

# I

*Colonial  
Establishments  
of Religion*

On the eve of the American Revolution most of the colonies maintained establishments of religion. Those colonies, although resentful of British violations of American rights, discriminated against Roman Catholics, Jews, and even dissenting Protestants who refused to comply with local laws benefiting establishments of religion. In the five southern colonies, including Virginia, the oldest, largest, and most influential of the thirteen colonies, the Church of England (Anglican) enjoyed the privileges of an exclusive legal union with the state; in the three New England colonies which the Congregationalists domi-

nated, the laws operated to prefer their churches at the expense of others.

The Reverend Isaac Backus, leader of the Baptists in Massachusetts, in the course of a protest against that colony's establishment of religion, informed the governor and council in 1774 that eighteen Baptists from the town of Warwick had been jailed forty miles from home, in Northampton, during the extremity of winter, for the crime of refusing to pay taxes in support of the town's Congregational minister.<sup>1</sup> They were jailed for conscience's sake, Backus declared, at a time when all America expressed alarm at British violations of American liberties. He believed that Massachusetts violated the right to be free from taxation without representation, because its legislature had authorized all the towns to impose "religious taxes." They were as illegal as Parliament's taxation of America, Backus alleged, because the province's charter guaranteed liberty of conscience to all Christians except "Papists." Moreover, Massachusetts law required that Baptists obtain a certificate proving that they regularly attended a church of their own denomination to be exempt from ministerial and church taxes. The towns enacted such taxes for the support of public worship held by "learned and orthodox" ministers (Congregationalists); but these individuals had to pay a tax of four pence (the tea tax was only three pence per pound) for a copy of the certification or legal document that they needed to prove their tax-exempt status. "All America are alarmed at the tea tax; though, if they please, they can avoid it by not buying the tea, but we have no such liberty," Backus complained, and, he added, conscience prevented payment of the certificate tax: government had no lawful authority over religion.<sup>2</sup> Backus had acted on behalf of a Baptist grievance committee formed to fight "oppressions occasioned by nonconformity to the religious establishment in New England."<sup>3</sup> Backus spoke for the Baptist minority that felt persecuted by the Congregational majority:

1. Alvah Hovey, *A Memoir of the Life and Times of Reverend Isaac Backus* (Boston, 1858), pp. 197, 198; dated Feb. 15, 1774.

2. Petition to the General Court, Dec. 2, 1774, in *ibid.*, pp. 215-21.

3. William G. McLoughlin, *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State*, 2 vols. (Cambridge, Mass., 1971), 1:529, quoting Warren Association Minutes, 1769.

John Adams spoke for the Congregationalists when he stated that the establishment to which he gave his support was "but a slender one" that did not infringe religious liberty.<sup>4</sup>

The Reverend Ezra Stiles, president of Yale College, who agreed with Adams, also ignored the fact that Massachusetts imprisoned Baptists and any others who refused obedience to the government in matters of support for religion. In Virginia and other southern colonies, Stiles observed, Baptists "not only pay ministerial Taxes for building churches but are imprisoned for preaching in unlicensed Houses."<sup>5</sup> The decade before the Revolution constituted the "time of persecution" in the history of Virginia's Baptists. Some were beaten by mobs, others fined and imprisoned for their religious beliefs, which prevented them from obeying the laws that established the Anglican (Episcopalian) Church.<sup>6</sup>

To protect the established religion, the Virginia courts regarded certain Baptist conduct as criminal. Preaching in unlicensed houses and preaching without Episcopal ordination were common crimes. For such crimes some Baptist ministers spent up to five months in jail. In a 1771 case, four preachers were convicted of unlawful assembly for having held a religious meeting "under the pretense of the exercise of Religion in other manner than according to the Liturgy and Practice of the Church of England." In another case the crime was defined as "Preaching the Gospel" contrary to the Anglican Book of Common Prayer, for which the criminal spent forty-six days in jail. About fifty Baptists suffered imprisonment for such crimes. Other Baptists were indicted for not attending the services of the established church. The law also made it a crime for any clergyman not licensed by that church to conduct marriages.<sup>7</sup> Young James Madison informed a Philadelphia

4. Hovey, *Backus*, p. 210.

5. Ezra Stiles, *The Literary Diary of Ezra Stiles*, edited by Franklin B. Dexter, 3 vols. (New York, 1901), 1:475.

6. For instances of mob violence, see Lewis Peyton Little, *Imprisoned Preachers and Religious Liberty in Virginia* (Lynchburg, Va., 1938), pp. 41, 43, 47, 49-52, 209, 298, 300.

7. *Ibid.*, pp. 236, 271, 288, 299, 418, 457. Sandra Rennie, "Virginia's Baptist Persecution, 1765-1778," *Journal of Religious History* 12 (June 1982): 48-61.

friend in 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 Gaol [jail] for publishing their religious Sentiments which in the main are very orthodox."<sup>8</sup>

The established church for whose benefit Baptist preachers faced jail for illegally preaching the gospel was an extension of the Church of England. The Virginia establishment originated with the colony's first charter in 1606, which provided that all ministers should preach Christianity according to the "doctrine, rites, and religion now professed and established within the realm of England." Dale's Laws in 1611 required everyone to be a churchgoer and observe the Sabbath, enjoined the clergy to offer regular religious instruction, and severely punished various offenses against religion including blasphemy, sacrilege, and criticism of the doctrine of the Trinity. Subsequent legislation commanded the public maintenance of every Anglican minister and tithed everyone for that purpose, required "uniformity to the canons and constitutions of the Church of England," allowed only ordained clergymen of the mother church to perform the marriage ceremony, demanded that every clergyman accept the Thirty-nine Articles of faith, and exacted taxes to underwrite the costs of building and repairing churches. The legal code governing this establishment of religion also required vestries in each parish to levy assessments for the benefit of those churches and ordered that the liturgy of the Church of England be followed according to the Anglican Book of Common Prayer. Thus, Virginia's Anglican church was established by law. It was the official church, the only one that enjoyed the benefits of a formal alliance with the government.<sup>9</sup> As the Presbyterian clergy of Virginia declared in a

puts the number of persecuted Baptists at seventy-eight for the period she covered. She finds too that the local gentry, including Anglican clergymen, justices of the peace, captains of the militia, and lesser planters, led the persecution.

8. William T. Hutchinson et al., eds., *The Papers of James Madison*, ser. in progress (Chicago, 1962-), 1:106. Hereafter cited as *Madison Papers*.

9. George M. Brydon, *Virginia's Mother Church*, 2 vols. (Richmond, Va.,

remonstrance to the legislature in 1784, the Anglican or "Episcopal Church was virtually regarded as the constitutional Church, the Church of the State" before the Revolution, laden with special privileges that destroyed the equality of all others.<sup>10</sup>

An establishment of religion in the conventional sense denoted a legal union of government and religion, if by "religion" is meant the religion of a single church or denomination, such as Roman Catholicism in Spain, Presbyterianism in Scotland, or Lutheranism in Sweden. Attendance at a state church was compulsory, unless the state indulged the existence of open religious services by dissenters. An establishment of religion had an official creed or articles of faith, and its creed alone could be publicly taught in the schools or elsewhere. Its clergy alone had civil sanction to perform sacraments or allow them to be performed. Subscribers to the established faith enjoyed their civil rights, but the law handicapped dissenters, even if it tolerated their worship, by the imposition of civil disabilities. Dissenters were excluded from universities and disqualified for office, whether civil, religious, or military. Their religious institutions (churches, schools, orphanages) had no legal capacity to bring suits, hold or transmit property, receive or bequeath trust funds. Test oaths usually discriminated against dissenters. Every establishment employed such oaths, although some governments, such as those of the Middle Atlantic colonies that had no establishments, also imposed religious tests on officeholders to make certain that only believers in the gospel would be entrusted with an official capacity.

Conventional establishments of religion existed in the southern colonies of Virginia, Maryland, North Carolina, South Carolina, and Georgia. In each the Church of England was the state church. In South Carolina the Reverend William Tennent, a Presbyterian acting as a spokesman for various non-Anglican denominations, drew up a "Peti-

1958), 1:426-81, reprints extracts from diocesan canons and statutes. The laws of Virginia on the establishment are scattered throughout William W. Hening, ed., *The Statutes at Large Being a Collection of All the Laws of Virginia (1619-1792)*, 13 vols. (Richmond, Va., 1809-23).

10. Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* (Lynchburg, Va., 1900), p. 228.

tion of the Dissenters" in 1777, requesting the legislature to disestablish the Church of England, by then calling itself the Protestant Episcopal Church. The existence of an established church, Tennent declared, abridged the "free and equal liberty in religious matters" to which all good Christian subjects were entitled, and by Christian he meant Protestant. He announced his objection to "all religious establishments" because they infringed religious liberty, but he did not favor the complete separation of government and religion. Very few Christians did. Like Tennent, they believed that the state should "give countenance to religion" by protecting all denominations and "do anything for the support of religion, without partiality to particular societies" and without abridging "the rights of private judgment" by exacting taxes to promote religion.<sup>11</sup>

Tennent depicted the establishment in South Carolina from the standpoint of a dissenter. He emphasized that it made invidious distinctions among people of different religious beliefs, merely tolerating dissenters as if they stood "on the same footing with the Jews," unmolested but unequal.<sup>12</sup> It also taxed all for the support of one religion. Invidious distinctions and tax support constituted its chief characteristics. "The law," he declared,

knows and acknowledges the society of the one as a Christian church; the law knows not the other churches. The law knows the clergy of the one as ministers of the gospel; the law knows not the clergy the other churches, nor will it give them a license to marry their own people. . . . The law makes provision for the support of one church; it makes no provision for the others. The law builds superb churches for the one; it leaves the others to build their own churches. The law, by incorporating the one church, enables it to hold estates and to sue for rights; the law does not enable the others to hold any religious property not even the pittances which are bestowed by the hand of charity for their support. No dissenting

11. Newton B. Jones, ed., "Writings of the Reverend William Tennent, 1740-1777," *South Carolina Historical Magazine* 61 (July-Oct. 1960): 197, reprinting "Mr. Tennent's Speech on the Dissenting Petition, Delivered in the House of Assembly, Charles-Town, January 11, 1777."

12. *Ibid.*, pp. 197, 202.

church can hold or sue for their property at common law. They are obliged therefore to deposit it in the hands of trustees, to be held by them as their own private property and to lie at their mercy. The consequence of this is that too often their funds for the support of religious worship get into bad hands and become either alienated from their proper use or must be recovered at the expense of a suit in chancery.

These are important distinctions indeed, but these are not all. The law vests the officers of the Church of England with power to tax not only her own people but all other denominations within the bounds of each respective parish for the support of the poor—an enormous power which ought to be vested in no denomination more than another. Greater distinction still—where there are parishes the law throws the whole management of elections, the most estimable of all the rights of freemen, into the hands of church officers exclusively. [Church wardens in each parish issued writs for the election of members of the legislature and managed the elections.]<sup>13</sup>

A scholar familiar with classic establishments of religion, like the one described by Tennent in South Carolina, concluded in capital letters that an establishment had always and everywhere meant what he found it meant in Europe: "A SINGLE CHURCH OR RELIGION ENJOYING FORMAL, LEGAL, OFFICIAL, MONOPOLISTIC PRIVILEGE THROUGH A UNION WITH THE GOVERNMENT OF THE STATE. That is the meaning given in the *Encyclopedia Britannica*. The phrase has been used this way for centuries in speaking of the established Protestant churches of England, Scotland, Germany, and other countries, and of the established Catholic church in Italy, Spain, and elsewhere."<sup>14</sup> The foremost American constitutional scholar of this century, Edward S. Corwin, advanced the same thesis. Criticizing the Supreme Court's doctrine of the unconstitutionality of government aid to all religions as "untrue historically," Corwin added, "In a word, what the establishment of

13. *Ibid.*, pp. 198-99.

14. James O'Neill, *Religion and Education under the Constitution* (New York, 1949), p. 204.

religion clause of the First Amendment does, and all that it does, is to forbid Congress to give any religious faith, sect, or denomination preferred status." He concluded, "The historical record showed beyond peradventure that the core idea of 'an establishment of religion' comprises the idea of preference, and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase."<sup>15</sup> Thus, we are told, "There is not an item of dependable evidence . . . which shows that the term means, or ever has meant, anything else."<sup>16</sup>

Corwin was wrong. The item of dependable evidence consists of much more than the curious but startling fact that sixteenth-century Transylvania, then part of Hungary, nurtured not only legends of vampires and werewolves but the simultaneous establishment of otherwise warring religions. They were Roman Catholicism, Calvinism, Lutheranism, and Unitarianism.<sup>17</sup> The inappropriateness of using the conventional European model of an establishment of religion as the only definition of an establishment is evident from the provisions of the Quebec Act of 1774. By that controversial statute Parliament established both Anglicanism and Roman Catholicism in Canada. Protestant America, however, received the act in vehemently bigoted terms as an establishment of only Catholicism. The act reconfirmed a previous guarantee of the "free exercise of the religion of the Church of Rome" and stipulated that its clergy might "hold, receive and enjoy their accustomed Dues and Rights" from persons professing that religion. On behalf of the English in Quebec, the next paragraph of the act provided "for the Maintenance and Support of Protestant Clergy within the Province."<sup>18</sup> A minority in Parliament, led by Lord Camden in the House of Lords and by Colonel Isaac Barré in the House of Commons,

15. Edward S. Corwin, "The Supreme Court as National School Board," *Law and Contemporary Problems* 14 (Winter 1949): 10, 20, criticizing *Everson v. Board of Education*, 330 U.S. 1 (1947).

16. O'Neill, *Religion and Education*, p. 204.

17. Earl Morse Wilbur, *A History of Unitarians: In Transylvania, England, and America* (Cambridge, Mass., 1952), pp. 3-98.

18. Charles H. Metzger, *The Quebec Act* (New York, 1936), p. 211.

condemned the act as pernicious to the religion and constitution of England, because it established Roman Catholicism.<sup>19</sup> That view of the matter virtually engrossed the thinking of the act's antagonists.

Alexander Hamilton, dismayed because the Quebec Act established Roman Catholicism as well as Protestantism, that is, the Church of England, accepted the validity of the proposition that "an establishment of religion is a religion, which the civil authority engages, not only to protect but to support." Hamilton approved of toleration for Roman Catholicism but argued that the act did not remain "passive and improvident" toward it, as toward a merely tolerated religion; the act, rather, was "active and provident" as toward an establishment of religion, because it fixed on ways to support and protect that religion especially by tithes.<sup>20</sup> Hamilton's explanation of an establishment met no known opposition in America, though neither he nor anyone else accepted the Quebec Act for what it was: a statutory provision for a dual establishment of religion.<sup>21</sup>

The classic concept of an establishment of religion as a single state church inappropriately described the American situation; this seems clear from the change in opinion of William Tennent of South Carolina and especially from the change in the character of that state's establishment. Shortly after Tennent had censured the existing establishment in 1777 and had declared himself opposed to "all" establishments as violations of religious liberty, he discovered an establishment that met his approval. He called it a "general establishment" because it recognized and nurtured the legal equality of all Protestants without preferring one denomination over others. The general establishment proposed Protestant Christianity as the established religion of the state.<sup>22</sup> In 1778 the

19. William Cobbett, ed., *The Parliamentary History of England [Debates] from the Earliest Period to the Year 1803*, 36 vols. (London, 1806-20), 17:1361-62, 18:657-58.

20. "Remarks on the Quebec Bill," in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett, ser. in progress (New York, 1961-), 1:169-72. Hereafter cited as *Hamilton Papers*.

21. The American reaction to the act is the subject of Metzger, *Quebec Act*.

22. Jones, ed., "Writings of Tennent," p. 203.

constitution of South Carolina created the establishment of religion endorsed by Tennent.<sup>23</sup>

The *Encyclopedia Britannica* and the European precedents notwithstanding, abundant evidence proves that the European form of an establishment was not the only form in America and that the European meaning of an establishment of religion was not the only meaning in America. America in the eighteenth century had broken with the precedents of Europe by providing legal recognition and tax support to more than one church or denomination within a colony and, later, within a state.

Indeed, at the time of the framing of the First Amendment all state establishments that still existed in America were general or multiple establishments of all the churches of each state, something unknown in the Europe familiar to Americans.

The American establishments of religion as of about 1790 authorized the taxation of everyone for the support of religion but allowed each person's tax to be remitted to the church of the person's choice. Without doubt, an establishment of religion still conveyed the basic idea of exclusivity or preference, but that was not the only idea that it conveyed. To the generation that adopted the First Amendment an establishment had also come to mean, in the main, the financial support of religion generally, by public taxation. Granted, religion was then virtually synonymous with Christianity—indeed, in most of America, with Protestantism.

In Europe a state church meant exactly what the term denotes: the church of one denomination, not of Christianity or Protestantism. Christianity or Protestantism may signify one religion in contrast with Judaism, Islam, or Hinduism; Protestantism may, more dubiously, be one religion in contrast with Roman Catholicism. But nowhere after the sixteenth century had Christianity or Protestantism been the solely established religion except in America. An establishment of Christianity or of Protestantism in the American states that permitted an establishment in about 1790 would have been, for practical purposes, a

23. Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, 7 vols. (Washington, 1909), 6:3252–57.

comprehensive or nonpreferential establishment, permitting government aid to all churches or to religion generally. No American state at the time maintained an establishment in the European sense of having an exclusive or state church designated by law.

Even before the liberating effect of the American Revolution, America had its Transylvanian equivalents, in which a single political jurisdiction established more than one church. The American experience, always remarkably diverse, comprehended exclusive establishments, dual establishments, and general or multiple establishments of religion. In contrast to the five southern colonies, where Anglicanism alone enjoyed an establishment, four colonies never had an establishment of any kind: Rhode Island, Pennsylvania, Delaware, and New Jersey. In the colonies of New York, Massachusetts, Connecticut, and New Hampshire, however, the pattern of establishment was diversified and uniquely American.

New York's colonial history of church-state relationships provided America's first example of an establishment of religion radically different from the classic European type. New York developed an establishment of religion in general—or at least of Protestantism in general—without preference to one church over others. When the English conquered New Netherlands in 1664, renaming it New York in honor of its new proprietor, the duke of York (James II), they found that the Dutch Reformed Church (Calvinist) was exclusively established as the state church; but after the colony passed to English control, this church lost its governmental support. The "Duke's Laws" of 1664, in the form of instructions to his governor, disestablished the Dutch Reformed Church and established in its place a multiplicity of churches. Any church of the Protestant religion could become an established church. In a sense, of course, this was an exclusive establishment of one religion, Protestantism, but the system involved a general establishment of several different Protestant churches, in sharp contrast to the European precedents that provided for the establishment of one church or denomination only.

Under the "Duke's Laws" every township was obliged publicly to support some Protestant church and a minister. The denomination of the church did not matter. Costs were to be met by a public tax: "Every

inhabitant shall contribute to all charges both in Church and State."<sup>24</sup> A local option system prevailed. Each town, by a majority vote of its householders, was to select the denomination to be established locally by electing a minister of that denomination. The head of the state was the head of all the churches. Upon proof that a minister was Protestant, he was inducted into his pastorate by the governor representing the state. In other words, this was an establishment of religion in which there was a formal, legal, official union between government and religion on a nonpreferential basis and without the establishment of any individual church. "Here," remarked a perceptive historian, "is an establishment without a name."<sup>25</sup>

In effect, the "Duke's Laws" allowed the Dutch Reformed Church to remain the established church in most localities, because the Dutch for a while were the most numerous among the settlers. Yet others dominated in a few towns, and as the religious composition of the population changed through constant immigration, the established church of different localities changed. New York's was the only establishment of religion at the time that permitted a very considerable religious liberty.

In 1683 the New York Assembly explicitly confirmed the system of multiple establishments by enacting a "Charter of Liberties." This "charter" stated that "the Churches already in New York do appear to be privileged Churches. . . . Provided also that all other Christian Churches, that shall hereafter come and settle in the province, shall have the same privileges."<sup>26</sup>

However, in 1686 the Catholic James II instructed Thomas Dongan,

24. Quoted in Sanford H. Cobb, *Rise of Religious Liberty* (New York, 1902), p. 326; Cobb's excellent account of church-state relations in colonial New York is on pp. 301-61. John Webb Pratt, *Religion, Politics, and Diversity: The Church-State Theme in New York History* (Ithaca, N.Y., 1967), is still fuller. Thomas Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York, 1986), pp. 62-72, 121-24, rejects the multiple-establishment interpretation. Curry's book is the best on the subject for the period between the colonial background and the ratification of the First Amendment, but it is marred by his rigidity.

25. Cobb, *Rise of Religious Liberty*, p. 327.

26. E. B. O'Callaghan and B. Fernow, eds., *Documents Relating to the Colonial History of the State of New York*, 15 vols. (Albany, 1853-87), 1:115; Hugh Has-

royal governor of New York and also a Catholic, to establish the Episcopalian Church of England as the state church of the colony, thereby singling out that church for preferential treatment. Services of the state church were to be based on the Anglican Book of Common Prayer; sacraments were to be administered according to Anglican rites. The ecclesiastical jurisdiction for the entire province was vested in the archbishop of Canterbury; the governor was empowered to remove ministers. Despite these instructions, Governor Dongan took no steps to establish the Church of England. Following the Glorious Revolution in England, London again demanded the establishment of Anglicanism. Governor Benjamin Fletcher tried to implement the royal instructions, but the colonial assembly refused to enact the needed statute. In 1693, however, the assembly, composed almost entirely of non-Anglicans, grudgingly enacted what one historian called "a bill for a religious establishment of an entirely nondescript character, the like of which is not to be found elsewhere."<sup>27</sup> The act stated that in the places thereafter named, "there shall be called, inducted, and established a good, sufficient, Protestant Minister." One such minister was for New York City, one for Richmond County, and two for Westchester and Queens counties. The ministers were to be supported by public taxes. The act did not apply to the remainder of the province of New York.<sup>28</sup>

In effect, the act of 1693 seemed to have established the Anglican Church in the four localities named, but not a word in the act referred to that church. The statute called only for "a good and sufficient Protestant Minister" and specified no denomination. Royal governors and most Anglicans asserted that the statute had established the Church of England; many non-Anglicans in New York disagreed. The legislature that had passed the measure resolved in 1695, to the governor's wrath, that the act permitted a "dissenting protestant minister" to be called to a church within the geographic limits of the act, and "he is to be paid and maintained as the act directs."<sup>29</sup> In other words, non-Anglican

tings and Edward S. Corwin, eds., *Ecclesiastical Records of the State of New York*, 7 vols. (Albany, 1901-6), 2:1073-78.

27. Cobb, *Rise of Religious Liberty*, p. 338.

28. O'Callaghan and Fernow, eds., *Documents*, 1:328-31.

29. Cobb, *Rise of Religious Liberty*, p. 340; Hastings and Corwin, eds., *Ecclesiastical Records*, 2:1114.

Protestants in the four localities could pay their taxes for the support of their own local church, and churches not of the Church of England were in fact built; they and their ministers were maintained by local taxation within the four localities after the act of 1693. In 1695 the legislature declared that the New York City vestry had rightly decided that under the law it could contract for a "Dissenting Protestant minister," that is, a non-Anglican. As a historian of church-state relationships in New York declared, "The concept of multiple establishments remained the dissenters' solution . . . as the seventeenth century drew to a close in New York."<sup>30</sup>

Lewis Morris, himself a strong Church of England man, declared in 1699, "The People were generally dissenters [and] fancied they had made an effectual provision for ministers of their own persuasion by this Act [of 1693]."<sup>31</sup> In 1711, shortly before becoming chief justice of the province, Morris admitted that the act of 1693 was "very loosely worded. The Dissenters claim the benefit of it as well as we."<sup>32</sup> As a result, there was constant argument—the royal governors and the Church of England on one side, the assembly and non-Anglican Protestants on the other—concerning the disposition of tax funds for the support of religion.

Finally, in 1731, the provincial court of New York decided the controversy in a case involving the Jamaica Church of Queens. The church had been built by a town tax as a Presbyterian edifice in 1699. Anglicans, backed by the governor, seized and took possession of the church on the grounds that any property for religious purposes built by public funds must belong to the Church of England as the only established church under the act of 1693. The Anglicans' action set off a long and bitter controversy. The Presbyterians refused to pay the salary of the Anglican minister because, as the Church of England townspeople reported, "they [the Presbyterians] stick not to call themselves the Established Church."<sup>33</sup> After several years of Episcopalian control, the Pres-

byterians again took the church. The Episcopalians then sued for possession, once more arguing that a publicly supported church could belong to none but the Church of England, and the Presbyterians lodged a countersuit. The court ruled in favor of the Presbyterians, allowing them to hold the church and collect taxes for its maintenance and for the salary of the minister.<sup>34</sup>

Thus a formal judicial decision by the highest court of the province shows that a multiple establishment of religion existed in New York and that an establishment of religion in New York did not simply mean government preference to one religion or sect over others; it meant public support of religion, especially by financial aid, on an impartial or nonpreferential basis. For much of the remainder of the colonial period, Anglicans managed to pry a minister's salary out of the reluctant inhabitants, but not without constant complaints and a further attempt, defeated by the courts in 1768, to withhold the minister's salary.<sup>35</sup>

Elsewhere on Long Island, the inhabitants supported the non-Anglican town ministers chosen by the majority. Brookhaven certainly supported such a dissenting minister, and, given the scarcity of Anglicans and Anglican ministers in the colony, most towns probably reached their own accommodations with the minister of their choice.<sup>36</sup>

Worthy of note also is the way in which the system of a multiple establishment in New York had changed since its initiation by the "Duke's Laws" of 1664. In the beginning, townspeople by majority vote selected a church as the established church of the town, to be supported by the taxes of everyone regardless of church affiliation. By 1731, however, the multiple establishment had come to mean not only that the several Protestant churches were established, but that in towns with a heterogeneous religious population there were likely to be sev-

34. *Ibid.*, 3:309–11. The Jamaica controversy can be followed in *ibid.*, pp. 205–302. See also Pratt, *Religion, Politics, and Diversity*, pp. 54, 61–62; Cobb, *Rise of Religious Liberty*, pp. 345–48.

35. O'Callaghan, ed., *Documentary History*, 3:311, 330; Pratt, *Religion, Politics, and Diversity*, p. 62.

36. Hastings and Corwin, eds., *Ecclesiastical Records*, 2:1392, 3:1589, 1695, 2141.

30. Pratt, *Religion, Politics, and Diversity*, p. 47.

31. O'Callaghan and Fernow, eds., *Documents*, 5:232.

32. Quoted in Cobb, *Rise of Religious Liberty*, p. 339.

33. E. B. O'Callaghan, ed., *The Documentary History of the State of New York*, 4 vols. (Albany, 1848–49), 3:278.



eral different established churches, each supported by the taxes of its own communicants.

In the 1750s the organization of King's (later Colombia) College provoked a fierce controversy over the nature of New York's establishment. Anglicans demanded that they control the new school because they enjoyed "a preference by the Constitution of the province."<sup>37</sup> Non-Anglicans rejected Anglican claims of control and preference. A young lawyer, William Livingston, who became a framer of the U.S. Constitution, and two associates, William Smith Jr. and John Morin Scott, organized the opposition. The Triumvirate, as the three came to be known, specifically denied that the Anglican church was exclusively established in the colony. They publicized this refutation in their paper *The Independent Reflector*, and Smith devoted a section to it in his *History*.<sup>38</sup> The Triumvirate insisted that the establishment "restricted no particular Protestant Denomination whatsoever" and that the people were to choose which ministers to establish.<sup>39</sup> Here again is evidence that the concept of a multiple establishment was understood by and also engaged the attention of the inhabitants of colonial New York.

Although New York Anglicans claimed an exclusive establishment of their church, a large number of the colony's population understood the establishment set up by the act of 1693 not as a state preference for one religion or sect over others but as allowing public support for many different churches to be determined by popular vote. Thus, in 1775, Alexander Hamilton, a young New York lawyer, defined "an established religion" as "a religion which the civil authority engaged, not only to protect, but to support."<sup>40</sup>

A widespread belief exists that the New England colonies, excepting

37. William Smith, *A General Idea of the College of Mirania* (New York, 1753; Charles Evans, *Early American Imprints*, no. 7121, microcard), p. 84. Pratt, *Religion, Politics, and Diversity*, pp. 67-71.

38. Milton Klein, ed., *The Independent Reflector* (Cambridge, Mass., 1963), pp. 171-78. William Smith Jr., *The History of the Province of New York*, edited by Michael Kammen, 2 vols. (Cambridge, Mass., 1972), 2:167-68, 175-76, 207-8.

39. Klein, ed., *Independent Reflector*, p. 26; William Livingston, *Address to Sir Charles Hardy* (New York, 1755), pp. vii-viii.

40. "Remarks on the Quebec Bill," in *Hamilton Papers*, 1:169-70.

Rhode Island, maintained exclusive establishments of the Congregational church. Anyone holding this view does not know or understand that multiple establishments were legally permissible and that dual establishments existed in fact.

Massachusetts, the major and archetypal New England colony, proclaimed no establishment of the Congregational church by name after 1692. The General Court's act of that year provided for an establishment of religion on a town basis by simply requiring every town to maintain an "able, learned and orthodox" minister, to be chosen by the voters of the town and supported by a tax levied on all taxpayers.<sup>41</sup> As a matter of law it was theoretically possible for several different denominations to benefit from the establishment.

Because the Congregationalists were the overwhelming majority in nearly every town, they reaped the benefits of the establishment of religion, except in Boston. The act of 1692 exempted Boston because voluntary contributions there had successfully maintained the Congregational churches, making the compulsion of law unnecessary. As a result, non-Congregationalists, chiefly Episcopalians, Baptists, and Quakers, did not face taxation for the benefit of religion in Boston; like the Congregationalists, they were left alone to support their churches as they wished. Except in Boston, the law operated to make Congregationalism the privileged church, which unquestionably was the law's purpose. Non-Congregationalists outside of Boston were taxed for the support of Congregational ministers and buildings.

An extraordinary situation, however, existed in the town of Swansea, settled and dominated by Baptists long before the 1692 statute. By 1693, Swansea, in southern Massachusetts, had two Baptist churches, and they became the official town churches, supported by public taxation. The Baptist ministers received the taxes for the public support of public worship. The exclusive Baptist establishment of religion in little Swansea was undoubtedly unique anywhere in the world. And, like any orthodoxy that had the law on its side as well as an overwhelming majority vote, the Baptist establishment mistreated the local religious minority.

41. Jacob C. Meyer, *Church and State in Massachusetts, 1740 to 1833* (Cleveland, 1930), p. 10.

The Congregationalists, who almost everywhere else in Massachusetts constituted the "standing order," found the tables turned in Swansea. Baptist ministers refused to baptize Congregational infants. Consequently the small Congregational minority presented the town of Swansea to the county court of general sessions for violation of the 1692 act, on the grounds that Swansea did not maintain an "orthodox learned minister." In 1708 the court ruled that religious taxes raised in Swansea must be divided equally between the two denominations, a victory for the Congregationalists that created another unique legal situation. From the time of that decision, Swansea possessed a dual establishment of religion: public taxation supported the churches of the two denominations, at least until 1717. In that year the Congregationalists, who continued to complain of religious persecution by the Baptists, received additional relief from an act of the General Court incorporating the Congregational section of town into the adjoining town of Barrington, where the standing order prevailed. Swansea then reverted to its exclusive Baptist establishment of religion, which lasted until 1727, when the General Court enacted a statute exempting Baptists from the payment of taxes for the support of religion.<sup>42</sup>

In a few towns, where Baptists or Quakers, or the two together, constituted a majority, they successfully refused, on conscientious grounds, to pay the religious taxes. Neither Baptists nor Quakers maintained a learned ministry, and both believed that the state had no jurisdiction over religion, which should be left to voluntary support of believers. In the towns of Tiverton and Dartmouth in Bristol County, people simply defied court orders year after year, even after the governor and council in Boston commanded the imprisonment of the towns' recalcitrant tax assessors. The Quakers of Tiverton appealed directly to England on the grounds that the Massachusetts charter of 1691 guaranteed liberty of conscience to all Protestants. The General Court yielded by agreeing to pay out of the provincial treasury for the

42. McLoughlin, *New England Dissent*, 1:136-48, 160; Susan Martha Reed, *Church and State in Massachusetts* (Urbana, Ill., 1914), pp. 70-73. Curry, *First Freedoms*, p. 108, having ignored the case of Swansea, repudiates the reality of multiple establishment and calls it a "theory" that served as a "smokescreen" for Congregationalism.

support of Congregational ministers in the two towns to do missionary work; but sporadic Congregational preaching failed to convert the obdurate dissenters, who controlled the towns and refused to pay taxes for the support of any town ministers. In 1717 Cotton Mather spoke hopefully of "Gospellizing the paganizing Tiverton," but not even his efforts succeeded. Six years later the authorities in Boston again assessed Tiverton for the support of a Congregational minister. The Quakers then challenged the system of an establishment of religion in Massachusetts by arguing before the authorities in London that the Toleration Act of 1689, the provincial charter of 1691, and the Massachusetts act of 1692, which allowed a majority of the town to choose its own minister, had established equality among all Protestants and a liberty of conscience unburdened by compulsory taxation for the support of religion. The Privy Council ruled that the ministerial taxes in Tiverton and Dartmouth were illegal and ought not be imposed by Congregationalists where they did not comprise a majority. During the entire colonial period the two towns paid no taxes under the establishment act of 1692.<sup>43</sup>

Unlike the Baptists and Quakers, the Anglicans (Episcopalians) did not dominate any Massachusetts towns. Scattered groups of them lived in many towns, but in 1727, when they received an exemption from supporting Congregationalist town churches, the Anglicans had only five churches and ministers of their own. Two were in Boston, the others in Newbury, Marblehead, and Bristol. Except in Boston, Anglicans had to pay a pro rata share for Congregational churches and ministers until 1727, or be jailed, and many were. Not surprisingly they sought relief by appealing to London. Some even contended that the true established church in Massachusetts was their own, by virtue of the fact that the church of the mother country was the church of any English colony. Some Congregationalists matched that absurd argument with one of their own, namely, that they, as the minister of Roxbury said in 1724, were "the Original Established Church of England, who do not live in England."<sup>44</sup>

43. McLoughlin, *New England Dissent*, 1:165-99; Reed, *Church and State*, pp. 77-78.

44. McLoughlin, *New England Dissent*, 1:217.

The struggle of Anglicans and Congregationalists to define themselves in connection with an establishment of religion led to a concession by some Congregationalists that theirs was not the sole established church in Massachusetts. Two of the preeminent Congregational ministers acknowledged in the 1720s that the act of 1692 commanding public worship at taxpayer expense allowed any denomination to become the established church of a town. Benjamin Colman of the Brattle Street Church in Boston, who declined the presidency of Harvard College, declared in 1725 that "here the Legal Establishment" consisted of the Congregational churches, but "if any Town shall chuse a Gentleman of the Church of England for their Pastor . . . he is their Minister by the Laws of our Province as much as any Congregational Minister among us is so."<sup>45</sup>

That formidable spokesman for Massachusetts orthodoxy, Cotton Mather, made a similar point the following year when he observed that whoever got elected by the majority was "the Minister of the Place," so that "the King's Minister" in any particular locality, the one entitled to tax support, was the people's choice, Christ's, and the king's. "If," Mather added, "the Most of the Inhabitants in a Plantation are Episcopalians, they will have a Minister of their own Persuasion; and the Dissenters if there be any in the place, must pay their proportion of the Tax for the Support of this Legal Minister."<sup>46</sup> Colman and Mather, whose remarks seem calculated to thwart a decision by the Privy Council or the king's attorney general that might harm Congregational interests, accurately interpreted the act of 1692. When the archbishop of Canterbury inquired of the royal governor of Massachusetts "Whether Independency [Congregationalism] be the Establishment of this Country?" Governor Jonathan Belcher replied: "I don't apprehend it is, but that the Church of England is as much established by the laws of this Province as that of the Independents, Presbyterians, or Baptists, and shou'd any town or parish in the Province elect a clergyman of the Church of England to be their minister, and he qualify'd as the law

45. Ebenezer Turall, *The Life and Character of Benjamin Colman* (Boston, 1749; Evans, *Early American Imprints*, no. 6434, microcard), p. 138.

46. Cotton Mather, *Ratio Disciplinae* (Boston, 1726; Evans, *Early American Imprints*, no. 2775, microcard), p. 20.

directs, altho'  $\frac{1}{20}$  of such parish shou'd be Dissenters, yet by the laws of the Province they wou'd be oblig'd to pay the maintenance of such minister."<sup>47</sup> Nearer the end of the colonial period, Jonathan Mayhew, the prominent liberal preacher of Boston, explicitly stated that Massachusetts did not establish a single church but rather "protestant churches of various denominations." He understood that "an hundred churches, all of different denominations . . . might be established in the same . . . colony, as well as one, two, or three."<sup>48</sup> Mayhew's interpretation of the establishment of religion in Massachusetts showed that even after the Baptists and Quakers received an exemption from religious taxes in 1728, the law still permitted a multiple establishment and did not fix on an exclusive establishment. If a multiple establishment did not in fact exist, demographic forces, not the law, provided the reason. Few towns had non-Congregational majorities in the pre-revolutionary period (Swansea was exceptional), although the growing number of dissenters forced concessions.

The act of 1727 resulted from Anglican pressure to break the Congregationalists' control of their tax monies for religion. While authorities in England considered Anglican claims, Governor William Dummer of Massachusetts urged the General Court to accept his compromise proposal "that the taxes of those belonging to the Church of England be paid by the collectors to the Ministers of the Church of England to whom they belong."<sup>49</sup> In 1727 the Anglicans won a major victory against the standing order, thereby beginning what eventually became a slow but steady trend. From 1727 to 1833 the Congregational church was obliged to retreat "until the other denominations in the Commonwealth were on an equal footing with it."<sup>50</sup> The retreat began in 1727 when the Anglicans won the statutory right of having their religious taxes turned over for the support of their own churches.<sup>51</sup>

47. McLoughlin, *New England Dissent*, 1:218.

48. Jonathan Mayhew, *A Defense of Observations* (Boston, 1763; Evans, *Early American Imprints*, no. 9442, microcard), pp. 46-47.

49. McLoughlin, *New England Dissent*, 1:221.

50. Meyer, *Church and State*, pp. 13-14.

51. *Ibid.*, pp. 14, 16-17, 71-72; Reed, *Church and State*, p. 180; McLoughlin, *New England Dissent*, 1:221. Curry, *First Freedoms*, pp. 112-23, fails to cope with the dual establishment in Massachusetts and Connecticut after 1727.

Town treasurers after that date had a legal obligation to give to Anglican churches the monies paid by Anglicans into the town treasuries for the support of public worship, on condition that the taxpayers regularly attended Anglican services within five miles of their homes.

In 1728 Massachusetts exempted Quakers and Baptists from all taxes for the payment of ministerial salaries; then in 1731 and 1735 each denomination received an exemption from sharing the taxes for building new town churches.<sup>52</sup> After those dates, the General Court periodically renewed tax exemption statutes on behalf of Baptists and Quakers so that members of these denominations would not have to pay religious taxes for the benefit of Congregational churches or of their own. As a result of a variety of complicated legal technicalities, as well as outright illegal action by Congregational town officials, frequent abuses occurred under the system of tax exemption; many Quakers and Baptists were unconscionably forced to pay for the support of Congregationalist churches. Even Anglicans who lived too far from a church of their own denomination to attend its services were taxed for the support of the Congregational churches. But these abuses of both the letter and the spirit of the law do not alter the basic fact that after 1727 an establishment of religion in Massachusetts meant government support of religion and financial aid to two churches, Congregationalist and Episcopalian, without preference to either, indeed, without preference to any.

Church-state relationships in Connecticut closely paralleled those of Massachusetts, except that Congregationalism dominated Connecticut to an even greater degree. In the seventeenth century few towns had any dissenters, let alone a majority of them. The basic law governing Connecticut's establishment in the eighteenth century dated from 1697. It continued the town option system and required the collection of taxes from everyone, even in towns without a settled minister. No one was exempt. The first statute concerning "Dissenters from the Established Order," enacted in 1708, was actually a toleration act passed soon after the founding of the first Anglican church, in Stratford, and the first Baptist church, in Groton. The act guaranteed "full

<sup>52</sup> Meyer, *Church and State*, p. 15; McLoughlin, *New England Dissent*, 1:225-43.

liberty of worship" yet required the payment of town ecclesiastical taxes for the benefit of existing Congregational churches. In the same year, 1708, Connecticut's legislature adopted the Saybrook Platform for the governance of its Congregational churches, although it did not mention them by name. The legislation declared that every church united in the platform would be acknowledged "as established by law," although any church or religious society that differed or dissented might exercise worship and discipline "in their own way, according to conscience."<sup>53</sup>

Less than a score of years later, however, the Anglicans of Connecticut enjoyed a de facto establishment of religion. In 1724 the bishop of London requested of Governor Joseph Talcott of Connecticut to indulge members of the Church of England so that they "may not be constrained to contribute to the Independent minister." (In England, the government indulged Independents or Congregationalists by allowing them to worship freely but did not exempt them from religious tithes for the Church of England.) Governor Talcott replied that Connecticut had only one Anglican minister, in Stratford, and that "His people are under no restraint to the support of any other ministers."<sup>54</sup> On the other hand, as the governor conceded, Connecticut towns did not exempt from religious assessments those who failed to attend the Church of England regularly and "pretended" to be a communicant just "to escape a small tax." That meant that any Anglican who did not live in or close to Stratford had to pay for the support of the standing order. When Fairfield imprisoned several of its Anglicans for refusing to pay their rates, they appealed directly to the provincial legislature for relief and got it in "An Act for the Ease of such as soberly Dissent." This act of 1727, which preceded a similar one enacted by Massachusetts in the same year, required Anglicans to continue to pay town taxes for religion but authorized that their taxes be rebated to their own ministers, if ordained according to the canons of the Church of England and if they lived "near" a church they could attend. That helped

<sup>53</sup> Cobb, *Rise of Religious Liberty*, pp. 266-67; McLoughlin, *New England Dissent*, 1:247-62; Williston Walker, *The Creeds and Platforms of Congregationalism* (New York, 1893), p. 507.

<sup>54</sup> Cobb, *Rise of Religious Liberty*, p. 269.

only Anglicans close enough to a church of their own. Within twenty years Connecticut had fourteen Anglican congregations, so the act of 1727 created a significant dual establishment of religion. No Connecticut authority, civil or religious, ever recognized the Church of England as an established church in the province, but short of recognition as such, that church received by government authority the same kind of financial assistance as the standing order. Officially the government acted neutrally toward Anglicans and Congregationalists; they had to attend worship regularly and pay taxes for the support of church buildings and a ministry, but the government was indifferent toward the denominational choice made by individual citizens. In that sense the Church of England enjoyed a parity with the standing order. Both had the seal of approval backed by coercive taxation and laws compelling church attendance.<sup>55</sup>

Few Quakers lived in Connecticut; by the middle of the eighteenth century no regular Quaker meetinghouse existed yet in the province. By then there were several Baptist churches, and their numbers rapidly increased during the Great Awakening. Regardless of their numbers, Quakers and Baptists, on seeing Anglicans receive exemption in 1727 from supporting local parish churches, also sought relief. Perhaps because the dissenters were so few and departed themselves so peaceably, unlike the fanatical Rogerine sect, tolerant Connecticut authorities supported their petitions for exemption. In 1729 the legislature enacted measures that offered Baptists and Quakers complete exemption from ecclesiastical assessments on condition that they could prove to town authorities that they regularly attended a congregation of their own sect.<sup>56</sup> Many, of course, could not produce certificates entitling them to exemption, because they did not live close enough to a church of their choice, and the Congregational churches as the churches chosen by the majority of the town's freeholders mulcted the dissenters. Nevertheless, Connecticut after 1729 maintained by law a dual establishment of religion, with substantial freedom of worship for dissenters.

55. M. Louise Greene, *The Development of Religious Liberty in Connecticut* (Boston, 1905), pp. 192–202; McLoughlin, *New England Dissent*, 1:263–65.

56. Greene, *Religious Liberty in Connecticut*, pp. 216–17; McLoughlin, *New England Dissent*, 1:265–77.

The situation did not fundamentally differ in New Hampshire, which had no official church. An act of 1693, adopted at a time when New Hampshire had only five churches, all Congregationalist, authorized the freeholders of every town to select and contract for a minister, and also required constables to collect assessments for his support. No one of a different religious persuasion received exemption unless he or she regularly attended a different church. Any Protestant group that won a town election could become the establishment. Thus, New Hampshire's basic law on the subject, at least in legal theory, allowed a multiple establishment of religion. Nevertheless, the town system of establishment actually operated to benefit the Congregational churches exclusively well into the eighteenth century, simply because of the absence or scarcity of dissenters. Although their numbers increased, New Hampshire did not systematically require the payment of rates by dissenters nor always concern itself with the support of their ministers. Quakers, Anglicans, Presbyterians, and Baptists who attended their own churches were exempt from supporting the local established church, which, because of Congregational dominance in town after town, was Congregationalist.<sup>57</sup>

When Presbyterians settled Londonderry in 1719, the situation changed. Presbyterians always dominated that town before the Revolution, and their church was the town's officially established church. As time passed, Anglicans in New Hampshire as well as Presbyterians and even Separate Baptists received authorization to establish their own parishes in towns dominated by Congregationalists and to use town authority to collect taxes for their own churches. The pattern of establishment had become bewilderingly diverse by the eve of the Revolution. Bedford, as well as Londonderry, had an exclusive Presbyterian establishment, although in Pembroke and Hampton Falls the Presbyterian church and the Congregational church were both established. In Holderness, Anglicans enjoyed an exclusive establishment but shared a dual establishment in Portsmouth. In most towns on the eve of the Revolution, the Congregational church remained the only publicly sup-

57. Charles B. Kinney, *Church and State: The Struggle for Separation in New Hampshire, 1630–1900* (New York, 1955), pp. 36–43, 58–64, 72–82; McLoughlin, *New England Dissent*, 2:33–40; Cobb, *Rise of Religious Liberty*, p. 298.

ported church, although non-Congregationalists in such towns were supposed to have an exemption from religious taxes if they had no church of their own. Some towns had a dual establishment, and the province as a whole had a multiple establishment, with free exercise for dissenters.<sup>58</sup>

Thus, throughout New England there was no single provincial establishment supported by all, and the law of each colony allowed the possibility of multiple establishments. Americans of the colonial period thought of an establishment of religion mainly in terms of the classic establishment of the mother country, as Thomas Curry has shown,<sup>59</sup> but little congruence existed between thought and law or between thought and reality in some New England towns.

58. Kinney, *Church and State*, pp. 72–84; McLoughlin, *New England Dissent*, 2:840–43.

59. Curry, *First Freedoms*, p. 133.

## 2

*State*

*Establishments*

*of Religion:*

*New England*

The Revolution triggered a long pent-up movement for disestablishment of religion in several of the states, and condemnations of establishments in three states that had never experienced an establishment of any kind during the colonial period. A fourth state that had never had an establishment, Rhode Island, did not adopt a state constitution and therefore had no provision on the subject.

New Jersey provided in its constitution of 1776 that no person should “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