly awkward—description might have been better still, something like the "independence of religion and government in the U.S. combined with their continuing interaction and interdependence among its people."

The basic significance of both the minimal attention to religion in the Constitution and the convoluted reference to it in the First Amendment, however, is to be located in a broader imperative. This was to form a limited federal government

grounded in separate branches, which through their balancing actions would check the exercise of power. Thus the provision to make religion independent from government derived from the ideal that the latter should be radically limited. Who among the framers could have imagined that within two centuries the United States would become a global superpower with an internally pluralistic culture? Or with such a transformation could any have conceived of the complex constitutional issues entailing religion that might arise? Through the intervening centuries unanticipated challenges have been explored—and legal determinations extrapolated—without seeming to satisfy either specialists in the law or religious partisans. If we recognize the contingent origin of these constitutional provisions, however, it is difficult to think that any other outcome was possible. In this perspective the religion policy of the American nation has been a work in progress from its outset and two centuries later it appears fated to continue as such.

ENDNOTES

1. Vermont eventually joined the United States in 1791 as the 14th state. See Willi Paul Adams, *The First American Constitutions*, trans. Rita and Robert Kimber (Chapel Hill, NC: University of North Carolina Press, 1980), 93–94.
2. On these states, see Adams, *The First American Constitutions*, 66–68.
3. Although the Articles of Confederation was sent to the states for consideration by the Continental Congress in November 1777, Maryland finally ratified it only in March 1781. See Adams, 280–283.
4. Adams' account includes very little attention to provisions for religion in the state constitutions. The most useful summary is Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (Oxford: Oxford University Press, 1987), Chapters 6 and 7.
5. Ibid., 148–151.
6. Ibid., 151–152.
7. Ibid., 152–153.
8. Virginia has deservedly received a great deal of attention with respect to the development of church–state issues as it made the transition from colony to state. See the account by Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776–1787* (Charlottesville, VA: University of Virginia Press, 1977). Also see Curry's summary, 134–148. Modern scholarship has explored these interfaces between religion and social divisions, beginning notably with the work of Rhys Isaac, *The Transformation of Virginia, 1740–1790* (Chapel Hill, NC: University of North Carolina Press, 1982).
9. See Curry, 139.
10. Ibid., 142–146.
11. Jefferson's draft may be consulted in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, 5 vols. (Chicago: University of Chicago Press, 1987), 5: 77. An echo of the controversy surrounding incorporation of religious groups in Virginia may be found in Madison's 1811 interchange with the House of Representatives concerning a bill to incorporate the Protestant Episcopal Church in Alexandria. See 99–101.

12. See Donald L. Drakeman, "The Church Historians Who Made the First Amendment What It Is Today," *Religion and American Culture* 17 (Winter 2007): 1, in which he explores the role played by religious historians whose work critically informed the Supreme Court about Virginia's extensive and public disagreements over the place of religion in the years before the new nation was founded.

13. Thomas Erastus, a sixteenth-century Swiss theologian, argued that civil authorities should supervise ecclesiastical affairs.

14. See Curry, 153–158.

15. Ibid., Chapter 7, 159 ff.

16. Ibid., 160–161.

17. Ibid., 161–162.

18. Ibid., 163–177.

19. Ibid., 163 ff.

20. Ibid., 165.

21. Ibid., 179–188.

22. Ibid., 188 f.

23. From its earliest years the course taken with respect to religion by Rhode Island and Providence Plantations placed it at odds, especially with other colonies in New England. One of its earliest leaders, Roger Williams, became a legendary figure for his opposition to "the New England Way." There is a large literature on his thought, his influence on the colony, and its place in the larger American story. In the revolutionary period Rhode Island's major role (beyond exemplifying religious liberty as the basis for public policy) was to serve as critic of and goad to Massachusetts, especially since it retained traditional attitudes and continued institutionalized religious privileges until 1833.

24. See Max Farrand, *The Framing of the Constitution of the United States* (New Haven, CT: Yale University Press, 1927). Farrand also edited and published *The Records of the Federal Convention*, 3 Vols. (New Haven, CT: Yale University Press, 1911).

25. See James Madison, *Notes of Debates in the Federal Convention of 1787*. Adrienne Koch issued a Norton paperback edition in 1987 based on a 1966 hardcover edition from Ohio University Press. *Notes* was initially published in volumes 2 and 3 of *The Papers of James Madison* (Washington, DC, 1840).

26. Kurland and Lerner, *The Founders' Constitution*. These volumes reproduce extensive materials about the various sections of the Constitution gathered from numerous sources and provide ready references to many relevant documents and sources. It is organized by section of the Constitution and the initial amendments.

27. See Anson Phelps Stokes, *Church and State in the United States*, 3 vols. (New York: Harper, 1950). Volume one of this collection includes materials relating to the nation's founding. On this treaty, see Stokes, 1: 497–499.

28. Development of the U.S. legal tradition has largely rested on the interpretation of individual clauses of the Constitution. Any critical historical interpretation of the document must attend to its overall structure. This is one factor differentiating the Bill of Rights (the text of which was set in passing by the conference committee) from the carefully constructed and edited original document.

29. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, collected and revised by Jonathan Elliot, were originally published in 1836 and subsequently reissued. References that follow use the five-volume edition issued in Philadelphia by the J.B. Lippincott Co., 1901.

30. A recent and readily available edition is Isaac Kramnick, ed. *The Federalist Papers* (New York: Penguin Books, 1987).

31. See *The Federalist Papers*, Number 10, in which Madison uses sectarian religion as one example of faction that can threaten a nation: "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source." See page 128 of the Kramnick edition.

32. The term "Antifederalist" may confuse modern readers because it may seem to suggest opposition to a more powerful national government. In this period it designated those specifically opposed to the proposed constitution for a range of reasons, but who did agree and argue that it should be augmented in one or another respect.

33. James Wilson's speech was addressed to the Pennsylvania Convention on December 4, 1787 and is reported in Elliot's *Debates*, II: 453 ff.

34. Although Governor Randolph did not act as a participant in the Philadelphia Convention and sign the Constitution, he did discuss it in great detail in the Virginia ratifying convention. His discussion of freedom of religion is reported in Elliot's *Debates*, III: 204–205.

35. See Elliot's *Debates*, III: 659–661 for the 20 amendments Virginia proposed.

36. Richard Spaight's speech is available in Elliot's *Debates*, IV: 208, as well as in *The Founders' Constitution*, 5: 92.

37. See Edward Dumbauld, *The Bill of Rights and What It Means Today* (Norman, OK: University of Oklahoma Press, 1957), 32, in which Dumbauld reports that Madison gathered 186 separate items from the various conventions in the states, reducible to 80 or so substantive proposals. A good biographically oriented study has traced Madison's critical involvement in the founding of the nation, especially his central role in achieving passage of the "Bill of Rights." See Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (New York: Oxford University Press, 2006). For summary reports of the various stages through which it passed, see Dumbauld, *The Bill of Rights*.

38. This is a point that may be overlooked in modern discussions because constitutional provisions are typically considered in relative isolation and consequently interpreted and applied apart from the overarching design of the document.

39. See Dumbauld, 206–209, in which he reproduces the set of amendments Madison offered in Congress on June 8, 1789.

40. See *The Federalist Papers*, Number 10, cited in note 32.

41. See Dumbauld, 208.

42. Available in *The Founders' Constitution*, 5: 94.

43. See Dumbauld, 44–48, in which he summarizes changes to the proposed amendments that originated in the Senate's review of them. He reproduces the text of the Senate version on pages 217–219.

44. See Dumbauld, 48–49, in which he discusses the outcome of the conference committee. He gives the text of the proposed 12 amendments sent to the states for ratification at 220–222.

45. Amendment I concerned adjusting the number of members of the House; Amendment II addressed compensation for the members of Congress and specifically provided that any change should not take effect until the body's next sitting following the subsequent election.

46. See, as an example, Madison's concerns about presidential proclamations entailing religion in *The Founders' Constitution*, 5: 102–103, 105–106.

47. Jefferson's phrase came from an 1802 letter addressed to the Danbury Baptist Association in Connecticut. Key paragraphs of the letter are reproduced in *The Founders'*

Constitution, 5: 96; see also Jefferson's letter to Samuel Miller in 1808 concerning his opposition to proclaiming a day of "fasting & prayer," 88–89.

48. Madison's characterization was included in an exchange of letters with the Rev. Jasper Adams, President of the College of Charlestown. Reproduced in *The Founders' Constitution*, 5: 107–108.

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CHAPTER 2

EIGHTEENTH-CENTURY RELIGIOUS LIBERTY: THE FOUNDING GENERATION'S PROTESTANT-DERIVED UNDERSTANDING

BARRY ALAN SHAIN

In eighteenth-century America, religious liberty, like almost every other understanding of liberty, enjoyed multiple, contested, and evolving meanings. When asked for definitions of liberty and a republic, Jefferson responded that these words "have been so multifariously applied as to convey no precise idea to the mind."[1] Even into the mid-nineteenth century, such confusion continued, for it was Lincoln who declared that "we all declare for liberty; but in using the same word we do not all mean the same thing."[2] This lack of clarity, though, did not prevent religious and civil liberty from being the twin and linked goals reported by Americans as having led them into and out of their war for independence. As Washington reported, "the establishment of Civil and Religious Liberty was the Motive which induced me to the Field."[3]

Although the eighteenth century is marked by a massive transformation in the declared goals served by the public support of Christianity—from serving God and openly soteriological ends, to serving man and unabashedly communal civil ones—the evolving sense of religious liberty for those in dissent, from toleration to equality, remained closely linked with two Christian concepts,

logically dependent on the first and interchangeable with the latter.[4] The first is spiritual or Christian liberty, the liberty with which Christ freed all of his reborn followers from absolute servitude to sin and the necessity of following the dictates of Mosaic law (Halakha). This liberty (or, among a few progressive thinkers, a secular equivalent),[5] made freedom, as liberty—political, religious, civil—possible and different from license. The second concept, still more difficult to specify and more emphatically dissenting Protestant in origin, is the freedom of religious conscience. As the Westminster Confession explained, "God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in any thing contrary to his Word, or beside it in matters of faith or worship. . . . [so that] the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also."[6] These two Christian concepts, along with contending schools of scriptural exegesis, importantly shaped how religious liberty was understood in eighteenth-century America.

Of course, on the political level, the invocation of equal religious liberty was most often made late in the century, not by the orthodox of a colony or state, but by dissenting Protestants seeking equal legal standing with other Protestant denominations and, as well, by a small but influential group of Christian humanists and deists who sought, in previously unheard of ways, to separate the intertwined functions of church and state.[7] Accordingly, in eighteenth-century America, equal religious liberty was the product of powerful currents in Protestant thought, which followed centuries-old pietistic and evangelical traditions, and supportive streams of what might be called secular thought.[8]

In ways difficult to keep in mind, let alone fully recover, these intertwined developments took place in, and were shaped by a world that was outwardly, openly, politically, and overwhelmingly Protestant.[9] Too often contemporary commentators fail to give this feature of the world of the founders its due.[10] Indeed, it is so essential a component of that world that it is even hard to imagine how Americans might have responded and what they might have thought if their world had been either less diverse in its range of Protestant denominations,[11] or less uniformly Protestant. The influx of Catholics and the rise of Mormonism in the nineteenth century and the repressive response they elicited, though, is usefully suggestive.[12]

After outlining, in brief, the remarkably Protestant background of the American social and political landscape in which religious liberty was necessarily understood, this essay will then consider the component parts of religious liberty. That is, *liberty* and its restrictive and objective rather than open-ended and subjective character is examined before looking at those concepts that undergirded the *religious* elements of religious liberty: the relatively constant understanding of spiritual or Christian liberty, and the evolving and expanding senses of freedom of religious conscience that, after the War for Independence, made equal religious liberty so different from the more narrowly "spiritual" goals that it had served earlier in the eighteenth century.