To Insure Domestic Tranquility: The Establishment Clause of the First Amendment

Joel H. Swift
TO INSURE DOMESTIC TRANQUILITY: THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

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I. INTRODUCTION

When the United States Supreme Court began contemporary Establishment Clause analysis in Everson v. Board of Education,¹ civil strife, generated by attempts of religious groups to maintain political supremacy in England and colonial America, was judged a significant motivating factor behind adoption of the clause in the first amendment.² During the ensuing two decades, the view that the Establishment Clause guarded against "political fragmentation on sectarian lines"³ was a regular feature in concurring and dissenting opinions,⁴ and in 1970 the Court expressly made it a part of what

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2. Id. at 8-9. "The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." Id.
4. See, e.g., id. at 694 (stating that the purpose underlying the first amendment Establishment and Free Exercise Clauses is to prevent "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a

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has become known as the "entanglement prong" used to analyze Establishment Clause issues.

In *Lemon v. Kurtzman*, after noting the relevance of the extent to which the state programs at issue would actually entangle government officials in the activities of religious bodies, the Court went on to say:

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs . . . Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the first amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.

Thus, the potential that particular governmental action would motivate the body politic to take positions along religious lines became a part of Establishment Clause analysis.

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5. 403 U.S. 602 (1971).
6. *Id.* at 619-21. The Court invalidated Rhode Island and Pennsylvania statutes as violative of the first amendment religion clauses. Both statutes supplemented salaries of school teachers who taught secular subjects in parochial schools. *Id.* at 607-10. The Court noted that "the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose." *Id.* at 620. The statutes at issue therefore involved excessive government entanglement since "[a] comprehensive, discriminating, and continuing state surveillance [would] inevitably be required to ensure" that the parochial school's religious objective would not intervene with the state supported secular programs. *Id.* at 619.
7. *Id.* at 622.
Shortly after the Lemon Court recognized that the state programs at issue intensified political fragmentation since they were intended to be continuing programs, the Court in Tilton v. Richardson found that "a one-time, single-purpose" expenditure is one factor that will "substantially lessen the potential for divisive religious fragmentation in the political arena," and thus will not foster excessive entanglement. This distinction between "one-time, single-purpose" governmental action and government involvement in continuing programs appears to make some sense when one considers potential political divisiveness. In Lemon, the Court interpreted the Establishment Clause to require that a statute "must [first] have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster 'an excessive government entanglement with religion.'" While a single act might run afoul of the Lemon test, it is only the continuing program which potentially motivates the citizenry to political activism. Moreover, although members of the Court have disagreed in cases since Lemon as to whether a program creates a potential for political division along religious lines, the argument has been raised only in cases involving programs intended to have a continuing effect.

In the past several years, however, it has been suggested that the "divisive political potential" element of the three-pronged Lemon test is a less important consideration than seemed apparent after its original exposition. In 1983, Justice Rehnquist wrote a lengthy footnote in Mueller v. Allen which raised important ques-

8. See id. at 623 ("The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.").
10. Id. at 688.
12. Compare Aguilar v. Felton, 473 U.S. 402, 414 (1985) ("As government agents must make . . . judgments [of deep religious significance to the controlling denominations], the dangers of political divisiveness along religious lines increase.") and id. at 416-17 (Powell, J., concurring) ("This risk of entanglement is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here.") with id. at 429 (O'Connor, J., dissenting) ("The Court's reliance on the potential for political divisiveness as evidence of undue entanglement is also unpersuasive."). See also Wolman v. Walter, 433 U.S. 229, 243 n.11 (1977) (Blackmun, J.) (Brennan, Marshall, Powell, and Stevens, J.J., concurring in part and dissenting in part in separate opinions).
13. Lemon, 403 U.S. at 622.
tions concerning the extent to which this factor should be considered.\textsuperscript{15} Relying on this footnote, the Court in \textit{Lynch v. Donnelly}\textsuperscript{16} declined to hold "that political divisiveness alone can serve to invalidate otherwise permissible [government] conduct."\textsuperscript{17} Notwithstanding this position, the \textit{Lynch} Court proceeded to discuss the evidence of divisiveness presented therein, and found that such evidence without more was insufficient to satisfy the \textit{Lemon} test.\textsuperscript{18} Nevertheless, this diminution of the divisive political potential issue has opened the door for future courts to ignore a factor which lies at the heart of the historical origins of the Establishment Clause and thus demands refutation.\textsuperscript{19}

Although one must recognize and acknowledge that "original intent" should only be one factor in resolving any issue of constitutional interpretation, and may never properly be determinative, support for an originalist approach has become increasingly common. Consequently, an examination of the history of the religion clauses and the spillover of religious disputes into the political arena in the colonial and early statehood eras is required before rejecting the potential for such spillover as a significant factor in reviewing the constitutional validity of government/religion interactions.

In undertaking this examination, one must bear in mind that the issue now, as it did two to three hundred years ago, involves

\textsuperscript{15} Id. at 403 n.11 ("We think, in the light of the treatment of the [\textit{Lemon} political divisiveness] point in later cases ... the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.").


\textsuperscript{17} Id. at 684 (emphasis added); see also id. at 689 (O'Connor, J., concurring) ("In my view, political divisiveness along religious lines should not be an independent test of constitutionality.").

\textsuperscript{18} Id. at 684-85.

\textsuperscript{19} It must be noted that the Supreme Court has not stood alone in questioning the viability of political divisiveness as an independent Establishment Clause doctrine. Dean Jesse H. Choper objects because it is sometimes difficult to draw a bright line distinction between religious and political issues. See Choper, \textit{The Religion Clauses of the First Amendment: Reconciling the Conflict}, 41 U. Pitt. L. Rev. 673, 684 (1980); see also, Schwarz, \textit{No Imposition of Religion: The Establishment Clause Value}, 77 Yale L.J. 692, 711 (1968) ("If avoidance of strife were an independent constitutional value, no legislation could be adopted on any subject which aroused strong and divided feelings."). These commentators, however, ignore the colonial experience which led to the conclusion that the existence of disputatious discussion of political issues was a unique value in a political democracy, while political disputes caused by governmental involvement in religious matters caused unacceptable and dangerous political instability. Indeed, Dean Choper pointed out on another occasion that the Supreme Court's decision in \textit{Mueller v. Allen} was reached "regardless of the historical relevance [of] the establishment clause." Choper, \textit{The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments}, 27 WM. & MARY L. REV. 943, 958 (1986).
attempts by majority religious sects to use their control over government to advance their religious beliefs at the expense of minority views. As Justice Felix Frankfurter noted early on, "The inevitability of such attempts is the very reason for Constitutional provisions primarily concerned with the protection of minority groups." The object of the following discussion is to demonstrate the accuracy of Justice Frankfurter's observation. The disputes which arose prior to the adoption of the first amendment resulted from control of the political process by majority religious groups, and the inclusion of a provision prohibiting laws respecting an establishment of religion was intended not to ensure that all religious views were adequately represented in the political process but rather to remove religious issues from that process.

The issues confronting the populace two to three hundred years ago, of course, differed from those arising today. Public schools, for example, were not a significant part of the colonial landscape, and the propriety of prayers in such schools was not open to debate. Much can be learned, however, from the primary issue which did confront our forefathers — the use of public funds to ensure the financial stability of churches — and from the political disputes which developed over that issue. The examination of this issue which follows amply demonstrates that the divisions it caused within the body politic were substantial and played a major role in resistance to government entanglement in religion as reflected in the Establishment Clause.

II. THE EARLY SETTLEMENTS

The seeds of political discord over religious issues were sown with the establishment of the second English colony on the North American continent. The Virginians, who first arrived in 1607, brought with them contemporary English views on the relationship of church and state. Those views recognized government establishment of an official religion and held that support of that church was a public charge imposed upon government. The colonial charter,
granted by James I in 1606,23 appears to have assumed that the English practice of government paying the clergy and building and supporting churches would be followed.24 In the early days of the settlement, Captain John Smith established clerical salaries25 and by 1624 ordinances had been issued which directly imposed upon the colonial Assembly the obligation to care for the church.26 Economic exploitation of the New World was the primary goal of the Virginia settlers, not religious tolerance. Thus, there was never an issue as to what church would be the beneficiary of this governmental largesse; the colonists had been members of the Church of England at home and simply continued the mother country's establishment of that church as the official church of the colony.

The motivation for emigration of the second group of colonists, however, differed from that of the Virginians. The Puritans who settled Plymouth Colony in 1620 were dissenters from the Church of England and came to the New World in order to find a place where they could practice their religious beliefs. Their unifying characteristic was a common and universally practiced religion. Their concern was solely with the establishment of civil government, and it does not appear to have been necessary to make special provisions for governmental support of their church.27

The Massachusetts Bay Puritans, who followed a decade later, established what was clearly the most intertwined church-state government of all the colonies.28 Although their 1629 Charter from

24. See id. at 8-10.
27. See The Mayflower Compact (Nov. 11, 1620), reprinted in 1 Documents of American History, supra note 23, at 15-16, and in A. Young, Chronicles of the Pilgrim Fathers of the Colony of Plymouth 121 (1841). It appears, nonetheless, that one's failure to pay his fair share toward support of the church was considered a sanctionable act. S. Cobb, supra note 22, at 141.
28. See L. Beth, The American Theory of Church and State 35-36 (1958). The Puritan philosophy was that the state was an institution established to further God's purposes and that the only way to preserve obedience to both the magistrate and religious belief was to insure that the magistrate shared those beliefs. Id. at 38; see Calvin, Institutes for the Christian Religion XXXII (1536), reprinted in 5 The Founder's Constitution 44-45 (P. Kurland & R. Lerner eds. 1987):
But in the obedience which we have shewn to be due to the authority of governors, it is always necessary to make one exception, and that is entitled to our first attention, that it do not seduce us from obedience to him, to whose will the desires of all
Charles I\textsuperscript{29} made no mention of ecclesiastic affairs, their sponsor, the Massachusetts Bay Company, provided for the support of ministers and the construction of churches.\textsuperscript{30} At its first meeting the colonial legislature adopted a measure providing for the support of ministers and houses of worship.\textsuperscript{31} A tax for this purpose was imposed three months later.\textsuperscript{32} In 1691 the Plymouth and Massachusetts Bay colonies were merged, with what was to become the Congregational Church as the officially established religion.\textsuperscript{33}

By 1630, therefore, there existed two English colonies on the continent with established but different churches. Under these circumstances, it was inevitable once the intervening land became settled and movement of the population became common, that these two churches would clash. The Puritans, as will be seen, had little tolerance for religious disagreement. The Anglicans, on the other hand, were eventually to take the not unreasonable position that an English colony could not discriminate against the established church of the mother country.

Although the Dutch who settled New York (which until 1738 included New Jersey) brought the practices of the Dutch Reformed Church with them, they apparently left the notion of church establishment in Europe. In 1628, the sponsoring Dutch West India Company sent a minister, which the company supported.\textsuperscript{34} Ten years later, the Company attempted to shift the cost of supporting the clergy to the colonists through a religion tax.\textsuperscript{35} Opposition to the tax was so great that the Company resumed responsibility in 1640 and

\begin{figure}
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\item Id. at 45. This Calvinist approach obviously was not popular with England’s non-Puritan reigning monarchs.
\item S. Cobb, supra note 22, at 148-49.
\item Id. at 155. Expenses incurred would be evenly divided between the Company and the colonists. Id.
\item Id. at 169.
\item Id.
\item Id.
\item Interestingly, however, the statutes creating the establishment did not mention the Congregational Church by name, and in at least one Massachusetts town dominated by Baptists, it was the Baptist ministers who received the proceeds of the religion tax. L. Levy, The Establishment Clause: Religion and the First Amendment 15-16 (1986).
\item S. Cobb, supra note 22, at 303.
\item Proposed Articles for the Colonization and Trade of New Netherland, reprinted in 1 Documents Relative to the Colonial History of the State of New York 110, 112 (E.B. O’Callaghan ed. 1856) (providing that “[e]ach householder and inhabitant shall bear such tax and public charge as shall hereafter be considered proper for the maintenance of Clergymen . . . .”)
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retained it until the colony was ceded to the English in 1664. The first dispute over public support for an established church in America, therefore, appears to have been won by the opponents of such support.

Upon taking control of the colony of New York, however, the Duke of York issued instructions mandating that the Church of England become the established church, that ministers were to be elected by the towns, and that a tax was to be levied to construct churches and pay the clergy. Nevertheless, the realities of the situation, with the Dutch Reformed Church being the almost universally practiced religion throughout the colony, made it impractical for the appointed governor to fully carry out these instructions. Governor Nicholls instituted instead a practice which, rather than establishing the Church of England as the exclusive recipient of public aid, generally established religion in whatever church happened to be in a town (in almost all cases, of course, that being the Dutch Reformed Church). The people of the town elected their minister, agreed to his salary, and paid him from the public treasury. Church buildings were constructed and maintained in the same manner. The Nicholl's compromise subsequently was given formal recognition by the New York Assembly. It was not until 1693 that an English

36. See Proposed Freedoms and Exemptions for New Netherland, reprinted in 1 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK, supra note 35, at 119, 123. The Company adopted the position that "no other Religion shall be publicly admitted in New Netherland except the Reformed, as it is at present preached and practiced by public authority in the United Netherlands; and for this purpose the Company shall provide and maintain good and suitable preachers..." Id. It appears, however, that the landed patroons were obliged to provide ministers on their estates.


38. See id. at 68-69.

39. Id. at 66-67.

40. Id. at 69. The authors indicate that one of the Governor's first acts was to order the City of New York to pay the salary of the Dutch minister. Id. Professor Leonard Levy asserts that this system of multiple establishment was in fact directed by the "Duke's Laws," rather than a compromise devised by Governor Nicholls. See L. LEVY, supra note 33, at 10. The evidence, however, is unclear. Professor Levy relies for his view on the description of the "Duke's Laws" provided by Sanford Cobb who in turn relies upon the Reverend E.T. Corwin. Corwin asserts that the Duke's actual instructions to Governor Nicholls were to introduce "Episcopacy" to the territory obtained from the Dutch, but that Nicholls found "[c]onciliatory measures at first, to heal the wounded feelings of the conquered, would be the dictate of wisdom." E. CORWIN, J. DUBBS & J. HAMILTON, supra note 37, at 69.

41. L. LEVY, supra note 33, at 11. In 1683, the New York Assembly enacted a "Charter of Liberties" giving all churches the same privileges. Id.
church was officially established in any part of the colony, and then only in the four southern counties which the English had heavily settled. 42 Even there, an attempt by the Anglicans to take control of a Presbyterian church constructed with public funds was rebuffed by the courts. 43 The original New York practice of supporting a single church in each community had given way to a system whereby each taxpayer's contributions were paid over to the church of his choice. 44

The Colony of New York, therefore, was the first colony to adopt an approach to church establishment which was unique to the American colonies, in that it created a compromise between the view that government should assist religion and the political difficulty caused by adherence of the citizenry to more than one religious sect with its resultant opposition to the English practice of establishment of a single sect. Variations on the New York compromise, which may be called "dual" or "multiple" establishments, were subsequently adopted in other New England 45 and several southern colonies 46 but were eventually widely rejected in the independent American states. Most significantly, Virginia, after great debate, rejected such an approach. 47

Several colonies, which subsequently became part of the original thirteen states, were spun off from Massachusetts. Settlers who had moved to Hartford and nearby towns established Connecticut by constitution in 1639 48 and five years later followed the lead of their parent colony by imposing a tax for support of the church. 49 Residents of what was to become New Hampshire established a government by "Agreement" about 1640, 50 formally separated from Massachusetts in 1679, 51 and established a more moderate form of the

42. See S. Cobb, supra note 22, at 11-12.
43. L. Levy, supra note 33, at 13. The Anglicans sued for possession of the church arguing that a publicly supported church had to belong to the Church of England as the only established church. Id.
44. Id. at 14.
45. See generally T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 105-21, 209-10 (1986).
46. L. Levy, supra note 33, at 47-49. Specifically, these were the colonies of Maryland, Georgia, and South Carolina. Id. at 47.
47. See infra text accompanying notes 125-48.
48. S. Cobb, supra note 22, at 242. This was the first constitution to create a new government. Id.
49. Id. at 249. In one instance, the court ordered the Committee of the Church of Greenwich to pay their minister or the sheriff would seize their chattel. Id.
51. See id. at 91.
Congregational Church. This establishment, however, was not without political discord. At least one group of New Hampshirites, residing in the Town of Dover, perceived their political separation from Massachusetts as a separation from that colony's church establishment as well, and in 1681 refused to pay the church tax. Only after losing a political fight in the legislature the following year did the Dover residents succumb to mandatory establishment.

Rhode Island followed a different course. Its founder, Roger Williams, had come to Massachusetts seeking freedom of religious worship, but discovered a degree of intolerance at least equal to that which he had left behind. Williams' view that the compact theory gave government civil responsibility only was anathema to the theocratic leaders of Massachusetts, and he was banished in 1636. In 1663 Williams obtained a charter for the Colony of Rhode Island and Providence Plantations which provided that "no man shall be compelled . . . to support any religious worship, place, or ministry whatever, except in fulfillment of his own voluntary contract . . . ." Thus began the first English colony in the western hemisphere in which church establishment was firmly rejected.

The settlement of Pennsylvania, which included Delaware, was motivated by a mixture of considerations. Like the Virginians, its proprietor, William Penn, sought the economic development and exploitation of his grant, but like Roger Williams, he believed in religious tolerance. The first settlers, like the Puritans, left England to avoid religious persecution, but unlike the Puritans, Penn's followers thought it improper to make the government the servant and supporter of religion. Consequently, at no time did the Pennsylvania

52. See S. COBB, supra note 22, at 291. Unlike the Congregational Church in Massachusetts, the Church in New Hampshire allowed voting by "all respectable men" regardless of religious faith. See id.
53. 1 PROVINCIAL PAPERS: DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE 430, 447 (N. Bouton ed. 1867).
54. See R. WILLIAMS, THE BLOODY TENENT OF PERSECUTION 3, 4 (1644). Williams maintained that "[a]ll Civil States with their Officers of justice in their respective constitutions and administrations are . . . essentially Civill . . . . An inforced uniformity of Religion throughout a Nation or civil state, confounds the Civill and Religious . . . ." Id. (emphasis omitted).
57. See PENNSYLVANIA CHARTER OF LIBERTY, LAWS AGREED UPON IN ENGLAND art. XXXV (1682), reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 28, at 52 (No per-
As in Pennsylvania, the settlement of Maryland served both economic and religious purposes. The Catholic proprietor, Cecil Calvert, sought both to assure a place for Catholics to worship in peace and to attract Protestant settlers. Accordingly, he issued "Instructions" in 1633 that Roman Catholic worship "be done as privately as may be," and that Protestants be treated "with as much mildness and favour as Justice will permitt." Shortly thereafter, these Instructions were amplified by an act of the colonial assembly, commonly known as the Toleration Act, which insured freedom of conscience for all Christians, a practice which continued until the English Revolution of 1688. When Calvert then failed to personally and publicly acknowledge the new English Protestant monarchs, an internal rebellion deprived him of his governing powers and an effort to establish the Anglican Church, with public support, began. The public, however, including its Protestant members, apparently was not particularly supportive, and fifteen years passed before full establishment was effected. For a period, therefore, Maryland joined Rhode Island and Pennsylvania as the only colonies which did not support religion, but by the time of the Revolution it had become much like Virginia.

Although the 1663 Charter of the Carolina Colony established the Church of England, the desire of the proprietors to attract settlers from the more northern colonies, especially Virginia, as well as from trade ships carrying crews from other lands, led to an unusu-
ally high level of religious freedom. Residents were not required to belong to the church or participate in its activities provided they did not interfere with it or use their religion as an excuse to misbehave. In 1669 the proprietors adopted the “Fundamental Constitutions,” allegedly drafted by John Locke. Most of the religion section sounds quite Lockian, with the exception of a section assigning to the legislature the obligation to take care for the building of churches, and the public maintenance of divines, to be employed in the exercise of religion, according to the Church of England; which being the only true and orthodox, and the national religion of all the King’s dominions, is so also of Carolina; and, therefore, it alone shall be allowed to receive public maintenance . . . .

Locke is reported to have denied authorship of this provision.

Such was the status of the colonies toward the close of the seventeenth century. In the colonies of Virginia, Massachusetts and Connecticut, undisputed acceptance of church establishment appears to have existed. Rhode Island, Pennsylvania, New York, and Maryland, on the other hand, rejected establishment at their formation, with the latter two succumbing only after the Anglican Church, supported by British arms, forced recognition. Even then, however, church establishment was successful only after political dispute and compromise, especially in New York, where establishment was not exclusive. New Hampshire accepted establishment, but not without political dispute. Finally, Carolina, although nominally accepting establishment, attempted to avoid political problems by specifically

65. A 1665 agreement between the proprietors of the Province of Carolina with certain adventurers of the Island of Barbados and their associates contained an explicit guarantee of freedom to practice religion according to personal conscience. Id. at 75, 80-81. At the same time, it granted to the General Assembly “power by act to constitute and appoint such and soe many Ministers or preachers as they shall thinke fitt, and to establish their maintenance . . . .” Id. at 81.


67. 1 A. Stokes, supra note 21, at 398. Locke’s connection with the Fundamental Constitutions, especially the provisions unrelated to religion, has been questioned as “impossible for Locke to conceive and distasteful to him when suggested by others.” S. Cobb, supra note 22, at 119.


69. S. Cobb, supra note 22, at 119.

70. See supra text accompanying notes 34-47.

71. See supra text accompanying notes 50-53.
rejecting mandatory adherence to the established church.\textsuperscript{72}

III. \textbf{THE RISE OF OPPOSITION}

At the beginning of the eighteenth century, a widespread movement of citizens of various religious sects, as well as non-believers, led to substantial political agitation against the continued establishment of a single religious denomination in any colony. While the fight was not won overnight, the view that government existed in part to encourage religious practice was widely losing support, and by the end of the century was almost totally rejected.

The decision of the Carolina proprietaries to pay lip service to the establishment of the Anglican church in their charter, while recognizing and accepting diverse religious practices, resulted in the first major American political dispute over church/state relations. The interior of the colony was settled mostly by dissenters from the Church of England.\textsuperscript{73} Consequently, few churches of the established religion existed. The legal establishment of the church, however, coupled with the non-adherence of a substantial, if not majority, portion of the population, inevitably led to a political dispute of some magnitude. Shortly after the turn of the century, Church of England members who had emigrated directly from the mother country and settled in the tidewater area gained control of the legislature and adopted an extensive program for the construction of churches and hiring of ministers throughout the colony.\textsuperscript{74} Quaker farmers, who did not believe that anyone should be paid for practicing religion and who thought that elaborate churches were inappropriate, acted with many who practiced no religion “together in one common cause to prevent any thing that will be chargeable to them, as they allege Church government will be . . . .”\textsuperscript{75} The dispute eventually reached Queen Anne,\textsuperscript{76} who voided the establishment law in 1706.\textsuperscript{77} It was repealed by the colonial assembly that same year.\textsuperscript{78} For the first time, opponents of establishment prevailed in a colony which followed the practice. Although the government continued to pay the salaries of the few Church of England ministers located in the tide-

\textsuperscript{72} \textit{See supra} text accompanying notes 64-69.
\textsuperscript{73} \textit{See} 2 J. \textit{Anderson, supra} note 26, at 465; 3 J. \textit{Anderson, supra} note 26, at 474.
\textsuperscript{74} 1 \textit{Colonial Records of North Carolina, supra} note 64, at 636.
\textsuperscript{75} \textit{Id.} at 600, 602 (Letter on Mr. Blair's Mission to North Carolina).
\textsuperscript{76} \textit{Id.} at 634-40.
\textsuperscript{77} \textit{Id.} at 643.
\textsuperscript{78} \textit{Id.}
opposition to supporting a minority church, especially in North Carolina (which became a separate colony in the 1720's), remained strong with the colonists prepared to terminate governmental support for religious practice at the first opportunity.

At about the same time, the three southern counties of Pennsylvania were granted autonomy and became the Colony of Delaware. The 1701 Charter establishing the colony provided that “no Person or Persons . . . shall . . . be compelled to . . . maintain any religious Worship, Place or Ministry, contrary to his or their Mind . . . .” This language was strongly reminiscent of the Rhode Island charter of 1663. Georgia’s colonial charter of 1732 directed that there be liberty of conscience except for “papists.” In 1758, however, Georgia adopted the Carolina practice of establishing the Church of England, although it appears that few churches were built. New Jersey was separated from New York in 1738, but apparently continued to reject a single denomination establishment.

During this time, serious objection to supporting the Congregational Church was developing in the New England colonies of Massachusetts and Connecticut. The Anglican, Quaker, and Baptist churches had each acquired a substantial number of followers, who not only provided voluntary support to their own churches but were obliged by law to pay for the support of the Congregational Church as well. In several Massachusetts towns in which Baptists and Quakers constituted the majority, the residents refused to pay the church tax in defiance both of the law and court orders, and eventually prevailed against tax collection attempts made by the Congregational Church. As a result of this agitation against double taxation, the Massachusetts legislature in 1727 passed what was known as the Five-Mile Act, establishing a version of the New York practice.

79. 2 Colonial Records of North Carolina, supra note 64, at 207 (An Act for Establishing the Church & Appointing Select Vestrys); 8 Colonial Records of North Carolina, supra note 64, at 4 (Letter from Governor Tryon to Lord Hillsborough); 9 Colonial Records of North Carolina, supra note 64, at 1009, 1010 (Letter from Governor Martin to the Earl of Dartmouth).


81. See supra text accompanying note 55.

82. 2 The Federal and State Constitutions, supra note 54, at 773.

83. S. Cobb, supra note 22, at 420-21.

84. See L. Levy, supra note 33, at 16.

85. Id. at 16-17.

Under this Act, Anglicans who lived within five miles of one of their churches were permitted to direct their taxes to that particular church. Unlike their Congregational counterparts, however, Anglican ministers were not paid a specific salary out of the general treasury, but received only those taxes paid by their parishioners. As a result, the Anglican Church became something of a second-class established church. The scope of the Act was expanded the following year to include Baptists and Quakers, but the latter, because they did not believe in a paid ministry, received no benefit from the Act and in 1731 were exempted from the tax. In 1727, after ten Episcopalians who refused to pay the church tax were jailed in Fairfield, an Act similar to the Five-Mile Act was adopted in Connecticut. In both colonies, members of sects other than the four established or quasi-established churches were still required to contribute to the support of the Congregational Church. Somewhat to the surprise of the more liberal Congregationalists who supported this measure, however, it failed to satisfy the opposition, especially the Baptists. The mechanics of the Act required that those wishing to avail themselves of its benefits identify themselves by obtaining a certificate from a civil magistrate, a practice to which the Baptists objected both as a matter of conscience, and because a tax was imposed to obtain the certificate. Consequently, the certificate system was seen as still mandating tax payment from those who disented from the orthodox faith. Apparently, nothing short of termination of the Congregational establishment would meet Baptist conscientious objections, a demand which John Adams is reported to have described some years later as equivalent to expecting "a change in the solar system." As a result, the battle over disestablishment

Providence of the Massachusetts Bay 459-60 (1874); see S. Cobb, supra note 22, at 270.
87. An Act in Addition to the Several Acts for the Settlement and Support of Ministers, Prov. L. 1727-28, reprinted in 2 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 459-60 (1874). After collecting the tax, the treasurer was authorized to deliver the tax money to the minister of the Anglican. Id.
88. S. Cobb, supra note 22, at 235.
89. Id.
90. Id. at 270; L. Levy, supra note 33, at 21.
91. See S. Cobb, supra note 22, at 270. Known as the Act for the Ease of such that soberly Dissent, it contained special regard for the Church of England.
93. Id. at 201 n.2. Thomas Paine contended that conscience had little to with the opposition of the Baptists — that it was merely a refusal to pay the fee required. Id.
94. L. Levy, supra note 33, at 2, 31, 41.
95. 2 I. Backus, supra note 92, at 201 n.2.
in most of New England was waged into and beyond the era of the federal Constitution.

What was undoubtedly the most substantial, and ultimately most successful, effort to terminate Anglican establishment took place in Virginia during the twenty-year period prior to independence. After more than a century of financial security, the clergy of the Anglican Church had acquired a status of wealth and importance separating them from the bulk of the citizenry, which perceived the clergy as an indolent group supported by the labor of others. At the same time, and probably not coincidentally, substantial numbers of Virginians had embraced dissenting sects, the most important of which were the Baptists, Presbyterians, Quakers, and Lutherans, and objection to support of the Anglican Church had become widespread.

The first open clash between the clergy and the people resulted from a poor tobacco harvest during several years in the mid-1750's which drove up the price of that commodity. Since clerical salaries and the taxes levied to pay them were computed on the basis of the value of an established quantity of tobacco, the increase in price also increased the amount of the tax and the salary. At the same time, small farmers whose crops had failed had less cash with which to pay their church taxes, as well as other debts tied to the price of tobacco. In an effort to provide relief, the Virginia Assembly in 1758 passed the Two-Penny Act, which provided that for the purpose of paying debts tobacco was to be valued at two pence per pound, approximately one-third its market value. Anglican clergymen, objecting to a two-thirds reduction in their salaries, complained to the Church in England, and succeeded in persuading the King to nullify

97. See generally 1 A. STOKES, supra note 21, at 370-74.
98. Id. at 367.
99. C. CAMPBELL, HISTORY OF THE COLONY AND ANCIENT DOMINION OF VIRGINIA 507 (1960). Previously, the tax was payable in tobacco. The Act made the tax payable in money or kind in lieu of tobacco. Id. A subsequent price-setting act set the value at 16 shillings and 8 pence per one hundred pounds of tobacco. 7 W. HENING, THE STATUTES AT LARGE: A COLLECTION OF ALL THE LAWS OF VIRGINIA 240 (1820). For more detailed discussions of the Two-Penny Act and the "Parsons' Cause" which it precipitated, see generally R. BROWN & M. BROWN, VIRGINIA 1705-1786: DEMOCRACY OR ARISTOCRACY? 255-59 (1964); C. CAMPBELL, supra, at 507-18; 1 F. HAWKES, CONTRIBUTIONS TO THE ECCLESIASTICAL HISTORY OF THE UNITED STATES OF AMERICA 117-19 (1836); 1 A. STOKES, supra note 21, at 367.
the Two-Penny Act. This nullification apparently was ignored by at least some colonial tax collectors and when an Anglican minister in Hanover County, a bastion of Presbyterianism, was paid in accordance with the terms of the Two-Penny Act, he brought suit for the remainder of his salary. The jury apparently felt bound by the letter of the King's action and rendered judgment for the minister; however, it evidently considered the attitude of the clergy to be an effort to thwart the will of the people and further enrich itself through their misfortune, and thus awarded damages of one penny.

Opposition to establishment asserted itself again in the 1760's when the Anglican Church sought to have bishops appointed for Massachusetts and Virginia. Although some concern was expressed in the former colony over the impact of such an action on the established Congregational Church, the primary Massachusetts's opposition came from the public at large, which objected to the prospect of further government involvement in the church and the prospect of tax funds being used for the bishop's support. The Virginia effort was also strongly opposed by the laity, which had become disaffected, because of both perceived clerical delinquency and residual anger over the efforts to nullify the Two-Penny Act. Both efforts to bring publicly-supported bishops to the colonies were defeated.

These religious disputes coincided with the political events presaging independence, and it is not surprising that relief from public support for religion was included among the goals of at least some of the disaffected. Anson P. Stokes has suggested that at the time of independence the great majority of colonists were not church members and opposed a state church. Even in New England, he as-

100. 1 A. STOKES, supra note 21, at 367. Sanford Cobb takes a sympathetic approach to the clergy, stating that the wage reduction was "thoroughly unjust." S. COBB, supra note 22, at 109.

101. C. CAMPBELL, supra note 99, at 515-18; 1 A. STOKES, supra note 21, at 367. Suit was brought in 1763 by the Rev. James Maury. Patrick Henry, then a 27 year-old lawyer, defended the tax collector, arguing that the King's nullification was tyranny. Id. This case appears to have launched Henry's political career. See C. CAMPBELL, supra note 99, at 516-18, 525.

102. C. CAMPBELL, supra note 99, at 517.
103. 1 F. HAWKS, supra note 99, at 120.
104. C. CAMPBELL, supra note 99, at 517.
105. S. COBB, supra note 22, at 465-68.
106. Id. at 467-69.
107. Id. at 469.
108. Id. at 473-74.
109. 1 A. STOKES, supra note 21, at 229-30.
serts, seven-eighths of the population were not church members. 110

IV. INDEPENDENCE AND STATEHOOD

In light of the growing disaffection with the existing interaction between government and religion, it is not surprising that many Americans saw independence from England as a route toward independence from that country's established church as well. However, it is likely that some perceived political disputes over church establishment as a potential hindrance to the unity necessary to achieve independence.

It appears that the first formal joinder of opposition to church/state entanglement and the movement for independence occurred in Carolina. In 1775, the people of Mecklenburg County, North Carolina, where Presbyterianism was strong, took an early stance in favor of independence and against mandatory church support. The Mecklenburg delegates to the Halifax Congress, called to consider a constitution for the colony they believed soon to be independent, were given instructions “[t]hat in all times hereafter no professing Christian of any denomination whatever shall be compelled to pay any tax or duty towards the support of the clergy or worship of any other denomination.”111 On December 18, 1776, the Halifax Congress adopted a Declaration of Rights 112 which included, in Article 34, a provision prohibiting mandatory church support in language quite similar to that set forth in the Rhode Island Charter of a century earlier. 113

The effort of the citizenry of Mecklenburg County to make North Carolina the first newly independent state to adopt a constitutional provision outlawing government support of an established church was thwarted, however, by even quicker action in several other states. The distinction of being first apparently belongs to Delaware, which included such a provision in Article 2 of its Declaration of Rights and Fundamental Rules, adopted on September 11, 1776. 114 New Jersey and Pennsylvania also adopted such provisions

110. Id. at 229.
111. 10 Colonial Records of North Carolina 870d, Instr. No. 20 (1886).
112. Id.
113. The North Carolina Constitution provided that “[no person shall] be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform . . . .” N.C. Const. of 1776, art. XXXIV, reprinted in 5 The Founder's Constitution, supra note 28, at 71.
114. Delaware Declaration of Rights and Fundamental Rules art. 2 (1776),
ESTABLISHMENT CLAUSE during the last six months of the year of Independence,\textsuperscript{115} and in 1777 New York and Georgia adopted constitutions which, in general terms, granted a freedom of religious exercise.\textsuperscript{116} Maryland's Declaration of Rights of 1776\textsuperscript{117} also contained a Rhode Island-type provision, but added, in article 33, permission to the legislature to lay a tax for the support of the Christian religion and allowed payment of the tax to the poor rather than to the church at the discretion of the taxpayer.\textsuperscript{118} Only one effort was made by Maryland to impose such a tax, and it was soundly rejected.\textsuperscript{119} Vermont, although not yet an

\textsuperscript{115} The New Jersey Constitution provided that "no person shall . . . ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform. N.J. Const. of 1776, art. XVIII, reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 28, at 71. Similarly, the Pennsylvania Constitution provided that "no man ought or of right can be compelled to . . . erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent . . . ." PA. Const. of 1776, art. II, reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 28, at 71.

\textsuperscript{116} The New York Constitution provided that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind . . . ." N.Y. Const. of 1777, art. XXXVIII, reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 28, at 75. Likewise, the Georgia Constitution stated that "[a]ll persons whatever shall have the free exercise of their religion . . . and shall not, unless by consent, support any teacher or teachers except those of their own profession." GA. Const. of 1777, reprinted in 2 THE FOUNDERS' CONSTITUTION, supra note 28, at 784. Subsequent Georgia constitutions adopted during the immediate post-colonial era were more specific in their prohibitions against compulsory financial support of religion. See, e.g., GA. Const. of 1789, reprinted in 2 THE FOUNDERS' CONSTITUTION, supra note 28, at 789; GA. Const. of 1798, §10, reprinted in 2 THE FOUNDERS' CONSTITUTION, supra note 28, at 800-01.

\textsuperscript{117} The Maryland Constitution provided that "[no person ought] to be compelled to . . . contribute, unless on contract, to maintain any particular place of worship, or any particular ministry . . . ." Md. Const. of 1776, art. XXXIII, reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 28, at 70.

\textsuperscript{118} See id. (providing that "the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county . . . .").

\textsuperscript{119} See A. Nevins, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789, at 430-31 (1924); see also L. Levy, supra note 33, at 48 (stating that the bill was defeated by a two-to-one margin). It is surely not at all coincidental that Maryland's effort to impose a general assessment was rejected in the same year as Virginia's. See infra notes 125-48 and accompanying text.

In 1810, a constitutional amendment deprived the legislature of the power to enact any tax "for the support of any religion." L. Levy, supra note 33, at 48.
independent state, also adopted a constitutional protection against required financial support in 1777,120 and South Carolina's constitution of 1778, while establishing the Christian Protestant religion as the official religion of the state,121 contained specific protection against obligatory financial support.122 Georgia's Constitution of 1777 permitted a non-preferential general assessment, and a law to this effect was passed in 1785, although two earlier attempts had failed.123 Available evidence does not demonstrate that it ever went into effect, however, and thirteen years later a new state constitution prohibited non-voluntary support for religion.124 It seems clear, therefore, that in a substantial number of newly independent states separation of the church from the government, as a political ideal, was a concept accepted by a majority of the population. Separation in practice, however, had been retarded by the political control of the mother country.

By far the most dramatic and, outside of New England, the most protracted battle over church establishment took place in Virginia, and involved disputes between individuals who were in other respects willing bedfellows in the cause of human rights. Virginians were clearly able to agree on disestablishment of the Anglican church, and did so in the month prior to the publication of the Declaration of Independence. Section 16 of the Virginia Declaration of Rights, adopted June 12, 1776, provided that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . .125 Unlike New York, however, where such language was accepted as prohibiting financial assistance from the state to religion, Virginians did not perceive such to be the case. James Madison proposed an additional clause providing "that no man or

120. The Vermont Constitution provided that "no man ought, or of right can be compelled to . . . erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience . . . ." VT. CONST. of 1777, ch. 1, § III, reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 28, at 75.
121. S.C. CONST. of 1778, art. XXXVIII, reprinted in 6 THE FEDERAL AND STATE CONSTITUTIONS, supra note 55, at 3255 (providing that "[t]he Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.").
122. See id. at 3257 (providing that "[n]o person shall, by law, be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support.").
123. L. LEVY, supra note 33, at 48-49.
124. Id. at 49.
125. VIRGINIA DECLARATION OF RIGHTS § 16 (1776), reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 28, at 70.
class of men ought, on account of religion to be invested with pecu-
liar emoluments or privileges . . . .” 126 His proposal was rejected,
however, because there was substantial sentiment in favor of adopt-
ing the New England practice of a general assessment for all reli-
gions, with each individual having the right to direct where payment
would go.

Six months later, the Virginia Assembly passed “An act for ex-
empting the different societies of Dissenters from contributing to the
support and maintenance of the church . . . .” 127 This act had three
major provisions relating to financial aid. Not only did it establish
the exemption stated in its title, but it also recognized that this ex-
emption might render some parishes unable to pay their ministers
the salary established by law, and therefore suspended both the sal-
ary and the tax laws until the next legislative session. 128 This suspen-
sion was continued from year to year until 1779, when it was made
perpetual, thus finally terminating the last vestiges of an exclusive
state-supported church. 129 The Act did not, however, prohibit all
state support for religion. Rather, it acknowledged a difference of
opinion on whether to adopt the practice of levying a general tax
payable to the church of choice, or leaving the churches to voluntary
contributions. Accordingly, the legislature expressly took no position
on that issue. 130

During the next decade, there were numerous efforts to resolve
this dispute. The proponents of a general tax, led by Patrick Henry,
Richard Henry Lee and John Marshall (with some support from
George Washington), were concerned about a “postwar decline in
religion and morality.” 131 Their position was supported by numerous
petitions from various conservative constituencies. 132 The position

126. I. BRANT, JAMES MADISON: THE VIRGINIA REVOLUTIONIST 245 (1941).
127. 9 W. HENING, supra note 99, at 164-67 (1821). The act’s preamble declared that
“it is contrary to the principles of reason and justice that any should be compelled to contrib-
ute to the maintenance of a church with which their consciences will not permit them to join,
and from which they can therefore receive no benefit.” Id.
128. Id.
129. See 1 K. ROWLAND, THE LIFE OF GEORGE MASON 1725-1792, at 243 (1964); see
also T. JEFFERSON, supra note 96, at 158.
130. 9 W. HENING, supra note 99, at 165 (1821).
131. L. BETH, supra note 28, at 62; see also E. GREENE, RELIGION AND THE STATE: THE
MAKING AND TESTING OF AN AMERICAN TRADITION 87 (1941) (“[S]uch relatively liberal
churchmen as Patrick Henry, were seriously disturbed by the apparent decline of religion and
morality, resulting in part from abnormal wartime conditions and . . . the diffusion of deistic
ideas.”).
132. DEPARTMENT OF ARCHIVES AND HISTORY, VIRGINIA STATE LIBRARY, SEPARATION
OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION
against all church support was lead by Thomas Jefferson, James Madison, George Mason, and George Nicholas, and supported primarily by the Baptists and Presbyterians. In 1779 a bill drafted by Jefferson was introduced which provided "that no man shall be compelled to . . . support any religious Worship place or Ministry whatsoever . . . ." Recognizing that such a bill, even if adopted, was not of constitutional magnitude and thus could not bind future legislatures, Jefferson included a provision that the rights set forth were "natural rights of mankind" and that any repeal or narrowing "will be an infringement of natural right." This bill failed to pass, as did numerous opposing bills which sought to establish the "Christian Religion" and impose assessments payable to the Church of choice.

The issue finally peaked in the legislative sessions of 1784 and 1785. In response to numerous arguments emphasizing the importance of religion to the success of society and asserting that it was the obligation of government to encourage and support religion, Patrick Henry once again introduced a general assessment bill. On this occasion it appears that the Presbyterian Church initially supported the assessment, prompting Madison to write that they "seem as ready to set up an establishment which is to take them in as they were to pull down that which left them out." The bill provided that "the people of this commonwealth, according to their respec-

72, 83, 84 (1910) (reproducing petitions) [hereinafter Separation of Church and State in Virginia].
133. L. Beth, supra note 28, at 63; Separation of Church and State in Virginia, supra note 132, at 119; J. Patton, The Triumph of the Presbytery of Hanover 38, 39, 45 (1887).

The Memorial from the Presbytery of Hanover of October 24, 1776 argued, inter alia, that payments to one set of men, without any special public services, is wrong, and asked "that all of every religious sect may be protected in the full exercise of their several modes of worship, and exempted from all taxes for the support of any church whatsoever, further than what may be agreeable to their own private choice or voluntary obligation." I A. Stokes, supra note 21, at 377.

135. Id. Jefferson, reflecting in 1821 upon his contribution to the American governmental system, expressed the view that four bills he had proposed to the Virginia legislature were part of "a foundation . . . for a government truly republican." See 1 T. Jefferson, The Works of Thomas Jefferson 77 (1821). Of the four, one "relieved the people from taxation for a religion not theirs." Id.
136. I A. Stokes, supra note 21, at 387.
137. Separation of Church and State in Virginia, supra note 132, at 72, 83-84; I A. Stokes, supra note 20, at 388-89.
138. L. Beth, supra note 28, at 64.
tive abilities, ought to pay a moderate tax or contribution annually, for the support of the Christian religion, or of some Christian church, denomination or communion of Christians, or of some form of Christian worship.

A resolution in support of the bill passed the legislature on its first reading on November 11, 1784, and on its second reading on December 23, by a vote of 44 to 42. The legislature adjourned, however, prior to the third and final vote.

Before the legislature reconvened, four events took place which were to turn the tide. Patrick Henry took office as Governor, thus depriving the proponents of their most active legislative leader. The Presbyterians once again changed position, and they, along with the Baptists and other religious groups, petitioned against the bill. George Washington, although still favoring the idea, ultimately concluded that since such a sizeable minority was opposed, the bill would “rankle and perhaps convulse the State” and therefore should probably not pass. By far the most important event, however, both in terms of the immediate issue at hand and for future development of the American concept of religious liberty, was Madison’s drafting and distribution of his famous “Memorial and Remonstrance.” This document, published on June 20, 1785, was widely read throughout the state during that summer. The Remonstrance contains an extensive exposition of Madison’s views on all subjects concerning religious freedom. Sections three and seven are most perti-

139. 2 K. ROWLAND, supra note 129, at 72-73.
140. SEPARATION OF CHURCH AND STATE IN VIRGINIA, supra note 132, at 102.
141. L. BETH, supra note 28, at 63; SEPARATION OF CHURCH AND STATE IN VIRGINIA, supra note 132, at 102.
142. L. BETH, supra note 28; A. NEVINS, supra note 119, at 436.
143. L. BETH, supra note 28, at 63; L. LEVY, supra note 33, at 58; A. NEVINS, supra note 119, at 433-36. The Baptists were especially active in opposition to Henry's bill. In 1785, a Resolution of the General Committee of the Baptist Society in Virginia stated: "Resolved . . . that the holy Author of our religion needs no such compulsive measures for the promotion of his cause; that the gospel wants not the feeble arm of man for its support . . . and that should the Legislature assume the right of taxing the people for the support of the gospel, it will be destructive to religious liberty."
A. NEWMAN, A HISTORY OF THE BAPTIST CHURCHES IN THE UNITED STATES 370 (4th ed. 1902). The following year a Baptist appeal to the Virginia legislature asserted that article IV of the Virginia Bill of Rights, "which prohibits rewards or emoluments to any Man, or set of men, except for services rendered the State," prohibited payment by the state to the clergy.
SEPARATION OF CHURCH AND STATE IN VIRGINIA, supra note 132, at 119.
144. L. LEVY, supra note 33, at 59; 2 THE PAPERS OF GEORGE MASON 831-32 (1970); 2 K. ROWLAND, supra note 129, at 89.
145. J. MADISON, MEMORIAL REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1795), reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 28, at 82-84.
nent; there Madison stated:

We remonstrate against the said Bill . . .
11. Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bounds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed 'that Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischief may not be dreaded, should this enemy to the public quiet be armed with the force of a law? 146

When the legislature reconvened that fall, the assessment bill was overwhelmingly defeated. Seizing the opportunity, Madison and his colleagues successfully reintroduced Jefferson’s 1779 Bill for Establishing Religious Freedom, 147 which expressly prohibited compulsory support for religious worship. 148 So ended Virginia’s final at-

146. Id. at 83. Professor Peter M. Schotten asserts that Madison supported the inclusion of religious divisions in the political arena, relying on a suggestion at the Virginia State Ratifying Convention that religious factionalism would provide the necessary protection against governmental abuse. See Schotten, The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Non Public Elementary and Secondary Schools, 15 Wake Forest L. Rev. 207, 224-27 (1979). Professor Schotten ignores, however, that portion of the Memorial and Remonstrance reproduced above, as well as Madison’s leadership of the fight to declare religious assessments in Virginia to be a violation of the natural rights of man. See Cahn, The “Establishment of Religion” Puzzle, 36 N.Y.U. L. Rev. 1274, 1290 (1961) (pointing to Madison’s view “that anything resembling an establishment would . . . destroy the harmony we have endeavored to build among highly diverse groups [and] provoke bitter inter-group hostilities . . . ”).
147. See supra note 134 and accompanying text.
148. See L. Beth, supra note 28, at 63. The bill provided:
Well aware . . . [t]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical; That even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most
attempt to provide public financial aid to religion.

The coming of independence to New England did not bring about disestablishment as it had in the other states. Connecticut, Massachusetts, and New Hampshire retained both their established churches and the general assessment scheme into the nineteenth century, but the tide was clearly against them. Connecticut did not adopt a new constitution, but continued to operate under its colonial charter, thus making it easier to continue the established church. This issue became entwined with the political battle between the Jeffersonian Republicans and the Federalists, and the culmination of that battle terminated the religious dispute as well. Congregational clergy were Federalists "almost to a man" while almost all non-Congregationalists were Republicans. Even the Anglican Church, although by nature closer in form to the Congregationalists than the Baptists and Methodists, and more conservative politically, concluded that the only way to defeat the established church was through politics, and joined forces with the Republican Party. Although the political dispute had numerous non-religious manifestations, opposition to church establishment played a major role in Connecticut's political debate. As already indicated, during the 1720's Connecticut had adopted a Five-Mile Act which permitted some dissenters to pay their religion tax to the church of choice. In 1784 this system was expanded into a general assessment effective throughout the state, but the Baptists still objected to the certi-

persuasive to righteousness, and is withdrawing from the Ministry those temporal rewards which, proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labour for the instruction of mankind . . . [t]hat it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it . . . .

We the General Assembly of Virginia do enact, that no man shall be compelled to . . . support any religious Worship place or Ministry whatsoever . . . .

And . . . we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

T. JEFFERSON, A BILL ESTABLISHING RELIGIOUS FREEDOM (1779) reprinted in 5 THE FOUNDER'S CONSTITUTION, supra note 28, at 77 (emphasis in original).

149. R. PURCELL, CONNECTICUT IN TRANSITION 1775-1818, at 310 (1918).

150. Id. at 327.

151. 1 A. STOKES, supra note 21, at 413.

152. See supra text accompanying note 91.

153. 1 A. STOKES, supra note 21, at 411-12.
cation requirement and refused to participate.

Two financial windfalls to the state became relevant in the religion support issue. First, The Western Lands Bill of 1793 proposed that the interest on proceeds from the sale of state owned lands be used to support ministers of recognized religious societies. The proposal was defeated, at least in part on the argument that it constituted an improper support for religion. Second, in 1817, the state received a refund from the national government for war expenses. This time, the General Assembly distributed a portion to several churches according to their tax lists. The Congregational Church accepted its allocation, although it objected to sharing the fund with other, non-established churches. The Baptists and Methodists, on the other hand, initially refused to accept, considering it a political effort to enlist them in the cause of church support. That same year, the legislature gave all denominations an equal right to tax their members (and only their members) for support of religion, although the Congregationalists still retained the exclusive use of the public tax collecting mechanism.

None of these efforts at compromise satisfied the dissenting religions, who saw political victory on the horizon and were willing to accept nothing less. In the 1817 gubernatorial election the Republicans saw and seized their opportunity. Oliver Wolcott, a former Secretary of the Treasury and a Congregationalist who did not support church establishment, was nominated by the Republicans and won the election by slightly more than five hundred votes. Almost immediately after taking office the Republicans called a constitutional convention, and in 1818 adopted a constitution. Drafted by a sub-committee of Jeffersonian Republicans, the constitution prohibited governmental assistance to religious institutions.

154. See supra notes 92-93 and accompanying text.

155. See R. Purcell, supra note 149, at 92-93 (stating that all dissenters objected to the certificate law, believing that certification put them under a political disability).

156. Id.

157. 1 A. Stokes, supra note 21, at 415. Stokes claims both groups did accept after there was a severance of the church-state connection. Id. Historical evidence is not perfectly clear. Professor Leonard Levy asserts that the Baptists did accept their share. See L. Levy, supra note 33, at 44 (relying on W.G. McLoughlin, New England Dissent (1971)).

158. R. Purcell, supra note 149, at 355.

159. 1 A. Stokes, supra note 21, at 414.

160. Article Seventh of the Connecticut Constitution provided that:

(1) It being the duty of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and their right to render that worship in the mode most consistent with the dictates of their consciences, no person shall by law be
The political victories of those supporting disestablishment in Virginia and Connecticut, as well as in most other states, were not repeated in Massachusetts for another fifteen years. No amount of petitioning or objecting by the opposition was able to disprove John Adams' prediction that establishment in that state was no more likely to change than was the solar system. The legal system established to maintain the church, however, turned out to contain the seeds of its demise.

In 1818, the Pastor of the Congregational Church in Dedham resigned to accept the presidency of Middlebury College. By that time a rift had developed within the church, in Dedham and elsewhere, between orthodox Congregationalists, or Trinitarians, and Unitarians. Since the political system established two hundred years earlier had mandated that all members of the community also be members of the Church, no legal distinction had been drawn between members and non-members in assigning responsibility for the church. Consequently, the selection of a minister was a civil function in which all community members were eligible to participate. The Unitarians, who constituted a majority of the electorate, promptly selected one of their own as minister, thus leaving the Trinitarian members no alternative but to form a separate church. Although a general assessment was in effect, and the deposed Trinitarians were not compelled to continue supporting their former church, they also lost all state support along with the buildings and property of the former church.

An effort to undo this unhappy turn of events was brought to the courts, but in 1820 the Supreme Judicial Court distinguished between the church, consisting of its members, and the church soci-
ety, which was a civil body consisting of the voters of the parish. 167 The court held that under the Massachusetts Constitution the church and its property belonged to the parish, which could select the minister. 168

As a result of the Dedham decision, 169 the orthodox Congregational Church in Massachusetts surrendered some eighty churches to the Unitarians with property value estimated by the Trinitarians to be in excess of six hundred thousand dollars. 170 By the early 1830's, there was no longer such desire for an established church, and in 1833 article XI of the amendments to the 1780 Constitution 171 was adopted and ratified by the voters by a ten-to-one margin, 172 establishing the church and terminating all state support.

Interestingly, the story of public aid to religion had no formal end in the State of New Hampshire during the period covered by this survey. Although political factors similar to those operating in Connecticut formally ended the system of tax support for religion in 1819, 173 section 6 of the Bill of Rights of that state contained throughout the nineteenth century a provision authorizing (but not requiring) towns to provide for the support of Protestant teachers. 174 There is no evidence, however, that any such payments were ever made. The State of Maine terminated financial aid to religion in 1820. 175 Although Vermont had prohibited mandatory financial aid to churches in 1777, 176 it apparently reestablished such aid in 1783 177 and abolished it once again in 1807. 178

168. Id.
169. See supra text accompanying notes 163-64.
170. J. MEYER, CHURCH AND STATE IN MASSACHUSETTS FROM 1740 TO 1833, at 177 (1930); W. WALKER, A HISTORY OF THE CONGREGATIONAL CHURCHES IN THE UNITED STATES 343 (6th ed. 1894).
171. Article XI provides that:
the several religious societies of this commonwealth . . . shall ever have the right to . . . contract with [their pastors or religious teachers] for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses; and . . . [non-members] shall not be liable for any grant or contract . . . entered into . . .

MASS. CONST. of 1780 art. XI, reprinted in 1 A. STOKES, supra note 21, at 426-27.
172. Id. at 426.
173. See L. BETH, supra note 28, at 68 (noting that the downfall of the tax support system was the result of the end of the Federalist party and the rise of Jeffersonianism); L. LEVY, supra note 33, at 40.
174. S. COBB, supra note 22, at 516; 1 A. STOKES, supra note 21, at 431-32.
175. L. BETH, supra note 28, at 68.
176. See supra note 120 and accompanying text.
177. S. COBB, supra note 22, at 517.
178. L. BETH, supra note 28, at 68; S. COBB, supra note 22, at 517.
V. Conclusion

It is arguable that the assertions made in the Mueller footnote\textsuperscript{179} and referred to in the majority opinion in Lynch v. Donnelly\textsuperscript{180} — that divisive political potential is relevant only in direct financial aid cases — are supported by the historical fact that political disputes during the colonial and early statehood periods raged almost solely over this issue. The Mueller footnote argued not from history, however, but from a highly technical and somewhat creative reading of the Lemon opinion's distinction of Everson v. Board of Education\textsuperscript{181} and Board of Education v. Allen,\textsuperscript{182} an interpretation of precedent which was aptly rejected in Justice Brennan's Lynch dissent, which pointed out that political divisiveness was considered a relevant factor in the post-Lemon, non-subsidy case of Walz v. Tax Commission.\textsuperscript{183} To the extent that the Mueller footnote can be supported by the history set forth herein it would be misplaced reliance. There is no basis for concluding that the divisiveness existing in the colonial and early statehood periods of our history primarily relating to direct financial assistance would or would not have been equally widespread had current forms of governmental aid to religion also been widespread. The fact is, however, that financial aid was the primary issue of the time, and was the issue over which the citizenry divided. The point is not whether our forefathers would have divided over other, modern issues. Rather it is that they did divide over a government/religion issue and that this division created a factionalism which found its way into the political process. Moreover, it is that the first amendment Establishment Clause was adopted at a time when there was widespread judgment that political division over religious issues, unlike other issues, was harmful. It is this judgment that must be considered whenever the "excessive governmental entanglement" prong of the Lemon test is at issue.

\textsuperscript{179} See supra note 15 and accompanying text.
\textsuperscript{180} See supra note 17 and accompanying text.
\textsuperscript{181} 330 U.S. 1 (1947).
\textsuperscript{182} 392 U.S. 236 (1968).