

# **RELIGION AND THE CONSTITUTION**

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# HISTORY

### A. THE THEORY AND PRACTICE OF RELIGIOUS ESTABLISHMENTS

The classic form of "establishment of religion" known to the framers of the First Amendment was the religion "by law established" in the British Empire: the Church of England (sometimes called the Anglican Church). Not only was this the official church in the mother country, but it was established by law in all the southern colonies (including Maryland after 1688), plus the four metropolitan counties of New York. The middle colonies of Pennsylvania, Delaware, and upstate New York, plus Rhode Island, had no formal religious establishment. The New England colonies outside of Rhode Island had a somewhat different kind of religious establishment, based upon the religious judgments of the people of each town.

Under the English system, the establishment of religion had these legal features (among others):

1. **Governmental Control over Doctrine and Personnel.** The Act of Supremacy, passed in 1534, made the King or Queen of England the official head of the Church, and gave the monarch power to correct "the ecclesiastical state and persons, and . . . all manner of errors, heresies, schisms, [etc.]." 1 Eliz., c.1, §8. During the reign of Edward VI, Parliament enacted the Thirty-Nine Articles—the doctrinal tenets of the Church of England—as well as the Book of Common Prayer, which prescribes the liturgy for religious worship. The Uniformity Act required all ministers (with the exception of certain trinitarian Protestant ministers exempted under the Toleration Act of 1689) to conform to these requirements. The Archbishop of Canterbury and other high

church officials were (and are) appointed by the government. See William Blackstone, Commentaries on the Laws of England Bk. I, ch. 11.

**2. Suppression of Alternative Faiths.** Not only did the government appoint church leaders, it forbade the public preaching of alternative doctrines. As noted above, only ministers from denominations that shared most of the Anglicans' theological doctrines were permitted to preach under the Act of Toleration. Particularly severe punishments were prescribed for Catholics, partly because the Roman Catholic Church recognized the Stuart Pretenders as the legitimate kings of England between 1688 and 1745. See Blackstone's Commentaries Bk. IV, ch. 4. The preaching of Unitarianism remained illegal (at least, formally) until well into the nineteenth century. Prior to the English Civil War, so-called "puritan" Protestants (who wished to "purify" Anglican worship of its "popish" elements) were also prohibited from engaging in public worship. These restrictions were the immediate reason why the Pilgrims fled their homes in England, first to Holland and then to Plymouth Bay.

In the Anglican colonies, colonial governors reserved to themselves the right to license preachers; in New England the colonial legislatures set qualifications for ministers. Many colonies prohibited itinerant preaching (can you speculate why?); this was the issue that occasioned Elisha Williams's sermon, reprinted below. In Virginia, until the eve of the Revolution, Baptist preachers were imprisoned for preaching without a license. The sight of Baptist ministers jailed in Culpepper County inspired the young James Madison to write his first words on the subject of religious freedom, in a letter to his college friend, William Bradford, on January 24, 1774:

That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business. This vexes me the most of any thing whatever. There are at this [time?] in the adjacent County not less than 5 or 6 well meaning men in close [jail] for publishing their religious Sentiments which in the main are very orthodox. I have neither patience to hear talk or think of any thing relative to this matter, for I have squabbled and scolded abused and ridiculed so long about it, [to so lit]tle purpose that I am without common patience. So I [leave you] to pity me and pray for Liberty of Conscience [to revive among us].

These requirements bear a close resemblance to the licensing of the press. Both maintained government control over the key means for the propagation of opinion.



**3. Political Connections.** The Church of England had an official, and prominent, position in the governmental structure of the country. Bishops, by virtue of their office, sat in the House of Lords. Pursuant to the Test Act, 25 Car. II, c.2, and the Corporation Act, 13 Car. II, st. 2, c.1, only those who had received communion in the Church of England in the preceding year and who swore that they did not believe in the Catholic doctrine of transubstantiation—the idea that the bread and wine of communion turn into the body and blood of Christ—could hold offices in government, including public corporations, military positions, and academic positions. (Isaac Newton, a non-trinitarian, thus had to obtain special leave of Parliament to teach at Cambridge.) Even after Independence, almost all of the states retained religious tests for office, some excluding Catholics, some excluding Jews, and some excluding atheists. Article VI of the U.S. Constitution forbids such “religious tests for office” at the federal level. See Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674 (1987).

**4. Compelled Attendance and Support.** In the days of Queen Elizabeth I, subjects were required to attend church, and were fined one shilling if they did not. 1 Eliz. 1, c.2 (1559). This law remained on the books until 1846, but by the time of American Independence it was essentially unenforced. Financial support for the established church principally came in the form of land grants (profit-making lands, called “glebe lands,” were expected to defray the basic needs of the minister) and mandatory tithes. (There was little in the way of direct appropriations by Parliament.) In most of the colonies—as in many European countries today—individuals were taxed for the support of the church. In the Anglican colonies, these mandatory payments went to the established Church of England; in New England they went to the minister selected by the particular town, which in practice almost always meant a Congregationalist (Puritan) minister.

The Anglican establishments of the South and metropolitan New York did not survive the American Revolution, in part because Anglican ministers tended to support the Crown, thus discrediting the church in the eyes of newly Republican America. (Can you see why Anglican theology would tend to be associated with support for England in the War of Independence?) By contrast, the Congregationalist (or Puritan) ministers of New England were enthusiastic proponents of independence (also for theological reasons, which were more complicated). The New England establishments thus emerged from the American Revolution with renewed prestige. Speaking of the Massachusetts establishment, John Adams commented that “we might as well expect a change in the solar system as to expect they would give up their estab-



lishment." By this time, however, the Massachusetts establishment had lost its earlier rigor. Adams called it "the most mild and equitable establishment of religion that was known in the world." Here are the constitutional provisions regarding toleration and establishment in Massachusetts, adopted in 1780:

## **CONSTITUTION OF MASSACHUSETTS (1780)**

### **Part the First.**

#### **A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts. . . .**

ART. II. It is 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. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshiping 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.

ART. III. As the happiness of a people and the 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 the public worship of God and of public instructions in piety, religion, and morality: Therefore, To promote their 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 the 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 expense, 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 cases where such 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 all times have the exclusive right of electing their public teachers and of contracting with them for their support and maintenance.

And all moneys paid by the subject to the support of public worship and of the public teachers aforesaid shall, if he require it, be uniformly