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A Constitutional Right of Religious Exemption: An Historical Perspective

Philip A. Hamburger*

Did late eighteenth-century Americans understand the Free Exercise Clause of the United States Constitution to provide individuals a right of exemption from civil laws to which they had religious objections? Claims of exemption based on the Free Exercise Clause have prompted some of the Supreme Court's most prominent free exercise decisions, and therefore this historical inquiry about a right of exemption may have implications for our constitutional jurisprudence.¹ Even if the Court does not adopt late eighteenth-century ideas about the free exercise of religion, we may, nonetheless, find that the history of such ideas can contribute to our contemporary analysis. The historical evidence concerning religious liberty in eighteenth-century America is remarkably rich and consequently can reveal analytical difficulties and solutions to which we should be attentive when formulating our modern constitutional law.

The possibility that the Free Exercise Clause was understood in the late eighteenth century to provide a constitutional right of religious exemption from civil laws has been examined by relatively few

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1. Exemptions were denied in the following cases: *Employment Division v. Smith*, 494 U.S. 872 (1990); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934); and *Reynolds v. United States*, 98 U.S. 145 (1879). Exemptions were created in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

scholars. Among these are Professors Michael J. Malbin and Ellis West, who have relied upon the writings of a small number of framers, ratifiers, and other Americans to argue that the First Amendment did not create a right of religious exemption.² Recently, however, Professor Michael W. McConnell has, with great sophistication, presented the case for a contrary position, and he thereby has created an opportunity to reexamine the issue.³ According to Professor McConnell, the Free Exercise Clause may have originally been understood to exempt individuals from civil laws to which they had religious objections. In qualification, McConnell adds that the First Amendment may have exempted only such noncompliance as was peaceable and did not threaten important government interests.⁴ McConnell's work is particularly significant not only because it takes a fresh view of the Free Exercise Clause but also because it has implications for our historical understanding of America's written constitutions: It suggests that American constitutions subordinated civil law, whenever practicable, to each individual's personal judgment about his or her higher obligations.

In fact, late eighteenth-century Americans tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws.⁵ The first part of this Article examines and calls into question McConnell's arguments that the Free Exercise Clause may have created such a right. The second part of this Article then considers more generally the history of a right of religious exemption and shows the extent to which Americans did not seek and even rejected such a right. Among other things, the second part also suggests how Americans reconciled their distaste for a right of exemption with their support for religious freedom. Of course, many Americans sympathized with their

2. MICHAEL J. MALBIN, *RELIGION AND POLITICS* (1978); Ellis West, *The Case Against a Right to Religious-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 624 (1990). For related perspectives on the constitutional question, see WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976); Phillip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); G.R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985 (1985-86).

3. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, *Origins*]. McConnell has developed his position in Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, *Free Exercise Revisionism*].

As Professor Carol Weisbrod points out, we can ask historical questions about exemption other than the one pursued here. Professor Weisbrod, for example, examines the different ways in which religious minorities are accommodated. Among other things, she inquires whether legislation and judicial decisions are the means most commonly used to meet the special needs of religious minorities. Carol Weisbrod, *Comment on Curry and Firmage Articles*, 7 J.L. & RELIG. 315, 320-21 (1989).

4. McConnell, *Origins*, *supra* note 3, at 1461-62.

5. The term "civil law" here refers to the law emanating from civil, as opposed to religious, authorities and relating to civil matters. So, too, "civil rights" here refers to the rights under such civil law.

neighbors who had pious scruples about oaths, military service, and a few other legal requirements, and, therefore, in various statutes and even state constitutions, Americans expressly granted religious exemptions from some specified civil obligations. Americans did not, however, authorize or acknowledge a general constitutional right of religious exemption from civil laws.

I. McConnell's Evidence

Eighteenth-century Americans spoke and wrote extensively about religious freedom and about government. Yet Professor McConnell apparently cites no instance in which a late eighteenth-century American explicitly and unambiguously said that an individual's right to the free exercise of religion included a general right of peaceable, religious exemption from civil laws—that is, from the otherwise secular laws of secular government.⁶ Instead, McConnell argues that his thesis is a possible and even the most probable explanation of a substantial body of other evidence.⁷ This part of this Article examines McConnell's evidence and draws a contrary conclusion.⁸

6. The closest McConnell comes to this is an argument by Elias Boudinot for including a militia exemption in the Bill of Rights. See McConnell, *Origins*, *supra* note 3, at 1500. But see *infra* note 56 and accompanying text.

7. McConnell, *Origins*, *supra* note 3, at 1414.

8. Some of McConnell's evidence will not be examined here because it is only indirectly pertinent to the question of what late eighteenth-century Americans thought about exemptions. For example, McConnell recites at length some nineteenth-century cases. See McConnell, *Origins*, *supra* note 3, at 1503-11. Although interesting, this evidence does not very directly inform us whether eighteenth-century Americans thought there was or should be a constitutional right of religious exemption.

Nonetheless, a word should be added about some of McConnell's seventeenth-century evidence. On the basis of the 1663 Rhode Island Charter and a few other charters, McConnell constructs three arguments. First, McConnell points out that these charters permitted colonists to pursue their religions notwithstanding English law to the contrary. *Id.* at 1427. Yet the precise words of, for example, the Rhode Island Charter, were that—“notwithstanding any law to the contrary—persons may enjoy ‘theire own judgments and consciences, in matters of religious concernments . . . ; they behaving themselves peaceable.’” See 6 NATHAN O. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS* 3213 (1909). England had various laws prohibiting certain religious meetings and otherwise penalizing dissenters, and provisions like that of the Rhode Island Charter merely freed colonists from complying with such laws, which restrained individuals “in matters of religious concernments.” Second, McConnell emphasizes that the charters “limited the free exercise of religion only as necessary for the prevention of ‘Lycentiousnesse’ or the injury or ‘outward disturbance of others,’ rather than by reference to all generally applicable laws.” McConnell, *Origins*, *supra* note 3, at 1427 (footnote omitted) (quoting SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 117 (1986)). For another interpretation, see the discussion of state constitutions *infra* text accompanying notes 9-49. Furthermore, the word “licentiousness” was frequently used to refer to immoral and, sometimes, merely prohibited behavior. WILLIAM ROBERTSON, *PHRASEOLOGICA GENERALIS* 823-24 (1681). So too, “civil injury”—another term used by the Rhode Island Charter, see 6 THORPE, *supra*, at 3213,—could refer to any injury under civil

McConnell finds support for his position in the religion clauses of certain state constitutions,⁹ and, because he describes these clauses as his "strongest evidence,"¹⁰ they will be examined here in detail. The clauses that interest him are those that acknowledged an individual's right to the free exercise of religion or to freedom of worship but that added a caveat, such as, "provided he doth not disturb the public peace."¹¹ According to McConnell, these caveats indicate that the right of free exercise was understood to include a right of exemption from religiously objectionable civil laws, except with regard to nonpeaceable behavior.¹² This argument, however, depends upon two assumptions: that the caveats concerned only nonpeaceable behavior, and that the caveats limited the extent rather than the availability of the right of free exercise. As it happens, both assumptions are mistaken. The caveats reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions.

The behavior described by the caveats included more than just nonpeaceful behavior. A caveat that required persons to avoid disturbing the "good order," "safety," or "happiness" of society or of the state appears to have demanded a greater degree of obedience than just peaceful behavior.¹³ Indeed, in Maryland, the caveat expressly mentioned persons who "shall infringe the laws of morality, or injure others in their natural, civil or religious rights," and, in New York and South Carolina, the caveats dealt with, among other things, "acts of licentiousness."¹⁴ Even those caveats that mentioned only disturbances of the peace did not exclusively concern acts of violence or force. According to long tradition, the criminal offenses over which common law courts had jurisdiction were said to be "*contra pacem*." Consequently, the phrase "*contra pacem*" became associated with the notion of violation of law. Whereas McConnell assumes that a disturbance of the peace was simply nonpeaceful behavior, eighteenth-century lawyers made clear that "every breach of law is against the peace."¹⁵ Thus, the disturb-the-

law. Third, McConnell points out that the 1665 Carolina Charter authorized the proprietors to exercise the power of granting indulgences and dispensations. McConnell, *Origins*, *supra* note 3, at 1428. This is not, however, evidence that religious exemptions were considered matters of constitutional right. In England in the 1680s, moreover, the dispensing power was condemned as unlawful. J. R. TANNER, *ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603-1689*, at 230, 253-55, 289-91 (1971).

9. McConnell, *Origins*, *supra* note 3, at 1455-66, 1512; *see also* McConnell, *Free Exercise Revisionism*, *supra* note 3, at 1117-18.

10. McConnell, *Free Exercise Revisionism*, *supra* note 3, at 1118.

11. N.H. CONST. OF 1784, pt. I, art. V.

12. McConnell, *Origins*, *supra* note 3, at 1461-62.

13. For a reproduction of many but not all of the caveats in state constitutions, *see id.* at 1456-58. Note also the existence of various draft proposals, such as George Mason's in Virginia and John Jay's in New York.

14. MD. DECL. OF RIGHTS OF 1776, art. 33; N.Y. CONST. OF 1777, art. XXXVIII; S.C. CONST. OF 1790, art. VIII, § 1. For the word "licentiousness," *see supra* note 8.

15. *Queen v. Lane*, 6 MOD. 128, 87 ENG. REP. 884 (Q.B. 1704); *see also* 2 WILLIAM

peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions.

The caveats, moreover, described the availability rather than the extent of the guaranteed religious freedom; instead of implying that the right of free exercise was very extensive—that it permitted peaceable departure from civil law—the caveats stated the conditions upon which religious liberty could be denied.¹⁶ This point can be illustrated with particular clarity by the Revolutionary constitutions of New Jersey, Delaware, and South Carolina.¹⁷ In these constitutions, the caveats about peaceable behavior clearly related to guarantees of equality or nondiscrimination rather than to the free exercise or freedom of worship clauses. In New Jersey, article XVIII

HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 8, § 38, at 40 (1726). Note that eighteenth-century lawyers could distinguish “actual” breaches of the peace when they wanted to.

Incidentally, this definition of a breach of the peace was recognized by Baptists who pleaded for an expanded religious freedom. Dissenting ministers who opposed most legislation with respect to religion and who insisted that individuals not be treated differently on account of their religions frequently were accused of opposing the regulation of morality. *E.g.*, TIMOTHY STONE, A SERMON 24-25 (Conn. election sermon 1792) (Evans 24820). In responding to such charges, dissenters pointed out that the state could punish immoralities—peaceful and nonpeaceful—as breaches of the peace. For example, after setting forth his strong stand on religious freedom, a Baptist, Caleb Blood, explained:

This however, by no means prohibits the civil magistrate from enacting those laws that shall enforce the observance of those precepts in the christian religion, the violation of which is a breach of the civil peace; viz. such as forbid murder, theft, adultery, false witness, and injuring our neighbor, either in person, name, or estate. And among others, that of observing the Sabbath, should be enforced by the civil power.

CALEB BLOOD, A SERMON 35 (Vt. election sermon [1792]) (Evans 24126). After giving an election sermon in which he argued against establishments, another Baptist, Samuel Stillman, had to respond to complaints “[t]hat upon the principles contained in the sermon, the civil magistrate ought not to exercise his authority to suppress acts of immorality.” SAMUEL STILLMAN, A SERMON 20 n.* (Mass. election sermon 1779) (Evans 16537). Stillman replied that his words had been misunderstood and that “[i]mmoral actions properly come under the cognizance of civil rulers, who are the guardians of the peace of society. . . . I beg leave to observe in the words of Bishop Warburton, ‘That the magistrate punishes no bad actions, as sins or offenses *against God*, but only as crimes injurious to, or having a malignant influence on society.’” *Id.* (Of course, by quoting Warburton—the bold defender of establishments—Stillman was taunting his critics.) For establishment opinion about the peace of society or disturbances of the peace, see, for example, Israel Evans’ statement, quoted *infra* note 36; JOSEPH LYMAN, A SERMON 36 (Mass. election sermon 1787) (Evans 20469); DAVID PARSONS, A SERMON 13 (Mass. election sermon 1788) (Evans 21360); WILLIAM WORTHINGTON, THE DUTY OF RULERS AND TEACHERS 18 (Conn. election sermon 1744) (Evans 5524).

16. Of course, religious freedom could be denied in varying ways and in varying degrees. For example, government could deny some civil rights to Protestant dissenters and could deny even more civil rights to Catholics. For a justification of graduated restraints, see William Warburton, *Alliance Between Church and State*, in 7 WORKS 254-56 (Richard Hurd ed., 1811).

17. For other examples, see *infra* note 26.

of the constitution concerned freedom of worship,¹⁸ and article XIX stated that:

no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, . . . shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.¹⁹

In Delaware, section 2 of the Declaration of Rights spoke of freedom of worship,²⁰ and section 3 provided that Christians "ought . . . to enjoy equal Rights and Privileges in this State, unless, under Colour of Religion, any Man disturb the Peace, Happiness or Safety of Society."²¹ The South Carolina Constitution declared:

That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges.²²

Thus, in New Jersey, Delaware, and South Carolina, the caveats related to language concerning equality and nondiscrimination, not to the language about free exercise, freedom of worship, or toleration. The caveats stated the conditions under which government could deny the religious freedom otherwise guaranteed.

Although not as clear as the New Jersey, Delaware, and South Carolina constitutions, other state constitutions with disturb-the-peace caveats are susceptible of similar interpretation. In these other states, rather than pertain unambiguously to equality clauses, the caveats related, or may have related, to the free exercise clauses. Nonetheless, the caveats still should be understood to have stated the conditions under which government could deny the promised religious liberty. Americans repeatedly reminded one another in sermons and pamphlets that individuals were "equally" free in the state of nature and that "all" individuals in that condition and even in civil society had a natural right to believe or worship as they pleased. In this context, it is hardly surprising that American constitutions tended to guarantee free exercise or freedom of worship to all persons.²³ Similarly, constitutions provided other guarantees of

18. "That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience . . ." N.J. CONST. OF 1776, art. XVIII.

19. *Id.* art. XIX.

20. "That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Consciences and Understandings . . ." DEL. DECL. OF RIGHTS OF 1776, § 2.

21. *Id.* § 3.

22. S.C. CONST. OF 1778, art. XXXVIII.

23. *E.g.*, GA. CONST. OF 1777, art. LVI ("[a]ll persons whatever"); MASS. CONST. OF

religious liberty to all persons, Christians, or Protestants.²⁴ In connection with these varied provisions, it is possible that the caveats were understood to indicate the circumstances in which government could deny religious freedom. For example, Georgia's constitution said that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State."²⁵ The second clause could have been a condition of the availability of a relatively narrow right of free exercise rather than a limitation on an otherwise very extensive right. In short, the theory that the disturb-the-peace caveats evince a right of religious exemption fails to explain the Delaware, New Jersey, and South Carolina constitutions; in contrast, the theory that the caveats permitted government to deny an otherwise guaranteed religious freedom explains the words of all early state constitutions.

It would seem, therefore, that the caveats set forth the conditions under which government could deny a promised religious liberty—the conditions under which government could restrict the availability of such freedom. Of course, the caveats reveal that the religious liberty guaranteed by American constitutions did not include the behavior described in the caveats. But the caveats did not in other respects define the extent of religious liberty.²⁶

This interpretation—thus far based largely on the words of the caveats—can be verified by the context in which the caveats were written. Like Englishmen before them, Americans disagreed about the circumstances in which government should be able to deny the religious liberty otherwise guaranteed. It will be seen that Americans took at least three broadly different positions on the availability of religious freedom and that their variously formulated religion clauses more or less reflected these three positions.

1780, art. II ("all men"); N.H. CONST. OF 1789, art. V ("[e]very individual"); N.C. CONST. OF 1776, DECL. OF RIGHTS, art. XIX ("all men"); PA. CONST. OF 1776, art. II ("all men"). Similarly, some state constitutions said that "no person" was to be denied free exercise or freedom of worship. See, e.g., MASS. CONST. OF 1780, art. II; N.J. CONST. OF 1776, art. XVIII.

24. E.g., MD. DECL. OF RIGHTS OF 1776, art. 33; N.Y. CONST. OF 1777, art. XXXVIII; S.C. CONST. OF 1790, art. VIII, § 1.

25. GA. CONST. OF 1777, art. LVI.

26. Further confirmation of this understanding of the caveats may be found in the charters and drafts of constitutions that added caveats to clauses granting "toleration." In 1776, George Mason proposed that "all men should enjoy the fullest toleration in the exercise of religion . . . unpunished and unrestrained by the magistrate, unless, under colour of religion, any man disturb the peace, the happiness, or safety of society or of Individuals." 7 REVOLUTIONARY VIRGINIA 272, 277 & n.26 (W.V. Schreeven & R.L. Scribner eds., 1983). For the New York debates concerning toleration, see *infra* text accompanying notes 37-49.

Note, moreover, the chronological development of the religion clauses in, for example, Georgia. The 1732 Charter and the 1777 Constitution had caveats. GA. CHARTER OF 1732, in 2 THORPE, *supra* note 8, at 773; GA. CONST. OF 1777, art. LVI. The 1789 Constitution did not.

The first approach made use of the ideas of John Locke. Some Americans, drawing upon Locke, argued that government should be able to discourage dangerous beliefs—that it should be able to deny religious liberty not only to persons whose religious opinions prompted actual violations of law but also to persons whose opinions merely tended to have this effect.²⁷ In the words of a Vermont minister,

every one has an undoubted right to choose that religion and mode of worship which to him appears most agreeable to the word of God, unless it be such as evidently tends to destroy civil peace and government; in that case no one ought to be *tolerated*—self-preservation forbids it.²⁸

In accord with this approach, Georgia's constitution permitted Georgia to deny religious freedom to persons whose religion was "repugnant" to the peace and safety of the state.²⁹ Such was the position Jefferson denounced in the preamble to his *Act for Establishing Religious Freedom*:

[T]o suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy . . . it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.³⁰

As Jefferson understood, some Americans still assumed that government had a right to restrain religious opinions it considered potentially dangerous.

Many Americans repudiated the idea that a religious opinion could be restrained merely on account of its bad tendency and adopted, instead, a second approach: that government should be able to deny religious liberty only to individuals who disturbed the peace—who actually violated civil law. Taking a version of this approach, the Northwest Ordinance declared that "[n]o person

27. In *A Letter Concerning Toleration*, Locke argued that "liberty of conscience is every man's natural right," and that civil government had no authority to interfere with the free exercise of an individual's natural right to worship as he or she pleased. Yet government could, according to Locke, deny toleration to any sect that espoused certain opinions inimical to the preservation of civil society and government. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 50-52 (Bobbs-Merrill 2d ed. 1955) (1689). Other authors also took versions of this position. See, e.g., WARBURTON, *supra* note 16, at 255-56; VATTEL, *THE LAW OF NATIONS*, bk. 3, ch. 12, § 133, at 59 (1849).

28. GERSHAM C. LYMAN, *A SERMON* 12 (Vt. election sermon 1784) (Evans 18566). He continued, "and we know that they have not the approbation of God, who under pretense of serving him, would nullify his ordinance." The words "his ordinance" referred to the various biblical injunctions about submission to worldly rulers. In Baltimore, the Rev. Bissett preached "that no Citizen ought, on account of his opinions (unless they be evidently incompatible with the well-being of Society) to be denied protection, or debarred from the walks of civil eminence." JOHN BISSETT, *A SERMON*, App. at 8 (1791) (Evans 23208).

29. See text accompanying *supra* note 25.

30. 12 HENING, *THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619*, at 85 (William W. Hening ed., Richmond 1823) [hereinafter HENING, *COLLECTION OF THE LAWS OF VIRGINIA*].

demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory."³¹ Yet even this ameliorated type of caveat still specified circumstances in which government could deny a person the religious freedom he otherwise was guaranteed. As Oliver Ellsworth explained,

In our country every man has a right to worship God in that way which is most agreeable to his own conscience. If he be a good and peaceable citizen, he is liable to no penalties or incapacities on account of his religious sentiments: or in other words, he is not subject to persecution.³²

If a person was not a good and peaceable citizen, he could be penalized on account of his religion.

In contrast was a third position—taken by those constitutions that did not qualify their guarantees of religious liberty.³³ Some of the constitutions that took this third approach not only omitted caveats from their religion clauses but also included provisions condemning the punishment of individuals "on account" of their religious beliefs.³⁴ Similar to these constitutions was Jefferson's *Act for Establishing Religious Freedom*. As seen above, the preamble to the Act condemned at least the first approach; in addition, the body of the Act stated that no man shall "suffer on account of his religious opinions or belief."³⁵ Thus, the Americans who abandoned the caveats apparently recognized that the caveats were designed to allow the punishment of individuals on account of their religion.³⁶ Whereas

31. Northwest Ordinance, art. I (1787). Another version of this approach was simply to condition religious liberty on the behavior specified in the caveat. Even this more general type of formulation, however, was drafted to enable government in the specified circumstances to punish individuals *on account* of their religion.

32. Oliver Ellsworth, *A Landholder*, CON. COURANT, Dec. 17, 1787, in 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 449 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter DOCUMENTARY HISTORY]; see also ELNATHAN WHITMAN, *THE CHARACTER AND QUALIFICATIONS OF GOOD RULERS* 24 (Conn. election sermon 1745) (Evans 5714).

33. E.g., GA. CONST. OF 1789, art. 3, § 5; KY. CONST. OF 1792, art. 12, § 3; PA. CONST. OF 1776, art. 2; VA. BILL OF RIGHTS OF 1776, § 16.

34. E.g., KY. CONST. OF 1792, art. 12, § 4; PA. CONST. OF 1776, art. 2.

35. 12 HENING, COLLECTION OF THE LAWS OF VIRGINIA, *supra* note 30, at 86. Although the Act is well-known for having precluded an establishment, it clearly did more than this.

36. As an anonymous Virginian wrote in 1777 of Christian sects that "quarrel" with one another, "they ought to be punished, not as professors of religion, but as disorderly members of the Commonwealth." THE FREEMAN'S REMONSTRANCE AGAINST AN ECCLESIASTICAL ESTABLISHMENT 5 (1777) (Evans 43750) [hereinafter THE FREEMAN'S REMONSTRANCE]. According to a New Hampshire minister,

when a man adopts such notions as, in their practice, counteract the peace and good order of society, he then perverts and abuses the original Liberty of man; and were he to suffer for thus disturbing the peace of the community, and injuring his fellow-citizens, his punishment would be inflicted not for the exercise of a virtuous principle of conscience, but for violating that

McConnell asserts that the caveats reveal an expansive notion of free exercise—including a right of exemption—in fact, the caveats permitted discriminatory restrictions on the availability of religious freedom and, for this reason, were condemned as intolerant.

The struggle over these three approaches can be observed in detail in the convention that drafted New York's 1777 constitution and particularly in the attempts of John Jay to obtain a caveat that would permit the repression of Catholicism.³⁷ The earliest extant draft considered by the drafting committee, of which Jay was a leading member, contained a religion clause apparently supported and probably even written by Jay.³⁸ Following the first approach described above, the draft conditioned toleration upon the tendency of opinions:

that free Toleration be forever allowed in this State to all denominations of Christians without preference or distinction and to all Jews, Turks and Infidels, other than to such Christians or others as shall hold and teach for true Doctrines, principles incompatible with and repugnant to the peace, safety and well being of civil society in general or of this state in particular[,] of and concerning which doctrines and principles the legislature of this State shall from time to time judge and determine.³⁹

This proposal assumed that government should be able to treat some religious beliefs as repugnant to the interests of civil society. Although not expressly mentioned, Catholicism was the religion the supporters of this language especially feared, for, according to many eighteenth-century Protestants, Catholics believed they were not always obligated by their civil oaths and allegiances. The drafting committee, however, rejected most of the anti-Catholic provision, adopting instead the unqualified statement—illustrative of the third approach—that “the free toleration of religious profession and worship shall forever be allowed to all mankind.”⁴⁰

Not deterred, Jay resumed his efforts when the committee's draft was discussed by the Convention on March 20, 1777. Following

universal law of rectitude and benevolence which was intended to prevent one man from injuring another.

ISRAEL EVANS, A SERMON 7 (N.H. election sermon 1791) (Evans 23358).

37. This history of the religion clause of the 1777 New York Constitution is traced by CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 541-45 (1906), who prints the early drafts, and JOHN W. PRATT, *RELIGION, POLITICS, AND DIVERSITY* 87-88 (1967).

38. Jay probably participated in preparing the draft, even if it is not written in his hand. See LINCOLN, *supra* note 37, at 495-99; PRATT, *supra* note 37, at 83, 86.

39. See LINCOLN, *supra* note 37, at 541. The draft continued, “and further that as the Prevalence of Religion and Learning greatly contributes to the Happiness & Security of the people of every free State, the legislature of this State ought shall to afford them all proper encouragement.” *Id.* Following the word “State” in the text, a marginal insertion added the words: “in religious Profession and worship to all mankind.” *Id.*

40. 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK 844 (1842) [hereinafter JOURNALS]. This language, from the Convention's Journal, may not have been an exact quotation of the committee's proposal. A slightly earlier draft said: “That the free exercise Toleration of religious profession and worship be forever allowed within this state to all mankind.” See LINCOLN, *supra* note 37, at 541.

closely the language of his earlier proposal, he moved that the committee's religion clause be qualified as follows: "Provided nevertheless, that nothing in this clause contained, shall be construed to extend the toleration of any sect . . . who inculcate and hold for true doctrines, principles inconsistent with the safety of civil society, of and concerning which the Legislature . . . shall . . . judge and determine."⁴¹ This attempt to reinstate a version of his original measure gave rise to "[m]any debates," and therefore Jay withdrew his amendment and substituted an addition to the religion clause that expressly denied religious liberty to Catholics.⁴² Again, he was disappointed—losing in a vote of 19 to 10.⁴³

At this point, Jay called for a postponement of further discussion so that he and other anti-Catholics could prepare a compromise position. Having failed to obtain approval of any of the Lockean or more expressly anti-Catholic formulations of the religion clause, Jay and other anti-Catholic framers shifted their focus from the religion clause to that concerning naturalization. In the words of the historian John W. Pratt, "the anti-Catholic group . . . altered its tactics"; it "decided to achieve the proscription of Catholics by means of a naturalization oath for aliens."⁴⁴ Therefore, on March 21, when the Convention returned to its consideration of the religion clause, Jay was ready to compromise, and he moved that there be added to the religion clause a somewhat less severe caveat: "provided that the liberty of conscience hereby granted, shall not be construed to encourage licentiousness, or be used in such manner as to disturb or endanger the safety of the State."⁴⁵

Yet even Jay's compromise proposal was insufficiently tolerant in the view of many members of the Convention, for it was ambiguous—it could be understood to refer not only to illegal actions but

41. 1 JOURNALS, *supra* note 40, at 844.

42. *Id.* This had the political advantage of clearly not threatening any Protestants. The substitute stated:

Except the professors of the religion of the church of Rome, who ought not to hold lands in, or be admitted to a participation of the civil rights enjoyed by the members of this State, until such time as the said professors . . . swear, that they verily believe in their consciences, that no pope, priest or foreign authority on earth, hath power to absolve the subjects of this State from their allegiance to the same. And further, that they renounce and believe to be false and wicked, the dangerous and damnable doctrine, that the pope, or any other earthly authority, have power to absolve men from sins. . . .

Id. Note that a less bigoted oath could be acceptable to some English Catholics. In the 1780s, the Catholic Committee of England attempted to obtain relief from the penal laws by proposing an oath with which Catholics would have "protested" against certain doctrines commonly attributed to them. *To the Catholics of England* [Circular Letter of the Catholic Committee to the Catholics of England] (Nov. 25, 1789). The substantial compromises proposed by the Committee were not acceptable to the Church.

43. 1 JOURNALS, *supra* note 40, at 844.

44. PRATT, *supra* note 37, at 87.

45. 1 JOURNALS, *supra* note 40, at 845.

also to dangerous opinions.⁴⁶ On this ground, Gouverneur Morris challenged Jay's motion by asking whether it was not substantially the same as Jay's proposal that was withdrawn.⁴⁷ The Convention, however, considered the proposals to be different. Therefore, Robert Livingston moved to substitute in place of Jay's compromise amendment a caveat that carefully referred only to actions: "provided that this toleration shall not extend to justify the professors of any religion in disturbing the peace, or violating the laws of the State."⁴⁸ In other words, to forestall Jay's compromise proposal, Livingston was willing to give up the unqualified guarantee of toleration that the committee had reported to the Convention, but, if there had to be a caveat, Livingston wanted it to refer to unlawful acts rather than dangerous opinions.

In the end—after a temporary victory by Jay—both sides had to compromise further. On April 1, upon a motion by Morris, the Convention unanimously adopted what became the Constitution's caveat to its guarantee of religious freedom: "Provided that the liberty of conscience hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."⁴⁹ A final compromise, the Morris proposal mentioned acts and practices but employed some of Jay's formulation.

This detailed account of the evolution of New York's religion clause reveals that Americans formulated the caveats in their religion clauses in a way that reflected their three main positions on the availability of religious freedom. To allow government to deny religious freedom with respect to what they considered dangerous beliefs, Jay and other anti-Catholic framers insisted upon a caveat relating to belief or, at least, Catholicism. In response, Morris, Livingston, and other relatively tolerant framers had to compromise: They abandoned the Committee's unqualified religion clause and attempted to limit Jay's caveat so that it would only concern unlawful acts. Far from reflecting a right of exemption, the various caveats indicated the circumstances in which government could deny the religious freedom otherwise guaranteed by a constitution.

B. *James Madison*

McConnell focuses his discussion of the framers on the writings of Madison. Yet even Madison did not believe that the right of free exercise included a right of religious exemption from civil laws.⁵⁰

46. PRATT, *supra* note 37, at 88.

47. 1 JOURNALS, *supra* note 40, at 845.

48. *Id.*

49. *Id.* at 860. The Constitution varied from the Morris proposal in its punctuation. The Constitution's provision was largely copied by South Carolina. S.C. CONST. OF 1790, art. VIII, § 1. It was unusual in its inclusion of the phrase "shall not be construed," which had been part of Jay's proposal and was left in place by Morris' amendments. Although the phrase was better suited to Jay's proposal than Morris', it clearly did not imply a right of exemption.

50. Although McConnell describes Jefferson's views, McConnell acknowledges that such opinions do not support his argument. McConnell, *Origins*, *supra* note 3, at 1451-

First, McConnell considers it significant that Madison and others in 1776 objected to the use of the word "toleration" on the ground that the exercise of religion was a right.⁵¹ According to McConnell, Madison's insistence that the exercise of religion was a right was a demand for an expanded religious liberty, possibly including a right of exemption.⁵² Yet if this was what Madison was claiming, why did he not say so? Perhaps he meant only what he said—that the free exercise of religion was a matter of right rather than of toleration or grace. Even if, however, Madison's objection did concern the extent of religious liberty, there is no reason to think that the right of free exercise was a right of exemption from civil laws. Indeed, there is reason to believe the contrary. By the 1770s, not only dissenters but also many supporters of religious establishments agreed that individuals had a natural right to the free exercise of religion.⁵³ Moreover, during the first decade of Independence, a majority of state constitutions provided for some form of establishment, yet only one state constitution, that of South Carolina in 1776, still spoke of "toleration" rather than a "right" of religious freedom.⁵⁴ It is unlikely that individuals and states unwilling to eliminate establishments were content to exempt each dissenter from the civil laws to which he or she had religious objections.

Second, McConnell argues that Madison's support for an express military exemption in the federal Bill of Rights implies that Madison believed the free exercise of religion included a general right of religious exemption from civil laws.⁵⁵ Yet other conclusions at least as probable as McConnell's can be drawn from Madison's proposal of a military exemption: For example, Madison may have assumed that a conscience or free exercise clause would not provide any right of exemption. Nor do the positions of Madison's colleagues in the congressional debates about the Bill of Rights support McConnell's

52. Indeed, Jefferson wrote to Madison: "The declaration that religious faith shall be unpunished, does not give impunity to criminal acts dictated by religious error." Letter to James Madison, (July 31, 1788), in 13 THOMAS JEFFERSON, PAPERS 442-43 (Julian P. Boyd ed., 1956). McConnell does discuss the minimal amount of evidence surviving from the debates concerning the framing and ratification of the Bill of Rights, McConnell, *Origins*, *supra* note 3, at 1511, but he does not, except with regard to Jefferson and Madison, examine much other evidence relating to the positions of individual framers and ratifiers.

51. McConnell, *Origins*, *supra* note 3, at 1462.

52. *Id.* at 1443.

53. See *infra* notes 82-85

54. See 1 ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES 444 (1964). The pressures that encouraged this uniformity of rhetoric included the efforts of dissenters. For example, in 1775, the Warren Association informed the Massachusetts Assembly that a freedom from religious taxation "is not a mere favor, from any man or men in the world, but a right and property granted us by God." See *id.* at 309. On the abandonment of the toleration language in New York, see PRATT, *supra* note 37, at 89.

55. McConnell, *Origins*, *supra* note 3, at 1454.

view of Madison. Of the representatives whose contributions were recorded, some supported a constitutional right to a military exemption—although only one did so explicitly on grounds of conscience.⁵⁶ Some, however, opposed such an exemption.⁵⁷ None are recorded as even discussing a general constitutional right of exemption. Moreover, the House proposal for the Bill of Rights included, in addition to a “free exercise” clause, a provision for “rights of Conscience” and a provision for a military exemption—both of which were removed by the Senate.⁵⁸ What any of this implies about the meaning of the Free Exercise Clause is speculative. Arguably, it suggests that the Free Exercise Clause, by itself, was not thought to create an exemption from civil laws.⁵⁹

Third, McConnell finds evidence in Madison’s rewriting of the religion clause of the 1776 Virginia Bill of Rights.⁶⁰ Madison’s proposal, which included a disturb-the-peace caveat, was broken by semicolons into three clauses. The first clause ended by declaring that “all men are equally entitled to the full and free exercise of [religion] accord[ing] to the dictates of Conscience.”⁶¹ The second added: “and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges.”⁶² According to the third clause, “nor [ought men on

56. Boudinot “wish[ed] that in establishing this government we may be careful to let every person know that we will not interfere with any person’s particular religious profession. If we strike out this clause, we shall lead such persons to conclude that we mean to compel them to bear arms.” *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 1791* (Helen E. Veit et al. eds., 1991) [hereinafter *CREATING THE BILL OF RIGHTS*]. Even this statement hardly indicates that Boudinot or others thought a free exercise of religion required a right of religious exemption from military service, let alone exemption from civil laws in general.

57. Most dramatically, Representative Benson said: “No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the government.” *Id.* at 184. McConnell attempts to explain this by pointing out that Benson also said it would be difficult to formulate any such exemption. McConnell, *Origins*, *supra* note 3, at 1502. Moreover, McConnell argues that Benson may have believed “there is no natural right to exemption from militia service because the government’s interest is potentially compelling and the degree of necessity for universal military service must be left to legislative discretion.” *Id.* Yet this is hardly what Benson said. For Benson, as for so many eighteenth- and nineteenth-century men, a natural right appears to have been a portion of the liberty existing in the state of nature. Opinion against a military exemption is apparent in *CREATING THE BILL OF RIGHTS*, *supra* note 56, at 183, 198.

58. See *CREATING THE BILL OF RIGHTS*, *supra* note 56, at 46. Also, during the ratification debates, many Anti-Federalists argued for a bill of rights that would include both a free exercise clause and a military exemption. For some of the demands for a military exemption, see 2 *DOCUMENTARY HISTORY*, *supra* note 32, at 509, 638; 13 *id.* at 60, 252-53, 513, 540; 16 *id.* at 419.

59. The surviving debates about the Free Exercise Clause are remarkable chiefly for their meagerness. As McConnell notes, “[t]he recorded debates in the House over these proposals cast little light on the meaning of the free exercise clause.” McConnell, *Origins*, *supra* note 3, at 1481.

60. *Id.* at 1462-63.

61. 7 *REVOLUTIONARY VIRGINIA*, *supra* note 26, at 457.

62. *Id.*

account of religion be] subjected to any penalties or disabilities unless, under [colour of religion, any man disturb the peace, happiness, or safety of society]."⁶³ This language conforms to the pattern observed in other state constitutions; the last clause clearly does not relate to the first and therefore does not imply that the first provided a right of exemption.

C. Exemptions from Particular Civil Obligations

Both before and after the adoption of constitutions guaranteeing the free exercise of religion, legislative and constitutional documents (including charters) granted exemptions from particular obligations, such as oaths, conscription, and assessments. McConnell suggests that when legislatures and other bodies created these exemptions they were attempting to reflect a free exercise right of exemption.⁶⁴ Yet legislators equally may have been showing their sympathy for Quakers and others whose piety prevented their conformity to law. As McConnell concedes, the issue whether an individual was understood to have a general constitutional right of religious exemption from civil laws is hardly the same issue as whether statutes or, occasionally, constitutions granted exemptions with respect to a few specific matters.⁶⁵

63. *Id.* The words within the last set of brackets are implied by an "&c" and are taken from the text to which Madison's language was to be an amendment.

64. McConnell, *Origins*, *supra* note 3, at 1466. Typically, these specialized exemptions were granted by legislative bodies. Some, however, were secured in state constitutions. For example, in Pennsylvania a person "conscientiously scrupulous of bearing arms" was exempted from "personal service" if he would pay "an equivalent." PA. CONST. OF 1776, DECL. OF RIGHTS, § VIII. According to John Bissett,

Government holds itself justifiable in overruling the scruples of those who think it unlawful to contribute for the support of a defensive war, and of courts of justice; and that liberty of conscience, in the extent to which some carry it, must, in many instances, be infringed by a power, the object of whose operations is the good of the whole. But this answer [of government] I propose, rather than defend; having a respect for religious scruples, however seemingly groundless; and being satisfied that a scheme can be devised in which these difficulties may be obviated.

How then is the object to be accomplished? —This is a question the solution of which properly belongs to Legislative Wisdom . . .

BISSETT, *supra* note 28, app. at 12. See also *id.* app. at 16, where Bissett employs the argument he here says he is not defending.

Incidentally, as Carol Weisbrod has discussed, claims of exemption can be accommodated "by a rule broad enough to include the particular practice." Weisbrod, *supra* note 3, at 316. The United States Constitution's clause concerning oaths or affirmations is an excellent example. U.S. CONST. art. VI. To the extent it was regarded as a civil law, it reflected a concession to those who wanted exemptions from civil laws, but the concession was made by altering a general requirement rather than by granting an exemption.

65. On the whole, legislatures appear to have assumed they had a right to grant military exemptions—at least if the exemptions did not specify a particular religion. Nonetheless, the right of legislatures to grant even such generally available exemptions could be challenged on the basis of demands that civil rights be equal rather than dependent upon an individual's religion. For example, after the 1776 Virginia Convention

At least one of McConnell's examples, the assessment system, involved exemptions, not from civil laws, but from laws relating to religion.⁶⁶ The assessments were state taxes levied to support religion. Many persons, including substantial numbers who were members of the supported church or churches, objected to having to provide such support, but at least dissenters could attempt to get legislative exemptions for their sects or, under some systems, had the right to have their contributions channelled to their own sects. Therefore, McConnell describes these assessment laws as containing exemptions and suggests that they reflected a constitutional

exempted Quakers and Mennonites from militia duties, the Committee of Frederick County complained "that they have a tender regard for the Conscientious Scruples of every religious Society but at the same time beg leave to represent the injustice of subjecting one part of the Community to the whole burthen of Government while others equally share the benefits of it." 7 REVOLUTIONARY VIRGINIA, *supra* note 26, at 549. Among other things, the Committee urged that Quakers and Mennonites either be subject to the "same fines" as other Americans for their failure to serve or be required to provide substitutes. *Id.* at 548-49. The Committee further asked if it "would not be reasonable to allow any person who should choose to contribute to the support of the public in lieu of attending Musters the same indulgence as to those who refuse from conscientious principles." *Id.* at 549. A few weeks later, the Convention required that the scrupulous were to be included in the militia but were not "obliged to attend general or private musters." *Id.* at 553 (quoting 9 Va. Stat. 139).

In Maryland, the small number of Mennonites and "Dunkers" were exposed to popular violence on account of their refusal to bear arms. James O. Lehman, *The Mennonites of Maryland During the Revolutionary War*, 50 MENNONITE Q. REV. 200, 205-07 (1976). The Provincial Convention granted an exemption to "such persons who from their religious principles cannot bear arms in any case," but this hardly put an end to the resentment. *Id.* at 208. Some military companies threatened to pull down the houses of conscientious objectors; other companies, it was thought, might refuse to fight. *Id.* at 209. The Committee of Correspondence "feared for the safety of the pacifists," as did the pacifists themselves, who, under these pressures, said they would pay amounts in lieu of service. *Id.*

Similar events occurred in Lancaster County, Pennsylvania, where members of the Church of the Brethren and other pacifists reluctantly paid what one of them called "'protection money,'" because "[t]here seemed to be no other alternative than to give something in order to be safe." Richard K. MacMaster, *Neither Whig nor Tory: The Peace Churches in the American Revolution*, 9 FIDES ET HISTORIA 14 (1977). Money paid as a substitute for military service could be disguised as contributions "for the needy," but, in fact, often was paid for protection from mob violence.

When Quakers complained about threats to their liberty of conscience guaranteed by Pennsylvania's charter, the sixty-six members of the Philadelphia Committee of Safety unanimously presented a response to the Speaker of the House. *Id.* at 16. The Officers of the Military Association of the City and Liberties of Philadelphia petitioned the Assembly:

We cannot alter the Opinion we have ever held with Regard to those parts of the Charter quoted by the Addressors, that they relate only to an Exemption from any Acts of Uniformity in Worship, and from paying towards the Support of other religious Establishments, than those to which the Inhabitants of this Province respectively belong. We know of no Distinctions of Sects, when we meet our Fellow Citizens on Matters of Public Concern, and ask those conscientiously scrupulous against bearing Arms, to contribute toward the Expence of our Opposition, not because of their *religious Persuasion*, but because the general Defence of the Province demands it.

Id. at 17.

For an interesting nineteenth-century criticism of exemptions developed by the judiciary, see HUGH H. BRACKENRIDGE, LAW MISCELLANIES 420-21 (1814).

66. See McConnell, *Origins*, *supra* note 3, at 1470-71.

right of religious exemption from civil laws.⁶⁷ Yet it remains unclear why exemptions from laws respecting religion should be understood to reveal much about a right of exemption from laws concerning civil matters.⁶⁸

D. The Role of the Judiciary

McConnell's argument appears to assume that late eighteenth-century Americans, at least by 1789, were content to have the judiciary evaluate the existence of conscientious objections and even to have the courts weigh such objections against the needs of government.⁶⁹ According to McConnell, religious conscience was not understood to justify nonpeaceful behavior—nor even a peaceful departure from a civil law, when the government had a compelling interest in uniform application.⁷⁰ With respect to a peaceful departure from civil law, the judiciary, indicates McConnell, was expected to weigh the interest of divinely inspired conscience against the interests of civil government.⁷¹

Although McConnell does not cite framers, ratifiers, or other Americans on the subject of judicial discretion, there is considerable evidence concerning late eighteenth-century perceptions of the judiciary, and it does not support McConnell's view of a right of religious exemption. In the framing and ratification debates, for example, both Federalists and Anti-Federalists repeatedly said that the written constitution should delineate with precision the extent of federal power and that federal judges should not be left with vague rules that might become sources of judicial discretion.⁷² Indeed, the Anti-Federalist insistence on clear, written limitations was of primary importance among the demands that gave rise to the Bill of Rights.⁷³ Thus, it is improbable that the framers and ratifiers of the Bill of Rights deliberately adopted a balancing test as the standard of individual religious liberty and federal power when these were in conflict.⁷⁴

67. *Id.* at 1471.

68. McConnell largely acknowledges that the assessments were laws relating to religion. *Id.* at 1470-71. Of course, members of establishments defended such laws as relating exclusively to civil concerns, but dissenters who demanded exemptions or the abandonment of assessments clearly held otherwise.

69. *Id.* at 1445, 1502, 1512.

70. *Id.* at 1461-62.

71. *Id.* at 1445.

72. Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 302-25 (1989) (and works cited therein).

73. *Id.* at 313-14.

74. Incidentally, for the opinion of Backus on judicial discretion in connection with exemptions, see ISAAC BACKUS, *The Sovereign Decrees of God*, in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789, at 295 (William G. McLaughlin ed., 1968) [hereinafter BACKUS ON CHURCH, STATE, AND CALVINISM]. Backus was a leading Baptist advocate for an expansion of religious liberty in America.

More generally, in the eighteenth century, the judiciary was understood to be as much a branch of civil government as the legislature. If individuals had a religious liberty that could exempt them from civil authority, they could claim exemption from judicial as well as legislative actions. Thus, for example, when a small Connecticut sect, the Rogerenes, breached civil laws, they were willing to defy the courts.⁷⁵ Persons claiming a right of religious exemption from civil law had no reason to stop at the courthouse door.

II. *A Constitutional Right of Religious Exemption in the Eighteenth Century?*

A review of McConnell's evidence has suggested reasons to doubt whether Americans thought the First Amendment provided a constitutional right of religious exemption from civil laws. It remains necessary, however, to examine more generally Americans' attitudes toward such a right. Although Americans frequently said religious freedom was based on an authority higher than the civil government and that the exercise of religion could not be submitted to civil authority, does this mean that they sought a religious or constitutional right of exemption from civil laws? On the basis of evidence chiefly from Madison, Mason, and Jefferson, Professor Michael Malbin has concluded that the First Amendment was not understood to give a right of religious exemption.⁷⁶ Professor Ellis West has supplemented Malbin's account with evidence from two notable dissenters, John Leland and Isaac Backus.⁷⁷ In the discussion that follows, it will be seen that there is much eighteenth-century evidence on the question, although only a selection of the evidence can be examined in this brief space.⁷⁸ What is presented, however, will suggest, first, that the free exercise of religion tended not to be considered a particularly extensive or radical claim of religious liberty—indeed, it was a freedom espoused not only by dissenters but also by establishments. Second, when advocating religious freedom—even a religious freedom broader than mere free exercise—dissenters who were politically active and influential in lobbying for expanded religious liberty⁷⁹ did not seek a constitutional right of exemption from

75. For a discussion of the Rogerenes, see *infra* text accompanying notes 101-03. For their willingness to defy the courts, see JOHN R. BOLLES & ANNA B. WILLIAMS, *THE ROGERENES; SOME HITHERTO UNPUBLISHED ANNALS BELONGING TO THE COLONIAL HISTORY OF CONNECTICUT* (1904).

76. MALBIN, *supra* note 2, at 19-37.

77. West, *supra* note 2, at 624.

78. Among the richest and most accessible sources for this Article are eighteenth-century election sermons. These were the product of New England, and therefore my New England evidence often is far more detailed than that from other regions. The evidence from different regions, however, is relatively consistent on the question examined here. Incidentally, note that the struggle for religious freedom could elicit co-operation among members of sects in very distant parts of America. For example, in 1774, Isaac Backus sought assistance for the Baptist cause in Massachusetts. In 1775, the Philadelphia Baptists publicized this. Among others, the Baptists of Charleston, South Carolina, sent money. See JOHN W. BRINSFIELD, *RELIGION AND POLITICS IN COLONIAL SOUTH CAROLINA* 84 (1983).

79. To be more precise, expanded general guarantees of religious freedom.

objectionable civil laws. Third, a right of exemption may have been considered a "law respecting religion" and may have been understood to create "unequal civil rights"—precisely what many dissenters considered attributes of establishment and sought to abolish.

A. Free Exercise

Although eighteenth-century Americans discussed the free exercise of religion in language that may, to twentieth-century lawyers, seem dramatic, by the last half of the eighteenth century, the notion of free exercise according to conscience was hardly a radical idea. Increasing numbers of eighteenth-century Americans asserted that an individual's relationship to the divine being was a matter of conscience and entirely personal.⁸⁰ This individualism was reflected not only in discussions of religion but also in the political analysis based on assumptions about the state of nature. According to the Lockean version of that analysis, the free exercise of religion was a right existing in the state of nature.⁸¹ It was dictated by personal conscience or judgment and therefore was not—and could not be—submitted to civil government.

Yet the right of free exercise was by no means a politically extreme idea or an idea that fully embodied the claims of dissenters seeking an expansion of religious freedom. The notion that each individual had an inalienable natural right to the free exercise of

Quakers and Mennonites, for example, were not, during the last half of the eighteenth century, typically among the dissenters who were influential in obtaining such guarantees.

80. For example, in Massachusetts, dissenters petitioned that "God hath given to every Man an Unalienable Right in Matters of His Worship to Judge for himself as his Conscience reserves ye Rule from God." 1749 petition to the Mass. Assembly from the Separate congregations in 17 towns, in 1 STOKES, *supra* note 54, at 422. Isaac Backus asserted: "In civil states particular men are invested with authority to judge for the whole; but in Christ's kingdom each one has an equal individual right to judge for himself." ISAAC BACKUS, *A Fish Caught in His Own Net*, in BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 74, at 198; see also *id.* at 332, 335. The Presbyterians of Virginia declared that:

Religion is altogether personal, and the right of exercising it unalienable; and it is not, cannot, and ought not to be, resigned to the will of the society at large; and much less to the legislature, which derives its authority wholly from the consent of the people, and is limited by the original intention of civil associations.

Memorial of the Presbyterians of Virginia to the General Assembly (Aug. 13, 1785), in AMERICAN STATE PAPERS 113-14 (William A. Blakely ed., 1911). Israel Evans preached: "As the conscience of man is the image and representative of God in the human soul; so to him alone it is responsible." EVANS, *supra* note 36, at 6. According to Samuel Shuttlesworth, "as piety and our mode of faith are matters only between GOD and our own souls, we ought to be amenable to no human tribunal; but only answerable to GOD and our consciences." SAMUEL SHUTTLESWORTH, A DISCOURSE 14 (Vt. election discourse 1792) (Evans 24788). To Samuel Stillman, religion was a "right of private judgment"; it was a matter "in which every man is personally interested; and concerning which every man ought to be fully persuaded in his own mind." STILLMAN, *supra* note 15, at 25.

81. For a discussion of Locke, see *supra* note 27.

religion according to conscience appealed not only to dissenters but also, by the time of the Revolution, to many supporters of establishments, who often were content to include free exercise and freedom of worship clauses in state constitutions.⁸² The idea of free exercise allowed supporters of establishments to refute charges of intolerance and persecution. They could point out that—notwithstanding state support for a particular sect or for Christian religion—all citizens could freely exercise their own religion.⁸³ Thus, even many

82. See, e.g., MD. DECL. OF RIGHTS OF 1776, § 33; MASS. CONST. OF 1780, art. II; N.H. CONST. OF 1784, art. V; VA. BILL OF RIGHTS OF 1776, § 16.

83. Evidence of such arguments is particularly rich for the strong and sophisticated establishments in Massachusetts and Connecticut. Amos Adams of Massachusetts preached: "Blessed be God for the writing of *Lock* [sic], and other learned men, who have so effectually exposed the iniquity and absurdity of persecution for religious opinions." AMOS ADAMS, RELIGIOUS LIBERTY AN INVALUABLE BLESSING 30 (1768) (Evans 10810). He also said: "[O]ur fathers obtained . . . a grant of *this* country, with such full *liberty* of conscience." *Id.* at 32. In a Massachusetts election sermon, Simeon Howard said the people should invest their rulers with the power to promote religion, "so far as is consistent with the sacred and inalienable rights of conscience, which no man is supposed to give up." SIMEON HOWARD, A SERMON (1780), in THE PULPIT OF THE AMERICAN REVOLUTION 373 (John W. Thornton ed., Burt. Franklin reprint 1970) (1860) [hereinafter PULPIT]. The magistrate, however, "should have power to provide for the institution and support of the public worship of God." *Id.* at 374. Howard thought conscientious "liberty and freedom every man may enjoy, though the government should require him to pay his proportion towards supporting public teachers of religion and morality." *Id.* at 375. In a sermon preached on the commencement of the new Massachusetts constitution and the inauguration of the new government, Samuel Cooper exclaimed: "[W]hat a broad foundation for the exercise of the rights of conscience is laid in this constitution!" SAMUEL COOPER, A SERMON 29 (1780) (Evans 16753). According to Cooper, the citizens of Massachusetts know that "it is framed upon an extent of civil and religious liberty, unexampled perhaps in any country in the world, except America." *Id.* at 30. Civil government could encourage and maintain religion "without binding the *rights* of conscience, or exerting their authority to impose articles of faith, or modes of worship; or enforcing these by penalties." PARSONS, *supra* note 15, at 12-13. For other similar views, see JOSIAH BRIDGE, A SERMON 45-46 (Mass. election sermon 1789) (Evans 21713); HENRY CUMINGS, A SERMON 26, 46 (Mass. election sermon 1783) (Evans 17899); MOSES HEMMENWAY, A SERMON 19, 30 (Mass. election sermon 1784) (Evans 18526); JOSEPH HUNTINGTON, GOD RULING THE NATIONS FOR THE MOST GLORIOUS ENDS 13, 29 (Conn. election sermon 1784) (Evans 18530); SAMUEL LANGDON, THE REPUBLIC OF THE ISRAELITES AN EXAMPLE TO THE AMERICAN STATES 47-48 (N.H. election sermon 1788) (Evans 21192); CHANDLER ROBBINS, A SERMON 37 (Mass. election sermon 1791) (Evans 23741); EZRA STILES, THE UNITED STATES ELEVATED TO GLORY AND HONOR 54-55 (Conn. election sermon 1783) (Evans 18198); WILLIAM SYMMES, A SERMON 16 (Mass. election sermon 1785) (Evans 19269); DAVID TAPPAN, A SERMON 23 (Mass. election sermon 1792) (Evans 24841); WILLIAM WELSTEED, THE DIGNITY AND DUTY OF THE CIVIL MAGISTRATE 18 (Mass. election sermon 1751) (Evans 6793); ABRAHAM WILLIAMS, A SERMON 11 (Mass. election sermon 1762) (Evans 9310).

Even in England, there was liberty of conscience, and Americans knew this. For example, in 1726, Peter Thacher said that in England there was "a just liberty of conscience to *Protestant Dissenters*." PETER THACHER, WISE AND GOOD CIVIL RULERS 25 (Mass. election sermon 1726) (Evans 2816). In 1747, the Synod of Philadelphia and the Second Presbyterian Congregation described liberty of conscience as "the Valuable & distinguishing privilege of Every British Subject." 1 PENNSYLVANIA ARCHIVES (1st ser.) 743-45, quoted in GUY S. KLETT, PRESBYTERIANS IN COLONIAL PENNSYLVANIA 244 (1937).

Note that there were different types of establishment. Some of the persons cited here favored the establishment of Christianity or Protestantism rather than of a particular denomination. Such persons tended to point out that they did not want establishment of any particular sect or mode of worship, and some of them even described themselves as opposed to establishments. For purposes of this Article, however, state tax support for Christianity or Protestantism will be considered an establishment.

members of establishments held that individuals possessed an inalienable right to the free exercise of religion according to conscience. Establishment writers also frequently wrote that religion or the exercise of religion was based on an authority higher than the civil government⁸⁴ and, increasingly, even that civil government could only act with respect to civil interests.⁸⁵ These were common

84. In 1783, the Episcopal clergy of Maryland quoted the religion clause of their state's constitution and then declared, *inter alia*, that their Church had the right, in common with other Christian Churches, "to have the full enjoyment and free exercise of those purely spiritual powers . . . which, being derived only from CHRIST and His Apostles, are to be maintained, independent of every foreign, or other, jurisdiction, so far as may be consistent with the civil rights of society." *A Declaration of Certain Fundamental Rights and Liberties of the Protestant Episcopal Church of Maryland*, in 1 STOKES, *supra* note 54, at 741. They confirmed this statement in 1790. In Vermont, the Rev. Powers preached:

But we are not to suppose any are bound to be subject to any law or government, in any article against the rights of conscience. The holy martyrs of Jesus have ever submitted to the civil laws of the government they lived under, acknowledging their bodies and estates belonged to the king, or emperor, but their consciences they held free.

PETER POWERS, A SERMON 25 (Vt. election sermon 1778) (Evans 16019). He also said: "ecclesiastical power is wholly of a spiritual nature, and no ways connected with either civil or military power. Christ's kingdom is not of this world, not of a worldly nature." *Id.* at 15. Moses Hemmenway said that "we may think, and speak, and act, and use our spiritual privileges with all freedom, according to the measures of wisdom and grace given to us; nor may any human authority forbid or restrain us from it." HEMMENWAY, *supra* note 83, at 25. Yet he also said: "It is true, the interests of society require subordination: but this deprives none of liberty, but helps all to enjoy it better." *Id.* at 27. According to Aaron Hutchinson,

By no means would I urge civil rulers to bind conscience in the chains of their decrees. Christ alone is Lord of the conscience: and every man must act for himself in all matters wherein conscience may be obliged But it is folly and stupidity for a man to plead conscience for breaking the moral law, which is a transcript of the moral perfections of God, and written upon the hearts of all by nature.

AARON HUTCHINSON, A WELL TEMPERED SELF-LOVE A RULE OF CONDUCT TOWARDS OTHERS 37-38 (Vt. const. convention sermon 1779) (Evans 15855).

85. Although, in the 1770s and 1780s, some Americans defended establishments on the ground that religion itself was a concern of the civil government, proponents of establishments increasingly justified religious legislation by arguing that civil authority had a civil interest in religion—that the civil government had to regulate and encourage morality and that religion, especially Protestantism, was a necessary prop to morality. Among others, Backus noted a shift in establishment arguments:

[W]hen it comes to be calmly represented that religion is a *voluntary obedience unto God* which therefore *force* cannot promote, how soon do they shift the scene and tell us that religious liberty is fully allowed to us only the state have in their wisdom thought fit to tax all the inhabitants to support an order of men for the good of *civil society*. A little while ago it was for religion . . . but now 'tis to maintain civility.

ISAAC BACKUS, *An Appeal to the Public* (1773), in BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 74, at 324. He also wrote: "[S]ome plead that if rulers have no right to establish any way of religious worship for its own sake, they have a right to do it for the good of civil society." ISAAC BACKUS, *Policy as Well as Honesty* (1779), in BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 74, at 375. The change in establishment arguments, however, should not be thought to have occurred uniformly about 1770. For example, in 1749, in Connecticut, Elihu Hall said: "Contribution for the support of the Gospel . . . 'tis a thing of meer civil & temporal Concernment, and therefore proper

assumptions among a broad range of Americans, including supporters of establishments with rather limited notions of religious liberty.⁸⁶

That the free exercise of religion was a minimal degree of liberty already largely conceded by establishments was understood by dissenters, who sought a more extensive freedom than mere guarantees of the natural right of free exercise. Against the establishments, many dissenters argued for an equality of civil rights, regardless of religious belief. More broadly, they took one of Locke's arguments further than Locke himself: If the civil authority had no power over any but civil matters, then it had to refrain, not merely from penalizing the free exercise of religion, but from making any laws respecting religion.⁸⁷ It was these liberties—an equality of civil rights and an absence of laws respecting religion—that dissenters sought and that establishments could not accept. Thus, dissenters were seeking, and establishments were opposing, religious rights far more extensive than free exercise—which was the one religious freedom upon which dissenters and establishments could easily agree.

B. Exemption

Whether claiming free exercise or a broader religious liberty, dissenters—particularly politically active and influential dissenters—tended not to ask for a right of exemption from religiously objectionable civil laws. Just as establishment writers could acknowledge that religion was based on an authority higher than the civil government,⁸⁸ so too dissenters typically could admit that natural liberty was protected only through submission to civil government and its laws. According to vast numbers of Americans, individuals in the state of nature had a liberty that was free from civil restraints but was insecure; therefore, said these Americans, individuals sought protection for their natural liberty by establishing civil government. Liberty could only be obtained by submission to the civil laws of civil government.⁸⁹

One reason late eighteenth-century ideas about religious freedom did not seem to require a general religious exemption is that the

Matter for civil Compact." ELIHU HALL, *THE PRESENT WAY OF THE COUNTRY* 52 (1749) (Evans 6328). Of course, the argument that religious establishments were useful for civil reasons was very old.

86. See BERNIS, *supra* note 2, at 2.

87. See *infra* note 117.

88. See *supra* note 84 and accompanying text.

89. West points out that eighteenth-century Americans assumed that freedom was thought to be obtained through law and government. West, *supra* note 2, at 624-25. Backus wrote: "[I]t is so far from being necessary for any man to give up any part of his real liberty in order to submit to government that all nations have found it necessary to submit to some government in order to enjoy any liberty and security at all." ISAAC BACKUS, *An Appeal to the Public* (1773), in BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 74, at 312. Incidentally, he also wrote, "nor are the people bound by any laws, but such as they have in like manner assented to, for their common good." ISAAC BACKUS, *Draft for a Bill of Rights for the Massachusetts Constitution, 1779*, § 7, in BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 74, at 488.

jurisdiction of civil government and the authority of religion were frequently considered distinguishable. It should not be assumed that late eighteenth-century Americans viewed religion as being necessarily in tension with civil authority. In fact, many Americans, especially dissenters seeking an expansion of religious liberty, repeatedly spoke of civil authority as if it could be differentiated from the scope of religion or religious freedom.⁹⁰ This assumption is apparent in the language of the First Amendment, which begins,

90. According to Professor Buckley, Virginia Baptists, "in the tradition of Roger Williams and Isaac Backus . . . wanted what may be fairly termed a separation of church and state based on the distinctive difference between these two spheres of man's activity and the need to maintain a pure church." THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1784*, at 176 (1977). In 1776, the "largely Presbyterian" Prince Edward County petitioned that Virginia "define accurately between civil and ecclesiastic authority; then leave our Lord Jesus Christ the Honour of being the Sole Law giver and Governor in his Church." *JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA, 1776*, at 7, *quoted in* H.J. ECKENRODE, *SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION* 46 (DaCapo Press 1971) (1910). The Presbyterians of Hanover, Virginia, regretted that "the distinction between matter purely religious and the objects of human legislation" had been confounded. *Memorial of the Presbytery of Hanover to the General Assembly of Virginia* (May 1784), in *AMERICAN STATE PAPERS*, *supra* note 80, at 101. According to Backus: "And where these two kinds of government, and the weapons which belong to them are well distinguished and improved according to the true nature and end of their institution . . . they do not at all interfere with each other." ISAAC BACKUS, *An Appeal to the Public* (1773), in *BACKUS ON CHURCH, STATE AND CALVINISM*, *supra* note 74, at 315. Comparing taxation to support religion with British taxation of the colonists, Backus wrote: "Can three thousand miles possibly fix such limits to taxing power as the difference between civil and sacred matters has already done? One is only a difference of *space*, the other is so great a difference in the *nature* of things . . ." *Id.* at 339. Samuel Stillman, a Baptist, cited Locke: "I esteem it, says the justly celebrated Mr. Locke, above all things, necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other." STILLMAN, *supra* note 15, at 22; *see also id.* at 21, 33. In Connecticut, Ebenezer Frothingham wrote that "the civil and ecclesiastical Rule, each standing in their Lot, they will never clash or interfere with one another through Time or Eternity." EBENEZER FROTHINGHAM, *THE ARTICLES OF FAITH AND PRACTICE* 297 (1750) (Evans 6504). According to Levi Hart,

Admitting that an exact determination of the boundaries between the rights of conscience, and of the magistrate, may be difficult, in some cases—the most important and practical principles, on the subject, are extremely plain; and are admitted by the most enlightened, of every denomination, as essential to good order and happiness in society.

LEVI HART, *THE DESCRIPTION OF A GOOD CHARACTER* 23 (Conn. election sermon 1786) (Evans 19699); *see also* ELEAZER WHELOCK, *LIBERTY OF CONSCIENCE* 15 (1775 N.H. Thanksgiving sermon, 1776) (Evans 15220).

Establishment writers sometimes emphasized the religious aspect of morality. For example, in his "Landholder" essays, written in favor of ratification of the United States Constitution, Oliver Ellsworth wrote: "I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties; . . . I heartily approve of our laws against drunkenness, profane swearing, blasphemy, and professed atheism." 3 *DOCUMENTARY HISTORY*, *supra* note 32, at 500, *quoted in* 1 STOKES, *supra* note 54, at 535. By categorizing moral regulation as religious regulation, establishment writers could show the necessity of the latter and thereby could help justify what really was threatened—not common moral regulation but tax support for religion. Dissenters easily responded that morals were not only

"Congress shall make no law."⁹¹ Rather than suppose that civil laws will in some respects prohibit the free exercise of religion and that exemptions will be necessary, the First Amendment assumes Congress can avoid enacting laws that prohibit free exercise. So too, it assumes Congress can avoid making laws respecting the establishment of religion.

In explaining the difference between religious and civil matters, Americans of the last half of the eighteenth century employed several different formulations. Locke had argued that individuals entrusted civil government with the security of "temporal goods" and "the things of this life" but that "the care of each man's soul, and the things of heaven . . . is left entirely to every man's self."⁹² Similarly, many Americans differentiated between the temporal and the spiritual, between "this world" and "the Kingdom of Christ."⁹³ Americans also sometimes listed the things that civil authority could not establish or determine. Typically, they mentioned religious belief and doctrine—what Locke had called "speculative opinions."⁹⁴ Occasionally, they also specified the internal governance of a sect and its mode or form of worship.⁹⁵

the subject of religious belief but also were temporal and thus a matter of civil concern. See, e.g., *supra* note 15.

91. U.S. CONST., amend. I.

92. LOCKE, *supra* note 27, at 48, 49.

93. For example, in a Massachusetts election sermon, Abraham Williams explained that "[t]he Constitution, Laws and Sanctions of civil Society respect this World, and are therefore essentially distinct and different from the *Kingdom of Christ*, which is *not of this World*." WILLIAMS, *supra* note 83, at 8. Abraham Booth wrote: "If all the subjects of Christ be real saints, it may be justly queried whether any *National religious establishment* can be a part of his kingdom." ABRAHAM BOOTH, AN ESSAY ON THE KINGDOM OF CHRIST 38-39 (1791) (Evans 23213). Booth asked: "[I]s it not plain, that a National church is inimical to the spirit of our Lord's declaration. *My kingdom is not of this world*? Does not that . . . saying compel us to view the church and the world in a *contrasted point of light*?" *Id.* at 39. According to Booth, "[s]ecular kingdoms are under the direction of human laws, which are frequently weak, partial, and unjust—or laws which, when least imperfect, extend their obliging power no further than the exterior behavior." *Id.* at 70; see also *Memorial of the Presbytery of Hanover to the General Assembly of Virginia* (Apr. 25, 1777), in AMERICAN STATE PAPERS, *supra* note 80, at 98; *Memorial of the Presbytery of Hanover* . . . (Oct. 1784), in AMERICAN STATE PAPERS, *supra* note 80, at 109. The view that civil government could only regulate visible, exterior, or public morality frequently was stated in language drawn from the works of Warburton.

94. LOCKE, *supra* note 27, at 45. For examples of Americans who discussed belief, doctrine, or opinion, see *infra* note 95.

95. One New Englander wrote: "That the civil authority have no power to establish any religion (*i.e.* any professions of faith, modes of worship, or church government) of a human form and composition, as a rule binding to Christians; much less may they do this on any penalties whatsoever." [ELISHA WILLIAMS], THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (1744), in POLITICAL SERMONS OF THE FOUNDING ERA 1730-1805, at 72 (Ellis Sandoz ed., 1991); see also ZABDIEL ADAMS, A SERMON 41 (Mass. election sermon 1782) (Evans 17450) (regarding, *inter alia*, modes and forms of religion and sentiment concerning doctrines); ROBERT BRAGGE, CHURCH DISCIPLINE 38-39 (1768) (Evans 10846) (regarding ceremonial law, doctrine, worship, and discipline); *Memorial of Presbytery of Hanover to the General Assembly of Virginia* (1784), in AMERICAN STATE PAPERS, *supra* note 80, at 111 (regarding, *inter alia*, articles of faith not essential to the preservation of society, modes of worship, and internal government of religious communities); EBENEZER FROTHINGHAM, A KEY TO UNLOCK THE DOOR 154 (1767) (Evans 6504) (regarding, *inter alia*, church membership, place of worship, who is qualified to choose a minister, and who shall preach or be a minister); ISRAEL HOLLY, A WORD IN ZION'S BEHALF 7

Americans tended to adhere to their distinction between the objects of civil authority and those of religion, even when discussing temporal matters that were the subject of religious opinions. Dissenters sometimes acknowledged the existence of matters that were the object of both religious and civil concerns and stressed that civil government could not regulate such matters as were exclusively religious.⁹⁶ So too, establishment ministers occasionally said that some matters were both temporal and religious but emphasized that civil government could regulate the temporal aspect of these.⁹⁷ Supporters of establishments could afford to take this position because they also frequently argued that civil government had a legitimate civil or temporal interest in supporting religion.⁹⁸ Some dissenters responded by arguing that civil government could not treat sects unequally. Some even argued that government could not legislate with respect to religion—that it simply could not take cognizance of religion.⁹⁹ It was on these issues that dissenters and proponents of establishments increasingly tended to disagree, not on the generalization that civil government only had authority over civil or temporal matters.

The assumption that religious liberty would not, or at least should not, affect civil authority over civil matters was so widely held that a general right of religious exemption rarely became the basis for serious controversy. Of course, some dissenters did broadly claim religious exemption from objectionable civil laws, on grounds of freedom of conscience or even divine command. Their claims, however, illustrate the marginal character of the support for a general right of religious exemption.¹⁰⁰ For example, John Bolles—a Rogerene—apparently claimed some religious exemption from civil

([1765]) (Evans 10005) (regarding articles of faith, creeds, forms of worship, and church government).

96. For example, Israel Holly wrote: "It is true, we are to render to Cesar [sic] the Things that are Cesar's. But then we ought to be very careful that we don't render that to Cesar, which is due to God alone." HOLLY, *supra* note 95, at 6. Noah Hobart preached: "I trust they [i.e., establishment churches or ministers] will always be far . . . from desiring you to inflict *temporal Punishments* on such as they censure for Faults that are *merely Ecclesiastical* in their Nature, and do not affect the Peace and Happiness of Civil Society." NOAH HOBART, CIVIL GOVERNMENT THE FOUNDATION OF SOCIAL HAPPINESS 42 (Conn. election sermon 1751) (Evans 6692). See also the quotation of the petition from Prince Edward County, Virginia, *supra* note 90.

97. For example, the Rev. Zabdiel Adams preached: "But that part of religion which has an immediate aspect on the good of the community falls under the cognizance of the ruler." Z. ADAMS, *supra* note 95, at 42-43; see also STONE, *supra* note 15, at 25.

98. See *supra* note 85.

99. See *infra* note 118 and accompanying text.

100. Eighteenth-century Quakers could not always conform to the demands of civil laws and frequently spoke about their consequent suffering in terms of "conscience." Yet they clearly failed to have their claims of conscience protected even in the Pennsylvania Constitution. After mid-century, moreover, particularly after 1776, Quakers retreated from politics and tended not to participate in the struggles for liberalizing

laws. In defense of two Quaker women who "went naked . . . one into a Meeting, the other . . . through the Streets of *Salem*," Bolles wrote that "they did it in Submission to a divine Power . . . as a Sign."¹⁰¹ For precedent, he cited the Bible, saying simply: "*Isaiah* went Naked."¹⁰² This was not, however, the sort of analysis that most late eighteenth-century Americans found persuasive with respect to constitutional law.¹⁰³

Although other dissenters, less extreme than Bolles, did seek exemption from civil laws, they typically asked, not for a general right of exemption, but merely for exemptions from a small number of specified civil obligations. Of these limited exemptions, moreover, only those relating to military service frequently were granted in constitutions.¹⁰⁴ Even constitutional military exemptions, however, often appear to have been given largely for reasons of compassion

general constitutional guarantees of religious liberty. On the Quaker retreat from politics, see JACK D. MARIETTA, *THE REFORMATION OF AMERICAN QUAKERISM, 1748-1783* (1984); WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630-1833*, at 595 (1971).

101. JOHN BOLLES, *TO WORSHIP GOD IN SPIRIT* 116-17 (1756) [hereinafter *BOLLES, TO WORSHIP GOD IN SPIRIT*]. To this, Jacob Johnson replied in outrage:

I should not have mentioned, these monstrous Practices . . . had I not found Friend *Bolles* justifying of them as Things innocent, & lawful. And which, it seems with him, are such cases of Conscience, and of so sacred, and religious a Nature, that the civil Magistrate hath nothing to do with 'em . . .

JACOB JOHNSON, *ANIMADVERSIONS*, in *BOLLES, supra*, at 29. Bolles answered that "*Isaiah* went Naked" and that the women went naked as "Signs." JOHN BOLLES, *A REPLY*, in *BOLLES, TO WORSHIP GOD IN SPIRIT, supra* at 28. After discussing laws concerning religion, Bolles quoted Timothy: "*The Law is not made for a Righteous Man, but saith he, for the Lawless, and Disobedient, for the Ungodly, and for Sinners. . . .*" *BOLLES, TO WORSHIP GOD IN SPIRIT, supra*, at 106 (quoting 1 Timothy 1:9). On the Quaker practice of going naked as a sign, see RICHARD BAUMAN, *LET YOUR WORDS BE FEW—SYMBOLISM OF SPEAKING AND SILENCE AMONG SEVENTEENTH CENTURY QUAKERS* 84-94 (1983).

102. See *supra* note 101.

103. For a sample of Bolles at his fervent best:

By the Scriptures thus it is Proved, that all the established Worship of *New England*, defended by the worldly Powers, is nothing but the Worship of the Dragon, and the Beast, and his Image; and also proved that the Power, Seat, and Authority given to the Beast, or worldly Powers, by the Dragon; is the power, and seat of Persecution to defend the said Worship, given to the Image of the Beast.

BOLLES, TO WORSHIP GOD IN SPIRIT, supra note 101, at 113-14. Johnson mocked his opponent: "Friend *Bolles* has drawn out his Discourse to so great a length, fetching his Evidence from the Dragon, the Beast, &c. How he has Succeeded, How clear his Proofs, & how just his Application . . . I leave to the Reader to judge (if any has the patience to Read it) . . ." JOHNSON, *ANIMADVERSIONS, supra* note 101, at 29. Johnson clearly was embarrassed at having been drawn into debate with Bolles, "Who has been Writing and Practicing against the civil Governments, and Churches of *Boston*, & *Connecticut*, for more than 30 Years past; and no Body has taken so much Notice of it, as to give him an Answer." *Id.* at 1. Indeed, Bolles complained of his failure to provoke attention, and friends of Johnson advised him "to take no public Notice of him." *Id.*

The Rogerenes deliberately interrupted church services, but even they could be equivocal about claiming exemptions. See *Petition of John Rogers and Timothy Wolverhouse to Connecticut General Assembly* (Sept. 28, 1769), reprinted in *THE PITKIN PAPERS: CORRESPONDENCE AND DOCUMENTS DURING WILLIAM PITKIN'S GOVERNORSHIP OF THE COLONY OF CONNECTICUT 1766-1769*, at 207 (1921).

104. See *supra* notes 57, 64 and accompanying text. Many Americans described exemption from a religious test or from a religious assessment as a religious right or as deserving of constitutional recognition. Yet these were exemptions from laws directly concerning religion. See *supra* notes 66 - 68 and accompanying text.

and politics.¹⁰⁵

Indeed, the idea that individuals had a general right to be exempted from civil laws contrary to their consciences was so unpopular that establishment writers attempted to use it to smear their opponents. By citing lurid stories about the sixteenth-century Anabaptists of Münster and by attributing the enthusiasms of extremists to dissenters as a whole, establishment writers could accuse dissenters of attempting to subvert all civil liberty.¹⁰⁶ For example, in support of Connecticut's religious establishment, Elihu Hall said that persons objecting to that establishment on grounds of conscience were making arguments that would justify nonpayment of civil taxes or breach of contract: "Thus a man may plead Conscience for the support or excuse of all the moral Dishonesty and Promise & Covenant-breaking in the World. But men have no Right to be their own Judges in their own Case in moral Matters, and where their neighbors Interest is equally concerned with their own."¹⁰⁷

105. Incidentally, Backus sought a constitutional right that "no man ought to be compelled to bear arms, who conscientiously scruples the lawfulness of it, if he will pay such equivalent." ISAAC BACKUS, *Draft for a Bill of Rights for the Massachusetts Constitution, 1779*, § 7, in BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 74, at 488. In North Carolina, it was urged "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead." N.C. Proposal for a Declaration of Rights, § 19, in 4 JONOTHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 244 (1941). See generally McConnell, *Origins*, *supra* note 3, at 1468-69. These formulations, which were very common, indicate that a substantial number of Americans were willing in their constitutions to provide exemptions from military service but not from taxes or other payments in support of war.

Note that an exemption from the requirement of a nondenominational oath may have been considered an exemption from civil law. This issue, however, often was resolved without resort to exemptions. See *supra* note 64.

In various states, ministers were not taxed and were denied the right to vote. Leland opposed the tax exemption on the ground that civil authority should be silent about religion. See *infra* note 120.

106. "Even to this day they can hardly preach a sermon or write a pamphlet for infant baptism without having something to say about the madmen of Münster who, they tell us, rebelled against their civil rulers." ISAAC BACKUS, *An Appeal to the Public* (1773), in BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 74, at 337; see also ISAAC BACKUS, *A Door Opened for Equal Christian Liberty* (1783), in BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 74, at 431.

107. HALL, *supra* note 85, at 59 (1749). A situation in which individuals were judges in their own case was one of the nonhistorical definitions of the state of nature.

The charges faced by Baptists and other dissenters may be further illustrated by a group of three pamphlets published together in 1762. In the first, Alexander Gardon described a man who told his wife's family that he had divine instructions to leave his wife for his youngest sister in law. "[T]he old man [the wife's father] took his Youngest Daughter by the Hand, and gave her to the Prophet to Wife, and he went in unto her and lay with her without any further ceremony, pursuant to his Revelation." The family eventually had a shoot-out with the constable and the militia. This instructive tale is followed by a reminder of the dangers of enthusiasm and impulses. ALEXANDER GARDON, *A BRIEF ACCOUNT OF THE DELUDED DUTARTRES* (1762) (Evans 9120). The second pamphlet was a lurid tale of an impulsive, secular murder followed by repentance.

To defend themselves from such accusations, dissenters who sought an expanded religious liberty disavowed a right of exemption from civil laws.¹⁰⁸ Writing against the Connecticut establishment, Ebenezer Frothingham argued that no "hurt" would be done to "any man's civil interest, by different sects worshipping God in different places in the same town."¹⁰⁹ Eight different sects might live together in one community, but none, he observed, would be exempt: "If any person of . . . these professions breaks the law, he lies open to punishment, equally so, as if there was but one profession in the town."¹¹⁰ Frothingham was not alone. Other influential dissenters also rejected a right of exemption.¹¹¹

A NARRATIVE OF THE LIFE . . . OF JOHN LEWIS (1762). The third was a lengthy criticism of reliance on "inward light." Among other things, this attack associated separatists who generally conformed to the civil law with Rogerenes, who were willing to breach civil law: "Now what Law of God requires you to separate from our Churches? . . . What Law requires you [Rogerenes] to disturb Churches . . . on the Lord's Day? . . . Do you think that no Respect is due to civil Authority?" ROBERT ROSS, A PLAIN ADDRESS TO THE QUAKERS, MORAVIANS, SEPARATISTS, SEPARATE-BAPTISTS, ROGERENES, AND OTHER ENTHUSIASTS 182 [1762] (bracketed reference to Rogerenes in original).

108. *Contra* McConnell, *Origins*, *supra* note 3, at 1447.

109. FROTHINGHAM, *supra* note 95, at 154.

110. *Id.* at 155.

111. On the ground that Leland did not support obedience to all laws, McConnell assumes Leland supported exemption from civil laws. McConnell, *Origins*, *supra* note 3, at 1447. Leland, however, explicitly opposed exemptions from civil laws. Although Baptists had religious objections to contracts between a minister and his flock, Leland nonetheless argued that such contracts, if made, were enforceable. Moreover, "To indulge [ministers] with an exemption from taxes and bearing arms is a tempting emolument. The law should be silent about them; protect them as citizens, not as sacred officers, for the civil law knows no sacred religious officers." JOHN LELAND, *The Rights of Conscience Inalienable, and, Therefore, Religious Opinions Not Cognizable by Law* (1791) in THE WRITINGS OF THE LATE ELDER JOHN LELAND 188 (N.Y. 1845) [hereinafter WRITINGS]. For Leland, conscience provided no legal objection to law that was silent about religion.

Leland told various stories about claims of exemption:

A Shaking-Quaker, in a violent manner, cast his wife into a mill-pond in cold weather; his plea was, that God ordered him so to do. Now the question is, Ought he not to be punished as much as if he had done the deed in anger? Was not the abuse to the woman as great? Could the magistrate perfectly know whether it was God Satan, or ill-will, that prompted him to do the deed? The answers to these questions are easy.

In the year of 1784, Matthew Womble, of Virginia, killed his wife and four sons, in obedience to a Shining One . . . to merit heaven by the action . . . Neither his motive, which was obedience, nor his object, which was the salvation of his soul had any weight on the jury.

JOHN LELAND, *The Yankee Spy* (1794), in WRITINGS, *supra*, at 228. Incidentally, it should not be thought that Leland opposed exemption only for illegal acts of violence. Apparently assuming that he was addressing the question of exemption, Leland also told a story about "two women . . . brought before the sessions for fornication"—one of whom was "a church member" and the other of whom was not. "She who was a daughter of Zion was pitied . . . but she who was not a member of the church, was judged a lewd slattern, and was driven out of the parish. . . ." *Id.*

Samuel Stillman said that "The subjects of this [i.e., Christ's] kingdom are bound by no laws in matters of religion, but such as they receive from Christ . . ." STILLMAN, *supra* note 15, at 27-28. He also said:

This kingdom does not in any respects interfere with civil government; rather tends to promote its peace and happiness, because its subjects are taught to obey magistracy . . .

The subjects of the kingdom of Christ, claim no exemption from the just authority of the magistrate, by virtue of their relation to it. Rather they yield a ready and cheerful obedience, not only for wrath, but also for conscience sake.

Of course, proponents of establishments did not advocate a right of religious exemption from civil laws,¹¹² but neither did the vast

And should any of them violate the laws of the state, they are to be punished as other men.

Id. at 27.

In 1780, Backus noted that his opponents "have *raked up* the German Anabaptists whom they represent as 'pleading conscience for lying with each other's wives, and for murdering their peaceable neighbors.'" ISAAC BACKUS, *An Appeal to the People* (1780), in BACKUS ON CHURCH, STATE, AND CALVINISM, *supra* note 74, at 393-94. He went on to say: "And all this without producing so much as a single *word* from all our writings to prove their charges against us." *Id.* at 395. After complaining about the new Massachusetts establishment, Backus said: "I challenge all our opponents to prove, if they can, that we have ever desired any other religious liberty, than to have this partiality entirely removed." *Id.* at 396. Backus wrote "the state is armed with the *sword* to guard the peace and the civil rights of all persons and societies and to punish those who violate the same." *Id.* at 315. On the Baptists' deference to law, see McLoughlin, *supra* note 100, at 753.

In a pastoral letter of 1783, the synod of the Presbyterian Church in New York and Pennsylvania noted that the rights of conscience had been secured and given constitutional protection: "The duty which you owe to the community at large for this inestimable blessing is to support civil authority, by being subject not only 'for wrath, but also for conscience' sake,' and by living 'quiet and peaceable lives in all godliness and honesty.'" See 1 STOKES, *supra* note 54, at 445. In its confession of faith, the Presbyterian Church in the United States declared: "Infidelity or difference in religion, doth not make void the magistrate's just and legal authority, nor free the people from their due obedience to him." THE CONSTITUTION OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA 36 (adopted by the Synod of New York and Philadelphia 1788) (1792) (Evans 24711); see also *id.* at 30. The Rules of Church Government of the Dutch Reformed Church began its section "of Christian Discipline" by warning that "christian discipline is spiritual, and exempts no person from the judgement and punishment of the civil power." THE CONSTITUTION OF THE REFORMED DUTCH CHURCH, IN THE UNITED STATES OF AMERICA 190 (1793) (Evans 26065) (the Rules were first adopted in 1619). When the Methodist Episcopal Church met in Baltimore in 1784 it required members of that sect to liberate their slaves, but added: "These rules are to affect the members of our Society no further than as they are consistent with the laws of the States in which they reside." See 2 STOKES, *supra* note 54, at 135. Of course, the Presbyterians of New York and Pennsylvania and the Dutch of New York were dissenters merely in the sense that they were not established churches in their states.

112. See quotations in *supra* note 84. Consider also the following. In 1789, George Washington wrote to American Catholics that "[a]s mankind becomes more liberal, they will be more able to allow that those who conduct themselves as worthy members of the community are equally entitled to the protection of civil government." See 1 STOKES, *supra* note 54, at 496. To the Quakers, he was slightly more explicit:

The liberty enjoyed by the people of these States, of worshipping Almighty God agreeably to their consciences, is . . . among the choicest . . . of their *rights*. While men perform their social duties faithfully, they do all that society or the state can with propriety demand or expect; and remain responsible only to their Maker for the religion, or modes of faith, which they may prefer or profess.

Your principles and conduct are well known to me; and it is doing the people called Quakers no more than justice to say, that (except their declining to share with others the burthen of the common defence) there is no denomination among us, who are more exemplary and useful citizens.

I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.

majority of dissenters. Although some dissenters asked for grants

30 THE WRITINGS OF GEORGE WASHINGTON 416 n.54 (John C. Fitzpatrick ed., 1939); see also BISSETT, *supra* note 28, app. at 12; Jonathan Law's speech to the [Conn.] General Assembly (May 1742), in THE WOLCOTT PAPERS: CORRESPONDENCE AND DOCUMENTS DURING ROGER WOLCOTT'S GOVERNORSHIP OF THE COLONY OF CONNECTICUT 1750-1754, at 457 (1916); JOSEPH LYMAN, A SERMON 36-37 (Mass. election sermon 1787) (Evans 20469); STONE, *supra* note 15, at 23; SAMUEL WEST, A SERMON 27 (Mass. election sermon 1786) (Evans 20142).

Also relevant are numerous statements, not focusing on conscience, but generally stating the need for conformity to law. The Rev. Jonas Clarke preached that:

In a word, as by the social compact, the whole is engaged for the protection and defense of the life, liberty and property of each individual; so each individual owes all that he hath, even life itself, to the support, protection and defence of the whole, when the exigencies of the state require it. And no man, whether in authority or subordination, can justly excuse himself from any duty, service or exertions, in peace or war, that may be necessary for the publick peace, liberty, safety or defence, when lawfully and constitutionally called thereto.

JONAS CLARKE, A SERMON 29 (Mass. election sermon 1781) (Evans 17114). Zabdiel Adams said of kings and magistrates: "Whilst they keep within constitutional limits they cannot be resisted with impunity. Disobedience to such, exposes both to temporal and eternal punishments." Z. ADAMS, *supra* note 95, at 7-8. According to Henry Cumings: "And when people, under pretence of liberty, refuse obedience to lawful authority, and oppose the measures of just government, merely because such measures do not coincide with their private views and separate interests, the principles on which they act, are evidently inconsistent with a state of society, and lead directly back to a state of nature." CUMINGS, *supra* note 83, at 13. Chandler Robbins argued:

All power originating in the *people*, will, by no means justify individuals, or a small part of the community, in refusing obedience to laws which *they* may think oppressive.—They have an indisputable right, with a decent, and manly firmness, to represent their grievances, and to remonstrate to government, in a suitable manner.

ROBBINS, *supra* note 83, at 28. According to William Symmes, "if those who 'rule over men must be just, ruling in the fear of God;' then no person can plead an exemption from the duty of submission to wise and just government." SYMMES, *supra* note 83, at 17. For further discussion of obedience to civil laws, see DAN FOSTER, AN ELECTION SERMON 10 (1789 Vt. election sermon, 1790) (Evans 22505); AMMI R. ROBBINS, THE EMPIRES AND DOMINIONS OF THIS WORLD 22 (Conn. election sermon 1789) (Evans 22118); SAMUEL WALES, THE DANGERS OF OUR NATIONAL PROSPERITY 22, 35 (Conn. election sermon 1785) (Evans 19359); SAMUEL WEBSTER, A SERMON 14 (Mass. election sermon 1777) (Evans 15703).

Ministers sometimes "recommended" religion to the civil authorities on the ground that religion encouraged obedience to civil laws. See, e.g., NATHAN STRONG, A SERMON 15 (Conn. election sermon 1790) (Evans 22913). As if to verify this, large numbers of election sermons contained statements, citing the Bible, that individuals should submit to government—not only for fear of wrath but also on account of conscience. For example, the Rev. G.C. Lyman said: "We must needs be subject not only for fear of the wrath which they will execute on us, but for conscience sake. It is a most inconsistent and distracted piece of conduct, to set up rulers, and then disobey their just & needful laws. . . ." G.C. LYMAN, *supra* note 28, at 19. Both dissenting and establishment ministers tended to mention this wrath and conscience line. Quotations and paraphrases of the passage occurred so frequently that it was almost a convention.

Occasionally, some Americans analyzed the right to resist political oppression in terms of "conscience." The difficulty was to explain that Americans could not conscientiously disobey law in ordinary circumstances. Typically, discussions of this problem distinguished between conscientious resistance to tyranny and the need to submit to the more or less just laws of governments formed by consent. Some of these political discussions accepted a greater degree of conscientious resistance to civil law than did discussions that focused on religious liberty. The following illustrates the genre:

Seeing Political Rulers derive their Authority from CHRIST, and rule under him, this teaches us, that it is the unquestionable Duty of the People to submit to them, and that for Conscience sake.—That is to say, unless they shall so pervert their Authority, as to decree and administer in such manner, as has a direct tendency to overthrow the Protestant Religion, or to deprive the People of

of exemption from a few specified civil obligations, such as military service, dissenters typically did not demand a general exemption from objectionable civil laws, let alone a constitutional right to such an exemption.¹¹³ If the myriad and voluble dissenters who sought an expansion of religious freedom were advocating a general constitutional right of religious exemption from civil laws, it is remarkable

their *Liberty and Property*; or, in a Word; unless they *violate their Oath*, and appear no other but as *Enemies* to the civil and religious Constitution.

SAMUEL PHILLIPS, POLITICAL RULERS AUTHORIZ'D AND INFLUENC'D 33 (Mass. election sermon 1759) (Evans 6593); see also ELIZUR GOODRICH, THE PRINCIPLES OF CIVIL UNION 25 (Conn. election sermon 1787) (Evans 20393); SIMEON HOWARD, A SERMON PREACHED TO THE ANCIENT AND HONORABLE ARTILLERY COMPANY IN BOSTON (1773), in 1 AMERICAN POLITICAL WRITING 189 (Charles S. Hyneman & Donald S. Lutz eds., 1983); WILLIAM MORISON, A SERMON 7-8 (N.H. election sermon 1792) (Evans 24563); JOSIAH WHITNEY, THE ESSENTIAL REQUISITES TO FORM THE GOOD RULER'S CHARACTER 24 (Conn. election sermon 1788) (Evans 21601).

More generally, some members of establishments said that Americans were obliged to obey civil government and the law, except if the law were unjust or contrary to conscience. Yet, given American assumptions about resistance and about the distinction between civil and religious matters, the words of these establishment writers need not and should not be understood to refer to a religious exemption from civil laws. For example, William Welsted said that magistrates "have an undoubted Right to be obeyed in all their Laws and Orders, not repugnant to the Commands of God," but he continued by explaining that Christianity required submission to government and that individuals should "Render therefore to *Caesar the Things that are Caesar's*." WILLIAM WELSTEED, THE DIGNITY AND DUTY OF THE CIVIL MAGISTRATE 40-41 (Mass. election sermon 1751) (Evans 6793). Similarly, the Rev. Williams preached:

The *Law of Nature*, which is the *Constitution of the God of Nature*, is universally obliging,—it varies not with Men's Humours or Interest, but is immutable as the Relations of Things: Human Laws bind the Conscience only by their Conformity hereto.—Laws ought to be plain and intelligible, consistent with themselves,—with Reason,—with Religion . . .

WILLIAMS, *supra* note 83, at 23. He also spoke about submission to government. *Id.* at 27-28. These ministers hardly were recognizing the conscientious objections of dissenters and, moreover, were addressing a right of resistance to civil government rather than a legal right under such government.

113. For the positions of leading dissenters who advocated greater religious liberty, see *supra* note 111. Note also that the two sects that played the most important role in achieving religious liberty in Virginia, the Baptists and the Presbyterians, objected to government support for the Episcopal Church but typically did not ask for exemptions from civil laws. BUCKLEY, *supra* note 90, at 176-77. Among other things, Buckley observes that Virginia's Baptists "request[ed] no favors from civil government." *Id.* at 176. Civil government was "to restrain the vicious and encourage the virtuous by wholesome laws equally extending to every individual." *Memorial of the Presbytery of Hanover to the General Assembly of Virginia* (April 25, 1777), in AMERICAN STATE PAPERS, *supra* note 80, at 97; see also *Memorial of Oct. 24, 1776*, in AMERICAN STATE PAPERS, *supra* note 80, at 94, 97. An anonymous Virginia dissenter said: "It is the Magistrate's province to scourge the disobedient, and chasten the refractory to good humour and submission, let them be of what denomination they will." THE FREEMAN'S REMONSTRANCE, *supra* note 36, at 5. In New York, the sometime chaplain to the United States House of Representatives, William Linn, preached to the Tammany Society that "[t]he members of the Church, indeed, are also members of civil society, and subject to all its laws, so far as is consistent with a good conscience; but the great evil has been in the civil magistrate usurping the throne of Christ and exercising spiritual dominion." WILLIAM LINN, THE BLESSINGS OF AMERICA 19 (Fourth of July sermon 1791) (Evans 23504). Linn's statement is ambiguous on the question of exemptions.

that they tended not to claim such a right and that some of their leading publicists disavowed it.

C. *Establishment*

In the late eighteenth century, the overwhelming majority of dissenters sought, not a constitutional right of exemption, but an end to establishments. As already discussed, dissenters based their arguments for greater religious liberty on the assumption that civil authority could be compatible with religious freedom and on the assumption that such freedom could only be secure under the civil laws of civil government.¹¹⁴ Constitutions, they argued, should guarantee dissenters (or at least Protestant dissenters) the same civil rights—that is, the same secular legal rights—as other Americans, without regard to religious differences.¹¹⁵ These complaints of dissenters reflected their own circumstances. In the last half of the eighteenth century, many Americans had unequal civil rights on account of their religious opinions; others had equal civil rights but thought this equality precarious. Therefore, many of these Americans wanted guarantees of equal civil rights. Of course, some wanted equality only for Protestants or Christians. Yet a form of equal civil rights was, increasingly, the minimum dissenters believed was theirs by right and what they believed they could get.¹¹⁶ Indeed, some—anxious that religion not be dependent upon civil government—demanded that government avoid legislating with respect to religion.¹¹⁷ If civil government was established for exclusively civil purposes, they argued, then it had no authority to make any law concerning religion. These anti-establishment claims—and, to a lesser degree, the grants of exemption from a few, specified obligations—were the goals pursued by large numbers of dissenters. For these Americans, the possibility of a general right of exemption was, at most, a distraction from the real issues at stake.

What dissenters said about establishments, moreover, had implications for exemption. Of course, the anti-establishment demands for equal civil rights and for the absence of laws respecting religion were made in response to legislative or constitutional provisions

114. See *supra* notes 88-91 and accompanying text.

115. BUCKLEY, *supra* note 90, at 177; McLoughlin, *supra* note 100, at xviii; see also THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* (1989).

116. See books cited in *supra* note 116. Note also that various state constitutions contained religion clauses that reflected such claims of equality.

117. For example, the Presbyterians of Hanover, Virginia, urged that: "In the fixed belief of this principle, that the kingdom of Christ, and the concerns of religion, are beyond the limits of civil control, we should act a dishonest, inconsistent part, were we to receive any emoluments from any human establishments for the support of the gospel." *Memorial of the Presbytery of Hanover to the General Assembly of Virginia* (Apr. 25, 1777), in *AMERICAN STATE PAPERS*, *supra* note 80, at 98; see also *Memorial of Oct. 24, 1776*, in *AMERICAN STATE PAPERS*, *supra* note 80, at 94. Madison wrote "that in matters of religion no man's right is abridged by the institution of civil society, and that religion is wholly exempt from its cognizance." James Madison, *Memorial & Remonstrance*, in *AMERICAN STATE PAPERS*, *supra* note 80, at 121.

that benefitted particular denominations or, more broadly, a particular religion rather than in response to claims of exemption for the religiously scrupulous. Nonetheless, the dissenters' positions on establishment were suggestive of their position on exemption. A right of exemption for the religiously scrupulous could be considered a law respecting religion. It even could create unequal civil rights; in the words of the Virginia *Act For Establishing Religious Freedom*, men's "opinions in matters of religion" shall "in no wise diminish, enlarge, or affect their civil capacities."¹¹⁸ The sweeping language with which so many Americans attacked establishments was not the language of persons seeking a constitutional right of exemption.¹¹⁹

Conclusion

Did late eighteenth-century Americans understand the Free Exercise Clause of the United States Constitution to provide a right of religious exemption from civil laws? Put another way, did the Free Exercise Clause require courts to subordinate civil law to individual interpretations of a higher, religious duty? By examining these historical questions, not only can we learn about the religious freedom recognized in the federal Constitution but also, more broadly, we can observe how eighteenth-century Americans perceived the relationship between their written constitutions and another, higher source of obligation.

As it happens, the claim that the Free Exercise Clause provided a right of exemption from civil laws depends upon evidence that may

118. HENING, *COLLECTION OF THE LAWS OF VIRGINIA*, *supra* note 30, at 86.

119. This Article argues that the vast majority of dissenters were not claiming a general constitutional right of exemption. Nonetheless, it may be asked whether dissenters who had exemptions from particular civil obligations understood that these exemptions may not have been in accord with what many dissenters said about establishments.

Many dissenters clung to their exemptions from particular obligations, especially if they feared they could not obtain equality or if (as in the case of Quakers) they wanted to avoid civil obligations to which most other Americans submitted. But the implication of the campaign against establishments was not lost on those who wanted these exemptions. Quakers were notably unenthusiastic about the anti-establishment arguments that might have threatened their exemptions from military service. Similarly, dissenting ministers omitted to insist that dissenting and establishment ministers give up their nonsectarian clerical exemptions from civil taxes and military service. An exception was the Baptist, John Leland, who wrote that "[t]o indulge [ministers] with an exemption from taxes and bearing arms is a tempting emolument. The law should be silent about them; protect them as citizens, not sacred officers, for the civil law knows no sacred religious officers." LELAND, *The Rights of Conscience Inalienable, and, Therefore, Religious Opinions Not Cognizable by Law* (1791), in *WRITINGS*, *supra* note 111, at 188. Yet from most dissenting ministers who sought equality and the absence of laws respecting religion, there was a politic silence about clerical exemptions. Neither dissenting nor establishment ministers had an interest in pointing out that these were special privileges and laws respecting religion. Thus, clerical exemptions and exemptions from military service were accepted even by most dissenters, notwithstanding their attacks on establishments. The possible contradictions sometimes were publicly acknowledged but more often were conveniently ignored.

be questioned. The disturb-the-peace caveats in state constitutions specified the circumstances in which state governments could deny religious liberty; such caveats related to the availability rather than the extent of religious freedom and do not evince a right of exemption from civil law. Similarly, the evidence does not support the position that Madison sought a general constitutional right of religious exemption. Moreover, that various state statutes (or even constitutions) expressly granted religious exemptions from military service and other specified civil obligations hardly suggests that such exemptions were rights under the United States Constitution—let alone that a general religious exemption from civil law was a right under any American constitution. Last but not least, the framers and ratifiers repeatedly said they were reluctant to leave the magnitude of individual freedom—including religious freedom—in the discretion of Congress or the federal judiciary.

A more general examination of religious freedom in late eighteenth-century America reveals that a constitutional right of religious exemption was not even an issue in serious contention among the vast majority of Americans. Members of establishments increasingly said that they favored the free exercise of religion, and they clearly did not understand that right to include a right of exemption. So too, the politically active and influential dissenters who sought and obtained expanded constitutional guarantees of religious liberty did not seek a general constitutional right of exemption from civil laws. Indeed, they expressly disavowed such a right and frequently agitated for equal civil rights and an absence of laws respecting religion. In eighteenth-century America, where varied Christian sects bickered with one another and thrived, a constitutional right to have different civil obligations on account of religious differences was precisely what dissenters did not demand.