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Published as “The Last American Establishment: Massachusetts, 1780-1833,” in Carl H. Esbeck and Jonathan Den Hartog, eds., *Religious Dissent and Disestablishment: Church-State Relations in the New American States, 1776-1833* (Columbia, MO: University of Missouri Press, 2019), 399-424 (with Justin Latterell)

## **The Last American Establishment: Massachusetts, 1780-1833**

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### **Abstract**

*This chapter surveys the arguments for and against religious establishment and religious freedom that informed the Massachusetts Constitution of 1780 and the subsequent amendments of 1821 and 1833. Most preachers, politicians, and citizens during this period agreed that religion was an essential source of morality, and that the Constitution should respect and encourage diverse religious beliefs and practices, at least among Protestants. But controversial issues including religious test oaths, church membership rules, and the use of taxes to support Congregationalist Churches created sharp political divisions. In 1833, the Eleventh Amendment to the Massachusetts Constitution moved away from religious establishment. It made church membership and funding entirely voluntary; granted all religious societies the right to hire their own clergy, to build their own churches, and to manage their own membership rolls; promised equal protection of the law to believers of all sects and non-believers, alike; and ensured that individual members of those sects could exit without incurring liability for contracts subsequently made by the other members of that sect.*

**Keywords:** Massachusetts; 1780 Constitution; religious liberty; liberty of conscience; Puritanism; Congregationalism; John Adams; establishment of religion; religious test oaths; tithes; moral establishment; covenant; disestablishment of religion

The 1780 Constitution of Massachusetts is the oldest continuously operating written constitution in the world.<sup>1</sup> Its principal drafter was John Adams – the “atlas” and “colossus” of the Revolution, America’s future second president, and already a formidable lawyer and legal historian.<sup>2</sup> In both Massachusetts law and federal law, Adams sought to balance religious liberty with religious establishment while ensuring that “all men of all religions consistent with morals and property ... enjoy equal liberty

[and] security of property ... and an equal chance for honors and power.” The 1780 Constitution reflected Adams’ belief that, in order to improve society, “we should begin by setting conscience free.”<sup>3</sup> At the same time, the 1780 Constitution instituted Adams’ vision of a “most mild and equitable establishment of religion”<sup>4</sup> featuring Puritan covenant ceremonies, Protestant religious test oaths, and special protections, privileges, and funding for preferred forms of Christian worship, education, morality, and charity.

Adams’ formulation sought to balance the demands of the Puritan Congregationalists who favored establishment with the demands of swelling groups of Baptists, Methodists, Catholics, and freethinkers who wanted the religious freedom guarantees available in other states. It mustered just enough support to win ratification in 1780, but the balance fell apart in subsequent decades as Congregationalists fractured into Unitarian and Trinitarian factions, and religious pluralism grew. While the Constitution retained ceremonial and moral features of the colonial establishment, amendments in 1821 and 1833 rejected religious test oaths and religious taxes.<sup>5</sup>

This chapter surveys the arguments for and against religious establishment and religious freedom that informed the Constitution of 1780 and the amendments of 1821 and 1833. The coalitions of politicians, preachers, and citizens making these arguments changed between 1778 (when the first constitutional draft failed) and 1833 (when religious taxes were repealed). The logic of their arguments, however, remained relatively stable. Virtually everyone agreed that religion was an essential source of public and private morality, and that the Constitution should encourage diverse religious beliefs and practices, at least among Protestants. Nearly everyone also agreed that the laws should equally respect and reflect the religious sentiments of all citizens. What was controversial was how to achieve these goals. Did the integrity of governmental institutions require public officials to swear religious test oaths of office? Did religious liberty extend equally to all churches and creeds – including Catholics and non-Christians who remained deeply suspect? Did the moral functions and vitality of religion require tax-funded churches and clergy, or would religion flourish better if left on its own? Such questions divided Massachusetts lawmakers along political, regional, and religious lines, and ultimately led to a new consensus about how best to order church-state relations.

## I.

The Massachusetts Constitution of 1780 is a document of nearly 12,000 words. It has a preamble and two main parts. Part One is a Declaration of Rights in thirty articles. Part Two is a Frame of Government in six chapters. Religion figured in ten of these provisions – the Preamble, Articles I, II, III, VII, and XVIII of the Declaration of Rights, and Chapters I, II, V and VI of the Frame of Government. These provisions reflect the long history of Congregational establishment going back to the Mayflower Compact of 1620, and the growing challenges by religious dissenters.

The 1780 Constitution replaced the 1691 Provincial Charter, issued by the British Crown to govern the Massachusetts colony. In 1778, a constitutional convention produced a draft constitution, but the people rejected it, in no small part because it lacked conventional civil and religious freedom provisions.<sup>6</sup> On February 20, 1779, the Massachusetts House of Representatives called for a new constitutional convention, and “lawfully warned” the “Selectmen of the several Towns” to deliberate their concerns and instruct their delegates.<sup>7</sup>

Religion figured prominently in these deliberations and instructions, with some townships calling for complete religious freedom, others for continued religious establishment. The delegate of Pittsfield, for example, came armed with a provision guaranteeing wide religious freedom:

[E]very man has an unalienable right to enjoy his own opinion in matters of religion, and to worship God in that manner that is agreeable to his own sentiments without any control whatsoever, and that no particular mode or sect of religion ought to be established but that every one be protected in the peaceable enjoyment of his religious persuasion and way of worship.<sup>8</sup>

By contrast, the Township of Sandisfield instructed its delegate to seek protections for the local Protestant establishment, along with guarantees of toleration for other Christians:

[Y]ou will Endeavour in the forming of the Constitution that the Free Exercise of religious principles or Profession, worship and Liberty of Conscience shall be for ever Secured to all Denominations of Protestants – and Protestant Dis[s]enters of all Denominations within the State, without any Compulsion whatever. Always allowing the Legislative Body of this State the Power of Toleration to other Denominations of Christians from time to time as they Shall see Cause, at the same time, Reserving to our Selves, the Right of Instructions to our Representatives Respecting Said Toleration as well as in other Cases.<sup>9</sup>

Delegates could also turn to scores of sermons and pamphlets that circulated in Massachusetts in the later 1770s.<sup>10</sup> The oft-printed pamphlet *Worcestriensis, Number IV*, for example, defended a generous toleration of all religions and a gentle establishment of the Protestant religion. The pamphlet demanded that “no part of the community shall be permitted to perplex and harass the other for any supposed heresy, but that each individual shall be allowed to have and enjoy, profess and maintain his own system of religion, provided it does not issue in overt acts of treason undermining the peace and good order of society. To allow one part of a society to lord it over the faith and consciences of the other, in religious matters, is the ready way to set the whole community together by the ears.”<sup>11</sup> State officials could not, therefore, command citizens to conform to their preferred religion, or subject nonconformists “to

pains, penalties, and disabilities” on account of their religious beliefs. But state officials could “give preference to that profession of religion which they take to be true.”

The establishment contended for ... must proceed only from the benign principles of the legislature from an encouragement of the General Principles of religion and morality, recommending free inquiry and examination of the doctrine said to be divine; using all possible and lawful means to enable its citizens to discover the truth, and to entertain good and rational sentiments, and taking mild and parental measures to bring about the design; these are the most probable means of bringing about the establishment of religion.<sup>12</sup>

Under this view, the state could extract religious oaths from public office-holders, “for there is no stronger cement of society.” The state could punish profanity, blasphemy, and debauchery, all of which “strike a fatal blow at the root of good regulation, and well-being of the state.” And the state could provide “able and learned teachers [ministers] to instruct the people in the knowledge of what they deem the truth, maintaining them by the public money, though at the same time they have no right in the least degree to endeavor the depression of professions of religious denomination.”<sup>13</sup>

Phillips Payson, an influential Congregationalist minister, recommended a firm establishment and warned against the “dangerous innovations” pressed by dissenters. To be sure, Payson wrote, “religious or spiritual liberty must be accounted the greatest happiness of man, considered in a private capacity.”<sup>14</sup> But, he insisted:

[R]eligion, both in rulers and people [is] ... of the highest importance to ... civil society and government, ... as it keeps alive the best sense of moral obligation, a matter of such extensive utility, especially in respect to an oath [of office], which is one of the principal instruments of government. The fear and reverence of God, and the terrors of eternity, are the most powerful restraints upon the minds of men; and hence it is of special importance in a free government, the spirit of which being always friendly to the sacred rights of conscience, it will hold up the gospel as the great rule of faith and practice. Established modes and usages in religion, more especially the stated public worship of God, so generally form the principles and manners of a people, that changes or alterations in these, especially when nearly conformed to the spirit and simplicity of the Gospel, may very well be esteemed very dangerous experiments in government. ... Let the restraints of religion once be broken down, as they infallibly would be by leaving the subject of public worship to the humours of the multitude, and we might well defy all human wisdom and power to support and preserve order and government in the State.<sup>15</sup>

Religion, under this view, was too important to leave to chance and individual initiative. Supporting public worship – while also protecting the individual conscience – was an essential prerogative of the state.

By marked contrast, Isaac Backus, the most able Baptist advocate of the day, called for the end of all religious establishments. Backus charged that Massachusetts authorities were “assuming a power to govern religion, rather than being governed by it.” “I am as sensible of the importance of religion and of the utility of it to human society, as Mr. Payson,” Backus wrote. “And I concur with him that the fear and reverence of God and the terrors of eternity are the most powerful restraints upon the minds of men. But I am so far from thinking with him that these restraints would be broken down if equal religious liberty was established.” Look at the long history of Christian establishment, Backus argued. It has led not to pure religion; instead “tyranny, simony, and robbery came to be introduced and to be practiced under the Christian name.” Look at Boston, which has had no religious establishment of late; there religion, state, and society all flourish without fail. Look at the principles of the Revolution: “all America is up in arms against taxation without representation.” Just as certainly as Americans were not represented in the British Parliament, so religious dissenters are not represented among the established civil authorities, yet they are still subject to their religious taxes and regulations. Look at the Bible: “God has expressly armed the magistrate with the sword to punish such as work ill to their neighbors, and his faithfulness in that work and our obedience to such authority, is enforced [by the Bible]. But it is evident that the sword is excluded from the kingdom of the Redeemer. ... [I]t is impossible to blend church and state without violating our Lord's commands to both.”<sup>16</sup> For all of these reasons, Backus and his fellow Baptist dissenters demanded that religion remain an entirely free and voluntary matter.

## II.

Such were some of the discordant sentiments on religious establishment and religious freedom on the eve of the second constitutional convention. It was clear that the Congregationalists would insist on some form of religious establishment. As John Adams put it: “We might as soon expect a change in the solar system as to expect they would give up their establishment.”<sup>17</sup> It was equally clear that religious dissenters would insist on disestablishment and free exercise of religion – particularly since other states had granted such liberties. Some *via media* between these competing perspectives was needed.

On September 1, 1779, 293 delegates gathered in Boston.<sup>18</sup> In the Convention were the leading lights of Massachusetts – 39 merchants, 31 lawyers, 22 farmers, 21 clergy, 18 physicians, and 18 magistrates.<sup>19</sup> Most delegates were Congregationalists. Five delegates were Baptists. A few were suspected to be Quaker, Anglican, or Catholic.<sup>20</sup>

On September 4, the Convention elected a committee of 27 members – later augmented by four – to prepare a declaration of rights and frame of government. This committee, in turn, delegated the drafting to a three-member subcommittee of James Bowdoin, Samuel Adams, and John Adams, with John Adams selected to push the pen for the subcommittee. He completed a draft by mid-October. First the three-member subcommittee, then the full drafting committee made modest alterations to Adams' draft. The committee submitted its draft to the Convention on October 28, 1779.<sup>21</sup> The Convention debated the draft until November 12. Adams participated to this point, but set sail thereafter for France. The Convention completed its deliberations between January 27 and March 1, 1780, now without Adams.

**A Limited Freedom of Religion.** The Constitution included several religious freedom provisions. Article I of the Declaration of Rights provided: "All men are born free and equal, and have certain natural, essential, and unalienable rights" of life, liberty, property, and pursuit of happiness.<sup>22</sup> Article II tendered more specific protections: "It is the right as well as the duty of all men in society, publickly, and at stated seasons to worship the SUPREME BEING, the great Creator and preserver of the Universe. No subject shall be hurt, molested, or restrained, in his person, Liberty, or Estate, for worshipping GOD in the manner and season most agreeable to the Dictates of his own conscience, or for his religious profession or sentiments; provided he doth not Disturb the public peace, or obstruct others in their religious Worship." Article III tacitly acknowledged the right to form religious associations, to select one's own minister, and to pay tithes directly to one's own church. And Chapter VI on the Frame of Government exempted Quakers from the swearing of oaths because of their scruples of "conscience."

Yet the 1780 Constitution imposed several limits on religion as well. Religious worship was not just a right, but also a duty in Article II. Indeed, Adams' original draft spoke only of "the duty" to worship. Only after other delegates objected was it amended to guarantee "the right as well as the duty of all men" to worship. Moreover, while a person could worship in "the manner and season most agreeable to the Dictates of his own conscience," such worship was to be directed to "the SUPREME BEING, the great Creator and preserver of the Universe," leaving non-theists unprotected. Moreover, worship, per Article III, was to include "conscientious and convenient" "attendance upon the instructions of ministers" "at stated times and seasons" as well as payment of tithes.

Religious freedom was more restricted for those in political office. In Chapter I of the Frame of Government, Adams stipulated that no person was eligible to serve in the House of Representatives "unless he be of the Christian religion." The Convention struck this provision, but it left untouched Chapter II, where Adams imposed the same religious conditions upon the offices of Governor and Lieutenant Governor.<sup>23</sup> In the same spirit, Adams proposed in Chapter VI that all state officials and appointees swear the same religious test oath "that I believe and profess the Christian religion and have a firm persuasion of its truth." The Convention insisted on a slightly reworded oath for

elected executive and legislative officers, requiring all other officers to declare their "true faith and allegiance to this Commonwealth." After several delegates argued for a specifically Protestant test oath, the convention added to both oaths a rather obvious anti-Catholic provision, which Adams and others later protested without success: "I do renounce and abjure all allegiance, subjection and obedience to ... every ... foreign Power whatsoever: And that no foreign ... Prelate ... hath, or ought to have, any jurisdiction, superiority, pre-eminence, authority, dispensing, or other power, in any matter, civil, ecclesiastical or spiritual within this Commonwealth."<sup>24</sup> Adams' draft oath had concluded "So help me God," but then made a specific provision "that any person who has conscientious scruples relative to taking oaths, may be admitted to make solemn affirmation" by other means. After delegates protested that so generic an exemption might be abused, the Convention restricted the exemption to Quakers.<sup>25</sup>

**The Establishment of Religion.** Not only was religious liberty narrowly drawn in the 1780 Constitution, it was further limited by religious establishment norms. The establishment had ceremonial, moral, and institutional features. The *ceremonial* and *moral* features reflected a general consensus about the role of religion in both government and society, and these provisions passed with little controversy. The *institutional* features of establishment, especially the compulsory payment of religious taxes, were contested in the Convention and ratification debates.

**Ceremonial Establishment.** The ceremonial elements of the establishment were most evident in the Preamble's declaration that "the whole people covenants with each Citizen, and each Citizen with the whole people, that all shall be governed by certain Laws for the Common good."

[T]he people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the Universe, in affording us, in the course of his Providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprize, o[f] entering into an Original, explicit, and Solemn Compact with each other; and of forming a New Constitution of Civil Government for ourselves and Posterity; and devoutly imploring His direction in so interesting a Design, DO agree upon, ordain and establish the following Declaration of Rights and Frame of Government.

This was classic covenant liturgical language, rooted in New England tradition going back to the Mayflower Compact of 1620.<sup>26</sup> The nature of the constitution was clear; it was a "solemn" covenant or compact with God invoked as witness, judge, and participant. The purposes of the covenant were clearly set forth: to create and confirm the identity of the "peoples" and "citizens of Massachusetts," and their devotion to the "common good," and to the rights of the people and the powers of the government. The ethic of the covenant was also defined – featuring "gratitude," "peacefulness," integrity ("without fraud, violence, or surprize"), and prayerful devotion ("devoutly imploring His direction in so interesting a Design").

Covenant rituals also informed the religious test oaths for public servants to be sworn before the people and their representatives in full assembly: “I, A.B, do declare, that I believe the christian religion, and have a firm persuasion of its truth ... and I do swear, that I will bear true faith and allegiance to the said Commonwealth ... so help me God.” This language reflected the conventional view that oaths functioned as “a cement of society” and as “one of the principal instruments of government.” Oaths were not merely symbolic, but a tangible confirmation of the covenant between God, the people, and the rulers, with solemn duties undergirded by “the fear and reverence of God, and the terrors of eternity.”<sup>27</sup>

Beyond the preamble and test oaths, the Constitution had other ceremonial elements of a religious establishment. God is invoked, by name or pseudonym (e.g., “Great Legislator of the Universe” and “Supreme Being”) a dozen times. References to the “common good” or “public good” appear four more times, as do two further references to divine “blessings” and “privileges.” With the exception of the oath requirement, these provisions were passed without comment, and still remain in place today.

***Moral Establishment.*** The 1780 Constitution established not only covenant ceremonies but also Christian morals. Article II of the Declaration of Rights, we saw, rendered religious worship both a right and a duty. Article III followed with the reason for this duty: “the happiness of a people, and good order and preservation of civil government, essentially depend upon piety, religion, and morality; and ... these cannot be generally diffused through a Community, but by the institution of publick Worship of God, and of public instructions in piety, religion, and morality.” Religion was closely bound to morality, the Constitution confirmed, and both were essential to happiness and social order.

Moral considerations also animated the constitutional provisions on education. Chapter V of the Frame of Government provided: “Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, [are] necessary for the preservation of their rights and liberties.” Officials were thus called “to cherish the interests of literature and sciences, and all seminaries of them; ... to encourage private societies and public institutions, rewards and immunities, for the promotion of [education] ...; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humour, and all social affections, and generous sentiments among the people.” The same Chapter V confirmed and commended the incorporation of Harvard College, since “the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the christian religion, and the great benefit of this and other United States of America.”<sup>28</sup> None of these provisions establishing a public religious morality triggered much debate during the constitutional convention, and most were not amended.



***Institutional Establishment.*** The foregoing consensus on ceremonial and moral matters stood in marked contrast to the controversies over Article III's religious taxes "for the support and maintenance of public protestant teachers of piety, religion and morality." This provision continued colonial patterns. A Massachusetts colonial law of 1692 had effectively blended church and state for purposes of taxation.<sup>29</sup> The law designated each of the 290 odd territories within the colony as both a "parish" and a "township" under the authority of one city council. In townships with more than one church, the multiple "parishes" were called "precincts," and each of these likewise was subject to the same council's authority. Each town/parish was required to have at least one Congregationalist "teacher of religion and morality." This minister would lead the local community in worship, and often in education and charity as well. The community was required to provide the minister with a salary, sanctuary, and parsonage. Funds to do so came from religious taxes usually called tithes, sometimes called church, parish, or religious rates. These were collected from all persons in the township, who were by definition also members of the parish, regardless of which church they attended.<sup>30</sup>

This system worked well enough when all persons within a township or parish were also active members of the established Congregational church. It did not work for persons who were religiously inactive, or were members of a non-Congregationalist church, whether Baptist, Quaker, Anglican, Catholic, or Free Church. As the number of dissenting churches grew, so did the protests to taxes to support Congregationalist ministers and churches. During the eighteenth century, colonial courts eventually carved out exceptions for some religious dissenters, allowing them to direct their tithes to support their own ministers and churches. Such dissenters, however, were required to register each church as a separate religious society, and to prove their faithful attendance at the same. Not all dissenting churches were able or willing to meet the registration requirements, and not all townships cooperated in granting the registrations or tithe exemptions.<sup>31</sup> If the dissenting church was too small to have its own full-time minister, the township denied them registration. If the dissenting church was conscientiously opposed to incorporation or registration, as were Baptists after 1773, their members were not exempt from taxation. If a member of a registered dissenting church was lax in attending worship, he was denied exemption from tithe payments. And if a town treasurer was pressed for revenue, or prejudiced against a certain group, he could refuse to give dissenting ministers their share of the tithes. In many cases, the Massachusetts courts proved churlish in granting standing, let alone relief, to individuals who protested such inequities.<sup>32</sup>

It was this century-long system of religious taxes that the 1780 Massachusetts Constitution aimed to perpetuate in Article III. The article proved so controversial that it took up more than a third of the Convention's debates.<sup>33</sup> The initial draft of Article III, submitted to the Convention on October 28, 1779, stated:

Good morals, being necessary for the preservation of civil society; and the knowledge and belief of the being of GOD, His providential government of the world, and of a future state of rewards and punishment, being the

only true foundation of morality, the legislature hath, therefore, a right, and ought to provide, at the expense of the subject, if necessary, a suitable support for the public worship of GOD, and of the teachers of religion and morals; and to enjoin upon all the subjects an attendance upon these instructions, at stated times and seasons; provided there be any such teacher, on whose ministry they can conscientiously attend.

All monies, paid by the subject of the public worship, and of the instructors in religion and morals, shall, if he requires it, be uniformly applied to the support of the teacher or teachers of his own religious denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.<sup>34</sup>

The first paragraph of this draft, stipulating the necessity and utility of public worship and religious instruction, was not particularly controversial. The second paragraph, however, mandating the collection of religious tithes to support the same, was a matter of great controversy. The initial reaction to the draft was so heated that delegates voted to put off further debate for a three-day period starting November 1. They also voted to suspend the rule that no delegate could speak twice to the same issue without special privilege from the chair. Rancorous debate over the draft Article broke out immediately when the floor was opened on November 1 – some condemning the provision as “too pale an approximation of a proper establishment,” others calling for abolition of the Article altogether, and still others decrying the insufficient recognition of the concessions that dissenters had arduously won over the years.

With the Convention deadlocked on November 3, the delegates appointed a seven-member *ad hoc* committee, chaired by a Baptist delegate, Rev. Noah Alden of Bellingham, to redraft Article III.<sup>35</sup> On November 6, this committee put a new draft before the Convention that spelled out the religious tax system in more detail. This draft was debated intermittently for the next four days, and modest changes were approved.<sup>36</sup> On November 10, a motion to abolish the Article altogether was defeated. A slightly amended committee draft was passed the following day. It stated in full:

As the happiness of a people, and good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a Community, but by the institution of publick Worship of God, and of public instructions in piety, religion, and morality: Therefore, to promote the happiness and to secure the good order and preservation of their government, the people of this Commonwealth have a right to invest their legislature with power to authorize and require, and their Legislature shall, from time to time, authorize and require, the several Towns, Parishes precincts and other bodies politic, or religious societies, to make suitable provision, at their own Expence, for the institution of the Public worship of GOD, and for the

support and maintenance of public protestant teachers of piety, religion and morality, in all causes which provision shall not be made Voluntarily. – And the people of this Commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the Subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can Conscientiously and conveniently attend. – PROVIDED, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at times, have the exclusive right of electing their public Teachers, and of contracting with them for their support and maintenance. – And all monies, paid by the Subject of the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose institution he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said monies are raised – And every denomina[t]ion of christians, demeaning themselves peaceably, and as good Subjects of the Commonwealth, shall be equally under the protection of the Law: And no subordination of any one sect or denomination to another shall ever be established by law.<sup>37</sup>

This final text made some concessions to dissenters.<sup>38</sup> The tithe collection system was now to be "voluntary" and local rather than state-wide – allowing Boston and, later, other townships to forgo mandatory tithing, with churches securing their own support from their members through voluntary tithes, tuition, or pew rents. Religious societies could contract individually with their own minister – allowing them to pay their tithes directly to their chosen minister rather than to a potentially capricious town treasurer. Local townships and religious societies could now participate in the selection of their parish minister, rather than be automatically saddled with a Congregationalist minister. In later years, this provision “had some unexpected results. Several of the towns and parishes, which thereby were given the exclusive right to elect their ministers ... were converted to Unitarianism and settled Unitarian pastors over old Calvinist churches.”<sup>39</sup>

Although it notably acknowledged the equality of diverse religious groups before the law, the final draft of Article III largely retained the traditional tithing system and jettisoned some of the hard-fought concessions that Baptists, Anglicans, and other dissenters had secured through litigation. As Samuel Eliot Morison wrote: “Article III was even less liberal than [the colonial] system, for instead of exempting members of dissenting sects from religious taxation, it merely gave them the privilege of paying their taxes to their own pastors. Unbelievers, non-church goers, and dissenting minorities too small to maintain a minister had to contribute to Congregational worship. The whole Article was so loosely worded as to defeat the purpose of the fifth paragraph [guaranteeing the equality of all sects and denominations]. Every new denomination that entered the Commonwealth after 1780, notably the Universalists and Methodists, had to wage a long and expensive lawsuit to obtain recognition as a religious sect. ... [A] subordination of sects existed in fact.”<sup>40</sup>

## III.

On March 2, 1780, the Convention put the draft constitution before the people for ratification. The Convention also provided a committee report that explained the draft, including the provisions juxtaposing religious freedom and religious establishment:

[W]e have, with as much Precision as we were capable of, provided for the free exercise of the Rights of Conscience: We are very sensible that our Constituents hold those Rights infinitely more valuable than all others; and we flatter ourselves, that while we have considered Morality and Public Worship of GOD, as important to the happiness of Society, we have sufficiently guarded the rights of Conscience from every possible infringement. This Article underwent long debates, and took Time in proportion to its importance; and we feel ourselves peculiarly happy in being able to inform you, that the debates were managed by persons of various denominations, it was finally agreed upon with much more unanimity than usually takes place in disquisitions of this Nature. We wish you to consider the Subject with Candor, and Attention. Surely it would be an affront to the People of Massachusetts-Bay to labour to convince them, that the Honor and Happiness of a People depend upon Morality; and that the Public Worship of GOD has a tendency to inculcate the Principles thereof, as well as to preserve a people from forsaking Civilization, and falling into a state of Savage barbarity.<sup>41</sup>

The people gave the draft their full “Candor and Attention” during the ratification process. Of the 290 eligible townships, 188 sent in returns that have survived, a number of them criticizing the religion provisions.<sup>42</sup> One group charged that Article III's establishment of religion contradicted the religious liberties set out in Article II.<sup>43</sup> The return of the Town of Dartmouth put it thus:

It appears doubtful in said Articles whether the Rights of Conscience are sufficiently secured or not to those who are really desirous to, and do attend publick Worship, and who are not limited to any particular outward Teacher ... we humbly conceive it intirely out of the power of the legislature to establish a way of Worship that shall be agreable to the Conceptions and Convictions of the minds of the individuals, as it is a matter that solely relates to and stands between God and the Soul before whose Tribunal all must account each one for himself.<sup>44</sup>

A second group of critics retorted that the happiness of a people and the good order and preservation of civil government did not, as a matter of historical fact, depend upon piety, religion, and morality.<sup>45</sup> The Return of the Town of Natick put it well:

When both antient History and modern authentik information concur to evince that flourishing civil Governments have existed and do still exist without the Civil Legislature's instituting the publick Christian worship of God, and publick Instruction in piety and the Christian,— but that rather wherever such institutions are fully [executed] by the civil authority have taken place among a people instead of essentially promoting their happiness and the good order and preservation of Civil Government, it has We believe invariably promoted impiety, irreligion, hypocrisy, and many other sore and oppressive evils.<sup>46</sup>

A third group of critics acknowledged the public utility of piety, morality, and religion, but thought that an establishment would jeopardize both religion and the state. The Return of the Town of Petersham put it thus:

We grant that the Happiness of a People and the good Order and preservation of Civil Government Greatly Depends upon Piety, Religion, and Morality. But we Can by no Means Suppose that to Invest the Legislature or any Body of men on Earth with a power absolutely to Determine For others What are the proper Institutions of Divine Worship and To appoint Days and seasons for such Worship With a power to impose and Indow Religious Teachers and by penalties and punishments to be able to Enforce an Attendance on such Publick Worship or to Extort Property from any one for the Support of what they may Judge to be publick Worship Can have a Tendency to promote true piety Religion or Morality But the Reverse and that such a Power when and where Ever Exercised has more or Less Been an Engine in the Hands of Tyrants for the Destruction of the Lives Liberties and Properties of the People and that Experience has abundantly Taught Mankind that these are Natural Rights which ought Never to be Delegated and Can with the greatest propriety be Exercised by Individuals and by every Religious Society of men.<sup>47</sup>

A fourth group of critics believed that to institute even a mild establishment of religion would lead to more odious forms. A pamphleteer named “Philanthropos” puts this argument well:

Perhaps it will be said that the civil magistrate has a right to oblige the people to support the ministers of the gospel, because the gospel ministry is beneficial to society. [But if so] it will follow, by the same law, that he may adopt any of the maxims of the religion of Christ into the civil constitution, which he may judge will be beneficial to civil society ... if magistrates may adopt any the least part of the religion of Christ into their systems of civil government, that supposes magistrates to be judges what parts shall be taken, and what left; power, then which nothing can be more dangerous, to be lodged in the hands of weak and fallible men.<sup>48</sup>

A fifth group of critics repeated Isaac Backus' earlier charge that Article III constituted a species of taxation without representation. As the return of Ashby put it: "Religious Societys as such have no voice in Chusing the Legeslature, the Legeslature therefore have no right to make law binding on them as such; every religeous Society, as such, is intirely independent on any body politick, the Legeslature having therefor no more right to make laws Binding on them, as such, then the Court of Great Britton have to make Laws binding on the Independent states of America." Indeed, the Ashby Return commented later, "to invest their Legeslature with power [to] make Laws that are binding on Religious Society ... is as much to say we will not have Christ to reign over us[,] that the Laws of this Kingdom are not sufficient to govern us, that the prosperity of this Kingdom is not equally important with the Kingdoms of this world."<sup>49</sup>

A sixth group of critics argued that Article III's guarantee of equality of all denominations contradicted the provisions on tax support for some denominations. If "all religious sects or denominations peaceably demeaning themselves" are equal before the law, why are some supported by taxes and others not? Why must religions be incorporated by the state in order to receive taxes, when some religions do not accept religious incorporation by the state? True religious liberty would leave the "several religious societies of the Commonwealth, whether corporate or incorporate" to their own peaceable devices. It would grant them "the right to elect their pastors or religious teachers, to contract with them 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."<sup>50</sup>

Proponents of Article III responded harshly, accusing critics of religious bigotry and chastising them for inviting moral decay under the guise of religious liberty. The "ancient atrocities of the German Anabaptists were raked up" to discredit Backus and his fellow Baptists, who were portrayed as "Disguised Tories, British emissaries, profane and licentious deists, avaricious worldlings, disaffected sectaries, and furious blind bigots."<sup>51</sup>

The Baptists, however, were not alone in opposing Article III. Indeed, the critics of Article III should have been numerically strong enough to block ratification. The clerks kept close tallies on the votes for Article III, and they "fell some 600 votes short of the necessary two-thirds majority for ratification" – with the popular vote in favor standing at 8,865 to 6,225 or a little over 58 per cent.<sup>52</sup> Though the individual township tallies were less closely kept for other provisions, it appears that Chapter II and VI, requiring the Governor to be a Christian and profess his adherence to the same in an oath, did not garner two-thirds support.<sup>53</sup> Nevertheless, delegates to the Convention – out of ignorance of the exact vote tally, or perhaps indifference to the same given the political pressure to succeed – treated the Constitution as fully ratified. On June 16, 1780, James Bowdoin, the President of the Convention, announced that the entire Constitution had garnered the requisite two-thirds vote.

On October 25, 1780, the Constitution went into effect, the first day that the General Court sat after ratification. Among the first acts of the General Court was a politically expedient pledge of support for religious liberty: “Deeply impressed with a sense of the importance of religion to the happiness of men in civil society to maintain its purity and promote this efficacy, we shall protect professors of all denominations, demeaning themselves peaceably and as good subjects of the Commonwealth, in the free exercise of the rights of conscience.”<sup>54</sup>

#### IV.

Massachusetts’ experiment with religious liberty and religious establishment encountered numerous challenges over the next half-century. On the one hand, the 1780 Constitution – softened by a pair of “Religious Freedom Acts” passed in 1811 and 1824 – was “mild and equitable” enough for dissenting churches to grow in number, membership, and influence. On the other hand, as some churches liberalized and split along theological lines, and as Congregational churches themselves splintered into Trinitarian and Unitarian factions, public support for the establishment eroded.<sup>55</sup> New political coalitions took up old arguments to challenge the 1780 Constitution.<sup>56</sup> Article III was the main target. But dissenters also challenged other aspects of the law – the laws and policies supporting traditional religious instruction at Harvard College; the hiring practices for clergy in parish churches; the tests used by courts and legislatures for dividing church property between schismatic factions; the imposition of religious oaths and tests for public office; the compulsory church attendance laws; and more. Between 1780 and 1833, citizens and legislators winnowed down the state’s religious establishment, ultimately leading to final disestablishment in 1833.

**Constitutional Convention of 1821.** The Constitutional Convention of 1820-1821 was a critical step in this disestablishment process.<sup>57</sup> Initiated by a popular referendum in 1820, the Convention addressed a wide range of constitutional issues and initiatives – notably oaths and tests for public office, the leadership and religious affiliation of Harvard College, and the provision of public funds for religious worship under Article III.<sup>58</sup> A “capable and experienced body of legislators”<sup>59</sup> debated these issues at length. Baptists – now flanked by a growing number of Methodists, Universalists, Quakers, Episcopalians, and even a few Congregationalists<sup>60</sup> – again led the effort to reform the state’s religious establishment laws. Support for the establishment was wobbly, with many legislators admitting they were of two minds.<sup>61</sup> The Convention proposed fourteen amendments, four of which would have tweaked or transformed constitutional provisions on religion.<sup>62</sup> However, the only amendments that voters approved were those that repealed religious oaths and tests for public office.

The 1821 debates over religious oaths and tests echoed familiar themes. Virtually everyone continued to affirm the value of religion as a foundation of personal and political morality – something that was relevant for legislators tasked with promoting the common good. But critics challenged these provisions on practical,

theological, and political grounds. James Prince of Boston, for example, emphasized that the rights of conscience were “unalienable” and that religion was solely “a matter between God and the individual.”

In forming or revising the social compact, let us then take heed, that we do not insert or retain any principle which by *possible construction* may interfere with, or abridge such sacred, such inestimable rights by an inquiry into opinions for which man is only accountable to his God. Social duties are between man and man. Religious duties are between God and the individual. ... Secondly – I hold that this act of injustice toward the individual is neither politic nor expedient; first, because ... it may deprive society of talent and moral excellence, which should always be secured and cherished as one of the best means of preserving the prosperity of the Commonwealth; and secondly, while it may thus exclude men possessing such useful and amiable qualification, yet it is no effectual safeguard whereby to keep out ambitious, unprincipled men from office, or a seat in the public councils. And, I moreover hold, that the cause of christianity does not require such a qualification to support it. This religion is founded on a rock and supported by a power which humanity cannot affect – it does not want the secular arm to defend it – its divine origin, and its own intrinsic merit, ever have been, and ever will be, its firmest support.<sup>63</sup>

However, defenders of religious oaths and tests reminded the people of the importance of having rulers who could affirm and maintain Christian beliefs and practices in accordance with the founding covenant of the state. The Reverend Joseph Tuckerman of Chelsea, for example, asked, “If our religion be from God, and if it be our duty, by all means which are consistent with its spirit, to promote its progress, it is a question on which we ought to pause, whether we shall open the door of office indiscriminately to those who believe, and to those who reject, this revelation of God’s will. ... If men should be elevated to high and responsible stations, who are enemies of christianity, may we not look with some apprehension to the consequences?”<sup>64</sup>

Still others were ambivalent about religious tests and oaths for political office. The famed orator and statesman Daniel Webster saw no reason why “the people” could not impose religious qualifications – or any other qualifications, for that matter – on public offices. “All bestowment of office remaining in the discretion of the people, they have, of course, a right to regulate it, by any rules which they may deem expedient.”<sup>65</sup> But Webster concluded that religious test oaths were not necessary insofar “as there is another part of the constitution which recognizes in the fullest manner the benefits which civil society derives from those Christian institutions which cherish piety, morality, and religion.” “I am desirous,” he continued, “in so solemn a transaction as the establishment of a constitution, that we should keep in it an expression of our respect and attachment to christianity; – not, indeed, to any of its peculiar forms, but to its general principles.”<sup>66</sup> For Webster, the general ceremonial



and moral establishment provisions of the Constitution were enough to ensure adherence to Christian values.

Ultimately the Convention proposed to abolish the religious test requirement and to modify the oath to read, “I, A. B., do solemnly swear that I will bear true faith and allegiance to the Commonwealth of Massachusetts and will support the constitution thereof. *So help me God.*”<sup>67</sup> The proposed amendment further allowed Quakers to “affirm” rather than “swear” the oath, and to replace the words, “*So help me God*” with “This I do, under the pains and penalties of perjury.” Isaac Parker, speaking on behalf of the Convention in its official “Address to the People,” reported these changes matter-of-factly:

We have agreed that the declaration of belief in the Christian religion ought not to be required in the future; because we do not think the assuming of civil office a suitable occasion for so declaring; and because it is implied, that every man who is selected for office, in this community, must have such sentiments of religious duty as relate to his fitness for the place to which he is called.”<sup>68</sup>

Massachusetts voters agreed and ratified these constitutional amendments in the spring of 1821.

**Toward Disestablishment.** The Convention of 1821 proposed other amendments to Article III<sup>69</sup> that aimed to reform and clarify the patchwork of court rulings and political measures from 1780 forward, but these efforts were defeated.<sup>70</sup> One proposed amendment sought to raise to constitutional status the Religious Freedom Act of 1811 that had standardized the application process for any group claiming exemption from tithes – a statute passed in response to the *Barnes v. Falmouth* case.<sup>71</sup> Another proposed amendment sought to regularize state procedures for the incorporation of religious groups.<sup>72</sup> Still another aimed to abolish mandatory church attendance. Another would have entitled citizens to transfer their religious taxes to any Christian church, rather than to Protestant churches alone.<sup>73</sup> The voters, however, rejected these amendments, leaving Article III in its original 1780 form.

Though Article III survived the Convention of 1821, subsequent lawsuits and controversies continued to erode popular and political support for it. The *Dedham* case, for example, pitted liberal Unitarian and traditional Trinitarian Congregationalists against one another in a contest over who controlled church property and clergy hiring decisions. The Unitarian parish members (who were required to pay religious taxes in support of the local church) sought to appoint a liberal minister for that local church. The Trinitarian members of the local church objected, claiming to be the true owners of the church and entitled to elect their own clergy. As the controversy unfolded, the local Trinitarian congregants left the church, taking the communion silver and other valuable church property with them. The Massachusetts courts held for the liberals – arguing that the parish, not the local church, controlled the church property and had the

authority to decide on clerical appointments.<sup>74</sup> Unitarians won legal victories in several other intrachurch disputes in the 1820s and 1830s, and gradually consolidated their control of other parishes, as well as the Harvard Divinity School.

In response, Trinitarians formed political alliances with opponents of the traditional establishment, making legislative concessions that ultimately undermined the religious tax system created by Article III. For example, a new Religious Liberties Act of 1824 made it even easier for non-church members and religious dissenters to claim exemptions from religious taxes, weakening the ability of parishes to collect tithes from dissenters and to support traditional Congregationalist ministries.<sup>75</sup> In other quarters, Article III proved to be increasingly “fruitful in lawsuits, bad feeling, and petty prosecution.”<sup>76</sup> By 1831, Samuel Lathrop, a leading member of the Senate, observed that Article III had grown decrepit. Serious disjunctions had developed between the law on the books and the law in practice:

Whenever any provision of the Constitution ceases to have any obligatory effect – when public opinion clearly and unequivocally demands of the legislature a disregard of its injunctions – when we are obliged to frame our laws in such a manner as to evade it, or directly to contravene it, and when our judicial tribunals give the sanction of constitutionality to such enactments, the continuance of the article remains not merely useless – it also tends to diminish our veneration for the whole instrument, and necessarily leads to a practice of immoral tendency. Will not these observations apply to the third article in our Bill of Rights?<sup>77</sup>

One year later, a widely circulated set of petitions decried the Constitution’s religion provisions as anachronistic, un-American, and even tyrannical – and quite in contrast with other New England states that had recently rejected religious taxes and other supports for religion.

Massachusetts stands alone among the States in the Union in making *legal* provision for the support of Religion; and notwithstanding the reverence which has by some been paid to the Third Article, it has become settled that it is a subject of vexation to many, a means of petty tyranny in the hands of a few, and altogether injurious to the cause of pure and undefiled religion.<sup>78</sup>

In 1833, those who sought to foster such “pure and undefiled religion” by way of church-state separation finally prevailed by passing the Eleventh Amendment to the Massachusetts Constitution. This Amendment replaced Article III with a system of religious voluntarism:

As the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government; – therefore, the several religious societies of this

commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them 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 all persons belonging to any religious society shall be taken and held to be members, until they shall file with the clerk of such society, a written notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract which may be thereafter made, or entered into by such society: – and all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.<sup>79</sup>

The Eleventh Amendment thus made church membership and funding entirely voluntary. It granted all religious societies – Christian or not, incorporated or not – the right to hire their own clergy, to build their own churches, and to manage their own membership rolls. It promised equal protection of the law to believers of all sects and non-believers, alike, and it ensured that individual members of those sects could exit without incurring liability for contracts subsequently made by the other members of that sect.

## V.

Additional amendments to the Constitution in 1855, 1917, and 1974 closed the door tightly against any form of state fiscal and material aid to religious institutions and endeavors – provisions that the Massachusetts courts have enforced with alacrity.<sup>80</sup>

For all of these changes, however, religion remains a feature of Massachusetts' Constitution, and the ceremonial and moral establishment policies remained in place after 1833. To this day, Article II protects the “right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe.” The Eleventh Amendment still justifies the principle of religious voluntarism on the ground that, “the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government.” The Preamble still acknowledges, “with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; ... [while] devoutly imploring His direction” in this constitutional covenant. In some ways, the chastened remnants of Massachusetts' religious establishment, combined with the strengthened protections for religious freedom, more fully reflect John Adams' original vision of a truly “mild and equitable establishment of religion.”

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<sup>1</sup> Robert J. Taylor, *Construction of the Massachusetts Constitution* (Worcester, MA: American Antiquarian Society, 1980), 317. Among countless overviews, see esp. the classic of Samuel Eliot Morison, *A History of the Constitution of Massachusetts* (Boston: Wright & Potter, 1917). For principal primary texts, see Oscar Handlin and Mary Handlin, eds., *The Popular Sources of Political Authority: Documents on The Massachusetts Constitution of 1780* (Cambridge, MA: Harvard University Press, 1966); Robert J. Taylor, ed., *Massachusetts, Colony to Commonwealth: Documents on the Formation of Its Constitution* (Chapel Hill, NC: University of North Carolina Press, 1961); Ronald M. Peters Jr., *The Massachusetts Constitution of 1780: A Social Compact* (Amherst, MA: University of Massachusetts Press, 1978). This chapter is adapted in part from John Jr. Witte, "A Most Mild and Equitable Establishment of Religion: John Adams and the Massachusetts Experiment," *Journal of Church and State* 41, no. 2 (Spring 1999): 213-252.

<sup>2</sup> See John Adams, *A Defense of the Constitutions of Government in the United States of America* (1787) in *The Works of John Adams*, ed. C.F. Adams, 10 vols., (Boston: Little & Brown, 1850-1856), vols. 4-6. See recent biographies by David McCullough, *John Adams* (New York: Simon and Schuster, 2008); Gordon S. Wood, *Friends Divided: John Adams and Thomas Jefferson* (New York: Penguin Books, 2017).

<sup>3</sup> Adams to Dr. Price, April 8, 1785, in Adams, *Works*, 8:232 and quotations in *The John Adams Papers*, ed. Frank Donovan (New York: Dodd, Mead & Company, 1965), 181. Also see Adams, *Works*, 4:290-297; John Adams, *A Dissertation on the Canon and Feudal Law* (1774), in *Works*, 3:451.

<sup>4</sup> Adams, *Works*, 2:399 (referring to the Congregational establishment of colonial Massachusetts, largely preserved in the 1780 Constitution).

<sup>5</sup> See overviews in Jacob C. Meyer, *Church and State in Massachusetts from 1740-1833: A Chapter in the History of the Development of Individual Freedom*, repr. ed. (1930; repr., New York: Russell & Russell, 1968); William C. McLoughlin, *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State*, 2 vols. (Cambridge, MA: Harvard University Press, 1971); Johann N. Neem, "The Elusive Common Good: Religion and Civil Society in Massachusetts, 1780-1833," *Journal of the Early Republic* 24 no. 3 (Fall 2004): 381-417; John D. Cushing, "Notes on Disestablishment in Massachusetts, 1780-1833," *William and Mary Quarterly* 26, no. 2 (April 1969): 169-190.

<sup>6</sup> Handlin and Handlin, *Popular Sources*, 190-201.

<sup>7</sup> "Resolve on the Question of a Constitution" (February 20, 1779), in Handlin and Handlin, *Popular Sources*, 383-384.

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<sup>8</sup> In Taylor, *Construction of Massachusetts Constitution*, 118.

<sup>9</sup> In Handlin and Handlin, *Popular Sources*, 419.

<sup>10</sup> Peters, *Massachusetts Constitution of 1780*, 24-30.

<sup>11</sup> *Worcestriensis, Number IV* (1776), in Charles S. Hyneman and Donald S. Lutz, *American Political Writing During the Founding Era, 1760-1805*, Liberty Fund Library of the American Republic (Indianapolis: Liberty Press, 1983), 449-454, at 450.

<sup>12</sup> *Worcestriensis*, in Hyneman and Lutz, *American Political Writing*, 452.

<sup>13</sup> *Worcestriensis*, in Hyneman and Lutz, *American Political Writing*, 452-453. See also Samuel West, *A Sermon Preached Before the Honorable Council ... of the Massachusetts-Bay in New England* (Boston: John Gill, 1776), in J.W. Thornton, *The Pulpit of the American Revolution* (Boston: Gould and Lincoln, 1860), 259-322, at 297-299.

<sup>14</sup> Phillips Payson, "Election Sermon of 1778," in Hyneman and Lutz, *American Political Writing*, 523-538.

<sup>15</sup> Payson, "Election Sermon of 1778," 528-530.

<sup>16</sup> William G. McLoughlin, ed., *Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-1789* (Cambridge, MA: Harvard University Press, 1968), 351, 357-58, 361, 373-75.

<sup>17</sup> As reported by Isaac Backus in McLoughlin, *Backus*, 12. See also Adams, *Works*, 2:399.

<sup>18</sup> The delegates did not attend all sessions; the highest recorded vote on any issue was 247. Samuel Eliot Morison, "The Struggle over the Adoption of the Constitution of Massachusetts, 1780," *Proceedings of the Massachusetts Historical Society* 50 (1916-1917): 356.

<sup>19</sup> Peters, *Massachusetts Constitution of 1780*, 24.

<sup>20</sup> Peters, *Massachusetts Constitution of 1780*, 23-31; McLoughlin, *Backus*, 386.

<sup>21</sup> The draft is in Adams, *Works*, 4:213-267.

<sup>22</sup> In 1976, Article I was amended by Mass. Const. art. CVI, which rendered "all men" as "all people" and added: "Equality under the law shall not be denied or abridged because of ... creed...."

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<sup>23</sup> Chapter I, Section III. See Chapter II, Section II (requiring that the governor “shall be of the Christian religion”); Section III (requiring that the lieutenant governor “shall be qualified, in point of religion”). Adams, *Works*, 4:241, 242, 245, 251.

<sup>24</sup> See Chapter VI, Art. I. Also see *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, from the Commencement of Their First Session, September 1, 1779, to the Close of Their Last Session, June 16, 1780* (Boston: Dutton and Wentworth, printers to the state, 1832), 97, 109-110 (summarizing debates on February 10, 14, and 15, 1780 about the same).

<sup>25</sup> Chapter VI, Article I, in Adams, *Works*, 4:260-266.

<sup>26</sup> See esp. Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988). See also John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 277-320.

<sup>27</sup> See Payson, “Election Sermon,” 529. This was also one reason that Adams wrote into his draft of Chapters I and II that every official must be “of the Christian religion.”

<sup>28</sup> For an overview of the subsequent controversies concerning the leadership and religious affiliation of Harvard College, see Meyer, *Church and State*, 87-91; Yan Li, “The Transformation of the Constitution of Massachusetts, 1780-1860” (PhD diss., University of Connecticut, 1991), 82-84. Also see debates in Nathan Hale and Charles Hale, eds., *Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts, Begun and Holden at Boston, November 15, 1820, and Continued by Adjournment to January 9, 1821, Reported for the Boston Daily Advertiser.*, rev. and cor. ed., *Making of Modern Law: Primary Sources, 1620-1926* (Boston: Boston Daily Advertiser, 1853), 15-16, 491-93, 527-32, 556-57, 619, 630-31.

<sup>29</sup> Ellis Ames, Abner Cheney Goodell, John H. Clifford, Alexander S. Wheeler, Wm. C. Williamson, Melville Madison Bigelow, Massachusetts, and Massachusetts General Court, *The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay: To Which Are Prefixed the Charters of the Province: With Historical and Explanatory Notes, and an Appendix*, 21 vols., *Making of Modern Law: Primary Sources, 1620-1926* (Boston: Wright and Potter, printers to the state, 1869-1922), 1:62-63.

<sup>30</sup> See sources and discussion in John Witte, Jr., “Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?” *Southern California Law Review* 64, no. 2 (January 1991): 363-415, at 368-380.

<sup>31</sup> Morison, “The Struggle,” 353-412, esp. 370.

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- <sup>32</sup> See details in Cushing, "Notes on Disestablishment," *William & Mary Quarterly* 26(2): 169-190; McLoughlin, *New England Dissent*, 547-565; Meyer, *Church and State*, 32-89.
- <sup>33</sup> Taylor, *Construction of Massachusetts Constitution*, 331.
- <sup>34</sup> In Adams, *Works*, 4:221-222; a slightly reworded version appears in the *Journal of the Convention*, Appendix II, at 193.
- <sup>35</sup> *Journal of the Convention*, 38-40.
- <sup>36</sup> *Journal of the Convention*, 43.
- <sup>37</sup> *Journal of the Convention*, 46-47.
- <sup>38</sup> See Yan Li, "Transformation of the Constitution," 68, arguing that members of dissenting churches were not uniformly opposed to Article III.
- <sup>39</sup> Morison, "The Struggle," 375.
- <sup>40</sup> Morison, "The Struggle," 371.
- <sup>41</sup> *Journal of the Convention*, Appendix III, at 218.
- <sup>42</sup> Morison, "The Struggle," 364-365.
- <sup>43</sup> See, e.g., "The Returns of New Salem," in Handlin and Handlin, *Popular Sources*, 482; "Town of Shutesbury," 597; "Town of Ashby," 633; "Town of Sherborn," 674; "Town of Westford," 682-683; "Return of Buxton," 731; "Town of Petersham," 855 and "Return of Ashby," in Taylor, *Documents*, 151-152.
- <sup>44</sup> "Return of Dartmouth," in Handlin and Handlin, *Popular Sources*, 509-510.
- <sup>45</sup> Peters, *Massachusetts Constitution of 1780*, 33-35.
- <sup>46</sup> "Return of Westford," in Handlin and Handlin, *Popular Sources*, 681, 682.
- <sup>47</sup> "Return of Petersham," in Handlin and Handlin, *Popular Sources*, 855.
- <sup>48</sup> *Continental Journal*, April 6, 1780, quoted in Peters, *Massachusetts Constitution of 1780*, 82. See also "Return of the Town of Westford" in Handlin and Handlin, *Popular Sources*, 682-683.
- <sup>49</sup> Quoted in Taylor, *Documents*, 151-152.

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<sup>50</sup> Taylor, *Documents*, 151-152.

<sup>51</sup> Meyer, *Church and State*, 111. Also see original quote in Morison, "The Struggle," at 368: "Baptist Advocates of religious liberty ... retorted by comparing religious taxation to a certain practice of the sons of Eli." (Likely referring to 1 Samuel 2: 12-36.) Even John Adams allegedly tried to inflame the Convention against Backus in order to secure passage of the controversial Article III. See Taylor, *Construction*, at 333, as cited in Wood, *Friends Divided*, 175.

<sup>52</sup> Meyer, *Church and State*, 113. The Township returns are included in Handlin and Handlin, *Popular Sources*, 475-932.

<sup>53</sup> Taylor, *Documents*, 113.

<sup>54</sup> In Taylor, *Documents*, 162-165, at 164. Also see Meyer, *Church and State*, 110-111, noting that the Convention "seems to have counted as in favor of an article all those who did not definitely and specifically vote in the negative on it, if the votes were needed to pass the article. This is the procedure which Professor Samuel Eliot Morison has called 'political jugglery.'"

<sup>55</sup> Also see Jonathan J. Den Hartog, *Patriotism and Piety: Federalist Politics and Religious Struggle in the New American Nation* (Charlottesville, VA: University of Virginia Press, 2015).

<sup>56</sup> See the careful sifting of this case law in McLoughlin, *New England Dissent*, 636-659, 1084-1106, 1189-1284, with summaries in William G. McLoughlin, "The Balkcom Case (1782) and the Pietistic Theory of Separation of Church and State," *William & Mary Quarterly* 24, no. 2 (April 1967): 267-283; Cushing, "Notes on Disestablishment."

<sup>57</sup> See McLoughlin, *New England Dissent*, 1145-1185.

<sup>58</sup> McLoughlin, *New England Dissent*, 1156.

<sup>59</sup> McLoughlin, *New England Dissent*, 1157.

<sup>60</sup> Meyer, *Church and State*, 187.

<sup>61</sup> McLoughlin, *New England Dissent*, 1159.

<sup>62</sup> See *Journal of Debates and Proceedings*, 612-639.

<sup>63</sup> *Journal of Debates and Proceedings*, 163-165.

<sup>64</sup> *Journal of Debates and Proceedings*, 170.



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<sup>65</sup> *Journal of Debates and Proceedings*, 161.

<sup>66</sup> *Journal of Debates and Proceedings*, 161.

<sup>67</sup> *Journal of Debates and Proceedings*, 620.

<sup>68</sup> *Journal of Debates and Proceedings*, 630.

<sup>69</sup> *Journal of Debates and Proceedings*, at 613-614, 623-624, 634.

<sup>70</sup> See, for example, the “exemption laws” of 1790-1791, in McLoughlin, *New England Dissent*, 925-928, 935-938.

<sup>71</sup> See McLoughlin’s discussion of “The Barnes Case and the Religious Liberty Act, 1810-1817” in McLoughlin, *New England Dissent*, 1084-1106.

<sup>72</sup> Debates about the legal status of church corporations played a notable role in the emergence of nonprofit corporations in the United States. See Johann N. Neem, “Politics and the Origins of the Nonprofit Corporation in Massachusetts and New Hampshire, 1780-1820,” *Nonprofit and Voluntary Sector Quarterly* 32, no. 3 (September 2003): 344-65.

<sup>73</sup> McLoughlin, *New England Dissent*, 1183.

<sup>74</sup> See McLoughlin, “The Dedham Case and the Amendment of the Religious Liberty Act, 1821-1824” chapter in McLoughlin, *New England Dissent*, 1189-1206.

<sup>75</sup> McLoughlin, *New England Dissent*, 1205.

<sup>76</sup> Morison, *History of the Constitution*, 24-25.

<sup>77</sup> “Domestic Intelligence: Massachusetts Legislature,” *Christian Register*, March 19, 1831, 47.

<sup>78</sup> McLoughlin, *New England Dissent*, 1246.

<sup>79</sup> Mass. Const. amend., art. XI (1833).

<sup>80</sup> Mass. Const. amend., art. XVIII (1855) provides that tax “moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.” This was superseded by Article XLVI (1917) that provides, in pertinent part, that “no law shall be passed prohibiting the free exercise of religion” and that no tax money was to be paid to religious groups or activities. Article XLVI, in turn, was further amended by Article CIII (1974): “No grant, appropriation, use of public money or property or loan of credit shall be made by the Commonwealth or any political subdivision thereof for

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the purpose of founding, maintaining, or aiding any ... charitable or religious undertaking which is not publicly owned and under the exclusive control of [the Commonwealth].” For summary of the cases, see Herbert P. Wilkins, “Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution” *Suffolk University Law Review* 14, no. 4 (Summer 1980), 887-930, at 892-894.