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The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right

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THE DAWN OF RELIGIOUS FREEDOM IN SOUTH CAROLINA: THE JOURNEY FROM LIMITED TOLERANCE TO CONSTITUTIONAL RIGHT

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I. INTRODUCTION	

The evolution of religious freedom in early South Carolina was not an unbroken line of progress toward liberty. The general movement was from limited to broader tolerance, and then from the view that religious freedom was a revocable boon dispensed by the government to the belief that it was a guaranteed constitutional right. Interruptions in the progress were caused by official vacillation between polar opposite policies: the view that religion was a matter of individual conscience, and its antithesis, that religion was an instrument of social control that could be used by the government to ensure the loyalty of the people through appeals to the spirit as well as to patriotism. The overture of this story is found in the early Charters and Fundamental Constitutions with their provisions for tolerance.¹ The main theme is the establishment of the Church of England; its counterpoint is the struggle for a more firmly grounded right of religious freedom unshackled by such favoritism.² The denouement is the adoption of a strong guarantee of religious freedom without preference in the Constitution of 1790.³ This Article will trace the journey from limited tolerance to a constitutional right of freedom of

1. 3 JAMES LOWELL UNDERWOOD, *THE CONSTITUTION OF SOUTH CAROLINA, CHURCH AND STATE, MORALITY AND FREE EXPRESSION* 1-18 (1992).

2. *See id.* at 19-28.

3. *See* S.C. CONST. of 1790, art. VIII, in *BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, THE CONSTITUTION OF 1790* (J. H. Easterby et al. eds., 1952) [hereinafter *BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY*]. S.C. Const. of 1790, art. VIII, § 1 stated that

[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall, forever hereafter, be allowed within this State to all mankind; provided that the liberty of conscience hereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

religion and will also trace the parallel journey from the belief that an established Church is essential to the preservation of civilization to the belief that such an establishment must be dispensed with if freedom of religion is to be fully realized.

II. THE CHARTERS AND FUNDAMENTAL CONSTITUTIONS: A LIMITED GRANT OF TOLERANCE SERVES AS A MAGNET TO SETTLERS

The first Charter for Carolina, granted by Charles II in 1663, seemed to be at once parsimonious and lavish in its grant of religious freedom. This ambivalence toward freedom of religion reflected the tensions of the time: Charles II's personal inclination toward tolerance was under constant pressure from Parliament for enforcement of conformity that strengthened the position of the Church of England.⁴ In the charters, these tensions found expression in provisions that envisioned a vital role for religion as part of the social glue that held society together, but with the government hand seeking to be simultaneously tolerant and controlling. A vigorous planting of new churches was expected, but under the careful control of the Lords Proprietors who were granted the following powers:

And Furthermore, the Patronage and Advowsons of all the Churches and Chapels which, as Christian Religion shall increase within the Country, Isles, Islets, and Limits aforesaid, shall happen hereafter to be erected; Together with license and power to Build and found Churches, Chapels, and Oratories in convenient and fit places within the said Bounds and Limits, and to cause them to be Dedicated and Consecrated according to the Ecclesiastical Laws of our Kingdom of England . . .⁵

4. See JOHN MILLER, CHARLES II 76-80, 99-100 (1991) (discussing Charles II's predilection toward tolerance for Protestant dissenters and Catholics and the pressure to which he was subjected by the House of Commons to curb that tendency and enforce the 1662 Act of Uniformity to fortify the position of the Church of England and maintain public order). For the text of the Act of Uniformity, see AN ACT FOR THE UNIFORMITY OF PUBLIC PRAYERS, AND ADMINISTRATION OF SACRAMENTS, AND OTHER RITES AND CEREMONIES: AND FOR ESTABLISHING THE FORM OF MAKING, ORDAINING AND CONSECRATING BISHOPS, PRIESTS AND DEACONS IN THE CHURCH OF ENGLAND, 12 Chas. 2, c. 4, 8 STATUTES AT LARGE 47 (1763) (Eng.). Ashley Cooper (Earl of Shaftesbury), a leading Carolina proprietor under the Charter granted by Charles II in 1663, is described as being in favor of a tolerant approach. MILLER, *supra*, at 154. In light of such crosscurrents of pressure, it is not surprising that the charters are not consistent in their recognition of religious freedom.

5. See Charter to the Lords Proprietors of Carolina (Mar. 24, 1663), in NORTH CAROLINA CHARTERS AND CONSTITUTIONS, 1578-1698, at 77 (Mattie Erma Edwards Parker ed., 1963) [hereinafter CHARTERS & CONSTITUTIONS]. A similar provision in the Maryland Charter granted in 1632 to Baron Baltimore gave him power to license churches "according to the Ecclesiastical Laws of [the] Kingdom of England." See The Charter of Maryland (1632), in 3 THE FEDERAL

The Charter needed to fly a flag of tolerance since potential settlers had varied beliefs. To this end, the Charter permitted the Lords Proprietors to grant relief from conformity with the doctrines of the Church of England to settlers who could not in good conscience embrace them, but who remained loyal to the Crown and whose worship did not “in any wise disturb the Peace and safety . . . or scandalize or reproach the said Liturgy, forms, and Ceremonies” of the Church of England.⁶ Such tolerance was feasible not only because it would be a magnet for settlers but because the “remote distances” of the colony from England meant that the variety of beliefs it countenanced would not undermine the “unity and uniformity established in this Nation.”⁷ But it is important to recognize that such nonconformity was permitted by reversible dispensation of the Lords Proprietors rather than as a right. The Charter speaks of “Indulgencies and Dispensations” that may exist “for and during such time and times, and with such limitations and restrictions” as the Lords Proprietors cared to impose.⁸

The second Carolina Charter, granted to the Lords Proprietors on June 30, 1665, provided a firmer basis for religious liberty; it forbade punishment for “differences in opinion or practice in matters of Religious concernment, [of those] who [did] not disturb the Civil Peace,” whereas the first Charter apparently permitted action against those who merely scandalized or

AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1678-79 (Francis Newton Thorpe ed., 1993) (1909) [hereinafter THE FEDERAL & STATE CONSTITUTIONS].

6. Charter to the Lords Proprietors of Carolina (Mar. 24, 1663), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 88-89.

7. *Id.* at 88. The religious tolerance permitted under the Charter soon became a cornerstone of the proprietors’ attempts to recruit settlers to migrate to Carolina. See, e.g., Robert Horne, *A Brief Description of the Province of Carolina*, in NARRATIVES OF EARLY CAROLINA 1650-1708, at 71 (Alexander S. Salley, Jr. ed., 1911) (listing first among the “chief privileges” of the colony the fact that “[t]here is full and free Liberty of Conscience granted to all, so that no man is to be molested or called in question for matters of Religious Concern; but every one to be obedient to the Civil Government, worshipping God after their own way”).

8. Charter to the Lords Proprietors of Carolina (Mar. 24, 1663), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 88. But, this broad discretion in the hands of the proprietors did not necessarily render religious liberties uncertain in the new colony. As William J. Rivers notes, the proprietors generally followed a “liberal interpretation” of the religious provisions of the charter such that religious freedom became well-established in Carolina despite the “remarkable [fact] that in the charter, the civil rights granted to the colonists are secured to them by the king independently of the proprietors, while religious freedom was left subject to their will and restriction.” WILLIAM J. RIVERS, A SKETCH OF THE HISTORY OF SOUTH CAROLINA TO THE CLOSE OF THE PROPRIETARY GOVERNMENT BY THE REVOLUTION OF 1719, at 78 (The Reprint Co., 1972) (1856). And, to Rivers, this “toleration [is all] the more to be admired when we consider the spirit of prosecution [sic] which still warmly existed in all denominations of Christians in the mother country.” *Id.*; see also John Oldmixon, *From The History of the British Empire in America*, in NARRATIVES OF EARLY CAROLINA, *supra* note 7, at 324 (noting that under the colonial charter’s language of toleration the “Lords Proprietors [took] care, that Persons of all Professions in Religion should be protected and secur’d in the free Exercise of them”).

reproached the standards of the Church of England.⁹ Furthermore, freedom of religion was protected against encroachment by English law by the second Charter, which announced that religious liberty was granted despite any “usage or Custom of Our Realm of England to the contrary hereof in any wise notwithstanding.”¹⁰

The broad terms of the first Charter were reduced to more concrete form in the concessions and agreement entered into on January 7, 1665 between the Lords Proprietors and a group of Barbadian settlers led by Sir John Yeamans and his son, Major William Yeamans.¹¹ This document displayed the same ambivalence to religious freedom found in the Charters: making a lavish grant of religious freedom with one hand and retaining the power to revoke it with the other.¹² The power to revoke freedoms was to be exercisable only as to new settlers who had not come to the colony in reliance on the initial grant.¹³ This raised the bizarre possibility of various waves of settlers coexisting with different degrees of religious freedom. The concessions and agreement also

9. Charter to the Lords Proprietors of Carolina (June 30, 1665), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 104 (religious freedom provisions of Second Charter). Charter to the Lords Proprietors of Carolina (Mar. 24, 1663), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 88-89 (religious freedom provisions of First Charter, 1663). The Charter of Rhode Island and Providence Plantation granted by Charles II in 1663 (replacing a 1643 charter) to Roger Williams and others who had fled religious oppression in Massachusetts contained a similar provision. It stated:

That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and every person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and their owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; they behaving themselves peaceable and quietlie, and not using this libertie to lycentiousnesse and profanenesse, nor to the civill injurie or outward disturbance of others; any law, statute, or clause, therein contayned, or to bee contayned, usage or custome of this realme to the contrary hereof, in any wise, notwithstanding.

Charter of Rhode Island and Providence Plantations (1663), in 6 *THE FEDERAL & STATE CONSTITUTIONS*, *supra* note 5, at 3213. See *id.* at 3209, for a 1643 land patent granted by Lords and Commons to Williams and others. In 1635, a court banished Williams from Massachusetts for several offenses including questioning the powers of the King to grant land patents in America without negotiating purchases from the Indians. However, the main charge related to his questioning the authority of civil magistrates over religious matters. See EDWIN S. GAUSTAD, *LIBERTY OF CONSCIENCE, ROGER WILLIAMS IN AMERICA* 39 (1991). Williams had earlier received a deed for the land from Indian leaders. *Id.* at 48.

10. Charter to the Lords Proprietors of Carolina (June 30, 1665), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 104.

11. Concessions and Agreement between the Lords Proprietors and Major William Yeamans and Others (Jan. 7, 1665), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 114-15.

12. *Id.* Note not only Item Eight containing a broad grant of religious freedom but also the Lords Proprietors' power to abrogate it contained in Item Seven. *Id.* at 114.

13. *Id.* at 114-15.

furnished evidence of how the proprietors would use their power to license churches. They promised not to exercise this power to dilute “the General clause of Liberty of Conscience.”¹⁴ The agreement granted county legislative assemblies the power to create churches and maintain them with public funds,¹⁵ but the assemblies were not to have a monopoly over the creation of new churches. Freedom was granted “to any person or persons to keep and maintain what preachers or Ministers they please,” but the implication was that these privately initiated groups were to fend for themselves for funds.¹⁶ This preferential system would give government churches a competitive advantage.

The approach of the Charters to religious freedom, which included granting liberty within carefully prescribed limits, making the grant of freedom subject to revision or revocation by the proprietors, and expressing a preference for certain religious beliefs, was refined in the Fundamental Constitutions. These documents, which allocated power and granted rights, were issued by the Lords Proprietors beginning in 1669.¹⁷ The numerous versions of these constitutions subjected religious freedom to such endless tinkering, expansion, contraction, and refinement that they did not provide a firm mooring for liberty.¹⁸ Since the Fundamental Constitutions were infused with medieval concepts, such as the creation of a rigidly hierarchical set of socio-economic classes including the serf-like “leetmen,” they were rejected by the people and never completely implemented.¹⁹ Speculation has credited John Locke with authorship of the Fundamental Constitutions, but some scholars have concluded that rather than reflecting his philosophy, they implemented the views of the proprietors.²⁰

14. *Id.* at 114.

15. *Id.*

16. *Id.*

17. CHARTERS & CONSTITUTIONS, *supra* note 5, at 128-240. See also the discussion *infra* note 25 of the earliest text of the Fundamental Constitutions (available at the South Carolina Department of Archives and History, Columbia, S.C.).

18. One historian captured the troubled history of the Fundamental Constitutions, and the persistent efforts of the proprietors to have the constitutions adopted by the people of Carolina by analogizing the constitutions to a “garment that did not fit the infant [but which] was still so beautiful to the parent’s eye, that it was altered, and pieced, and patched, and again and again lovingly tried upon his limbs, even in the years of his robust manhood.” RIVERS, *supra* note 8, at 165.

19. See ROBERT M. WEIR, COLONIAL SOUTH CAROLINA: A HISTORY 55-73 (1983); 2 DAVID RAMSAY, HISTORY OF SOUTH CAROLINA, FROM ITS FIRST SETTLEMENT IN 1670 TO THE YEAR 1808, at 122-24 (Reprint Co., 1960) (1858). See also WALTER EDGAR, SOUTH CAROLINA: A HISTORY 42-43 (1998) (noting that since the colonists refused to ratify the constitutions, they did not become the “basic law” of Carolina, but many provisions were implemented “de facto,” and the religious freedom provisions became influential in attracting settlers “looking for a new beginning”); Mattie Erma E. Parker, *Legal Aspects of “Culpeper’s Rebellion,”* 45 N.C. HIST. REV. 111 (1968) (attributing the Albemarle uprising of 1677 to a “constitutional crisis” caused by the ambiguous authority of the Fundamental Constitutions and the directives the proprietors issued under those constitutions).

20. 2 RAMSAY, *supra* note 19, at 122 (noting the controversy over Locke’s authorship). See also 1 CORRESPONDENCE OF JOHN LOCKE 395 n.2 (E.S. de Beer ed., 1976) (discussing how key ideas may have come from Locke’s patron Lord Shaftesbury). In his examination of the issue,

However, Locke's influence may be seen in that the ideas he later expressed in *A Letter Concerning Toleration* (1689) are foreshadowed, albeit imperfectly, in the Fundamental Constitutions.²¹ Locke observed that "neither pagan nor Mahometan nor Jew ought to be excluded from the civil rights of the commonwealth because of his religion."²² But Locke argued that toleration should not be extended to those whose religion undermined the moral standards necessary to preserve civil society, nor to religions that required allegiance to a foreign prince or that denied the existence of God.²³ Even though the Fundamental Constitutions were never fully implemented, they furnished the rhetorical weaponry for any disputes over religious freedom.

The Fundamental Constitutions attempted to strike a balance by creating an aura of sympathetic tolerance to attract settlers, while, on the other hand, insisting that they adhere to broadly defined core religious principles thought to be essential to a civilized society.²⁴ Article 86 [61] of the July 21, 1669 Fundamental Constitution stipulated these bedrock beliefs: "No man shall be permitted to be a Freeman of Carolina, or to have any Estate or habitation within it, that does not acknowledge a God, and that God is publicly and Solemnly to be worshipped."²⁵ Anyone adhering to these core principles, even

J.R. Milton concludes that "[it] is therefore probable, though by no means certain, that Locke was not the original author of the *Fundamental Constitutions of Carolina*, though he undoubtedly contributed significantly to the final text as it emerged from successive stages of revision." J.R. Milton, *John Locke and the Fundamental Constitutions of Carolina*, in 21 THE LOCKE NEWSLETTER III 128-29 (Roland Hall ed., 1990). WEIR, *supra* note 19, at 53, gives credit to Lord Shaftesbury for some of the "more Utopian features."

21. John Locke, *A Letter Concerning Toleration* (1689), in 22 THE LIBRARY OF LIBERAL ARTS 18 (Oskar Piest ed., 2d ed., 1955).

22. *Id.* at 56.

23. *Id.* at 50-52.

24. This effort by the proprietors to guarantee a limited, yet attractive, amount of religious liberty in a constitutional document was paralleled in the proprietary colony of East New Jersey. See JOHN E. POMFRET, THE PROVINCE OF EAST NEW JERSEY, 1609-1702: THE REBELLIOUS PROPRIETARY 140-143 (1962). In a "Fundamental Constitution" proposed for that colony in 1683, the New Jersey proprietors provided that all persons "who confess and acknowledge the one Almighty and Eternal God . . . shall in no way be molested or prejudged for their religious persuasions and exercise in matters of faith and worship." The Fundamental Constitutions For The Province of East Jersey In America, Anno Domini 1683, in 5 THE FEDERAL & STATE CONSTITUTIONS, *supra* note 5, at 2579-80. However, this grant of religious freedom did have its limits—holders of public office were required to be Christians, the advocating of atheism or irreligiosity was prohibited, and sinful activities such as drunkenness, swearing, and "indulging . . . in stage plays" were not to be excused under the guise of religious liberty. *Id.* But, like Carolina's Fundamental Constitutions, these proposed constitutions were never adopted in New Jersey. See POMFRET, *supra*, at 140.

25. Fundamental Constitutions of Carolina (July 21, 1669), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 148. Article 91 [66] made clear that not only were monotheistic beliefs required but church membership as well. It stipulated that "no person above [sixteen] seventeen years of Age shall have any benefit or protection of the law, or be capable of any place of profit or honor, who is not a member of Some church or profession, having his name recorded in Some one, and but one Religious Record at once." *Id.* at 149. The numbers and words found in brackets are from a text of the July 21, 1669 version of the Fundamental Constitutions found

though they otherwise deviated from orthodoxy, was welcome. To avoid discouraging settlement by those who might fear that their religion was unacceptable, the July 21, 1669 version promulgated a generous policy for the creation of new churches. Article 87 [62] stated:

that heathens, Jews, and other dissenters from the purity of Christian Religion may not be Scared and kept at a distance from [knowledge of] it, but, by having an opportunity of acquainting them selves with the truth and reasonableness of its Doctrines, and the peaceableness and inoffensiveness of its professors, may, by good usage and persuasion, and all those convincing Methods of Gentleness and meekness Suitable to the Rules and design of the Gospel, be won over to embrace and unfeignedly receive the truth: Therefore, any Seven or more persons agreeing *in any Religion* shall constitute a church or profession, to which they shall give Some name to distinguish it from others.²⁶

A similar but less generous provision was contained in the Pennsylvania Charter of 1681 granted by Charles II to William Penn. It stated

that if any of the inhabitants of the said Province, to the number of Twenty, shall at any time hereafter be desirous, and shall by any writeing, or by any person deputed for them, signify such their desire to the Bishop of *London* for the time being that any preacher or preachers, to be approved of by the said Bishop, may be sent unto them for their instruction, that then such preacher or preachers shall and may be and reside within the said Province without any deniall or molestation whatsoever.²⁷

in the S.C. Department of Archives and History in Columbia, S.C. This text, now considered to be the earliest, was the version given to the first governor and settlers and was cited by the colonists against new versions offered by the proprietors. For this text see Ruth S. Green, *The South Carolina Archives Copy of the Fundamental Constitution, Dated July 21, 1669*, 71 S.C. HIST. MAG., Apr. 1970, at 86. Mattie Erma Edwards Parker discusses this document and the reasons for considering it the earliest in *The First Fundamental Constitution of South Carolina*, 71 S.C. HIST. MAG., Apr. 1970, at 78; see especially p. 84 (describing the colonists' championing of this document against versions they considered improperly altered by the proprietors). The author is grateful to Dr. Charles Lesser of the South Carolina Department of Archives and History for the observation concerning the significance of the archives text of the July 21, 1669 version.

26. Fundamental Constitutions of Carolina (July 21, 1669), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 149 (emphasis added).

27. Charter For The Province of Pennsylvania (1681), in 5 THE FEDERAL & STATE CONSTITUTIONS, *supra* note 5, at 3043.

The grant of religious freedom in the Pennsylvania provision was more tight-fisted; less room was permitted for local religious inventiveness since all of the preachers dispatched at the colonists' request had to be approved by the Bishop of London.

As generous as the Carolina provision was, it did not value tolerance in itself so much as it appreciated its effectiveness as a beacon for settlers and as a subtle instrument for evangelism. But such pragmatic tolerance is often the only kind obtainable. A similar tolerance, broad but still constrained by boundaries requiring acceptance of essential religious principles, governed the creation of churches by private parties. While Article 87 [62] permitted "[s]even or more persons in any Religion [to] constitute a church," Article 90 [65] required that to be deemed a church, an organization had to embody in its communion the beliefs that there was a God and that God was "publicly to be worshipped"; it also had to provide some mechanism by which its members could vow that testimony they gave in official proceedings was the truth.²⁸

This theme of tolerance, circumscribed by broad belief requirements, recurs in South Carolina history. Over a hundred years later, the Constitution of 1778 proclaimed "[t]hat 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."²⁹

The 1669 Fundamental Constitutions, though broadly tolerant, circumscribed the privacy of both the churches and their members by requiring that their membership rolls be maintained by public officials.³⁰ This was an essential mechanism for enforcing the rule that acceptance of broad monotheistic religious standards was a necessary attribute of citizenship.

Groups not complying with the intricate maze of regulations that must be adhered to in order to be deemed a church were viewed as outlaw assemblies, which "shall not be Esteemed as churches, but unlawful meetings, and be punished as other Riots."³¹ But churches meeting the standards received protection of their worship from those who would disturb it. Article 93 [68] stipulated that "[n]o man of . . . [an]other Church or profession shall disturb or molest any Religious Assembly," and Article 97 [72] decreed that

28. Fundamental Constitutions of Carolina (July 21, 1669), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 149 (quoting Article 90 [65] which sets beliefs that must be espoused by an organization wishing to be considered a church).

29. See S.C. CONST. of 1778, art. XXXVIII, in *BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY*, *supra* note 3. But Article 38 required more specific Protestant Christian beliefs before a church could enjoy the benefits of legal incorporation. *Id.*

30. Article 92 [67] specified that "[t]he Religious Record of every church or profession shall be kept by the public Register of the Precinct where they reside." Fundamental Constitutions of Carolina (July 21, 1669), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 149.

31. *Id.* at 150.

[n]o person shall use any reproachful, Reviling, or abusive language against the Religion of any Church or Profession, that being the certain way of disturbing the public peace, and of hindering the conversion of any to the truth, by engaging them in Quarrels and animosities, to the hatred of the professors and that profession, which otherwise they might be brought to assent to.³²

The last provision might have been calculated to aid a religiously diverse society in coexisting harmoniously, but it also could have discouraged the theological debate that helps prevent religious atrophy.

Religious debate can be messy, and the Fundamental Constitutions prized order over bruising disputes. This was nowhere more evident than in the Fundamental Constitution's attempt to safeguard the government from being undermined by religious dissent. Religious freedom was the beneficiary of broad tolerance, but state security was a higher virtue. This was evidenced by the stern admonition that "[n]o person whatsoever shall speak any thing in their Religious assembly Irreverently or Seditiously of the Government or Governors or States matters."³³

To a limited extent even slaves were to share in the largesse of tolerance. Article 98 [73] provided that

[s]ince Charity obliges us to wish well to the Souls of all men, and Religion ought to alter nothing in any man's civil Estate or Right, It shall be lawful for Slaves, as all others, to enter them selves and be of what church any of them shall think best, and thereof be as fully members as any freemen. But yet, no Slave shall hereby be exempted from that civil dominion his Master has over him, but be in all other things in the same State and condition he was in before.³⁴

However, tolerance did not extend to religious beliefs that would undermine the slaves' status of servitude. The Fundamental Constitutions firmly decreed that "[e]very Freeman of Carolina shall have absolute Authority over his Negro Slaves, of *what opinion or Religion soever*."³⁵ Judged by this language, the slave's freedom of religion was largely inward; religion could not remove

32. *Id.* Article 100 [75] further provided that "[n]o person whatsoever shall disturb, molest, or persecute another for his speculative opinions in Religion or his way of worship." *Id.* This bespoke an affirmative duty of the government to protect freedom of worship.

33. *Id.*

34. *Id.* The words "or Right" are not included in the draft set forth in Green, *supra* note 25, at 86.

35. Fundamental Constitutions of Carolina (July 21, 1669), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 150 (emphasis added). This provision is not included in the earliest text of the July 21, 1669 version discussed in Green, *supra* note 25, at 86.

external restraints upon him. Yes, the constitution purported to give the slaves the right to choose a church, but it is doubtful that such a freedom could exist in isolation without other freedoms to undergird it.

Even though the 1669 Fundamental Constitution had belief requirements that had to be met to qualify as a freeman in Carolina, the standard was more generous and less specific than a 1624 provision governing the colony of New Amsterdam which stated:

[The Colonists] shall practise no other form of divine worship within their territory than that of the Reformed religion as presently practised in this country, and, in so doing, by their Christian life and conduct, lead the Indians and other blind people to the knowledge of God and of His word, without, however, persecuting anyone because of his faith, but leaving to everyone the freedom of his conscience. But, if anyone among them or within their jurisdiction should wantonly revile or blaspheme the name of God or of our Savior Jesus Christ, he shall be punished by the commander and his council according to the circumstances.³⁶

Freedom of conscience is far less meaningful if its external manifestations must adhere to a specific mode and doctrine.

In a new version of the Fundamental Constitution issued on March 1, 1670, the proprietors tightened their embrace of the Church of England. Article 96 provided:

As the Country comes to be sufficiently Planted and Distributed into fit Divisions, it shall belong to Parliament to take care for the building of Churches and the public Maintenance of Divines, to be employed in the Exercise of Religion according to the Church of England, which, being the only true and Orthodox, and the National Religion of all the King's Dominions, is so also of Carolina, and therefore, it alone shall be allowed to receive public Maintenance by Grant of Parliament.³⁷

36. 1 THE ANNALS OF AMERICA 88 (Mortimer J. Adler et al. eds., 1968).

37. Fundamental Constitutions of Carolina (Mar. 1, 1670), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 181. One of the proprietors said that another proprietor inserted this provision contrary "to Mr. Locke's judgment." THE SHAFTESBURY PAPERS AND OTHER RECORDS RELATING TO CAROLINA AND THE FIRST SETTLEMENT ON ASHLEY RIVER PRIOR TO THE YEAR 1676, at 312 n.2 (Langdon Cheves ed., South Carolina Historical Society 2000) (1897).

The new document continued the requirement of its predecessor that one must believe in God to be a freeman in Carolina.³⁸

This fiscal and ideological endorsement of the Church of England clouded the message of tolerance sent to current and would-be settlers by the Charters and the earlier version of the Fundamental Constitutions and replaced it with a not-so-subtle hint that those who wished to advance socially, politically, and economically would align themselves with the official religion. Government financial support of the Church of England would give it an advantage over its competitors by draining, through taxes, the pool of funds that might otherwise be available for private contributions to other religious bodies and would dampen the ardor of Church of England followers to contribute to their own religion. One commentator has absolved John Locke of any responsibility for the retrogressive Article 96 by noting that a draft of the July 21, 1669 version in Locke's handwriting contained no such provision and that Locke later claimed that Article 96 was included in the new version at the behest of other proprietors rather than his patron Lord Ashley.³⁹

Two drafts of the Fundamental Constitutions issued in 1682 tightened the religious requirements for being a freeman in Carolina. The January 12, 1682 version stipulated that to be a freeman, one must not only believe in God and that God is publicly to be worshipped but also that "there is a future being after this Life."⁴⁰ Another version issued later in 1682 contained the stern admonition that not only must the freeman avow a belief in God, that God is publicly and solemnly to be worshipped, and that he believes in a future life after this one, but that the future existence can be either one of "happiness or misery" depending upon the path taken in this life.⁴¹ The official leash on freedom of conscience became tighter and tighter. Curiously, however, this same version temporarily reduced the burden placed on taxpayers by the

38. Fundamental Constitutions of Carolina (Mar. 1, 1670), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 181.

39. JOHN WESLEY BRINSFIELD, *RELIGION AND POLITICS IN COLONIAL SOUTH CAROLINA* 7-8 (1983).

40. See Fundamental Constitutions of Carolina (Jan. 12, 1682), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 202.

41. Fundamental Constitutions of Carolina (Aug. 17, 1682), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 227.

Church of England establishment.⁴² It provided that the public maintenance of the Church of England

is to arise out of lands or rents assigned voluntarily, contributions, or such other ways whereby no man shall be chargeable to pay out of his particular Estate that is not conformable to the church as aforesaid; but every church or Congregation of Christians, not of the communion of the Church of Rome, shall have power to lay a tax on its own members, not exceeding a penny per acre on their Lands and twelve per head per annum, for the maintenance of their public ministers; and of all money so paid and disbursed they shall keep an account, which the grand council, or any authorized by them, shall have liberty from time to time to Inspect.⁴³

Even though forced tax payments were replaced by voluntary contributions, only followers of the Church of England were expected to contribute to it, and other churches used their own administrative tools rather than government machinery to collect funds from their adherents; the Constitution of August 17, 1682 still assumed everyone would be a member of some church. Preference for the Church of England was still evident in the restraint the Constitution placed on the growth of its rivals by limiting the amount that they could collect from their members and was also evident in the government's power to inspect the rivals' books, which could have dampened their ardor. Whether the purpose of these restraints was to lighten the load of the taxpayer or a desire to hobble competitors of the established church, these provisions still bespoke the kind of microscopic government scrutiny that could chill nonconformity. The reference to the Catholic Church as the "Church of Rome" and its exclusion from the fiscal powers enjoyed by others showed a fear that the Papal State could undermine the power of England over the colony if its religious agents were given a firm foothold. Still, the voluntary contributions measure was a bold departure signaling tolerance.

42. The 1682 removal of the tax burden from the shoulders of non-Anglicans in order to support the established church was part of a largely successful campaign by the proprietors to recruit English, Scottish, and French dissenters to Carolina. See RIVERS, *supra* note 8, at 142; M. Eugene Sirmans, *Politics in Colonial South Carolina: The Failure of Proprietary Reform, 1682-1694*, in 23 WM. & MARY Q. 35-36 (1966); WEIR, *supra* note 19, at 64. This recruitment campaign and the accompanying amendments to the Fundamental Constitutions would interject religion squarely into the debates over the ratification of the constitutions as newly arrived dissenters favored adopting the constitutions and their guarantees of religious freedom, and established Anglican elites resisted the efforts of the proprietors to force the Fundamental Constitutions on the colony. See Sirmans, *supra*, 39-40.

43. Fundamental Constitutions of Carolina (Aug. 17, 1682), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 227-28 (citations omitted).

Further evidence that religion was intended to be the tool of the state rather than its master is seen in Article 102 of the August 1682 version of the Fundamental Constitution. It stipulated that “[n]o ordained minister, or that receives any maintenance as minister of any congregation or Church, shall be member of parliament, or have any civil office, but wholly attend his ministry.”⁴⁴ This was separation of church and state of a sort: religious officials were to be separated from the levers of state power, but religion was entwined with the state as one of its agents of social control.

The seemingly endless permutations of the Fundamental Constitutions congealed into a final version, issued April 11, 1698. The experiment with voluntary contributions had run its course. The final version reverted to language similar to Article 96 of the 1670 draft. Parliament was charged with the duty of providing for the construction of churches and payment of the salaries of ministers, and the Church of England was anointed as the “only true and orthodox[] and the National Religion of the King’s Dominions.”⁴⁵

Even though the Charters and the Fundamental Constitutions sent a mixed message, on the one hand flying flags of broad tolerance and on the other flying banners signifying a preference for the Church of England, the overall tone was attractive to settlers of varied backgrounds and beliefs. An early Carolina statute, passed during the 1696-97 legislative session, reaffirmed this enlightened tone by extending to all settlers, whatever their country of origin, the same property rights and rights before the courts as were enjoyed by settlers born in the colony to English parents.⁴⁶ The preamble of the statute extended a welcoming hand to all those who were fleeing religious oppression who would be loyal to the King.⁴⁷ But this generous message was muted by provisions in the same law that granted a “full, free and undisturbed” worship but limited the right to “all Christians” and excluded papists.⁴⁸

Despite the vacillation between broad tolerance to all settlers and unflinching preference for the Church of England, the predominant flavor of the Charters and Constitutions was attractive to the religiously oppressed. Barnett Elzas, in his history of the Jews of South Carolina, praised the 1669 Fundamental Constitution by observing that

44. *Id.* at 228.

45. Fundamental Constitutions of Carolina (Apr. 11, 1698), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 238. The 1698 document did not include the ban on ministers occupying civil offices that had been in Article 102 of the August 1682 version. *Id.*

46. See Act No. 154 of Mar. 10, 1696-97, para. VI, 2 S.C. STATUTES AT LARGE 131, 133 (Thomas Cooper ed., 1837). A similar provision granting equal rights to settlers of non-English origins is found in the Charter of Rhode Island and Providence Plantations granted by Charles II in 1663. See Charter of Rhode Island and Providence Plantations (1663), in 6 THE FEDERAL & STATE CONSTITUTIONS, *supra* note 5, at 3220. A similar, if somewhat less expansive provision, was included in the 1662 Charter of Connecticut. See Charter of Connecticut (1662), in 1 THE FEDERAL & STATE CONSTITUTIONS, *supra* note 5, at 533.

47. Act. No. 154, 2 S.C. STATUTES AT LARGE at 131.

48. *Id.*

[t]his Constitution of John Locke (1669) was a veritable Magna Charta of liberty and tolerance. South Carolina started right. Our chief concern being with the Jews of South Carolina, it would be well to note carefully Article 87 [permitting a church to be formed by “seven or more persons of *any religion*”] of this wise and far-seeing Constitution.

Little wonder, then, that the persecuted Jew, like the persecuted Huguenot and German Palatine, soon came here to find a haven of rest. To be undisturbed in the possession of “life, liberty, and the pursuit of happiness,” and to enjoy the privilege of worshipping God as his conscience dictated – these have ever been the ideals of the Jew, even as they were the ideals upon which this great Republic was established. For by far the greater part of his history, in every country, some or all of these “inalienable rights of man” have been denied him. Here he could have them all, and in fullest measure. South Carolina welcomed him, welcomed him as a man and as a citizen, and the Jew showed himself worthy of the confidence that was reposed in him.⁴⁹

The Huguenots, Protestants who fled from persecution in France in the late seventeenth and early eighteenth centuries, especially after the 1685 revocation of the Edict of Nantes (1598) that had guaranteed tolerance, found Carolina to be an attractive destination because there they could “live in comparative innocence, free from the rigid requirements of antiquated religious limitations.”⁵⁰

Robert St. John observed that although the Fundamental Constitutions set broad belief standards for those who wished to be freemen in Carolina, and all persons above seventeen were expected to choose a church in order to be eligible for places of honor and profit, a generous ambit was still left for individual differences of belief. St. John further noted that even though the message of tolerance embodied in the Fundamental Constitutions was in part

49. BARNETT A. ELZAS, *THE JEWS OF SOUTH CAROLINA FROM THE EARLIEST TIMES TO THE PRESENT DAY* 17-19 (The Reprint Co. 1972) (1905).

50. ARTHUR HENRY HIRSCH, *THE HUGUENOTS OF COLONIAL SOUTH CAROLINA* 3, 6 (Archon Books 1962) (1928). The Edict of Nantes reestablished the Roman Catholic Church in France but permitted Protestants to live throughout the Kingdom and worship in designated places. See the text of the Edict in MILTON VIOST, *GREAT DOCUMENTS OF WESTERN CIVILIZATION* 106-08 (1965). The revocation ordered the destruction of Reformed Protestant Temples, banned RPR meetings, excluded its ministers from the Kingdom and ordered Protestant children to be raised as Roman Catholics. *Id.* at 146-47. For an argument against the revocation see SAMUEL PUFENDORF, *OF THE NATURE AND QUALIFICATION OF RELIGION IN REFERENCE TO CIVIL SOCIETY* 108 (Simone Zurbuchen ed., J. Crull trans., Liberty Fund 2002) (1687) (arguing against revocation of tolerance when dissenters had been granted it by contracts such as the Edict of Nantes).

motivated by the missionary goal of gently nudging non-Christians toward conversion, the documents still created an atmosphere of freedom of conscience.⁵¹

But the Charters and Fundamental Constitutions proceeded on the dubious assumption that religious freedom could exist without separation of church and state. This is demonstrated by the fact that these basic documents set Christian missionary goals as one of the pivotal purposes of colonization.⁵² Indeed the Charter of 1663 noted that one of the reasons for the grant to the Lords Proprietors was that they were “excited with a laudable and pious zeal for the propagation of the Christian Faith” along with a desire to enlarge the King’s empire.⁵³ Such religious goals commonly formed a part of colonial charters. For example, the Maryland Charter issued to Caecilius Calvert, Baron of Baltimore in 1632, stated that one reason for its promulgation was the need to colonize the land because it was then “occupied by Savages, having no knowledge of the Divine Being.”⁵⁴ The language in the 1681 Pennsylvania Charter granted to William Penn also combined the practical goals of economic and political empire building with devout purposes. Charles II commended Penn for his desire “to enlarge our *English* Empire, and promote such usefull comodities as may bee of Benefit to us and Our Dominions, as also to reduce the savage Natives by gentle and just manners to the Love of Civil Societie and Christian Religion.”⁵⁵ With similar proselytizing goals in the Carolina Charter and the preference for the Church of England that permeated the Fundamental Constitutions existing alongside the message of tolerance found in the same documents, a tug-of-war of competing principles was launched with the Church of England establishment being the immediate victor, but with religious freedom being the ultimate winner when its vigorous exercise was found to be incompatible with a pervasive establishment.⁵⁶

51. ROBERT ST. JOHN, *JEWS, JUSTICE AND JUDAISM: A NARRATIVE OF THE ROLE PLAYED BY THE BIBLE PEOPLE IN SHAPING AMERICAN HISTORY* 62-63 (1969). See also Article 90 [65] (setting belief standards for freemen), Article 91 [66] (requiring those above seventeen [sixteen] to select a church to be eligible for places of honor and profit), and Article 87 [62] (setting a policy of tolerance to persuade non-believers to accept Christianity because of its benign nature). Fundamental Constitutions of Carolina (July 21, 1669), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 148-49.

52. See Fundamental Constitutions of Carolina (July 21, 1669), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 148-49 (setting the goal of converting “heathens, Jews, and other dissenters from the purity of [the] Christian Religion”).

53. Charter to the Lords proprietors of Carolina (Mar. 24, 1663), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 74, 76.

54. The Charter of Maryland (1632), in 3 *THE FEDERAL & STATE CONSTITUTIONS*, *supra* note 5, at 1677.

55. Charter for the Province of Pennsylvania (1681), in 5 *THE FEDERAL & STATE CONSTITUTIONS*, *supra* note 5, at 3035-36.

56. Indeed, as early as 1705, Daniel Defoe appealed to the tradition of religious liberty embodied in the colonial charter and the Fundamental Constitutions in his successful pamphleteering campaign against the 1704 Exclusion Act, which limited membership in the South Carolina assembly to those who had taken the sacraments in conformity with Church of

III. THE ESTABLISHED CHURCH: CAUGHT IN A REGULATORY WEB

The Church of England was the favorite of the law, receiving both ideological and fiscal support of the government. But it paid a substantial price by forfeiting much of its freedom of decision making for a dense maze of regulations. An intricate 1704 law, declared null and void by the Queen in Council and repealed and replaced in 1706 by another complex law, shows the extent to which the church became the instrument, rather than the partner, of government.⁵⁷ The statute's goal was to find "a well grounded Christian commonwealth."⁵⁸ The statute dictated the content of Church of England services, including the Book of Common Prayer, the Psalms of David, and the morning and evening prayers that had to be read in every established church.⁵⁹ No tolerance was shown for innovative modes of worship in established churches. Church growth was on a legal leash; parish boundaries, the creation of new parishes, and the construction of new churches were all controlled by statute.⁶⁰ Primacy of civil authority over religion was seen in the fact that the highest power in church governance was not a group of clergymen, local or London-based, but laymen with political clout who were named in the statute.⁶¹ This colony-wide group of church commissioners exercised considerable sway over the composition of the clergy. Even though church rectors were elected by parish residents who were both Church of England members and taxpayers, they could be dismissed only by the commissioners who held a hearing upon a complaint by nine respectable members of the parish.⁶² This pervasive

England doctrine. See John W. Brinsfield, *Daniel Defoe: Writer, Statesman, and Advocate of Religious Liberty in South Carolina*, 76 S.C. HIST. MAG., Jan. 1975, at 107-11.

57. See Act No. 225 of Nov. 4, 1704, 2 S.C. STATUTES AT LARGE 236-46 (Thomas Cooper ed., 1837), repealed by Act No. 255 of Nov. 30, 1706, 2 S.C. STATUTES AT LARGE 281 (Thomas Cooper ed., 1837); Act No. 256 of Nov. 30, 1706, 2 S.C. STATUTES AT LARGE 282 (Thomas Cooper ed., 1837) (replacing Act No. 225). See also JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 534-35 (Octagon Books, Inc. 1965) (1950); 1 THE COLONIAL RECORDS OF NORTH CAROLINA: 1662 to 1712, at 635-44 (William L. Saunders ed., 1886) (setting forth the House of Lords' message (March 12, 1705) objecting to the law, the petition from Carolina to the House of Lords, and the opinion of the Attorney General and Solicitor General that the laws were contrary to reason and English law and the Queen's Order in Council issued June 10, 1706 declaring the law null and void). On March 6, 1705, the Lords Proprietors, apparently reacting to objections of the Bishop of London to portions of the law encroaching on ecclesiastical power, sent instructions to the governor that the law was null and void and should not be enforced. See RECORDS IN THE BRITISH PUBLIC RECORD OFFICE RELATING TO SOUTH CAROLINA 1701-1710, at 140-41 (A.S. Salley ed., 1947) [hereinafter RECORDS] (containing text of proprietor's instructions to governor). See also CHARLES H. LESSER, SOUTH CAROLINA BEGINS: THE RECORDS OF A PROPRIETARY COLONY, 1663-1721, at 262 (1995) (providing synopsis of documentation concerning the law).

58. Act No. 225, 2 S.C. STATUTES AT LARGE at 236.

59. *Id.*

60. *Id.* at 236, para. II.

61. *Id.* at 240-41, para. XVI.

62. *Id.* at 239-40, para. XIV & XV. The governor had veto power over the firing of ministers. *Id.* at 246, para. XXXV.

involvement of civil government authorities in church affairs provoked complaints by church authorities in London who viewed the lay commissioners as rivals who were eroding their power.⁶³ Impetus for the grant of clergy removal powers to the commission was given by the case of Dr. Edward Marston, minister of St. Philip's Church in Charleston, whose stinging criticism of legislative and executive officials in sermons and correspondence created intense dislike of him by the targets of his barbs.⁶⁴ Marston so incensed the Commons House of Assembly by impugning its honor that in 1704 it ordered him to present his sermon notes for examination, and when he refused, the House censured him, ordered his salary stopped, and finally, had him brought before the lay commission which "removed his living."⁶⁵ The Marston case dramatically illustrates the treacherous path that had to be trod by a minister of the established church who sought to be a moral critic of the government upon which the church was dependent. It is notable that the House was especially infuriated when Marston insisted that his commission came from God and not the legislature, even though the latter paid his 150 pound per year salary.⁶⁶ This is an example of the machinery of an establishment being more preoccupied with the preening of secular officials than with spiritual duties.

Despite these elaborate controls over church personnel, dissent remained. The Reverend George Whitefield, an ordained Anglican priest, became a leader of the Methodist faction that was growing within the Church of England. In 1740, a tribunal of Anglican priests was convened to hear charges by the Reverend Alexander Garden of St. Philip's Church in Charleston that Whitefield had conducted services without using the authorized Book of Common prayer and that he had preached that salvation could be gained by a sudden conversion without living a life of good works. Whitefield questioned the authority and impartiality of the tribunal. The church court concluded that Whitefield had forsaken the official doctrine that he vowed to obey when he became a priest and suspended him as a Church of England priest. Whitefield ignored the judgment as well as the tribunal and continued his evangelism throughout the colonies, including occasional forays into South Carolina.⁶⁷

63. See GEORGE C. ROGERS, JR., CHURCH AND STATE IN EIGHTEENTH-CENTURY SOUTH CAROLINA 13-15 (1959); see also FREDERICK DALCHO, AN HISTORICAL ACCOUNT OF THE PROTESTANT EPISCOPAL CHURCH, IN SOUTH CAROLINA, FROM THE FIRST SETTLEMENT OF THE PROVINCE, TO THE WAR OF THE REVOLUTION 62 (Arno Press Reprint 1970) (1820).

64. BRINSFIELD, *supra* note 39, at 21.

65. DALCHO, *supra* note 63, at 54-58 (describing House censure of Rev. Marston); see *id.* at 63 (noting lay commission proceedings concerning Rev. Marston); see also John S. Green's Transcript of the Commons House Journal 1702-1706 No. 2, at 259-61, 271-75 (entries for Oct. 10, 1704, Oct. 18, 1704, and Oct. 19, 1704) (available at South Carolina Department of Archives and History, Columbia, S.C.).

66. Green, *supra* note 65, at 271-73 (describing charges against Marston in the entries for Oct. 18-19, 1704).

67. See DALCHO, *supra* note 63, at 128-46; ALBERT M. SHIPP, THE HISTORY OF METHODISM IN SOUTH CAROLINA 118-21 (The Reprint Co. 1972) (1884); see also ALBERT DEEMS BETTS, HISTORY OF SOUTH CAROLINA METHODISM 24-25 (1952) (arguing that the charges against

Benjamin Franklin heard Whitefield preach on several occasions when the evangelist visited Philadelphia. In his *Autobiography*, Franklin described the impact of Whitefield's preaching on that city: "From being thoughtless or indifferent about religion, it seemed as if all the world were growing religious, so that one could not walk through the town in an evening without hearing psalms sung in different families of every street."⁶⁸

The fiscal resources of the civil government fueled the expansion of the established church, but the resulting price was statutory specification of the mode of church governance and of the pace and direction of church growth. The 1704 statute specified the broad areas in which new churches were to be created, but the exact location was to be decided by the commissioners with the advice of Church of England followers in the area.⁶⁹ The commissioners had the power to accept contributions for building new churches. If these were inadequate, the commissioners could use public treasury funds for a project.⁷⁰ If public treasury funds were insufficient to pay ministers of the established church, the commissioners could levy an additional tax for that purpose.⁷¹ Gifts and charges due the church were the first source of funds for church repairs. If these were inadequate, the church vestry could assess a tax on "*all and every* [one of] the inhabitants, owners and occupiers of lands, tenements and hereditaments, or any personal estate."⁷² Thus, the burden was shared by non-adherents of the established church who might have preferred to devote the money to their own churches or secular purposes. One historian of the Huguenots, Calvinist Protestants who fled France to escape religious persecution in the late seventeenth and early eighteenth centuries and settled in Carolina after an interim in England, concluded that one reason their churches were absorbed into the Church of England was that maintaining a separate existence for their churches was not economically feasible since they did not have sufficient resources to both pay taxes supporting the Church of England

Whitefield were a ploy by the established church to enlist the power of the civil government against a rival); THE SOUTH CAROLINA GAZETTE, July 18, 1740 (no clear page number) (available at the South Caroliniana Library, University of South Carolina, Columbia, S.C.) (describing the key charge as "not using the Form of Common Prayer in Charlestown Meeting houses where he has preached" and noting that he questioned the jurisdiction and impartiality of the court). In January 1741, Whitefield was called before a civil court to answer charges that he had been guilty of editing a statement that libeled the established clergy. Far from being intimidated by the charge, Whitefield wrote in his journal, "My soul rejoices in it." GEORGE WHITEFIELD'S JOURNALS 502-03 (Banner of Truth Trust 1960).

68. BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 133 (Barnes & Noble, Inc. 1994) (1791).

69. See Act No. 225 of Nov. 4, 1704, para. VI, 2 S.C. STATUTES AT LARGE 237 (Thomas Cooper ed., 1837).

70. *Id.* at 238, para. VIII. The supervisors of church building projects could draft skilled and unskilled labor for the project.

71. *Id.* at 239, para. XIII.

72. *Id.* at 245, para. XXXI (emphasis added).

and support their own congregations.⁷³ Since the board of a Church of England congregation was in effect the delegatee of the civil government's taxing authority, it is not surprising that the 1704 statute prescribed the form of church governance. Each established church was to have a vestry (which was a policy-making board of nine elected members) and two wardens who were given practical tasks such as keeping the church in good repair.⁷⁴ The right to vote on vestrymen was restricted to those who met three standards: by being (1) inhabitants of the parish, (2) followers of the Church of England, and (3) taxpayers.⁷⁵ Thus, not everyone subject to the vestry taxes could have a say in selecting the board's members. So comprehensive was the statute that it even set the dates of important vestry meetings.⁷⁶ Nothing was left to chance. The tolerance found in some portions of the Charters and Fundamental Constitutions was overlaid by a dense network of regulations that gave scant room for innovation even by the favored denomination.

So intimate was the legal relationship between the established church and the civil government that decisions concerning the distribution of power or responsibility in the religious sphere could effect the balance of secular power and vice versa. This was especially true with regard to parish boundaries, since the parish served not only as a religious unit but also as the basis for legislative representation. These parish boundary changes that could be needed to improve the churches' ministry might be problematic because they could upset the political balance of power.⁷⁷ Before its repeal, the 1704 Act was supplemented

73. See HIRSCH, *supra* note 50, at 94, 127.

74. Act No. 225, para. XXI-XXIII, 2 S.C. STATUTES AT LARGE at 242.

75. *Id.* at 242, para. XXII. The vestrymen also had to be Church of England members and taxpayer/freeholders. *Id.*

76. *Id.* at 244, para. XXX.

77. For examples of statutes that divided parishes that also had to provide for reallocation of legislative representation, see Act No. 795 of June 14, 1751, para. XVI, 7 S.C. STATUTES AT LARGE 79, 83 (David J. McCord ed., 1840); Act No. 567 of Apr. 9, 1734, para. V, 3 S.C. STATUTES AT LARGE 374, 374-75 (Thomas Cooper ed., 1838). Numerous statutes regulating established church activities were passed in the wake of the 1704 enactment. See Act No. 256 of Nov. 30, 1706, 2 S.C. STATUTES AT LARGE 282 (Thomas Cooper ed., 1837) (replacing the 1704 statute). This law continued the establishment of the Anglican Church, the required use of the Book of Common prayer, and use of province-wide church commissioners, but deleted commission authority concerning firing ministers, created new parishes, set the compensation for priests, and provided the procedure by which all parish residents could be taxed for needs of the established church. The 1706 law provided for the seizure of the property of those who balked at paying the tax. See Act No. 256, para. XIX, 2 S.C. STATUTES AT LARGE at 287. The procedure for the election of vestrymen was refined in Act No. 241 of Feb. 17, 1704-1705, para. II, 2 S.C. STATUTES AT LARGE 259, 260 (Thomas Cooper ed., 1837). It also reserved the right of the ministers of dissenting congregations to conduct christenings, marriages, and burials. *Id.* at 260, para. III. The creation of auxiliary ministries, called chapels of ease, often required statutory permission. See Act No. 533 of Aug. 20, 1731, 3 S.C. STATUTES AT LARGE 304 (Thomas Cooper ed., 1838); Act No. 505 of Dec. 9, 1725, 3 S.C. STATUTES AT LARGE 252, 252-53 (Thomas Cooper ed., 1838). Church repairs received statutory attention. See Act No. 568 of Apr. 9, 1734, 3 S.C. STATUTES AT LARGE 376 (Thomas Cooper ed., 1838). The buying, selling, renting, and altering of the use of land required statutory permission. See Act No. 880 of Apr. 7, 1759, 7 S.C.

by another law the same year which set election procedures for vestrymen and wardens.⁷⁸

Intense objections to the 1704 law's grant of sweeping and arbitrary power to the lay commissioners to remove ministers summarily for a variety of offenses, ranging from immorality to quarrels with their parishioners, were lodged in a petition from merchant Joseph Boone and other inhabitants of Carolina to the House of Lords, condemning the law as intruding on the rights of the colonists to arrange their own spiritual life without such officious interference. The House of Lords argued that this law, and the law excluding Protestant dissenters from the assembly,⁷⁹ not only exceeded the powers granted in the Charter and discouraged trade with Carolina, but also that the heavy-handed tactics harmed religion, presumably by making it appear to be a mere political tool rather than an independent spiritual force. After the House of Lords conveyed these objections to the Queen on March 12, 1705, a Privy Council order was issued on June 10, 1706 declaring the law null and void and threatening legal proceedings to revoke the Charter.⁸⁰ This none-too-subtle rebuke resulted in repeal of the law by the colonial legislature. The 1706 statute replacing the original 1704 law reaffirmed the Church of England establishment, set the Book of Common Prayer as the spiritual standard, and gave authority to a province-wide lay commission but deleted the controversial provision that had given them the essentially ecclesiastical power of removing incumbent ministers upon petition of church members and vestrymen.⁸¹ In addition to delineating parish boundaries, the 1706 law tightened government fiscal controls of religion by setting a limit on the sums commissioners could

STATUTES AT LARGE 84 (David J. McCord ed., 1840) (granting St. Michael's permission to acquire additional land for a parsonage); Act No. 991 of Apr. 7, 1770, 7 S.C. STATUTES AT LARGE 93 (David J. McCord ed., 1840) (granting St. Philip's permission to divide glebe lands into rental lots); Act No. 904 of July 25, 1761, 4 S.C. STATUTES AT LARGE 152 (Thomas Cooper ed., 1838) (granting permission to St. Bartholomew's to sell glebe lands to raise funds to buy young female slaves for the rector).

78. See Act No. 241 of Feb. 17, 1704, 2 S.C. STATUTES AT LARGE 259 (Thomas Cooper ed., 1837). This law also attempted to preserve the power of ministers of dissenter churches to conduct marriages, christenings, and burials. *Id.* at 260-61, para. III. But we shall see later in this chapter that the issue recurs as dissenter ministers, such as Rev. William Tennent, use their inability to get licenses to marry their parishioners as one of the arguments for disestablishing the Church of England. See 3 UNDERWOOD, *supra* note 1, at 61.

79. See Act No. 222 of May 6, 1704, 2 S.C. STATUTES AT LARGE 232 (Thomas Cooper ed., 1837).

80. See 1 THE COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 57, at 635-44 (setting forth the House of Lords' message, the petition from Carolina to the House of Lords, and the opinion of the Attorney General and Solicitor General that the laws were contrary to reason and English law, and setting forth the Queen's Order in Council); see also SMITH, *supra* note 57, at 534-35.

81. See Act No. 256, 2 S.C. STATUTES AT LARGE at 282; see also Act 225, para. XV, 2 S.C. STATUTES AT LARGE at 240 (giving offensively broad powers to the lay commissioners); S. CHARLES BOLTON, SOUTHERN ANGLICANISM: THE CHURCH OF ENGLAND IN COLONIAL SOUTH CAROLINA 28 (1982) (discussing the objections to the broad powers given the lay commissioners).

take from the treasury to finish church buildings, determining the salaries of the rectors, and creating a system by which all parish inhabitants could be taxed to compensate Church of England priests specified in the act.⁸² Taxpayers who balked at the levy could have their goods seized and sold.⁸³ The 1706 statute provided for modest diversity by permitting rectors in parishes with largely French membership to use a version of the Book of Common Prayer in their native language.⁸⁴

The incessant revision, tinkering, and supplementation of laws in this area continued with a 1712 statute.⁸⁵ This comprehensive statute redefined the authority of the church commissioners, vestry, and wardens, determined the compensation of priests, delineated parish boundaries, and created a provincial library, specifying that it was to be located in the St. Philip's parsonage.⁸⁶ This detailed act even defined the circumstances under which the books could be used.⁸⁷ This phantasmagoria of increasingly web-like church regulations must have squeezed dry the juices of spiritual creativity. Perhaps that was their purpose. At any rate, a heavy price in lost independence was paid by the established church.

An examination of the Church Commissioner's minutes from 1717 to 1742 shows the significant involvement of civil government with church affairs.⁸⁸ Some members of the Commission had substantial power in the secular government. For example, minutes for the October 1, 1717 meeting reflect the election of Governor Robert Johnson as president of the Commission and note that Chief Justice Nicholas Trott was in attendance as a commissioner.⁸⁹ The intertwining of Church and State hierarchies increased when the Reverend Alexander Garden, minister of St. Philip's and Commissary of the Bishop of London, sat as a Commission member.⁹⁰ The Commission had its finger upon the financial pulse of the established church. Minutes for 1717 and 1722 note that the Commission approved the allocation of funds for the annual expenses

82. Act. No. 256, para. XVI-XVIII, 2 S.C. STATUTES AT LARGE at 286-87 (determining rectors' salaries); *id.* at 283-84, para. VI (setting money limits for building churches).

83. *Id.* at 287, para. XIX.

84. *Id.* at 288, para. XXII.

85. See Act No. 307 of June 7, 1712, 2 S.C. STATUTES AT LARGE 366 (Thomas Cooper ed., 1837).

86. *Id.* at 374-75, para. XXI-XXVI (creating a library); *id.* at 366-68, para. I-IV (defining power of commissioners); *id.* at 368-69, para. VI (defining authority of vestry); *id.* at 368, 372-73, para. V, XII, XV (determining rectors' salaries).

87. *Id.* at 375, para. XXIII. The statutes mentioned in this section of this article are merely a sampling of the prolific set of laws defining and redefining church regulation. See also 3 UNDERWOOD, *supra* note 1, at 9-28 (discussing additional laws).

88. Transcript of the Minute Book of the Church Commissioners, 1717-1742 (available at the South Carolina Department of Archives and History, Columbia S.C.) [hereinafter Minute Book].

89. *Id.* at 1.

90. See *id.* at 62 (describing election of Alexander Garden as Commissioner on Sept. 13, 1736).

of particular churches.⁹¹ After this intimate involvement with fiscal affairs of individual churches during the early years covered by the minute book, the Commission's interest in financial matters focused more on province-wide issues such as granting a request by the clergy that their salaries be paid in "proclamation money" according to a rate of exchange with the currency that was to be set by the Commission.⁹² One power exercised by the Commission was fraught with political significance; the Commission had the responsibility of resolving parish boundary disputes which, because of the use of parishes as election units, had implications for the exercise of secular as well as religious power.⁹³ Beginning in 1739, the Commission addressed a boundary dispute involving St. Philips and St. James Goose Creek.⁹⁴

Perhaps the most frequently recurring items on the Commission agenda were requests from Church of England congregations that the Commission order the holding of an election to choose a minister for the congregation. Even though the 1717-1742 minutes do not reveal Commission involvement in the removal of ministers, a controversial practice that helped fuel opposition to the 1704 church law discussed above,⁹⁵ the Commission was often involved in the selection process.⁹⁶ This involvement was not as initiator of the selection process, or as ultimate decision-maker, but as a group whose permission was needed before an election could be held and whose confirmation was needed after the congregation had acted. A few examples will illustrate the

91. *Id.* at 2 (discussing the minutes of October 1, 1717, which approved orders of forty pounds per year to defray expenses during 1713 and 1716 for the Parish of Goose Creek); *see also id.* at 7 (describing how similar orders to defray expenses were issued on November 17, 1722 to pay the expenses of St. James Goose Creek, St. Andrews, Christ Church, St. Johns, St. Pauls, St. James Santee, and St. Philips of Charles Towne. Most of these orders were for 40 pounds per year for several years, but the larger Parish of St. Philips received 55 pounds. St. Pauls received two grants, one for eighty and one for fifteen pounds).

92. *See id.* at 40-42.

93. *See* Act No. 394 of March 20, 1718-1719, 3 S.C. STATUTES AT LARGE 50 (Thomas Cooper ed., 1838) (designating parishes as election districts); *see also* 2 JAMES LOWELL UNDERWOOD, *THE CONSTITUTION OF SOUTH CAROLINA: THE JOURNEY TOWARD LOCAL SELF-GOVERNMENT* 16-20, 30 (1989) (discussing the government function of parishes); James Lowell Underwood, *African American Founding Fathers: The Making of the South Carolina Constitution of 1868*, in *AT FREEDOM'S DOOR* 4, 183 n.34 (James Lowell Underwood & W. Lewis Burke eds., 2000) (discussing the demise of the parish electoral system by omission from the Constitution of 1865).

94. *See* Minute Book, *supra* note 88, at 68-69; *see also id.* at 70-74 for records of commission consideration of a boundary dispute between Prince George and Prince Frederick parishes.

95. *See supra* notes 69-83 and accompanying text.

96. Even though the 1717-1742 commission minutes do not reveal that body conducting clergy removal proceedings, Dalcho describes an incident occurring in 1774, near the end of the Commission's life, when members of St. Michael's Church, who opposed the firing of the assistant minister by the vestry for injecting politics into a sermon, requested the Commission to intervene and grant redress. Lieutenant Governor William Bull called a meeting of the Commission to consider the petition, but since no quorum appeared, the Commission took no action and did not meet again. *See* DALCHO, *supra* note 63, at 201-04.

Commission's role. At a November 22, 1717 meeting, the Commission granted the request of the vestry of St. Philip's Charles Towne that a precept for the election of a minister be issued.⁹⁷ The Commission order described those who were entitled to vote: inhabitants of the parish who conformed to the Church of England and were freeholders or were taxpayers in some other capacity.⁹⁸ The order set the day for the election and required that notice be published at the church on the two Sundays immediately preceding the election.⁹⁹ The election results were reported to the Commission.¹⁰⁰ As a prelude to issuing an order for a 1718 election at Christ Church that had been requested by its vestry, the Commission asked the candidate to present his credentials.¹⁰¹ The Commission often examined the credentials of Church of England ministers upon their arrival in the Province.¹⁰² When election results were returned to the Commission showing that the candidate was successful, the minutes would often contain an entry that, since no objection had been made to the election, the results were "ratified and confirmed."¹⁰³ Despite its broadranging activities, it is significant that the Commission minutes do not reflect any decision-making concerning churches that were not Church of England established congregations. However, such monocular attention from a group dominated by politically powerful laymen carried significant risks for the religious groups whose fate was influenced by the Commission's decisions. Among these risks was a possibility that decisions concerning them could be motivated more by political than spiritual considerations. Looking back at the movement for disestablishment throughout the country, the United States Supreme Court, in 1970 and 1971 decisions, labeled such "active involvement of the sovereign in religious activity" as one of the "main evils" against which disestablishment was directed.¹⁰⁴

When a government establishes and financially aids a church, it can find itself diverting funds from uses of benefit to the public in general to the needs of the preferred church, and when the church shares in the state's fiscal bounty, it may find itself in unseemly competition for a larger share of the fiscal pie with secular uses. In 1757, a South Carolina statute sought to bolster an

97. Minute Book, *supra* note 88, at 8-9.

98. *Id.* at 9.

99. *Id.* at 9-10.

100. *Id.*

101. *Id.* at 17.

102. For examples of Commission examination of credentials see *id.* at 22-24; Minute Book, *supra* note 88, at 27 (showing the examination of Rev. Alexander Garden's credentials by the Commission).

103. Minute Book, *supra* note 88, at 36 (showing that the election of Reverend Alexander Garden was "ratified and confirmed"); *id.* at 37 (showing the election of Mr. Varnod (likely Reverend Francis Varnod) by St. Georges Parish was "approved, ratified and confirmed").

104. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (describing the three evils caused by establishment, including ideological and financial sponsorship of religion by the state and active involvement by the state in religious activity) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

inadequate appropriation for finishing a steeple and spire at St. Michael's by diverting funds from construction of a beacon near Charleston Harbor.¹⁰⁵ The funds came from sources that, from a latter-day perspective, would be considered morally compromising—taxes on the importation of slaves and liquor.¹⁰⁶

The government was not always a benign benefactor of the church; sometimes it was a hard-nosed creditor. A 1768 statute provided an interest-free loan, repayable in three years, rather than a grant for constructing a new parsonage at St. Michael's.¹⁰⁷ Although the terms were generous, the creditors' remedy in case of default was harsh: the public treasurer could sell the church pews.¹⁰⁸

In addition to financial support and ideological endorsement of its beliefs, a third dimension existed in the relationship of an established church to the state: it served as the instrument for the performance of certain state functions. In South Carolina, the established church played important roles in education, aid to the poor, and the conduct of elections.¹⁰⁹ The church's educational role was a logical extension of its traditional responsibility for instruction in ethical standards. The Society for Propagating the Gospel in Foreign Parts did pioneering work in organizing schools in eighteenth century South Carolina.¹¹⁰ The comprehensive 1712 church law discussed above is an example of the use of the church to dispense knowledge, since it provided for a provincial library and stipulated that it be located in St. Philip's.¹¹¹ When the government undertook the responsibility of educating indigent children in a 1710 statute, it did so in a manner that recognized the educational leadership of the established church. In addition to being knowledgeable in Latin and Greek, the instructor had to be a member of the Church of England, and religious instruction was required as well as art, science, and grammar.¹¹²

The role assigned the established church in administering government assistance to the indigent was a logical projection of the church's Biblical duty

105. See Act No. 861 of May 21, 1757, para. II, 4 S.C. STATUTES AT LARGE 38, 38-39 (Thomas Cooper ed., 1838).

106. *Id.*

107. See Act No. 977 of Apr. 12, 1768, 4 S.C. STATUTES AT LARGE 303 (Thomas Cooper ed., 1838).

108. *Id.* at 303-04, para. II.

109. See 3 UNDERWOOD, *supra* note 1, at 24-25.

110. See B. James Ramage, *Local Government and Free Schools in South Carolina*, in 1 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 13 (Herbert B. Adams ed., 1883).

111. See Act No. 307 of June 7, 1712, para. XXI-XXVI, 2 S.C. STATUTES AT LARGE 366, 374-76 (Thomas Cooper ed., 1837).

112. See Act No. 290 of Apr. 8, 1710, para. X-XI, 2 S.C. STATUTES AT LARGE 342, 345 (Thomas Cooper ed., 1837). For a discussion of the early history of education in South Carolina, see 2 UNDERWOOD, *supra* note 93, at 27-32.

to minister to the poor.¹¹³ A 1712 statute assigned the church vestries the duty to raise and distribute aid to the poor.¹¹⁴ The vestries were directed to nominate two overseers for the poor who were to share with the church wardens the task of distributing the aid. Like its 1704 predecessor, the 1712 law spread the financial burden for Church of England programs beyond the Anglican community. If funds from fines and gifts designated for the poor fell short, the vestry could name three assessors to impose a tax “equally upon the estates real and personal of *all* and every the inhabitants, owners and occupiers of lands, tenements and hereditaments, or any personal estate, within the several parishes.”¹¹⁵ As in the case of the church repair assessments mentioned above, the use of the word “all” in the statute meant that non-Anglicans were subject to the tax even though they could not participate in choosing the vestrymen who could initiate it.¹¹⁶

Church officials were assigned the task of conducting elections, and parishes served as the unit of legislative representation as well as determining the boundaries of a spiritual community.¹¹⁷ This responsibility of ensuring honest elections was a natural coordinate to the church’s traditional role in setting standards of probity. With the church being a key instrument for delivering government services such as education, aid to the poor, and the conduct of elections, and with the government granting fiscal support and ideological endorsement to the established church, it is not surprising that religion played a role in the qualifications to participate in the political process as an officeholder or voter.

113. See *Luke* 14:13-14 (New Revised Standard Version) (“But when you give a banquet invite the poor, the crippled, the lame, and the blind. And you will be blessed, because they cannot repay you, for you will be repaid at the resurrection of the righteous.”); *Galatians* 2:10 (New Revised Standard Version) (“They asked only one thing, that we remember the poor . . .”).

114. See Act No. 325 of Dec. 12, 1712, 2 S.C. STATUTES AT LARGE 593 (Thomas Cooper ed., 1837).

115. *Id.* at 594, para. III (emphasis added).

116. See Act No. 256, para XXX, 2 S.C. STATUTES AT LARGE at 290; *Vestry of St. Luke’s Church v. Mathews*, 4 S.C. Eq. (4 Des.) 578 (1815) (describing a political maneuver by which sitting vestrymen attempted to impose a \$50 poll tax on Episcopalians seeking to vote in an election that might have replaced the incumbents). The Chancellor struck down the new voter qualification and observed that under well-established tradition stretching back to the early eighteenth century, the electors had to be (1) inhabitants of the parish, (2) freeholders or those who otherwise contributed to the public tax fund, and (3) adherents of the Church of England. *Id.* at 581; see also Act No. 2388 of Dec. 20, 1826, 6 S.C. STATUTES AT LARGE 283 (Thomas Cooper ed., 1839) (completing the drawn out process of replacing the vestries as administrators of government aid to the poor by granting secular commissioners authority over aid to the poor).

117. See Act No. 394, 3 S.C. STATUTES AT LARGE at 50; see also 1 BIOGRAPHICAL DIRECTORY OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES 41 (Walter B. Edgar ed., 1974) (providing a list of the Sixteenth Assembly). Several of the parishes were beginning to become election districts with the election of 1717. See 2 UNDERWOOD, *supra* note 93, at 16-20, 30 for a general discussion of the governmental functions of the parish.

IV. RELIGIOUS QUALIFICATIONS FOR POLITICAL PARTICIPATION

Attributing superior religious wisdom to a particular denomination can lead to attributing superior governmental judgment to the same group, especially if doing so also serves practical political goals. Such an approach underlay a 1704 act that drove Protestant dissenters from the Commons House of Assembly.¹¹⁸ This law stipulated that all persons elected to Commons who had not participated in the rite of the Lord's Supper according to the ritual of the Church of England should do so in a public ceremony immediately after worship, and certification of such participation should be given by the minister and two witnesses and presented to the Speaker in an open session of the Assembly.¹¹⁹ As an alternative, a Church of England member who did not think he was spiritually prepared to participate in the sacrament at that time could attest that he regularly attended church, believed in the rite of the Lord's Supper, was a faithful adherent of the Church of England, and would diligently work for its interest in the legislature.¹²⁰ The preamble to the Act attempted to strike a lofty tone by claiming "that the admitting [into the legislature] of persons of different persuasions and interest in matters of religion . . . hath often caused great contentions and animosities in this Province, and hath very much obstructed publick business."¹²¹ John Wesley Brinsfield has described more mundane political maneuvering that led to passage of the law.¹²² Although a comfortable equilibrium of power between the Church of England adherents and dissenters had existed from 1670 to 1700, this balance was disturbed when Queen Anne began her reign and started to energetically press Anglican interests. The waters were further roiled when Lord John Granville, the Palantine (the leading Proprietor), tried to manipulate both factions to his advantage.¹²³ The situation became even more tense when Governor James Moore maneuvered to undermine his opponents, largely dissenters, in the assembly by charging that they were trying to corner the trade with the Indians; the dissenters answered with similar charges against Moore. The feud grew more bitter when the Governor found that dissenters were blocking appropriations for his expedition to repulse a Spanish threat from Florida. The quarrel became even more virulent under Moore's successor, Nathaniel Johnson, who became determined to remove the dissenter blight from the

118. See Act. No. 222, 2 S.C. STATUTES AT LARGE at 232.

119. *Id.* at 233, para. I.

120. *Id.* at 233, para. II.

121. *Id.* at 232, pmbl.

122. See BRINSFIELD, *supra* note 39, at 14-37; see also Act No. 202 of May 6, 1703, 2 S.C. STATUTES AT LARGE 196, 196 (Thomas Cooper ed., 1837), which had previously discouraged religious debate by disqualifying from "employments, ecclesiastical, civil or military" anyone who professed to be a Christian but denied the existence of the Holy Trinity, that there is only one God, that Christianity is the true religion, or that the Bible is inspired by God.

123. See BRINSFIELD, *supra* note 39, at 18-19; see also M. EUGENE SIRMANS, COLONIAL SOUTH CAROLINA: A POLITICAL HISTORY, 1663-1763, at 76-89 (1966).

Assembly. He resorted to a parliamentary trick to obtain passage of the 1704 statute which excluded from Commons all who could not certify that they had participated in the Lord's Supper in accordance with the Church of England ritual. He quickly called the Commons House of Assembly into a special session and hurried the bill's passage before the dissenters arrived to cast their vote.¹²⁴ The covert nature of this ploy furnished ammunition for those seeking to have the statute voided. Opponents of the measure hired Daniel Defoe, later author of the novel *Robinson Crusoe*, who was then a literary mercenary, to use his verbal swordsmanship to argue for reversal of the law.

In *The Case of Protestant Dissenters in Carolina* (1706), Defoe argued that liberty of conscience was the most important freedom since it related to one's fate in the afterlife.¹²⁵ Every man should be free to believe and act as he sees fit so long as he does not disturb the public peace.¹²⁶ Any system by which a legal preference is given to any particular religion undermines the freedom of all, including followers of the favored religion, since the preference could shift as the political tides change and a newly favored group uses the government to retaliate against those who were previously preferred. The only certain protection for any religion was "Universal and Absolute Toleration" of all peaceful denominations.¹²⁷ Eligibility for a seat in Commons was akin to a property right that had vested in the dissenters by virtue of their reliance on earlier standards that had made them qualified for such seats. Disqualifying the dissenters had stripped them of their dignity, made them objects of derision, and inspired mob attacks on the dissenter members of the Commons who were thought to have undermined the policies of the executive branch.¹²⁸ Defoe argued that since all rights are interrelated, banning dissenters from the assembly could lead to the demise of their right to vote and property rights lest these be the instruments by which the dissenters regained parliamentary power.¹²⁹ The dissenters had not been antagonistic to the Church of England and did not deserve such shabby treatment. In 1698, Governor Blake, a dissenter, had encouraged Anglican priests to settle in the colony, and dissenter members of the legislature had supported these efforts.¹³⁰ Such generosity had been the product of the previous system of mutual tolerance which should be resumed. Defoe made practical arguments which might appeal to the economic self-interest of those whose influence might bring about repeal of the statute. Religious strife was bad for trade. It diverted attention from the creation of wealth. The dissenters composed about two-thirds of the population of the colony, including some of its wealthiest inhabitants. Creating a hostile climate

124. BRINSFIELD, *supra* note 39, at 19-24.

125. DANIEL DEFOE, *CASE OF PROTESTANT DISSENTERS IN CAROLINA* 3-4 (1706) (available on microfilm at Emory University, Atlanta, Ga.).

126. *Id.* at 3.

127. *Id.* at 4.

128. *Id.* at 8.

129. *Id.* at 10.

130. *Id.* at 11.

that might drive them out of the colony would cripple the economy.¹³¹ Religious non-conformists would be discouraged from settling in Carolina.

Not just the exclusionary act but the entire system of intermingling secular and spiritual power earned Defoe's ire. Another 1704 law gave too much power over church affairs to the province-wide board of lay commissioners.¹³² A minister beholden to civil authorities for his job, his salary, and approval of expansion plans for his church would be unlikely to comment candidly on the morality of his benefactors' conduct.

Defoe argued that the exclusionary act contravened the broad-gauged tolerance of the Fundamental Constitutions and the Charters. Even though the Fundamental Constitutions had not been ratified by the people at large, they had been accepted by each colonist as a condition of settlement and were as binding on the proprietors as on the colonists.¹³³ The exclusionary act was unconstitutional since it had not been passed according to the procedure set forth in the Charter of March 24, 1663, which stipulated that new laws could only be passed "with the advice, assent and approbation of the Freemen of the said Province, or of the greater part of them, or of their Delegates or Deputies."¹³⁴ A law adopted by a mere rump faction of the legislature fell short of those standards. Since the Charters had been granted to the proprietors on the condition that they practice religious tolerance, the intolerance of the exclusionary act jeopardized the continued legitimacy of the proprietors' holdings.¹³⁵

The legal issue was joined when a Carolina merchant petitioned the House of Lords in England to invalidate the exclusion of dissenters from the legislature. The petition contended the following: (1) the statute had not been passed according to correct procedure since (a) the advice and consent of the freemen or their delegates had not been obtained as required by the 1663 Charter, (b) only a partisan fragment of the legislature had had an opportunity to vote on it, (c) many members of the rump-faction that had passed the law had been illegally elected at a 1703 contest in which unqualified voters had participated; (2) to be valid, a law had to be in accord with sound reason and the customs of England, but the statute defied reason by excluding from the assembly a majority of the population; and (3) the proprietors usurped the role

131. DEFOE, *supra* note 125, at 14-16, 26-27.

132. *See id.* at 23-24; *see also* Act No. 225, para. XVI, 2 S.C. STATUTES AT LARGE at 240-41 (indicating the commissioners and power given to them).

133. *See* DEFOE, *supra* note 125, at 29-33; *see also* Fundamental Constitutions of Carolina (July 21, 1669), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 148-49 (containing generous provisions for organizing a church of "any religion").

134. Charter to the Lords Proprietors of Carolina (Mar. 24, 1663), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 78-79 (containing the legislative provisions of the Charter).

135. *See* DEFOE, *supra* note 125, at 29-33; *see also* Charter to the Lords Proprietors of Carolina (Mar. 24, 1663), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 88 (containing provisions of the charter encouraging the proprietors to grant indulgences and dispensations to those who do not conform to the Church of England so long as they do not disturb the peace).

of the sovereign by sanctioning a law contrary to the King's Charter.¹³⁶ An even more fundamental defect of the statute according to the merchant's petition was that it broke the promise that had been made to settlers in the Charters and Fundamental Constitutions that they could find relief from Old World religious oppression in Carolina.¹³⁷ Even if the colonists were not direct parties to the Charters, they were beneficiaries of the promises in them and had relied upon them in deciding to come to, or stay in, the colony.

The House of Lords endorsed the petition in an address to Queen Anne. In addition to accepting the petition's assertions that the exclusion law was contrary to English customs and the Charters, the House of Lords gave practical reasons why the law was bad policy: it would frighten away potential settlers, deter trade, and transform a vigorous economy into a wasteland. On a less mundane level, the House of Lords concluded that the law might undermine religion and encourage atheism, presumably because it was such a cynical political ploy hiding behind a religious facade.¹³⁸ The Queen responded at first with regal vagueness: "I Thank the House for Laying these Matters so plainly before Me; I am very Sensible of what Great Consequence the Plantations are to England, and will do all that is in My Power to Relieve My Subjects in Carolina, and to Protect them in their just Rights."¹³⁹

This statement was followed by a June 10, 1706 order by the Queen in Council which declared the exclusion act and the 1704 church act null and void.¹⁴⁰ Since the Queen's order in council threatened legal action to revoke the charter, enormous pressure was placed on Provincial authorities to repeal the law.¹⁴¹ The exclusionary law was repealed in a 1706 statute and the dissenters returned to their role as a potent political force.¹⁴² Ironically, earlier during the last decade of the seventeenth century and the first two years of the eighteenth century, the dissenters had led an effort to block Huguenot voting out of fear

136. *To the Right Honourable the Lords Spiritual and Temporal in Parliament Assembled*, in NORTH CAROLINA GOVERNOR JOHN ARCHDALE'S PAPERS 4 (1705) (available at the South Carolina Department of Archives and History, Columbia, S.C.).

137. *Id.*

138. *Id.* at 3.

139. *Id.*; see BRINSFIELD, *supra* note 39, at 22-32.

140. See 1 THE COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 57, at 634-44 (setting forth the order in Council and the merchant's petition, the House of Lords' message, and the opinions of crown legal advisors).

141. *Id.* See SMITH, *supra* note 57, at 534-35 for a discussion of the official action with regard to the petition opposing the exclusion law.

142. See Act No. 255, 2 S.C. STATUTES AT LARGE at 281; see also COMMISSIONS AND INSTRUCTIONS FROM THE LORDS PROPRIETORS OF CAROLINA TO PUBLIC OFFICIALS OF CAROLINA, 1685-1715, at 188-94 (A.S. Salley, Jr., ed., 1916) (containing ratification of the repealing statute by the Proprietors, July 22, 1707) (available at Thomas Cooper Library, University of South Carolina, Columbia, S.C.). See also a June 13, 1706 notation in the records of the Commissioners for Trade and Plantations that the order of council and report of the attorney general and solicitor general recommending proceedings against the Charter were read to the Commissioners, in RECORDS, *supra* note 57, at 160. See also LESSER, *supra* note 57, at 262 for a synopsis of the orders relating to this law.

that this group of French Protestants would be a pivotal swing vote that could throw elections to the rival Church of England party.¹⁴³ The anti-Huguenot bias was spawned by a combination of political, religious, language, and nationality differences which set them apart from British settlers.¹⁴⁴ The proprietors sought to alleviate this prejudice by passage of an act during the 1696-97 assembly that granted to aliens, who petitioned the government and swore allegiance to the King, the same rights as those born of English parentage, including the right of free exercise of religion to all Christians, except “papists.”¹⁴⁵

Even though repeal of the ban on Protestant dissenter service in the legislature signaled a growing consensus behind a broader range of participants in the governing process, the political scene still had a decidedly Christian, and sometimes a Protestant, character. In 1702, the Commons House of Assembly voted in the affirmative on the question of “whether Roman Catholicks have Right to Vote in Elections of members for Assembly.”¹⁴⁶ However, one commentator asserts that this resolution was not passed by a properly constituted assembly, since (1) it consisted only of dissenters because the Church of England party had withdrawn, (2) the resolution did not represent the general opinion in the colony, and (3) it was inconsistent with other official positions on the issue.¹⁴⁷ Whatever the motives for the resolution, it was probably not the sweet milk of a philosophy of tolerance but rather the pungent fruit of political maneuvering. At the same session at which the pro-Catholic resolution was passed, the Assembly issued a directive commanding a group of voters with predominantly French names, presumably Huguenots, to appear before the Grand Committee to respond to allegations that they had voted illegally as aliens who had not registered the certificates necessary to become qualified voters.¹⁴⁸

143. See HIRSCH, *supra* note 50, at 103-30. The argument was that some Huguenots were not fully naturalized and lacked the right to vote. Hirsch criticizes Defoe’s account of the Protestant dissenter controversy as being one-sided in that it was based entirely on accounts from the dissenters’ supporters. *Id.* at 108.

144. *Id.* at 121; see also EDGAR, *supra* note 19, at 51-52 (discussing the tribulations that the Huguenots endured).

145. EDGAR, *supra* note 19, at 52; see also Act No. 154, para. III - VI, 2 S.C. STATUTES AT LARGE at 132-33 (noting the Papist exception to “undisturbed liberty”). The assembly journals for 1702 show that opposition to Huguenot voting continued to some extent despite the 1696-97 law. See JOURNALS OF THE COMMONS HOUSE OF ASSEMBLY OF SOUTH CAROLINA FOR 1702, at 52-53 (A.S. Salley ed., 1932) [hereinafter JOURNALS] (available at the South Carolina Department of Archives and History, Columbia, S.C.). The JOURNALS show that petitioners alleged voting by unqualified persons in a recent “Berkly” county election for members of the assembly. *Id.* at 52. To resolve the dispute, the assembly ordered a group of voters, many of whom had French names, to appear before the Grand Committee to prove that they were qualified to vote. *Id.* at 53. See also HIRSCH, *supra* note 50, at 121, who says that the vote was by a “purely Dissenter-party Assembly” since the Church of England members had withdrawn.

146. See JOURNALS, *supra* note 145, at 52.

147. See HIRSCH, *supra* note 50, at 121.

148. See JOURNALS, *supra* note 145, at 50-60; see also HIRSCH, *supra* note 50, at 121 (discussing when the “Huguenots were summoned for alleged illegal voting”).

A 1716 law, repealed in 1718 by the Proprietors, required that voters be Christians.¹⁴⁹ The law did not explicitly require that legislators be Christians, but did stipulate that they must swear on the holy evangelists that they met the property ownership requirements for service.¹⁵⁰ A 1721 act that replaced it also required that voters be Christian and that legislators swear on the holy evangelists.¹⁵¹ A tug of war was fought over the requirement of a 1745 law that legislators swear on the “holy evangelists” that they had met the standards for that office.¹⁵² Some Protestant dissenters objected to this form of oath and pressed for a change which was made in a 1747 law, which admitted the earlier provision had kept “many Protestant dissenters in the Province of good estates and sufficient abilities” from serving in the legislature even though they had faithfully performed the duties of citizenship, such as jury service.¹⁵³ The new law permitted them to take an oath “according to the form of . . . [their] profession.”¹⁵⁴ Even though this law may have attempted to stop an internecine war of oaths among Protestants, it did not signal the end of religious requirements for voting or holding office. A 1759 law lent a private club air to

149. See Act No. 365 of Dec. 15, 1716, para. XX, 2 S.C. STATUTES AT LARGE 683, 688 (Thomas Cooper ed., 1837). See *id.* at 691, for a note on repeal by proprietors and replacement by 1721 act described below.

150. *Id.* at 688, para. XX; see also Act No. 373 of June 29, 1717, para. V, 3 S.C. STATUTES AT LARGE 2, 4 (Thomas Cooper ed., 1838) (requiring that before taking their seats, legislators had to take an oath “on the holy evangelists or according to the form of his profession” which ended with the words “[s]o help me God.”). This act was also repealed by the proprietors. *Id.* at 4. It was replaced by Act No. 446 of 1721, para. IX, 3 S.C. STATUTES AT LARGE 135 (Thomas Cooper ed., 1838). The Lords Proprietors gave as the reason for vetoing the 1716 and 1717 laws that they “tend to the entire alteration and subversion of the Constitution of the Province of South Carolina and are contrary to the Laws and Customs of Parliament in Great Britain.” 7 RECORDS IN THE BRITISH PUBLIC RECORD OFFICE RELATING TO SOUTH CAROLINA 1717-1720, at 144 (available at the S.C. Department of Archives and History, Columbia, S.C.); see also Act No. 394, para. X, 3 S.C. STATUTES AT LARGE at 52 (containing the oath on the holy evangelists or according to the form of his profession); Act No. 446, para. IX, 3 S.C. STATUTES AT LARGE at 137 (containing the oath on the holy evangelists). The 1721 law also required that voters be Christians. *Id.* at 136, para. III. In *City Council of Charleston v. S.A. Benjamin*, 33 S.C.L. (2 Strob.) 508 (1846), Justice O’Neill described the traditional oath on the holy evangelists as having the following significance:

A Christian witness, having no religious scruples against placing his hand on the book, is sworn upon the holy Evangelists – the books of the New Testament, which testify of our Saviour’s birth, life, death, and resurrection; this is so common a matter, that it is little thought of as an evidence of the part which Christianity has in the common law.

Id. at 523. Not only would the New Testament focus exclude Jews from taking the oath, its meaning as described by O’Neill gives it an aggressive proselytizing flavor. *Id.*

151. See Act No. 446, para. III, 3 S.C. STATUTES AT LARGE at 136; *id.* at 137, para. IX.

152. See Act No. 730 of May 25, 1745, para. III, 3 S.C. STATUTES AT LARGE 656, 657 (Thomas Cooper ed., 1838) (requiring legislators to swear on the “holy evangelists” that they were qualified).

153. See Act No. 746 of Mar. 12, 1747, para. III, 3 S.C. STATUTES AT LARGE 692, 692 (Thomas Cooper ed., 1838).

154. *Id.* at 693, at para. III.

the voting list. To qualify to vote for members of the General Assembly, one had to be a free white male Protestant of at least twenty-one years of age who had resided in the colony for at least a year prior to issuance of the election notice and had to be the owner of a freehold estate worth at least sixty pounds.¹⁵⁵ The legislators themselves also had to be Protestants and the property holdings they had to have approached the princely,¹⁵⁶ presumably as a means of weeding out those who might be inclined to high taxation and promiscuous government spending. The legislator was required to have “a settled plantation or free-hold estate of at least five hundred acres of land and twenty slaves, over and above what he shall owe” or have houses, town lots, or other land valued at a thousand pounds more than his debts.¹⁵⁷ On December 26, 1761, the Commons House of Assembly received notice from Governor Thomas Boone that the 1759 statute had been disallowed by the King upon advice of the Privy Council.¹⁵⁸ The Assembly elected under the disallowed law was dissolved.¹⁵⁹ However, since the law is listed by Statutes at Large editor Thomas Cooper as having passed all of the provincial stages of the legislative process, including passage by the House and Council and assent of the Governor, the law probably reflected local attitudes if not those in England.¹⁶⁰

The commitment to religious tolerance in colonial South Carolina was uneven; periods of tolerance were followed by periods of rigidity, and then the pendulum would swing back again, then again. The problem of the legislator's oath on the holy evangelists continued to bedevil some sects even in the decade just before the Revolutionary War. A dramatic confrontation, with religious freedom the loser, occurred in 1766 with regard to Samuel Wyly (or Wyly), a respected Quaker gentleman who had been elected to represent St. Mark's

155. See Act No. 885 of Apr. 7, 1759, para. I, 4 S.C. STATUTES AT LARGE 98, 99 (Thomas Cooper ed., 1838).

156. *Id.* at 99, para III.

157. *Id.*

158. See JOURNALS OF THE GENERAL ASSEMBLY OF SOUTH CAROLINA FOR THE 26TH DAY OF DECEMBER 1761, at 274-75, for the Proclamation of Royal Disallowance of 1759 statute announced by Governor Thomas Boone [hereinafter JOURNALS OF THE GENERAL ASSEMBLY] (available at the S.C. Department of Archives and History, Columbia, S.C.). On May 29, 1761, the Board of Trade sent a letter to the King recommending that the law be disallowed because it had been passed without a suspending clause that would have delayed effectiveness of the law until the King gave his assent. Thus, the law may have been vetoed more because it was an affront to the King than because it discriminated on the basis of religion. See 29 BRITISH PUBLIC RECORDS OFFICE RECORDS (Board of Trade), South Carolina (containing May 29, 1761 letter from Board of Trade to the King) (available at the South Carolina Department of Archives and History, Columbia, S.C.); see also Frances Haskell Porcher, Royal Review of South Carolina Law: 1719 - 1776, at 66-76 (1962) (unpublished Masters Thesis, University of South Carolina) (available at the S.C. Department of Archives and History, Columbia, S.C.) (ascribing similar reasons for the disallowance of several election laws during that period).

159. JOURNALS OF THE GENERAL ASSEMBLY, *supra* note 158, at 275.

160. See Act No. 885, para. VII, 4 S.C. STATUTES AT LARGE at 101 (showing the act completed all local phases of the legislative process).

parish.¹⁶¹ The Journals of the Commons House of Assembly for January 25, 1766 noted that when he was asked to take the oath, “Mr. Wyly being one of the People called Quakers declared he could not take the oath on the Holy Evangelists without doing a violence to his conscience.”¹⁶² This recalcitrance prompted passage of a resolution denying Wyly his seat, probably because reform laws such as the 1747 statute were disallowed by the King and the legislature had to follow the old oath on the holy evangelist procedure of the 1721 election law.¹⁶³ Not only was Wyly denied his seat, but those who voted for him were also denied their choice of representative.

Such oath requirements followed the tradition of the infamous English Test Act of 1677 which not only disqualified Papists from sitting in Parliament, but also required that before taking his seat a member of Parliament had to take an oath renouncing belief in the adoration of the Virgin Mary and the transubstantiation of the bread and wine of the Lord’s Supper into the body and blood of Christ. Not only did the statute bar someone who refused to take the oath from serving in Parliament, but it also barred him from holding public office, acting as a guardian of a child or as an estate executor, suing in court, or receiving a gift or legacy.¹⁶⁴

Even though the election laws insisted that the legislators be Christian and the holy evangelists oaths had a New Testament focus, as the Revolutionary War approached and talented men were needed for public service regardless of their religion, such restrictions did not always control. Francis Salvador (1747-1776) was born in London into a family of Portuguese Jewish descent. His father had been a wealthy merchant, but after business losses, young Salvador moved to South Carolina where he assumed management of his father-in-law’s land and acquired extensive holdings of his own. The *Biographical Directory of the South Carolina House of Representatives* credits him with being the first Jewish member of the legislature.¹⁶⁵ He was elected to represent the Ninety Six

161. See 3 UNDERWOOD, *supra* note 1, at 38-39.

162. *Id.*

163. *Id.*; see also CHARLES WOODMASON, CAROLINA BACKCOUNTRY ON THE EVE OF THE REVOLUTION 7 n.7 (Richard J. Hooker ed., 1953) (discussing Samuel Wyly’s refusal to take the oath). William Roy Smith notes that the 1745 and 1747 [48] laws, and other election reform laws, were disallowed by the King with the result that the 1721 law remained in force for the most part until the Revolution. See WILLIAM ROY SMITH, SOUTH CAROLINA AS A ROYAL PROVINCE: 1719-1776, at 117 (Books for Libraries Press 1970) (1903). The older law, Act No. 446, para. IX, 3 S.C. STATUTES AT LARGE at 137, required an oath on the holy evangelists. A 1776 Revolutionary Era law contained no reference to an oath on the holy evangelists or any other religious standard for most officials, but the oath for President (governor) required that he swear to “defend the laws of God, the Protestant religion, and the liberties of America.” Act No. 1012 of Apr. 6, 1776, para. I-II, 4 S.C. STATUTES AT LARGE 338, 338 (Thomas Cooper ed., 1838).

164. AN ACT FOR THE MORE EFFECTUAL PRESERVING THE KING’S PERSON AND GOVERNMENT BY DISABLING PAPISTS FROM SITTING IN EITHER HOUSE OF PARLIAMENT, 30 Car. 2, 8 STATUTES AT LARGE 427 (1763) (Eng.).

165. 3 BIOGRAPHICAL DIRECTORY OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES 1775-1790, at 632 (N. Louise Bailey & Walter B. Edgar eds., 1981).

District in 1775 in the First Provincial Congress and again was chosen for the Second Provincial Congress (1775-76) and the First General Assembly in 1776.¹⁶⁶ He was active in a wide range of public services including negotiations with the Indians and militia service in the Cherokee campaign, dying of battle wounds in 1776.¹⁶⁷

The shattering of the sense of political community caused by such laws as the English Test Act, the exclusion of Protestant dissenters, and the requirements that legislators swear on the holy evangelists before they could take office may have prompted Charles Pinckney, an influential South Carolina delegate to the Federal Constitutional Convention, to propose on August 20, 1787 the insertion in the U.S. Constitution of a provision that stipulated that “[n]o religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S.”¹⁶⁸ On August 30, 1787, he broadened the language of his proposal so that it would state “but no religious test shall ever be required as a qualification to any office or public trust under the authority of the U. States.”¹⁶⁹ With only minor changes in language, this provision became Article 6, section 3 of the U.S. Constitution.¹⁷⁰ Not only do religious

166. *Id.*

167. *Id.* Earlier sources were less precise about the time of Salvador’s legislative service, how much of it was in the Provincial (Revolutionary) Assembly, and how much was in the first State Assembly, than the BIOGRAPHICAL DIRECTORY OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES. *See* ELZAS, *supra* note 49, at 84 n.21; RUFUS LEARSI, THE JEWS IN AMERICA: A HISTORY 34 (1954); LEE J. LEVINGER, A HISTORY OF THE JEWS IN THE UNITED STATES 94 (10th ed. 1952); CHARLES REZNIKOFF, THE JEWS OF CHARLESTON: A HISTORY OF AN AMERICAN JEWISH COMMUNITY 34-40 (1950); ST. JOHN, *supra* note 51, at 75; THE JEWS IN AMERICA 1621-1777: A CHRONOLOGY & FACT BOOK 3-4 (Irving J. Sloan ed., 2d ed. 1978).

168. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 342 (Max Farrand ed., 1966) [hereinafter RECORDS].

169. *Id.* at 468. It could be argued that Pinckney’s revised language is broader than the original in that it prohibits any religious qualifications for federal office and not just the recitation of religious oaths upon assuming office.

170. Article 6, Section 3 of the U.S. Constitution states in the relevant part “but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. 6, § 3. Even though this language can be interpreted to apply only to prohibit religious qualifications for federal offices, it was also used by the Supreme Court of South Carolina, along with the federal Constitution’s First Amendment protection of free exercise of religion and prohibition of government establishment of religion, as authority for a 1997 decision striking down a provision of the South Carolina Constitution, which stated that “no person who denies the existence of the Supreme Being shall hold any office under this constitution.” S.C. CONST. art. VI, § 2 and art. XVII, § 4. *See* Silverman v. Campbell, 326 S.C. 208, 486 S.E.2d 1 (1997) (invalidating Art. 6, sec. 2, and Art. 17, sec. 4, of the Constitution of South Carolina in a suit brought by an applicant for notary public, an atheist, who claimed a violation of his religious freedom). Even though the court did not explain its invocation of Article 6, Section 3 of the U.S. Constitution in a case involving a state office, the most likely explanation is that the court considered state offices to be “under the United States.” U.S. CONST. art. 6, § 3; *see also* Torcaso v. Watkins, 367 U.S. 488 (1961) (invalidating on First Amendment grounds a Maryland law requiring belief in God as a prerequisite for holding public office). In reaching its decision in *Torcaso*, the United States Supreme Court did not reach the question of whether the Maryland law violated Article 6, Section 3. *Id.*

qualifications for public office collide with the religious freedom of the would-be office holder, they are also antithetical to democratic debate by presuming certain political doctrines to be divinely ordained and, thus, beyond challenge.

V. THE ESTABLISHMENT AND THE LORD'S DAY

The establishment not only affected the structure and functions of both church and state, it also affected the personal routine of individuals, especially the way they spent Sunday. South Carolina's early Sunday laws followed the example of a 1677 English law, The Sunday Observance Act.¹⁷¹ This law required everyone to spend the "Lords day" in "the duties of piety and true religion;" forbade "wordly labour" or any other "ordinary calling[] upon the Lords day" except for works of "necessity and charity"; and mandated that "noe person or persons whatsoever shall publickly cry shew forth or expose to sale wares merchandizes, fruit, herbs goods or chattells whatsoever upon the Lords day."¹⁷² Sunday travel was also forbidden, except upon those extraordinary occasions when permission could be obtained from the justice of the peace.¹⁷³ Practical necessity forced relaxation of the monocular focus on religion on Sunday by permitting families to prepare meals, "inns cookeshops or victualling houses" to sell food "for such as otherwise cannot be provided," and by permitting perishable items, such as milk, to be sold early in the morning or late in the afternoon,¹⁷⁴ presumably at times that would not conflict with church services. Service of legal process could not be made on Sundays except for treason, felony, or breach of peace,¹⁷⁵ all of which were offenses that sometimes required swift action to avoid flight by the offender or commission of fresh wrongs. Church and state authority intermingled in the enforcement of the law; church wardens as well as civil officers could seize goods sold on Sunday.¹⁷⁶

A 1691 South Carolina Sunday law took an approach similar to this English precedent.¹⁷⁷ It emphasized the duty to spend Sunday in worship rather than in the idle and profane pursuit of pleasure. It stated:

171. *The Sunday Observance Act 1677*, 29 Car. 2, c. 7, in 8 HALSBURY'S STATUTES OF ENGLAND 23 (A.D. Younge et al. eds., 3d ed. 1969).

172. *Id.* Those who engaged in wordly work on Sunday were subject to a fine of five shillings, and those who sold goods on Sunday forfeited the merchandise. *Id.*

173. *Id.* at 24.

174. *Id.* at 25.

175. *Id.*

176. *The Sunday Observance Act 1677*, *supra* note 171, at 24-25.

177. See Act No. 74 of Dec. 11, 1691, 2 S.C. STATUTES AT LARGE 68 (Thomas Cooper ed., 1837). It is difficult to identify the first South Carolina Sunday laws because of the scarcity of records. A 1685 law reinstates a 1682 law, but does not describe its contents. The text of the 1682 statute has not otherwise survived. See Act No. 28 of Nov. 23, 1685, 2 S.C. STATUTES AT LARGE 13 (Thomas Cooper ed., 1837); see also LESSER, *supra* note 57, at 231 for an argument that a 1670 law enacted to curb "grand abuses, practiced by the people, to the greate [sic] dishonor of God Almighty" was the first Sunday law.

F[orasmuch] as there is nothing more acceptable to Almighty God than the true sincere performance of and obedience to the most divine service and worship, which although at all times, yet chiefly upon the Lord's Day, commonly called Sunday, ought soe to be done, but instead thereof many idle, loose and disorderly people doe wilfully profane the same in tipling, shooteing, gameing, and many other vicious exercises, pastimes and meetings, whereby ignorance prevails and the just judgement of Almighty God may reasonably be expected to fall upon this land if the same by some good orders be not prevented.¹⁷⁸

This harsh judgment could be avoided if the people spent the Lord's Day "exercising themselves of piety and true religion."¹⁷⁹ "Worldly labour," the sale of goods, and travel were forbidden on Sunday.¹⁸⁰ Intoxicating beverages could not be sold on Sunday "unless it [was] for necessary occasions, for lodgers or sojourners."¹⁸¹ The 1691 law also contained religiously-based morality standards that applied to everyday conduct and not just Sunday deportment. The Act observed that drunkenness was growing widespread in the Province, and since it was "the roote and foundation of many other enormous sins," those guilty of the offense were subject to being fined five shillings.¹⁸² Since "profane sweareing and curseing [were] forbidden by the word of God," those guilty of that offense would be fined "seaven pence halfepenny" for each "oath or curse."¹⁸³ Enforcement mechanisms grew more draconian. In addition to the traditional sanction of seizure and sale of goods that had been marketed on Sunday, the 1691 statute did the following: (1) provided for the humiliation of those who could not pay fines by having them placed in the public stocks for two hours and (2) encouraged people to watch their neighbors closely by providing for diversion of one third of a fine or the sales price of forfeited goods to those who informed on an offender, if the magistrate thought such a reward to be justifiable.¹⁸⁴ But the South Carolina law, like its English precursor, sometimes softened in the face of the realities of life and commerce; milk could be sold before nine or after four on Sundays, family meals could be prepared, and taverns and victualling houses could prepare and serve meals for those who could not otherwise be provided for.¹⁸⁵

178. See Act No. 74, 2 S.C. STATUTES AT LARGE at 68-69.

179. *Id.* at 69.

180. *Id.* The prohibition on travel reflected the circumstances of the New World by forbidding travel by canoe as well as by more conventional modes. *Id.*

181. *Id.*

182. *Id.*

183. Act No. 74, 2 S.C. STATUTES AT LARGE at 69.

184. *Id.* at 70.

185. *Id.* at 70.

The Sunday system did not merely provide for a day of rest; it mandated a day of worship. A 1712 law went beyond directing everyone to abstain from worldly work and to participate in “true religion, publickly and privately” but further required them to

resort to their parish church, or some other parish church, or some meeting or assembly of religious worship, tolerated and allowed by the laws of this Province, and shall there abide orderly and soberly during the time of prayer and preaching, on pain and forfeiture for every neglect the sum of five shillings current money of this Province.¹⁸⁶

Thus, the Act went beyond mandating worship by also requiring that this be done in part through a group mode, namely, at “some meeting or assembly of religious worship” and required that one not express his displeasure with the sermon by leaving before its conclusion. This approach goes well beyond that of an earlier document, the Fundamental Constitution of July 21, 1669, which stipulated that to be a freeman in Carolina, one must believe in God and that “God is publicly and Solemnly to be worshipped,” prescribing to a degree the mode of that worship.¹⁸⁷ However, the 1712 law still appears to tolerate a variety of denominations as satisfying the worship requirement so long as they are recognized by provincial law.¹⁸⁸

The provisions in the 1712 law with regard to Sunday travel were more elaborate than in its predecessors. The general ban on Sunday travel did not apply when the purpose of the travel was to comfort the sick or an emergency arose and permission to travel was obtained from officials.¹⁸⁹ If a trip did not fit one of those exceptions, it had to cease on Sunday even if the traveler was already on the road.¹⁹⁰

The 1712 law banned rowdy pastimes that were likely to disturb the quiet atmosphere of worship which the law sought to foster on Sundays. It mandated:

That no publick sports or pastimes, as bear-baiting, bull-baiting, foot-ball playing, horse-raceing, enterludes or common plays, or other unlawfull games, exercises, sports or pastimes whatsoever, shall be used on the Lord’s Day by any person or persons whatsoever, and that every person or

186. Act No. 320 of Dec. 12, 1712, para. I, 2 S.C. STATUTES AT LARGE 396, 396 (Thomas Cooper ed., 1837).

187. See Fundamental Constitutions of Carolina (July 21, 1669), in CHARTERS & CONSTITUTIONS, *supra* note 5, at 148.

188. Act No. 320, para. I, 2 S.C. STATUTES AT LARGE at 396.

189. *Id.* at 397, para. IV.

190. *Id.*

persons offending in any of the premises, shall forfeit for every offence the sum of five shillings current money.¹⁹¹

By excluding competing activities such as sports, the law increased the likelihood that the colonists really would spend Sunday in worship. The aggressive character of the law's enforcement provisions is seen in the grant of police power to Charleston church wardens, as well as the regular constabulary, to search the "publick house[s]" for those who might be "drinking or idly spending their time on the Lord's Day." If the tavern was locked, they were empowered to "break open" the doors.¹⁹²

What the law dictates and what it actually achieves may be quite different. Several observers have noted that Sunday in eighteenth century South Carolina was not always the oasis of quiet worship contemplated by the Sunday laws. Charles Woodmason, Anglican missionary to the backcountry, was an especially shrewd observer of religious practice or, from his view, its absence. In a 1768 diary entry he noted that

[t]he open profanation of the Lords Day in this Povince [sic] is one of the most crying Sins in it—and is carried to a great height—Among the low Class, it is abus'd by Hunting fishing fowling, and Racing—By the Women in frolicing and Wantoness. By others in Drinking Bouts and Card Playing – Even in and about Charlestown, the Taverns have more Visitants than the Churches.¹⁹³

Another trenchant observer was Josiah Quincy, a visitor from Massachusetts, who was especially adept at painting the hues of social life. In 1773, he observed that the "Sabbath is a day of visiting and mirth with the rich, and of licence, pastime and frolic for the negroes."¹⁹⁴ The scene that Woodmason described was far from one of forced church attendance. He complained that the Sabbath was not observed because the people were so exhausted from dancing, trading, litigating, partying and drinking on Saturdays that they could not rouse themselves for worship on Sundays. As a remedy, he proposed extending the prohibition of worldly activities to Saturday, an impractical proposal that would have had serious economic consequences and fed resentment of the establishment.¹⁹⁵

Despite the picture of non-worshipful conviviality, revelry, and dissipation painted by Quincy and Woodmason, enforcement of the Sunday laws was still

191. *Id.* at 397, para. V.

192. *Id.* at 397, para. VI-VII.

193. WOODMASON, *supra* note 163, at 47.

194. Josiah Quincy, Jr., *Journal of Josiah Quincy, Junior, 1773*, in 49 MASS. HIST. SOC. PROC. Oct. 1915 - June, 1916 at 424, 455 (1916).

195. WOODMASON, *supra* note 163, at 96-97.

pressed. Resentment of the church wardens' Sunday law enforcement powers helped fuel demands for disestablishment of the Church of England and its replacement by a general Protestant establishment in the Constitution of 1778.¹⁹⁶ George C. Rogers has noted that zealous Charleston church wardens halted drovers, butchers, and servants who were suspected of transporting goods in violation of the Sunday laws.¹⁹⁷ Such actions, along with ousting idlers and tipplers from public houses, may have meant to some that the government's hand in support of the established church had grown too heavy, and changes were needed.

VI. THE LINGERING ILLNESS AND DEATH OF THE ESTABLISHED CHURCH

A. The Constitution of 1778 Replaces the Anglican Establishment With a General Protestant Establishment But With Intricate Regulations

Resentment of the governmental powers of the established church, such as the Sunday law enforcement authority of the church wardens, was but one of the complex matrix of reasons leading to the decline and ultimate demise of the established church. Another reason was the growing perception of the dangers of an established church. The downside to fiscal and ideological support by the government was the assumption by government officials that they could use the church as a tool of social control. Woodmason muttered in his diary about the indignity of being given a sermon topic by Lieutenant Governor William Bull.¹⁹⁸ In accordance with this directive, Woodmason drafted a sermon using as his text I Thessalonians 4:11, which contained the phrase "[a]nd that ye study to be quiet," which was calculated to soothe the disgruntled backcountry population into a more submissive state of mind.¹⁹⁹ Woodmason complained that he could not leave the province without legislative consent.²⁰⁰ He carped about non-Anglican Protestants gaining clout in the legislature and through the dissembling of their leaders, a group of conniving lawyers, blocking legislation that would have been favorable to the Church of England.²⁰¹ He argued that back-country growth of the established church was stymied because growth would have involved creating new parishes; since parishes also served as the unit for apportionment of legislators, officials were reluctant to take that step for fear of altering the geographical balance of political power.²⁰² He complained that legislative attention to the Stamp Act controversy had sidetracked appropriations that would have redressed salary inequities between

196. BRINSFIELD, *supra* note 39, at 71; *see also* S.C. CONST. of 1778, art. XXXVIII, in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3.

197. GEORGE C. ROGERS, JR., CHARLESTON IN THE AGE OF THE PINCKNEYS 22 (1980).

198. WOODMASON, *supra* note 163, at 57.

199. *Id.* at 57 n.48.

200. *Id.* at 90.

201. *Id.* at 43.

202. *Id.* at 28, 72, 86.

town and rural ministers.²⁰³ The church was being smothered more with regulations than riches.

The shocking realization dawned that once the habit of establishing churches became entrenched, there was no guarantee that your church would continue to be the favored one. The shock was administered by British passage of the Quebec Act in 1774.²⁰⁴ The Act is most accurately viewed as a dual establishment of the Protestant and Catholic religions in Canada and a declaration of the freedom of Catholics to practice their religion. In a realistic recognition of the great concentration of French Catholics in Quebec, the Act gave Catholic priests the right to “hold, receive, and enjoy, their accustomed dues and rights, with respect to such persons only as shall profess the said religion.”²⁰⁵ It is notable that this provision did not impose taxes on the non-Catholics to support the Catholic Church. Furthermore, it provided “for the encouragement of the protestant religion, and for the maintenance and support of a protestant clergy.”²⁰⁶ Even though the Act provided for the support rather than the stifling of the Protestant religion, it sparked fears of a Catholic establishment in all of Britain’s North American colonies and the specter of Catholic troops pouring across the border from Canada to quell unrest. The South Carolina Constitution of 1776, more a revolutionary litany of complaints than a traditional fundamental law, addressed the issue in the following terms:

The Roman Catholic Religion (although before tolerated and freely exercised there [Quebec]) and an absolute Government are established in that province, and its limits, extended through a vast tract of Country so as to border on the free Protestant English settlements, with design of using a whole People differing in Religious principles from the neighbouring Colonies, and subject to arbitrary power, as fit Instruments to over-awe and subdue the Colonies.²⁰⁷

Similar concerns were expressed by the noted Baptist leader and advocate of disestablishment, Richard Furman, in his celebrated *Address on Liberty*. He argued that the English had “established the Roman Catholic religion, and made it a Military, Arbitrary, and Tyrannick government” with Canadian troops poised to “subdue” the other colonies, and if they succeeded, “we have nothing to assure us but the Popish religion may be established in all the colonies.”²⁰⁸ The shocked reaction in South Carolina to the Quebec Act was

203. *Id.* at 86.

204. Quebec Act, 14 Geo. 3, c. 83, 30 STATUTES AT LARGE 549 (1773) (Eng.).

205. *Id.* at 551, para. V.

206. *Id.* at 551, para. VI.

207. S.C. CONST. of 1776, pmbl., in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3.

208. Richard Furman, *Address on Liberty* (1775), in RICHARD FURMAN COLLECTION (available at Furman University, Greenville, S.C.).

described by Judge John Drayton, who said that its passage “sunk deep into the minds of the people.”²⁰⁹ This view that linked the Catholics with a threat of foreign intervention could have been one reason why the extension of religious freedom to Catholics was slower than it was to non-Anglican Protestants. However, the main impact of the Quebec Act was the alarming realization to Anglicans that establishment did not always mean that your religion would be the favored one.

The growing disenchantment of Anglicans with the establishment converged with dislike of having to support someone else’s religion through taxes and government endorsement. Together they created more impetus toward dismantling or altering the establishment; various formal and informal groups compiled lists of grievances. The High Hills of Santee was the scene of an interdenominational meeting in March 1776 called by the Reverend Richard Furman and a prominent Charleston Baptist minister, Oliver Hart, to compose a list of grievances against the establishment.²¹⁰ The Grand Jury of the Ninety-Six District provided a more secular and somewhat official platform for citizen discontent. In a 1776 presentment, the Grand Jury recommended that the legislature “put all Sects and Denominations of true Protestants in this State on equal Footings.”²¹¹ This language foretold that the Revolutionary War era wave of reform of church-state relations would benefit non-Anglican Protestant denominations more than Catholics and Jews. Even though dissenter Protestant groups had enjoyed generous freedom of worship, their development was retarded by several features of the establishment. The Grand Jury particularly complained of the tax burden shouldered by non-Anglicans in support of the priests and building programs of the Church of England, which meant that their own churches had difficulty raising money through voluntary contributions from the fiscal scraps left after the taxes.²¹²

Another bitter point of contention was the Church of England’s attempt to monopolize the performance of certain basic rites, especially the marriage ceremony. Woodmason noted in a January 25, 1767 diary entry that even though only the Church of England could perform a licensed marriage, the scarcity of Anglican ministers in remote areas meant that many couples were living together in sin without the benefit of any form of marriage or, just as bad, they were united by an ersatz marriage performed by non-Anglican ministers.²¹³ This feature of the establishment undermined the stability of

209. See 1 JOHN DRAYTON, MEMOIRS OF THE AMERICAN REVOLUTION 136 (Arno Press, Inc. 1969) (1821); see also BRINSFIELD, *supra* note 39, at 81 (quoting John Drayton who stated that “the Quebec Act establishing the Roman Catholic religion ‘shook the South Carolina Assembly’”).

210. BRINSFIELD, *supra* note 39, at 64.

211. SOUTH CAROLINA AND AMERICAN GENERAL GAZETTE, Dec. 5-12, 1776, at 129 (available at the South Caroliniana Library, University of South Carolina, Columbia, S.C.).

212. *Id.*

213. WOODMASON, *supra* note 163, at 15.

families and the legitimacy of children. However, some of these marriages may have been recognizable as common law marriages.²¹⁴

The bitter bile produced by resentment of the establishment finally overflowed into a petition presented by the Reverend William Tennent of the Independent or Congregational Church in Charleston on behalf of dissenters to the Commons House of Assembly on January 11, 1777.²¹⁵ Tennent first sought to diminish the opposition to change by assuring Anglicans that he respected the Church of England and did not seek to deprive it of property it had already gained through government aid; instead, he only opposed continuation of its preferred position, including new acquisitions of property with government assistance.²¹⁶ No particular church should be government sponsored, no matter how morally admirable it might be. Government establishments “amount to nothing less, than the legislature’s taking the consciences of men into their own hands, and taxing them at discretion.”²¹⁷ Tennent contended that a man’s relation to God was the product of a personal spiritual search, not of a legislative edict; the state could not interfere with that individual religious odyssey unless that personal search did concrete injury to others.²¹⁸ He considered such a legislative edict to be theologically presumptuous, as trespassing on the domain of a “higher tribunal.”²¹⁹ The government’s proper relationship to religion was to protect its free exercise rather than to dictate doctrine to the people.²²⁰ However, Tennent’s philosophy was not one of total separation of church and state. He observed that “[t]he state may do any thing for the support of religion, without partiality to particular societies, or imposition upon the rights of private judgment.”²²¹ The problem with the South Carolina establishment was that it was rife with such partiality. It “makes a

214. *Rodgers v. Herron*, 226 S.C. 317, 335, 85 S.E.2d 104, 113 (1954) (discussing the difficulties of proving a common law marriage); see 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 617 (William Carey Jones ed., Claitor’s Publ’g Div., 1976) (1915) (including an annotation by Professor William G. Hammond noting that both “cohabitation and reputation of being husband and wife” had to exist before a presumption of marriage would apply). Scholar David Duncan Wallace observed that the attempts by Anglican ministers to get the government to give them exclusive authority to perform licensed marriages failed repeatedly, but finally succeeded at some unascertained time between 1760 and 1777. See 1 DAVID DUNCAN WALLACE, THE HISTORY OF SOUTH CAROLINA 417 (1934). However, he determined that marriages performed without licenses could still have been valid. If he was relying on the concept of common law marriage for this statement, the validity of the marriage would probably have depended upon meeting the elements described in the above annotation, although it is hard to ascertain the exact status of South Carolina law at that time.

215. Tennent’s speech is reproduced as an appendix to DAVID RAMSAY, THE HISTORY OF THE INDEPENDENT OR CONGREGATIONAL CHURCH IN CHARLESTON, SOUTH CAROLINA, FROM ITS ORIGIN TILL THE YEAR 1814, at 53-71 (1815).

216. *Id.* at 53-54, 65.

217. *Id.* at 54.

218. *Id.* at 54-55.

219. *Id.* at 54.

220. *Id.* at 54-55.

221. RAMSAY, *supra* note 215, at 55.

legal distinction between people of different denominations, equally inoffensive; it taxes all denominations, for the support of the religion of one; it only tolerates those that dissent from it” rather than firmly guaranteeing their rights.²²² The law’s distinction between the established church and other denominations harmed individuals and retarded the work of the dissenter churches in serving God and their members. In rolling cadences Tennent listed the grievances:

I say it makes a legal and odious distinction between subjects equally good. The law knows and acknowledges the society of the one, as a Christian church; the law knows not the other Churches. The law knows the Clergy of the one, as ministers of the gospel; the law knows not the Clergy of other Churches, nor will it give them a license to marry their own people. Under this reputedly free government, licenses for marriage are even now refused by the ordinary, to any but the established clergy. The law makes provision for the support of one Church,—it makes no provision for the others. The law builds superb Churches for the one,—it leaves the others to build their own Churches: the law by incorporating the one Church, enables it to hold estates, and to sue for rights; the law does not enable the others to hold any religious property, not even the pittances which are bestowed by the hand of charity for their support. No dissenting Church can hold or sue for their own property at common law. They are obliged therefore to deposit it in the hands of trustees, to be held by them as their own private property, and to lie at their mercy. The consequence of this is, that too often their funds for the support of religious worship, get into bad hands, and become either alienated from their proper use, or must be recovered at the expense of a suit in chancery.²²³

The petitioners were incensed that the established church wielded political as well as spiritual power. Particularly irritating was the commitment of “the whole management of elections, that most inestimable of all rights of freemen! into the hands of Church officers exclusively.”²²⁴ No minority, whether religious or secular, should have the power to manipulate the elections even if the opportunity is never used. Assistance to the poor was run by Church of England officials even though the taxpaying public at large bore the expense.²²⁵

222. *Id.* at 57.

223. *Id.* at 57-58.

224. *Id.* at 58.

225. *Id.*

Tennent referred to the tax-paying burden on the dissenters again and again; it was like a throbbing wound which could not be forgotten. He complained that Protestant dissenters, a majority of the population, shouldered a heavy burden in paying for a religion that was not their own. He estimated that from 1765 to 1775, the established church received 164,027 pounds and 16 shillings with about half of this being paid by the dissenters who, after making such payments, had difficulty finding money for their own religion.²²⁶

What Tennent sought was not tolerance, a boon that could be granted or withdrawn at the sovereign's fickle pleasure, but a firm right of free exercise of religion. Religion that was merely tolerated had to be exercised timidly or else the sovereign might be stirred to suppress it.²²⁷ This distinction between tolerance and rights was not peculiar to Tennent. At the 1776 Virginia Constitutional Convention, the young James Madison successfully argued for the substitution of language guaranteeing religious liberty instead of wording that spoke of mere toleration.²²⁸ Later, George Washington also embraced the need for a guaranteed right of free exercise of religion rather than revocable tolerance. In a message to leaders of the Newport Hebrew Congregation in the fall of 1790, President Washington observed that we no longer speak of tolerating another's religion "as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights."²²⁹

In South Carolina, the Reverend Tennent attacked temporizing measures that would have left remnants of the establishment in place. One halfway measure would have halted general tax support of the Church of England, but would have left it as the official church, receiving ideological endorsement from the state. This was still unacceptable since non-conformists must "bear the reproach of the law, as not being on a level with those that are Christians in its esteem."²³⁰ To preserve for the Anglican Church the "mere empty name" of the official church would be to create "a bone of endless contention in the state."²³¹

No better was the suggestion that government financial support of religion be continued but equally distributed among all Protestant denominations, or on a per member basis. This too would be a source of "everlasting strife," as the various denominations would fight over members or otherwise try to increase their share of the fiscal pie.²³² The best method of church finance in a religiously diverse community was to "[l]eave each Church to be supported by

226. *Id.* at 59.

227. RAMSAY, *supra* note 215, at 60.

228. RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 72-73 (1971).

229. See WILLARD STERNE RANDALL, GEORGE WASHINGTON: A LIFE 465 (1997). For the full text, see THE PAPERS OF GEORGE WASHINGTON, 6 PRESIDENTIAL SERIES, JULY - NOVEMBER 1790, at 284 (Mark A. Mastromarino ed., 1996).

230. RAMSAY, *supra* note 215, at 60-61.

231. *Id.* at 61.

232. *Id.* at 62.

its own members, and let its real merit be all its pre-eminence.”²³³ Tennent’s rallying cry was “Equality or Nothing!”²³⁴

Pragmatism was often more effective than theoretical arguments on church-state relations. Tennent argued that the dissenter majority would more fervently work for the success of the Revolutionary War if they had a fairer share in the liberty for which it was being waged. Maintaining the establishment would drive away settlers hoping to find religious freedom and destroy the sense of community in the state.²³⁵ The future belonged to states casting their lot with religious freedom and equity among religions. He observed that “[the] state in America which adopts the freest and most liberal plan will be the most opulent and powerful, and will well deserve it.”²³⁶

The assembly debated a range of options extending from complete disestablishment to the retention of significant elements of official recognition of the Church of England. John Wesley Brinsfield described the four leading options by the following: (1) that no church be established either by government fiscal support or official recognition of its doctrine; (2) that the Church of England continue exercising the two key civil power elements of administering the government’s program of assistance to the poor and superintending elections, but that no taxes be collected from followers of other faiths to finance its worship; (3) that all Protestant churches meeting broad belief standards receive equal financial support from the government; (4) that all Protestant denominations meeting certain broad doctrinal standards be established to the limited extent of receiving the ideological approval of the government and certain legal powers, such as the right to incorporate.²³⁷ The fourth alternative, ideological establishment but no tax support of all Protestant churches which adhered to certain broadly defined doctrines, was the core of the compromise that became Article 38 of the Constitution of 1778 after veto by President John Rutledge but signed by his successor.²³⁸

Article 38 was self-contradictory. It granted a large measure of religious freedom, but retarded its exercise by entangling it in a labyrinth of regulations. It advanced religious freedom by dismantling the Church of England establishment and replacing it with a general Protestant establishment. Under

233. *Id.*

234. *Id.*

235. *Id.* at 63-64.

236. RAMSAY, *supra* note 215, at 63.

237. BRINSFIELD, *supra* note 39, at 120; *see also* A BIOGRAPHY OF RICHARD FURMAN 55 (Harvey T. Cook ed., 1913) (basing its contents on notes by Wood Furman). Charles Cotesworth Pinckney is sometimes credited with fashioning the fourth option, a compromise that significantly influenced the final outcome. *See* BRINSFIELD, *supra* note 39, at 120. The second alternative which would have kept the Church of England’s authority to superintend elections and administer assistance to the poor, but with no tax support for worship, was defeated in a close vote. *See* BRINSFIELD, *supra* note 39, at 120; EDWARD MCCRADY, THE HISTORY OF SOUTH CAROLINA IN THE REVOLUTION, 1775-1780, at 212-13 (Russell & Russell 1969) (1901).

238. BRINSFIELD, *supra* note 39, at 126; *see* S.C. CONST. of 1778, art. XXXVIII, in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3.

this new regime, established churches were endorsed, but not financially supported by the state. This removed the tax burden that was the crux of William Tennent's dissenter petition. Article 38 stated that "no Person shall, by Law, be obliged to pay towards the Maintenance and Support of a religious Worship that he does not freely join in, or has not voluntarily engaged to Support."²³⁹ David Ramsay, a physician, historian, and public official in late eighteenth and early nineteenth century South Carolina, described the new fundamental law as one that "comprehended every denomination of Protestant Christians, giving to each of them equal rights and capacities, but withholding public pecuniary support from all."²⁴⁰ Other Protestant churches could now do what only Anglican churches could do before: petition the legislature for incorporation and directly own their property rather than having it held by a trustee. However, Article 38 only empowered churches "professing the Christian Protestant religion" to incorporate; Catholic churches and Jewish synagogues still could not. Even Protestant churches had to jump through ideological hoops in order to receive the honored label of established church and to qualify for incorporation. Each had to certify that it adhered to the following principles:

First, That there is one eternal God, and a future State of Rewards and Punishments.

Second, That God is publicly to be worshipped.

Third, That the Christian Religion is the true Religion.

Fourth, That the Holy Scriptures of the Old and New Testament, are of Divine Inspiration, and are the Rule of Faith and Practice.

Fifth, That it is lawful, and the Duty of every Man, being thereunto called by those that govern, to bear witness to Truth.²⁴¹

Religious beliefs are subjective; personal spiritual journeys are often continuous and are not amenable to being frozen into a legal code. Codified religions may strike some as incomplete. The Independent or Congregational Church of Charleston certified that it adhered to the five doctrines specified in Article 38, but added that it also believed in others, such as the Trinity, that were not found in the official list.²⁴² In addition to the beliefs that a church had

239. S.C. CONST. of 1778, art. XXXVIII, in *BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY*, *supra* note 3.

240. RAMSAY, *supra* note 215, at 33.

241. S.C. CONST. of 1778, art. XXXVIII, in *BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY*, *supra* note 3.

242. RAMSAY, *supra* note 215, at 33-34. Apparently the church was concerned that the incompleteness of the doctrines listed in Article 38 would leave an opening for non-Biblical beliefs to be attributed to the church. See 2 GEORGE HOWE, *HISTORY OF THE PRESBYTERIAN CHURCH IN SOUTH CAROLINA* 22 (reprint 1966) (1883).

to accept to become part of the establishment and be incorporated, its pastor had to subscribe to an even more detailed set of beliefs, the core of which was that he should base his teaching only on the Holy Scriptures. Article 38 sought to assure congregational democracy by specifying that only ministers elected by the congregation or its delegates could serve established churches.²⁴³ As liberal as this seems at first glance, it dictated a form of church governance that denominations preferring ministerial appointment by a hierarchical superior could have found hard to accept.

The religious freedom provisions of the article were generous, but even so, liberty was surrounded by conditions. It stated “[t]hat 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.”²⁴⁴ This language evokes that of Article 86 [61] of the Fundamental Constitution of July 21, 1669, which said that “[n]o man shall be permitted to be a Freeman of Carolina, or to have any Estate or habitation within it, that does not acknowledge a God, and that God is publicly and Solemnly to be worshipped.”²⁴⁵ Both provisions speak of tolerance, a sovereign act of grace that can be withdrawn, rather than of a guaranteed right. Both are somewhat self-contradictory in that they grant religious freedom but only to those who entertain specified beliefs. Still, the overall tone of Article 38, signaled by the replacement of the Church of England as the official religion with a general Protestant establishment, was one of widening tolerance. If the tent were not as large as it could be, at least the overall movement was in the direction of considering religion to be more a matter of individual conscience than state dictation. This is seen in the provision regarding the oaths to be taken by witnesses, which does not condition the oath-taking on adherence to a highly specific set of beliefs. It states, “That every Inhabitant of this State, when called to make an Appeal to God, as a witness to Truth, shall be permitted to do it in that Way which is most agreeable to the Dictates of his own Conscience.”²⁴⁶

Participation in the political system under the Constitution of 1778 was more of a mixed bag; office holders were required to meet more specific religious standards than voters. Article 3 stipulated that the governor, lieutenant governor, and members of the privy council be “all of the Protestant Religion.”²⁴⁷ Article 12 mandated that “no Person shall be eligible to a Seat in the said Senate, unless he be of the Protestant Religion,” and Article 13

243. S.C. CONST. of 1778, art. XXXVIII, in *BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY*, *supra* note 3.

244. *Id.*

245. Fundamental Constitutions of Carolina (July 21, 1669), in *CHARTERS & CONSTITUTIONS*, *supra* note 5, at 148.

246. S.C. CONST. of 1778, art. XXXVIII, in *BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY*, *supra* note 3.

247. *Id.* at art. III.

declared that members of the House of Representatives be Protestant.²⁴⁸ The standards for electors in Article 13 did not require membership in a particular sect but did have broad belief standards. It mandated that an elector must be one “who acknowledges the Being of a God, and believes in a future State of Rewards and Punishments.”²⁴⁹ Catholics and Jews were not disenfranchised if they adhered to these broad standards. These standards, like the Article 38 standard defining which religions would be tolerated, harkened back to the approach of Article 86 [61] of the July 21, 1669 Fundamental Constitution that stipulated that certain basic religious beliefs were essential for a civilized society.²⁵⁰

Article 21 forbade ministers of the gospel from serving as Governor, Lieutenant Governor, or as members of the House of Representatives, Senate, or Privy Council because they “ought not to be diverted from the great duties of their Function.”²⁵¹ The Reverend William Tennent, who had been an adamant advocate of dismantling the Anglican establishment, attacked this ministerial disqualification as designed to politically weaken those who espoused change, even though the ostensible purpose of the provision was to prevent religious quarrels from infecting legislative deliberations.²⁵² The Reverend Richard Furman later opposed retaining the ministerial disqualification in the 1790 Constitution, since it would deny the state many talented men’s services.²⁵³ However, the provision did not prevent Furman and the Reverend Doctor Henry Purcell from serving as delegates to the Constitutional Convention of 1790. The Convention records also list other ministers as delegates.²⁵⁴ Despite Furman’s views, Article 1, section 23 of the 1790 Constitution retained a ministerial disqualification provision similar to that found in the 1778 fundamental law.

Even though the 1778 Constitution replaced the Church of England Establishment with an endorsement of all Protestant churches meeting the broad belief standards stipulated by Article 38, there was no hint of vengeance

248. *Id.* at arts. XII, XIII.

249. *Id.* at art. XIII.

250. 3 UNDERWOOD, *supra* note 1, at 8.

251. See S.C. CONST. of 1778, art. XXI, in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3. The U.S. Supreme Court struck down similar ministerial disqualifications as violating the First Amendment right of pastors to freely exercise their religion in the 1978 case of *McDaniel v. Paty*, 435 U.S. 618 (1978). *McDaniel* involved a Tennessee provision that had been used to block a Baptist minister from serving in the state constitutional convention. The Court concluded that the provision invalidly punished the minister for engaging in his religion. *Id.*

252. See BRINSFIELD, *supra* note 39, at 113-14.

253. See A BIOGRAPHY OF RICHARD FURMAN, *supra* note 237, at 21; JAMES A. ROGERS, RICHARD FURMAN: LIFE AND LEGACY 70 (1985).

254. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA: MAY 10, 1790 - JUNE 3, 1790, at 3-6 (Francis M. Hutson ed., 1946).

against the dethroned official church. Article 38 continued the corporate status of Anglican churches and allowed them to retain their property.²⁵⁵

Now that non-Anglican Protestant churches, which certified adherence to the belief standards set in Article 38, could be incorporated, a flood of special laws poured from the legislature granting this status. One of the first 1778 enactments granted corporate status to the Independent or Congregational Church in Charleston, the Reverend Oliver Hart's Baptist Church in Charleston, The Presbyterian Church of Bethel in Saint Bartholomew's parish, The Presbyterian Church of Caintroy in Saint Thomas' parish, and The Presbyterian Church of Salem in Saint Mark's parish.²⁵⁶ After stating that the petitioning churches had met the constitutional standards for incorporating, the act granted each of them status as a body corporate and politic,²⁵⁷ empowered them to adopt a seal,²⁵⁸ to hold property directly rather than through trustees,²⁵⁹ to receive contributions,²⁶⁰ to have perpetual succession as an entity,²⁶¹ to sue and be sued,²⁶² to make by-laws in accordance with standards set by the state,²⁶³ to elect ministers,²⁶⁴ and to hire other employees and set their compensation.²⁶⁵ No government funds were authorized for use by the churches. Instead they were authorized to pay their bills from corporate funds and pew rentals assessed against members.²⁶⁶

A casual reading of an incorporation statute might lead to the mistaken impression that a church was receiving government funds. For example, a 1783 statute, incorporating a Calvinist church of French Protestants, recited that the petitioner's motive for seeking corporate status was to put its affairs on a "more solid and lasting foundation than they could be by their voluntary subscriptions."²⁶⁷ But the financial system authorized by the statute did not involve funds involuntarily wrested by the government from the general tax-paying public, but assessments by the church made as pew charges upon those who chose to become its members.²⁶⁸ The assessment was not made by government officials but by vote of the church members. However, the state

255. S.C. CONST. of 1778, art XXXVIII, in *BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY*, *supra* note 3.

256. Act No. 1102 of Oct. 9, 1778, 8 S.C. STATUTES AT LARGE 119 (David J. McCord ed., 1840).

257. *Id.* at 120, para. I.

258. *Id.*

259. *Id.* at 120, para. I, III.

260. *Id.* at 120, para. II.

261. *Id.* at 120, para. I.

262. Act No. 1102, para. I, 8 S.C. STATUTES AT LARGE at 120.

263. *Id.*

264. *Id.* at 120, para. I, II.

265. *Id.*

266. *Id.* at 120, para. I.

267. Act No. 1166 of Mar. 12, 1783, para. I, 8 S.C. STATUTES AT LARGE 122, 122 (David J. McCord ed., 1840).

268. *Id.* at 123-24, para. IX.

hand was not entirely missing from the transaction, since the statute made the pew assessments legally enforceable by the church.²⁶⁹ Furthermore, the state controlled church fiscal growth to an extent by placing a limit of 500 pounds on the amount it could receive in one year.²⁷⁰

Even though pew assessments were distinguishable from the former taxes imposed by the state, under some circumstances they could provoke the same resentment. This was especially true when the person assessed was a member who was not renting the pew, but had purchased it outright and had completed the payments originally agreed upon. On February 19, 1787, Samuel Beach, a member of St. Philip's Church in Charleston, presented a petition to the General Assembly complaining that the assessment power given to his church violated Article 38 when the assessment was against a purchaser in his position. He argued that he was the outright owner of the pew and that any further exactions upon him were illegal. Article 38 protected citizens against involuntary support of religion, and Beach claimed that any assessments beyond the agreed purchase amount were involuntary. He contended that although the assessments were not governmentally imposed, the state incorporation of churches, labeling the churches as established, and granting them legally enforceable pew assessment authority had the same effect as a state imposed tax for religion, which was no longer legal under Article 38. Beach found a further constitutional violation because Article 38 decreed equal treatment of all Protestant denominations meeting the criteria for establishment and contended that this principle had been violated since some Protestant churches had been given pew assessment authority and others had not.²⁷¹ The General Assembly Committee reviewing the petition rejected this last argument when it concluded that so many churches had been given pew assessment authority that this amounted to equal treatment. The Committee never directly met Beach's contention that the system was coerced contribution to religion in violation of Article 38. It cynically observed that if Beach did not like the pew assessments, he could solve the problem by selling his pew.²⁷² The Beach

269. *Id.*

270. *Id.* at 123, para. IV.

271. See Petition of Samuel Beach with Regard to Pew Assessments for St. Philip's and St. Michael's Churches to the General Assembly (February 19, 1787) (unpublished manuscript, available at S.C. Department of Archives and History, Columbia, S.C.); see also Act No. 1278 of Mar. 24, 1785, para. IV, 8 S.C. STATUTES AT LARGE 130, 131 (David J. McCord ed., 1840) (incorporating Saint Michael's and Saint Philip's in Charleston and granting the vestries the right "annually to rate and assess each and every of the pews in the said churches, at such sum or sums of money as they, or a majority of them, shall think proper," and if a member failed to make the payment, empowering the churches "to let to hire the said pew or pews").

272. See Reports of the Committee to Review the Petition of Samuel Beach on Pew Assessments at St. Philip's and St. Michael's Churches (Feb. 24 and 26, 1787) (unpublished manuscript, available at S.C. Department of Archives and History, Columbia, S.C.); see also Marion Cecil Chandler, Jr., Church Incorporations in South Carolina under the Constitution of 1778, at 56-58 (1969) (unpublished M.A. thesis University of South Carolina) (on file with University of South Carolina and S.C. Department of Archives and History, Columbia, S.C.)

petition was not granted, but one scholar, who surveyed the church incorporation records under the 1778 Constitution, concluded that the petition may have influenced the legislature in passing later incorporation laws that required the church to choose between a system of selling or renting pews. If the former was selected, no assessment was permitted after a complete and unconditional sale.²⁷³

The Constitution of 1778 not only benefitted dissenter congregations, but also gave greater freedom of action to congregations of the old establishment who had lost the close government monitoring that went with government funding. A 1785 statute which incorporated Saint Michael's and Saint Philip's Churches in Charleston gave them plenary power over their affairs.²⁷⁴ Since government financial support would no longer be possible under the Constitution of 1778, those churches were given the same pew assessment authority that had incensed Samuel Beach.²⁷⁵

The 1778 Constitution and its grant allowing non-Anglican Protestant churches to incorporate also spurred the development of larger denominational organizations, sometimes with an ecumenical flavor, to administer the growing number of incorporated churches. In 1787-88 Lutheran and German Reformed churches came together to form an organization called The Corpus Evangelicum or Unio Ecclesiastica, which was designed to work for the incorporation of German churches, to ordain ministers, and to provide an administrative umbrella for the churches.²⁷⁶ Although this organization proved to be short-lived because of fundamental disagreements among the parties, its creation is further evidence of the vigorous growth unleashed by constitutional change.

However, as a charter of religious freedom, the 1778 Constitution was incomplete. Catholic churches and Jewish synagogues still could not

(discussing the committee's reasons for rejecting the petition and questioning the committee's conclusion that equal assessment authority had been given to the various Protestant churches since one of the "laws" upon which this conclusion was based had never been passed).

273. See Chandler, *supra* note 272, at 58-59. But see Act No. 1415 of Feb. 29, 1788, para. IV, 8 S.C. STATUTES AT LARGE 145, 147 (David J. McCord ed., 1840) (mandating that if an individual does not pay the assessment, then vestries and church wardens can hire pews out).

274. Act No. 1278, 8 S.C. STATUTES AT LARGE at 130.

275. *Id.* at 131, para. IV. The transition of Episcopal Churches from government financial support to membership support is depicted in Act No. 1289 of Mar. 24, 1785, 4 S.C. STATUTES AT LARGE 703 (Thomas Cooper ed., 1838). See also DALCHO, *supra* note 63, at 206-07 (describing a church finance system involving "rents and assessments of Pews, the rent of Glebe lands, Interest on Stock, Burial Fees" and "annual subscriptions"). The minutes of St. Philip's and St. Michael's Parishes reveal that these churches adopted a voluntary subscription system on December 7, 1778, since the new constitution meant that government funds would no longer be available. See THE MINUTES OF ST. MICHAEL'S CHURCH OF CHARLESTON, S.C. FROM 1758-1797, at 137, entry no. 155 (Mrs. C.G. Howe and Mrs. Charles F. Middleton eds., n.d.).

276. See G.D. BERNHEIM, HISTORY OF THE GERMAN SETTLEMENTS AND OF THE LUTHERAN CHURCH IN NORTH AND SOUTH CAROLINA 289-90 (The Reprint Co. 1972) (1872); see also HISTORY OF THE EVANGELICAL LUTHERAN SYNOD OF SOUTH CAROLINA: 1824-1924, at 22-23 (S.T. Hallman ed., 1924).

incorporate and had to own their property through trustees who might abuse their power. Furthermore, legislators and key executive officials had to be Protestants,²⁷⁷ and churches that could incorporate had to certify adherence to constitutionally stipulated belief requirements.²⁷⁸ Additionally, the Constitution was laden with detailed instructions of how ministers of established churches were to comport themselves.²⁷⁹ Broad standards of religious tolerance were included, but even these were hedged with traditional conditions of belief in God and that God was publicly to be worshipped.²⁸⁰ The Church of England was no longer the favored religion. The government no longer levied taxes to support religion, but some, like Samuel Beach, believed that legally enforceable pew assessments had the same impact. The net of tolerance was more broadly cast, but Church and State were still entwined. The fatal flaw of the Constitution of 1778 was its self-contradictory nature; it sought to grant broad religious freedom while at the same time intensely regulating it through the code-like Article 38. And it spoke of tolerance instead of guaranteed rights. It remained for the Constitution of 1790 to advance beyond the half-way measures of 1778.

B. Under the 1778 Constitution, Catholics and Jews Still Could Not Incorporate

Distrust of the unfamiliar still retarded the expansion of Catholics' and Jews' rights. The unreasonable fear that the Quebec Act of 1774 meant a Catholic establishment in a major part of Canada and the threat that a Catholic army would be dispatched across the border by Britain to control malcontents in the lower colonies probably lingered in 1778.²⁸¹ These fears revived earlier concerns that had arisen in 1749 as rumors spread that Jesuits were plotting with French agents in Mobile to launch an attack against South Carolina.²⁸² A 1775 edict of the Committee of Public Safety of the Provincial Congress directed the disarmament of Catholics, Negroes, and Indians.²⁸³ At the core of these fears was the suspicion that Catholics owed allegiance to foreign powers, whether the Papal State, the British, or the French. Woodmason, an Anglican missionary to the backcountry, reported that the suspicion was so pervasive that

277. S.C. CONST. of 1778, art. III, XII, XIII, in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3.

278. *Id.* art. XXXVIII.

279. *Id.*

280. *Id.*

281. Quebec Act, 14 Geo. III, c. 83, para. V-VII, 30 STATUTES AT LARGE at 551 (providing for a dual Protestant/Catholic establishment which gave rise to fears of Catholic dominance); *see also* S.C. CONST. of 1776, pmbl., in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3 (giving voice to those fears as a complaint against British authorities).

282. *See* BRINSFIELD, *supra* note 39, at 47.

283. *Id.* at 47, 90; *see also* 1 DRAYTON, *supra* note 209, at 300-02 (discussing the incident of a Roman Catholic who was told about the disarmament).

some Catholics took the precaution of disguising themselves as followers of religions that were regarded as less threatening. In a 1768 journal passage, he observed that “[a]mong these Quakers and Presbyterians, are many concealed Papists—They are not tolerated in this Government—And in the Shape of New Light Preachers, I’ve met with many Jesuits.”²⁸⁴

Even after the 1791 passage of the First Amendment to the U.S. Constitution with its strong protection of free exercise of religion and the South Carolina Constitution of 1790 with its safeguard of freedom of worship “without discrimination or preference,” Catholic leaders had to fight distrust of their loyalty.²⁸⁵ As late as 1826, Bishop John England of Charleston had to combat such distrust in a speech in the Hall of the House of Representatives. He not only rebutted charges that the primary loyalty of Catholics was to the Papal State, but also rebutted contentions that the hierarchical nature of their church governance would undermine their allegiance to democracy.²⁸⁶ But the Catholics had already proved their loyalty in the Revolutionary War, and this helped create a climate for the extension of greater constitutional protection to them in 1790. A contemporary observer, David Ramsay, noted that

[t]he orderly conduct and active co-operation of its [Catholic Church] members in all measures for the defence and good government of the country, proves that the apologies offered in justification of the restrictions imposed on them by the protestant governments of Europe are without foundation, or do not apply to the state of things in Carolina.²⁸⁷

The Revolutionary War fueled the growth of religious liberty by furnishing an incentive to replace the Anglican establishment with a general Protestant establishment to cement dissenter support of the Revolution, and by furnishing a chance for Catholics and Jews to prove their loyalty and thus their entitlement to greater religious freedom. With regard to conciliating the non-Anglican Protestants, Ramsay observed that “[t]he dissenters felt their weight, and though zealous in the cause of independence, could not brook the idea of risking their lives and fortunes for anything short of equal rights. . . . The prize

284. WOODMASON, *supra* note 163, at 42.

285. See U.S. CONST. amend. I (providing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”). The quote from the South Carolina Constitution of 1790 is from Article 8. See S.C. CONST. of 1790, art. VIII, in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3.

286. See Bishop England’s Discourse Preached in the Hall of the House of Representatives of the Congress of the United States in the City of Washington 32-35 (Jan. 8, 1826) (available at the South Caroliniana Library, University of South Carolina, Columbia, S.C.). In 1835, Alexis De Tocqueville concluded that American Catholics composed the religion most compatible with democracy because the same doctrinal standards applied to all members and the priests, unlike some in Europe, were not active in politics. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275-76 (Harry C. Mansfield & Delba Winthrop eds., 2000) (1835).

287. 2 RAMSAY, *supra* note 19, at 22.

contended for being made equally interesting to all, equal exertions were made by all for obtaining it."²⁸⁸

The situation confronting Jewish citizens was one of a generous measure of freedom but rights that were not fully equal to others. Robert St. John noted that

[i]n Charleston, Jews had the right to worship as they pleased and to work at any occupation they chose, or to conduct any type of business, or to engage in any form of trade, without restriction. This was the sort of freedom that persecution-weary Old World Jews were seeking.²⁸⁹

But since the Constitution of 1778 only permitted incorporation by Protestant churches, even venerable congregations such as Charleston's Beth Elohim (now spelled Elohim), one of America's oldest synagogues with its earliest surviving records dating back to 1750, still could not take advantage of the more efficient corporate form of operation.²⁹⁰ Despite this not quite equal legal status, Ramsay pictured the South Carolina Jews as "[e]qually interested in the welfare of the country, they are equally zealous for its defence and good government."²⁹¹ This patriotism is seen in the political and military career of Francis Salvador, who was a member of the revolutionary legislative assembly that declared independence.²⁹² Further evidence of commitment to the American cause is found in the Revolutionary War service of a military unit informally known as the Jews' Company, but a scholarly dispute emerged over whether it was completely, predominantly, or only fractionally composed of

288. *Id.* at 12.

289. ST. JOHN, *supra* note 51, at 63.

290. Article 38 of the Constitution of 1778 granted "equal religious and civil Privileges" to "all Denominations of Christian Protestants" who conducted themselves peaceably and faithfully." It also limited the right of incorporation to groups "professing the Christian Protestant Religion." S.C. CONST. of 1778, art. XXXVIII, in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3; see LEVINGER, *supra* note 167, at 93 (concluding that Beth Elohim is the third oldest Jewish congregation in the United States, following congregations in New York and Newport; Savannah, Philadelphia, and Richmond have the fourth, fifth, and sixth oldest, respectively); *The Congregation "Beth Elohim," Charleston, S.C.*, CITY OF CHARLESTON YEAR BOOK 301 (1883) (available at the South Caroliniana Library, University of South Carolina, Columbia, S.C.).

291. 2 RAMSAY, *supra* note 19, at 23.

292. LEARSI, *supra* note 167, at 33-34; LEVINGER, *supra* note 167, at 94; REZNIKOFF, *supra* note 167, at 8, 34-40; ST. JOHN, *supra* note 51, at 75; THE JEWS IN AMERICA 1621-1977, *supra* note 167, at 4; *Elzas v. Hühner*, NEWS & COURIER (Charleston, S.C.), Feb. 1903, at 2 (available at the South Caroliniana Library, University of South Carolina, Columbia, S.C.); see also *supra* notes 165-67 and accompanying text (providing a brief biography of Francis Salvador's life).

Jews.²⁹³ Those who participated in the struggle for freedom wanted to share equally in its fruits.²⁹⁴

National events helped create an atmosphere conducive to the expansion of religious freedom. On July 13, 1787, Congress passed the Northwest Ordinance to provide standards for governing the territories. Article 1 of the Northwest Ordinance ensured that “[n]o person 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.”²⁹⁵ National and local leadership passed into the hands of persons with a deep interest in freedom of religion and in reducing the entwining of church and state. Charles Pinckney was both governor and constitutional convention president in 1790.²⁹⁶ As a federal constitutional convention delegate in 1787, Pinckney offered a scheme of government with a strong civil rights component. The sixth article of Pinckney’s plan stated that “[t]he Legislature of the United States shall pass no Law on the subject of Religion, nor touching or abridging the Liberty of the Press nor shall the Privilege of the Writ of Habeas Corpus ever be suspended except in case of Rebellion or Invasion.”²⁹⁷ Pinckney was the point man at the federal convention in arguing against adopting religious test oaths for federal offices.²⁹⁸ He presided over finishing the task of disestablishment and provided the link between federal and state constitutional reform.

C. The Constitution of 1790 Completed Disestablishment and Ensured Religious Liberty

Federal constitutional reform spurred state constitutional reform. The religious clauses of the federal First Amendment and the strong freedom of conscience provisions of Article 8 of the South Carolina Constitution of 1790 were part of the same wave of revisions. The First Amendment, along with the

293. ST. JOHN, *supra* note 167, at 75 (concluding that roughly fifty percent of the company were Jews); see also LEON HÜHNER, SOME ADDITIONAL NOTES ON THE HISTORY OF THE JEWS OF SOUTH CAROLINA 151-56 (THE AMERICAN JEWISH HISTORICAL SOCIETY 1910) (describing the composition and the activities of the Jews-Company) (available at the South Caroliniana Library, University of South Carolina, Columbia, S.C.). But Rabbi Dr. Barnett Elzas concluded that the company, which was commanded by Captain Richard Lushington, was not made up completely, or even largely, of Jews. *Elzas v. Hühner*, *supra* note 292, at 3.

294. See LEARSI, *supra* note 167, at 48.

295. 3 THE ANNALS OF AMERICA, 1784-1786, at 194 (Encyclopedia Britannica, Inc. 1976).

296. JOURNAL OF THE CONSTITUTIONAL CONVENTION, *supra* note 254, at 11.

297. S. Sidney Ulmer, *James Madison and The Pinckney Plan*, 9 S.C. LAW Q. 415, 442 (1957).

298. Charles Pinckney introduced a provision at the Federal Convention on August 20, 1787 that provided that “[n]o religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S.” 2 RECORDS, *supra* note 168, at 342. This was an influential precursor of the test oath ban eventually adopted as Article 6, Section 3 of the U.S. Constitution.

rest of the Bill of Rights, passed Congress on September 25, 1789.²⁹⁹ It provided that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”³⁰⁰ These rules applied to Congress and left the states unaffected. James Madison had attempted to persuade the House of Representatives to adopt a measure forbidding the states, not just the national government, to impinge on fundamental rights such as the “right of conscience.”³⁰¹ Madison observed that some state constitutions guaranteed basic rights and others did not. Federal civil rights protection that is binding upon the states was needed to provide a “double security.”³⁰² Since Madison’s proposal failed to pass, state constitutional change was needed to insure the protection of basic civil liberties.

South Carolina’s adoption of a new constitution, with its own religious freedom measure, followed closely after its ratification of the Federal Bill of Rights with its First Amendment religious freedom provision. Presidential notice of South Carolina’s ratification of the Bill of Rights was received by the Congress on April 3, 1790, and on May 10, 1790, the state’s constitutional convention began.³⁰³ After the convention, commentators described the influence of federal constitutional revision in creating a climate for change in South Carolina. Judge Brevard noted that “[t]he delegates of the people met in general convention at Columbia, in June 1790, established a constitution for the government of the state, conformably to the principles of the constitution of the United States.”³⁰⁴ Ramsay made comparable observations but with more direct references to the clauses on freedom of conscience when he said that the new constitution was crafted by a convention called to frame a new fundamental law “adapted to the new order of things” spawned by the new Federal Constitution.³⁰⁵ The need for a new state constitution more in line with the new federal one also pervaded a letter written by a visiting observer, John Brown Cutting, apparently in Charleston on business, to John Rutledge, Jr.; Cutting described the South Carolina political scene in 1789 as the legislature debated calling the convention. The letter noted that

299. 1 THE ANNALS OF CONGRESS: THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED 916 (Gales and Seaton 1834) (1789). The printer seems to have mislabeled the date as February 25th even though the passage is found in the September sequence.

300. U.S. CONST. amend. I.

301. 1 ANNALS OF CONGRESS, *supra* note 299, at 441.

302. *Id.*

303. *Id.* at 961 (showing notice to Congress of South Carolina’s approval of Bill of Rights); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 254, at 7.

304. Judge Brevard’s Observations on the Legislative History of South Carolina, 1 S.C. STATUTES AT LARGE 425, 436 (Thomas Cooper ed., 1836).

305. 2 RAMSAY, *supra* note 19, at 78-79.

[a] committee of both houses is appointed to take into consideration the propriety of calling a convention this year to alter and amend the constitution. It is proposed, I find, to lessen the enormous representation which now prevails, and in a word to diminish the expense of the civil list and establish a constitution for South Carolina more conformable to that of the Union than the present.³⁰⁶

Although only twelve years old, the Constitution of 1778, with its complex, web-like regulation of religion, already seemed an anachronism. This view was expressed in a letter to *The City Gazette or the Daily Advertiser* (Charleston S.C.) published on May 11, 1790, just as the convention was getting underway. It was signed simply “Freeman.” In advising the convention delegates, it said:

I am happy to find a great number of gentlemen of acknowledged abilities employed in the arduous task, not doubting but their outmost abilities will be exerted to compose a just and permanent code, whereby not only our civil and religious liberties will be secured, but our political interest, attended to, that we may rise from obloquy. . . .³⁰⁷

The 1790 Constitution would complete disestablishment. The 1778 Constitution moved from a Church of England establishment to a general Protestant establishment. The 1790 Constitution made no reference to any form of establishment. However, the 1790 Constitution was not born in an atmosphere of complete separation of church and state. This is seen in the calling and conduct of the convention. The legislative resolution calling for the election of delegates designated church wardens as election managers in those areas still using parishes as units of political representation and required the managers to take an oath ending with the words “so help me God.”³⁰⁸ Early in the convention, during the organizational phase, John Drayton suggested that

306. Letter from John Brown Cutting to John Rutledge, Jr. (Feb. 21, 1789), in 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790, at 213, 214 (Merrill Jensen & Robert A. Becker eds., 1972).

307. CITY GAZETTE OR DAILY ADVERTISER (Charleston, S.C.), May 11, 1790, at 2 (available at the Charleston Library Society, Charleston, S.C.).

308. The resolution authorizing the election of convention delegates was widely published in newspapers. See, e.g., COLUMBIAN HERALD (Charleston, S.C.), Mar. 26, 1789, at 2 (available at the South Caroliniana Library, University of South Carolina, Columbia, S.C.); Convention Resolution (Mar. 6, 1789), in THE STATE RECORDS OF SOUTH CAROLINA: JOURNALS OF THE HOUSE OF REPRESENTATIVES 1789-1790, at 229-34 (Michael E. Stevens and Christine M. Allen eds., 1984) (reprinting legislative resolutions of March 13, 1789 and March 6, 1789, recommending to voters that they elect delegates to “a state convention, for the purpose of revising, altering, or forming a new constitution of this state,” setting the election for the “26th and 27th days of October, 1789,” and naming election managers, including church-wardens, in areas still using parishes as election units).

clergymen members of the convention lead it in thanking God and asking for his leadership in drafting the constitution. Colonel Gervais stated that he had no objection to such proceedings, but suggested that they be held on Sunday.³⁰⁹ From then on, convention members regularly met on Sundays, sometimes in the State House, to hear a discourse or sermon by a clergyman who was a delegate to the convention. These included the Reverend Richard Furman and the Reverend Dr. Henry Purcell.³¹⁰ Thus, the convention whose hallmarks were disestablishment and the broadening of the beneficiaries of religious freedom met for worship as a group at official premises. The content of these sermons was not recorded, and we cannot precisely ascribe later remarks of a speaker in another context to an earlier address, but a letter written a few years later by Richard Furman to Oliver Hart is at least suggestive of the views of one leading religious freedom advocate who was a delegate. Furman's advocacy of dismantling the Church of England establishment is described above;³¹¹ but the following passage reflects his belief that political principles cannot be entirely divorced from religion. In a 1793 Letter to Hart criticizing the excesses of the French Revolution, he wrote that the zealots of reform would "lay aside Religion altogether, and have nothing but a little Morality taught to the Youth, and this Morality to be founded on Political Principles; which even excluded the Idea of God's Providence if not of his Existence from the Mind."³¹² His approach appears to have been one of broad acceptance of God's leadership in government as well as in the other affairs of life, but with no preference given to any denomination.

During the months immediately prior to the convention, South Carolina newspapers printed documents from other states that espoused a constitutional philosophy of broad religious freedom without establishment. One was a provision suggested by a Rhode Island convention for inclusion in the Bill of Rights. It stated, in part, that "therefore all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience; - and that no particular religious sect, or society, ought to be favored or established by law, in preference to others."³¹³ A copy of the new

309. CITY GAZETTE OR DAILY ADVERTISER (Charleston, S.C.), May 18, 1790, at 2.

310. See CITY GAZETTE OR DAILY ADVERTISER (Charleston, S.C.), May 26, 1790 (noting that on Monday, May 17, 1790, the convention thanked Rev. Furman for his discourse the previous Sunday and asked Rev. Henry Purcell to give one the next Sunday). In his dairies, the Reverend Evan Pugh, a delegate, notes that he attended three such sermons, on May 16, 23 and 30th. As to the last of these, he explicitly mentions that it took place in the "State House." See THE DIARIES OF EVAN PUGH 301 (Horace F. Rudisill ed., 1993).

311. See *infra* pp.151-52.

312. Letter from Richard Furman to Oliver Hart (Sept. 23, 1793) (on file with the Livingston Library, Shorter College, Rome, Ga.). Oddly enough, this letter appears to have been started in 1793, interrupted, and then resumed in 1795. The portion quoted above is from 1793.

313. See *The Bill of Rights and Amendments to the Constitution of the United States as Agreed to by the Convention of the State of Rhode Island and Providence Plantations at South Kensington, in the County of Washington on the First Day of March A.D. 1790*, CITY GAZETTE OR DAILY ADVERTISER (Charleston, SC), Apr. 22, 1790, at 2.

Pennsylvania Constitution of 1790 was also printed. It stated that “no human authority can controul or interfere with the rights of conscience in any case whatever, nor shall any preference ever be given, by law, to any religious establishments or modes of worship.”³¹⁴ There is no record of these provisions having been discussed at the South Carolina Convention, but as we shall see, the South Carolina Constitution took a similar approach of guaranteeing freedom of conscience without giving special privileges to any denomination.

The report of a fourteen-member committee charged with making a digest of key proposals suggested strong religious freedom guarantees. With respect to religion, it recommended that “[a]ll mankind are to enjoy equal liberty in matters of religion, and the rights of conscience to be defended. Civil officers to be appointed to manage elections throughout the state, and the name of parish exchanged for district.”³¹⁵ The provision finally adopted was Article 8 of the Constitution of 1790, which stated:

Sec. 1. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall, forever hereafter, be allowed within this State to all mankind; provided that the liberty of conscience hereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

Sec. 2. The rights, privileges, immunities, and estates of both civil and religious societies and of corporate bodies shall remain as if the constitution of this State had not been altered or amended.³¹⁶

Article 1 retained religious names for many low country election districts.³¹⁷ The chief legacy of the 1790 document was that there were no longer second-class citizens relegated to a diluted brand of religious freedom.

D. The 1790 Constitution Permitted Incorporation of Jewish and Catholic congregations, Open Celebration of the Mass, and Wider Dispersion of Political Power

Article 8 of the Constitution of 1790 drops all references to establishment of religion, whether of a particular denomination or Protestantism in general,

314. See *The Pennsylvania Constitution of 1790*, CITY GAZETTE OR DAILY ADVERTISER (Charleston, S.C.), Feb. 16, 1790, at 2; *id.* art. IX, para. III.

315. See *Extract of a letter from Columbia, dated May 31st*, CITY GAZETTE OR DAILY ADVERTISER (Charleston, S.C.), June 5, 1790, at 2.

316. S.C. CONST. of 1790, art. VIII, in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3.

317. *Id.* art. I.

and explicitly forbids preferring one religion over another. Gone are the provisions of Article 38 of the 1778 Constitution that reserved the right to incorporate to Protestant churches that subscribed to certain beliefs.³¹⁸ This freed the historic Charleston synagogue of Beth Elohim to petition the legislature on January 12, 1791 for incorporation.³¹⁹ The petition read:

Humbly Sheweth, That the said Congregation conceive that it will be conducive to the decent and regular exercise of their religion, and public worship of the great Jehovah and Almighty ruler of the Universe, to the proper maintenance of the poor, & to the support and education of the orphans, of their Society, as well as other pious purposes, to have their said Congregation legally incorporated, and with privileges and powers similar to those, which have been heretofore granted by the legislature, to other religious Sects.³²⁰

The petition cited Article 8 section 1 of “our excellent new constitution” as providing authority for the petition.³²¹ The petition then continued:

They therefore humbly pray this honorable house, to grant that they may be legally incorporated, with privileges and powers as abovementioned, and they hope, that their religious and political conduct, will tend to exemplify the true wisdom, genuine charity, and sound policy of the said Article of the Constitution, which entitles them, as they presume, to that equal participation of religious freedom and immunities.³²²

The legislature granted the incorporation.³²³ The statute granting incorporation began by noting that Article 8, section 1 bestowed freedom of religion without discrimination or preference.³²⁴ The law granted typical corporate powers to the congregation including the power to hold property up to 5,000 pounds in value.³²⁵ The statute gave a key role in property

318. See S.C. CONST. of 1778, art. XXXVIII, in BASIC DOCUMENTS OF SOUTH CAROLINA HISTORY, *supra* note 3.

319. See THE STATE RECORDS OF SOUTH CAROLINA: JOURNALS OF THE HOUSE OF REPRESENTATIVES 1791, at 16 (Michael E. Stevens & Christine M. Allen eds., 1985).

320. *Id.*

321. *Id.*

322. *Id.*

323. See Act No. 1516 of Feb. 19, 1791, para. IV, 8 S.C. STATUTES AT LARGE 162, 163 (David J. McCord ed., 1840).

324. *Id.* at pmbl.

325. *Id.* at para. II.

management to the elders of the congregation and granted the synagogue the right to hire and fire rabbis.³²⁶

On the same day, an act was passed incorporating the Catholic Church in Charleston.³²⁷ It gave the church the typical corporate powers to adopt a seal, sue and be sued, to have “perpetual succession of officers and members,” to adopt by-laws so long as they were in conformity with the “laws of the land,” to hire ministers, and to buy, sell, and hold property of up to 5,000 pounds in value.³²⁸ Giving Catholics and Jewish congregations equal power to incorporate represented major progress in religious liberty, but one distinguished commentator saw dangers in any religious body having corporate powers. On February 21, 1811, President James Madison vetoed a bill by which Congress incorporated the Protestant Episcopal Church in Alexandria in the District of Columbia. In his veto message, Madison criticized the bill as giving churches “a legal agency in carrying into effect a public and civil duty,” responsibilities such as the education and support of the poor that he viewed as belonging more on the secular rather than the religious side of the line separating church and state.³²⁹ In an 1819 memorandum, the retired James Madison spoke against the “evil” from “the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations.”³³⁰ Apparently, he was concerned that religious corporations would acquire such vast resources that they would dominate civil as well as spiritual affairs. Therefore, he recommended limits on the life of such corporations and the amount of funds they could acquire.³³¹

In addition to enhancing Catholic Church organizational powers, the 1790 Constitution made open celebration of the Mass feasible.³³² In his history of the Catholic diocese of Charleston, the Right Reverend John England observed that during the Revolutionary War period, there were few Catholics in the diocese and those who were there were often unwilling to identify themselves as such to either their fellow Catholics or others.³³³ In his view, they kept their religion secret because their presence was still resented by Huguenots, whose ancestors had suffered persecution at the hands of Catholic clergy in France, and by

326. *Id.* at para. III.

327. *See* Act. No. 1515 of Feb. 19, 1791, 8 S.C. STATUTES AT LARGE 161 (David J. McCord ed., 1840).

328. *Id.*

329. *See* HOUSE OF REPRESENTATIVES RETURNED BILL 21, 23 FEB. 1811, in 5 THE FOUNDERS’ CONSTITUTION 99 (Philip B. Kurland & Ralph Lerner eds., 1987) (containing Madison’s veto of church incorporation).

330. JAMES MADISON, WRITINGS 761 (Jack N. Rakove ed., 1999).

331. *Id.* at 761-62. Madison wanted similar limits on other types of corporations as well.

332. *See* BRINSFIELD, *supra* note 39, at 47 (concluding that the first legal mass was celebrated in Charleston in 1790). One commentator concluded that masses had been performed beginning in 1788 by a Father Ryan sent to Charleston by Bishop John Carroll. PETER GUILDAY, THE LIFE AND TIMES OF JOHN CARROLL 736 (1922).

333. *See* 4 THE WORKS OF THE RIGHT REVEREND JOHN ENGLAND: FIRST BISHOP OF CHARLESTON 302 (Sebastian G. Messmer ed., 1908).

Scotch-Irish settlers, whose ancestors had occupied land in Northern Ireland that had been confiscated from Catholics.³³⁴ He cited one 1775 incident in which distrust went beyond mere resentment. Two Catholics, who were said to be in favor of arming Catholics, Negroes, and Indians and were alleged to have threatened a citizen, were cited in a petition to the Committee of Public Safety.³³⁵ The petitioner, Michael Hubart, complained to the Committee that the two Catholics, James Dealey and Laughlin Martin, had not only advocated arming Catholics, Negroes, and Indians, threatened him with a knife, and cursed the Committee, but were also working against “the Protestant interest.”³³⁶ The Committee transferred the matter to a “secret committee of five,” who ordered Dealey and Martin to be stripped, tarred and feathered, and “carted through the streets of Charlestown.”³³⁷ This distrust of Catholics began early and lingered long. Bishop England cited a 1696 South Carolina statute that granted a wide latitude of religious freedom to all Christians except “Papists.”³³⁸ Remnants of this distrust survived into the Revolutionary War era. Bishop England observed that although the Revolutionary War era state constitutions still excluded Catholics from positions of trust, they were soon succeeded by amendments or new constitutions, such as the South Carolina Constitution of 1790, that removed these impediments.³³⁹ But he argued that despite these legal changes, “the strong current of popular opinion” was still “set strongly against [the Catholic].”³⁴⁰

In Bishop England’s view, the best way for Catholics to gain the respect of their fellow citizens was for them to exercise the franchise in an ethical and responsible manner. Thus, in an 1831 letter to the Catholic citizens of Charleston, written during a time of bitter factionalism concerning whether the state could nullify federal tariff laws, Bishop England stated that he possessed no infallible insight as to how they should vote. He carefully avoided expressing his personal preference, but advised them that their vote should be cast according to what was best for South Carolina and the country and not pursuant to partisanship, political intrigue, bribery, promise of office, or any other selfish motive.³⁴¹ He counseled those who were, as he was, Irish immigrants to vote based on the merits of the candidates and to not let any politician sway their vote by appealing to them as fellow Irishmen.³⁴²

334. *Id.* at 300.

335. *Id.* at 436-37 (citing 1 DRAYTON, *supra* note 209, at 273-74, 300).

336. *Id.* at 436-37.

337. *Id.* at 437 (citing 1 DRAYTON, *supra* note 209, at 273-74).

338. *Id.* at 433. The statute to which England referred is Act No. 154, para. VI, 2 S.C. STATUTES AT LARGE at 133.

339. 4 THE WORKS OF THE RIGHT REVEREND JOHN ENGLAND, *supra* note 333, at 303.

340. *Id.*

341. See Letter on Civic and Political Duties to the Roman Catholic Citizens of Charleston, in 6 THE WORKS OF THE RIGHT REVEREND JOHN ENGLAND, *supra* note 333, at 352-72; see also EDGAR, *supra* note 19, at 330-37 (discussing the nullification controversy and the bitter election contests produced by it).

342. See 6 WORKS OF THE RIGHT REVEREND JOHN ENGLAND, *supra* note 333, at 370.

The new constitution eliminated the 1778 requirement that key officeholders be Protestants.³⁴³ Levi Myers, a young physician of the Jewish religion, was soon elected to represent the Winyah district.³⁴⁴ Myers was a South Carolina native who was born near Jacksonborough. He studied medicine under South Carolina doctors, including David Ramsay, and enrolled in the medical schools at Edinburgh and Glasgow from which he received his medical degree in 1787.³⁴⁵ His service is a realization of the philosophy of Charles Pinckney, governor and president of the 1790 Constitutional Convention, who had been a leading opponent of religious test oaths in the Federal Constitutional Convention.³⁴⁶ The oath to be given officeholders as prescribed in Article 4 of the 1790 Constitution does not even use the traditional “so help me God” ending.³⁴⁷ However, that phrase was reintroduced in an 1834 amendment.

E. Despite Disestablishment, Some Officials Viewed Christianity in General as the De facto Established Religion

Was religion handicapped after it lost first the financial support and then the ideological endorsement of the government as the law shifted from a fiscally-aided Church of England establishment to legal and ideological support of Protestantism generally in the 1778 Constitution, and finally to no establishment at all in the 1790 Constitution? Would it wither away without the government crutch? One observer of the state constitutional status of freedom of religion in the late eighteenth century argued that instead the result would be a re-energizing of religion. In 1791 John Leland, a minister and advocate of the separation of church and state, said:

Here let me add, that in the southern states, where there has been the greatest freedom from religious oppression, where liberty of conscience is entirely enjoyed, there has been the greatest revival of religion; which is another proof that true

343. See S.C. CONST. of 1778, art. III (governor, lieutenant governor, and privy council members must be Protestant), arts. XII, XIII (mandating that members of the Senate and House of Representatives respectively be Protestants), in BASIC DOCUMENTS IN SOUTH CAROLINA HISTORY, *supra* note 3.

344. JOURNALS OF THE HOUSE OF REPRESENTATIVES 1791, *supra* note 319, at ix-x.

345. See 4 BIOGRAPHICAL DIRECTORY OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES: 1791-1815, at 420 (N. Louise Bailey ed., 1984).

346. 2 RECORDS, *supra* note 168, at 342, 468 (introducing measures against religious test oaths).

347. S.C. CONST. of 1790, art. IV, in BASIC DOCUMENTS IN SOUTH CAROLINA HISTORY, *supra* note 3.

religion can and will prevail best where it left is entirely to Christ.³⁴⁸

Richard Furman credited disestablishment with spurring the growth of the Baptist religion. In a February 12, 1791 letter to a Reverend Pearce, Furman observed that “the interest of our churches appear on the whole to be advancing, our liberty, religious as well as civil is unrestrained[?], and those who have ability and worth of every denomination are eligible to places of civil trust which makes a considerable difference between our Temporal Situation and that of our Brethren in Britain where a partial establishment prevails.”³⁴⁹

But the dramatic departure of the Constitution of 1790 from the tradition of religious preference could be limited by narrow interpretations. One such interpretation is found in the annotation made by Dr. J. Adams, President of the College of Charleston, to a sermon he delivered to the Episcopal diocese of South Carolina in 1833. His view was that, although the Constitution of 1790, still in force then, forbade a legal preference for Protestantism over other forms of Christianity, it still established Christianity, in general, as the favored religion.³⁵⁰ A similar theme was struck in an 1846 decision by South Carolina’s appellate court. In *City Council of Charleston v. Benjamin* the court upheld a conviction of a Jewish merchant who had been charged with violating the laws forbidding worldly work and the sale of goods on Sunday.³⁵¹ When the defendant pleaded that the Sunday closing law violated his religious freedom under the Constitution of 1790, the court upheld the law. In an opinion by Judge John Belton O’Neill, the court gave Article 8, section 1, a “Christian construction.”³⁵² To O’Neill, religious freedom was less a matter of guaranteed rights and more a matter of tolerance expressed by Christians toward practitioners of other faiths, which flowed from Christ’s teaching his followers to love their enemies.³⁵³ Constitutional and common law were grounded not in the beliefs of any particular denomination but on the doctrines of Christianity in general.³⁵⁴ But then O’Neill shifted his ground after having gone to

348. John Leland, *The Rights of Conscience Inalienable; and Therefore Religious Opinions Not Cognizable by Law: Or The High-flying Church-man, Stript of His Legal Robe, Appears a Yahoo*, in *THE CONNECTICUT DISSENTER’S STRONG BOX*: NO. 1 at 22 (New London, Charles Holt 1802).

349. Letter from Richard Furman to Rev. W. Pearce (Feb. 12, 1791) (available at Furman University, Greenville, S.C.).

350. J. ADAMS, *Sermon Preached Before the Convention of the Protestant Episcopal Church of the Diocese of S.C. (Feb. 13, 1833), The Relation of Christianity to Civil Government in the United States* 38-44 (available in South Caroliniana Library, University of South Carolina, Columbia, S.C.).

351. *City Council of Charleston v. Benjamin*, 33 S.C.L. (2 Strob.) 508 (1846).

352. *Id.* at 522.

353. *Id.*

354. *Id.* at 524-25. The issue of whether the common law is rooted in Christianity attracted the attention of Thomas Jefferson, who argued that it was not so rooted since many basic principles of the common law were already framed prior to the introduction of Christianity into

considerable trouble to provide a religious basis for Article 8, section 1. He concluded that the Sunday closing laws were not designed to serve a religious purpose but to provide everyone with a day of rest.³⁵⁵ The law was not a direct interference with the free exercise of religion of the Jewish merchant since he was still free to observe his own Sabbath on another day, and he was not required to engage in any Christian rituals on Sunday. Of course this ignored the economic plight that could befall the faithful adherent to Jewish doctrine who must close his store one day because of his religion and again on another day because of the civil law. However, the result was similar to that reached many years later by the U.S. Supreme Court in *Braunfeld v. Brown* (1961), which upheld Sunday closing laws as providing a secular day of rest that did not directly interfere with Jewish free exercise of religion.³⁵⁶ But the U.S. Supreme Court opinion had none of the Christian rhetoric found in the earlier South Carolina decision. The jaundiced interpretations of Dr. Adams and the *Benjamin* case seem to minimize the language of Article 8, section 1, which extended religious freedom “to all mankind” and “without discrimination or preference.” O’Neill unconvincingly made the argument that there was no discrimination since adherents of all faiths had to give equal compliance to the Sunday closing laws.³⁵⁷ But he failed to note that there is a differential impact of a Sunday closing law since that day is the preferred religious day of rest for one group but not the other. One might just as well argue under O’Neill’s logic that a law requiring everyone to recite a Buddhist chant was not discriminatory since Buddhist and non-Buddhist must recite the same chant.

At the opposite pole from the narrow, retrograde interpretation given to the religious freedom provisions of the 1790 Constitution was the expansive reading given it by the collector of early South Carolina law, Thomas Cooper. In 1831, he defended himself against charges that he had taught heretical doctrines as President of the South Carolina College by arguing that the Article 8, section 1 language mandating that the state conduct itself “without discrimination or preference” with regard to religion forbade any legislation or other official action that even touched on the subject of religion because such action would inevitably result in some kind of preference.³⁵⁸ But in his more objective role as collector of laws, Cooper conceded that the 1790 religious clauses did not forbid the incorporation of religious groups to achieve civil goals and did not prohibit the passage of laws declaring Sunday to be a secular day of rest.³⁵⁹

England. See THOMAS JEFFERSON, WRITINGS 1324-25 (Merrill D. Peterson ed., 1984).

355. *Benjamin*, 33 S.C.L. (2 Strob.) at 529.

356. 366 U.S. 599; see also *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965) (upholding Sunday closing laws).

357. *Benjamin*, 33 S.C.L. (2 Strob.) at 529-30.

358. See THE CASE OF THOMAS COOPER M.D. 3-6 (2d ed. 1832) (available at the South Caroliniana Library, University of South Carolina, Columbia, S.C.).

359. See 2 S.C. STATUTES AT LARGE 707 (Thomas Cooper ed., 1837).

Mere constitutional language is no guarantee against religious discrimination. Much depends on the attitude of those in official positions. This is illustrated by comparing the disparate manner in which two governors treated Jewish citizens with regard to Thanksgiving proclamations. Governor James H. Hammond of South Carolina issued a Thanksgiving Day Proclamation in 1844 in which he stated that the United States was a Christian nation and exhorted “our citizens of all denominations to assemble at their respective places of worship, to offer up their devotions to God their Creator, and his Son Jesus Christ, the Redeemer of the world.”³⁶⁰ When Charleston Jews objected to the exclusively Christian orientation of the proclamation, Hammond offered no apology but dug in his heels and responded:

I have always thought it a settled matter that I lived in a Christian land! And that I was the temporary chief magistrate of a Christian people. That in such a country and among such a people I should be, publicly, called to an account, reprimanded and required to make amends for acknowledging Jesus Christ as the Redeemer of the world, I would not have believed possible, if it had not come to pass.³⁶¹

That Hammond’s action was not an inadvertent omission is seen in later diary entries in which he excoriated his successors as Governor for not making a “point” to the Jews by giving a similarly Christian cast to their Thanksgiving Day Proclamations.³⁶² This incident continued to be notorious and was cited by U.S. Supreme Court Justice Harry Blackmun in his lead opinion in the 1989 case of *County of Allegheny v. ACLU*³⁶³ as an example of hostile government action that makes a religious minority feel that it is not a valued member of the political community.³⁶⁴ He stated that such proclamations “demonstrate an official *preference* for Christianity and a corresponding official *discrimination* against all non-Christians, amounting to an exclusion of a portion of the political community.”³⁶⁵

360. See MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* 142 n.2 (1984).

361. *Id.* In 1797 and 1805, the United States concluded two treaties with Tripoli. The first of these stated that “the United States is not, in any sense, founded on the Christian religion.” This wording was dropped from the 1805 treaty. See ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 89 (1964).

362. See *SECRET AND SACRED: THE DIARIES OF JAMES HENRY HAMMOND, A SOUTHERN SLAVEHOLDER* 125-26, 137-38, 142 (Carol Bleser ed., 1988).

363. 492 U.S. 573 (1989) (ruling that a stand-alone crèche display in a courthouse was an illegal establishment of religion, but that a varied display of religious and secular items in a county office building was valid).

364. *Id.* at 604 n.53.

365. *Id.* Blackmun was interpreting the federal First Amendment in a modern case rather than the South Carolina Constitution of 1790, but his views on the meaning of discrimination are still useful in understanding the impact of the earlier events in South Carolina.

Hammond's actions stand in stark contrast to those of an earlier Governor, Henry Middleton, even though they were both operating under the same constitutional language. In an 1812 Thanksgiving proclamation, Middleton inadvertently omitted Jews from those who were invited to be celebrants. When he learned of this mistake, he sent an apology to Beth Elohim synagogue.³⁶⁶

VII. CONCLUSION: THE CHANGE FROM FICKLE TOLERANCE TO GUARANTEED RELIGIOUS RIGHTS AND DISESTABLISHMENT FREED RELIGION FROM THE ENERVATING EMBRACE OF THE STATE

Even though an unsympathetic administrator such as Governor Hammond could erode the quality of religious freedom from time to time, and even though court rhetoric such as that in the *Benjamin* case could create an aura of preference for Christianity in general, if not for a particular denomination, the climate produced by the Constitution of 1790 was far more conducive to religious freedom than the previous Church of England establishment, when tax money from the population at large was used to support the buildings, priests, and social programs of the official church. Freed of this burden by the partial reform brought by the Constitution of 1778, dissenting Protestant denominations could devote their energies to their own growth rather than having it siphoned off to another church whose beliefs were not their own. So long as they were supportive of broad belief requirements stipulated in Article 38, Protestant churches of all varieties were allowed to incorporate and hold their property directly rather than risk its misuse by trustees. The 1778 Constitution also freed congregations of the old established church from much of the paralyzing regulations of their internal affairs by the government. The price they paid in the loss of financial support under the 1778 Constitution was made worthwhile by this increased freedom for Anglican congregations.³⁶⁷

However, the general Protestant establishment of the Constitution of 1778, though it benefitted and energized dissenting Protestant denominations, was still an incomplete victory for religious freedom. The intricate web-like regulations of Article 38 were at war with themselves—at once trying to grant religious freedom and precisely regulate it by demanding belief standards be adhered to before Protestant congregations could be incorporated, and even presuming to tell ministers their duties and how to perform them. Articles 3, 12, and 13 continued to insist that key officers be Protestant. Most importantly, the 1778 Constitution wrought an incomplete victory for religious freedom because its message of ideological support for Protestantism still seemed to exclude Catholics and Jews from the charmed inner circle of the political community. Even though the Charters and Fundamental Constitutions had sent signals of tolerance and welcome to all who embraced the broad idea that there was a God and that he was publicly to be worshipped, and even though generous provisions for forming congregations with a variety of beliefs were found in the Fundamental Constitutions, the inability of Jewish and Catholic congregations

366. REZNIKOFF, *supra* note 167, at 111-12.

367. See HIRSCH, *supra* note 50, at 94, 127.

to incorporate and own property directly was a serious handicap that continued even under the 1778 document. It took the Constitution of 1790 to eliminate this handicap and complete the evolution from (1) the Church of England establishment to (2) the 1778 Constitution's general Protestant establishment to finally (3) a complete disestablishment by granting religious freedom "without discrimination or preference . . . to all mankind."³⁶⁸

A fundamental flaw of the charters and pre-1790 constitutions was that they embodied a belief that a pervasive establishment and a vigorous religious freedom could coexist. They cannot. The government and the established religion will always be disposed to intensely scrutinize other religions and participants in the political process to guard against encroachment on the prerogatives of the established church. A pervasive establishment was particularly troublesome in a society such as colonial South Carolina that relied on attracting a varied population of immigrants for its growth. An establishment is a homogenizing force; immigration is a diversifying force. The clash between these incompatible forces accounts for much of the on-again, off-again quality of religious freedom in colonial South Carolina that was seen in the imposition, revocation, reimposition, and revocation again of religious qualifications for participation in the political process. The 1790 Constitution ended the attempt to have it both ways (a pervasive establishment coexisting with vigorous religious freedoms) by coming down squarely on the side of freedom. The Charters and Fundamental Constitutions had exuded the invigorating aroma of tolerance. But tolerance is a shifting quicksand upon which to erect freedom. Freedom that is merely tolerated can be taken away or narrowed at the whim of the sovereign. Such freedoms can expand or contract as political fortunes shift from faction to faction.

The Constitution of 1790 moved from this uncertain foundation to the firm ground of a guaranteed right to "[t]he free exercise and enjoyment of religious profession and worship."³⁶⁹ This did not mean that there was a right that would be forever immune from official encroachment. Much depends on the attitudes of administrators. The battle for religious freedom is never permanently won, but the Constitution of 1790 gave firm textual roots to religious freedom that fostered its hardy growth. James Madison argued that "religion flourishes in greater purity, without than with the aid of Gov[ernment]."³⁷⁰ Religion departs from such "purity" when it tailors its programs to the agenda of the government grant-maker rather than the needs of its parishioners. Disestablishment removes this temptation. In addition, disestablishment removes the pressure on non-adherents of the official religion to feign acceptance of the beliefs of the established church. This frees people to be sincere in their religious profession. This releases the energy that invigorates religion.³⁷¹ It is establishment, not

368. S.C. CONST. of 1790, art. VIII, *in* BASIC DOCUMENTS IN SOUTH CAROLINA HISTORY, *supra* note 3.

369. *Id.* at art. VIII, § 1.

370. 5 THE FOUNDERS' CONSTITUTION, *supra* note 329, at 106 (arguing in a letter from James Madison to Edward Livingston that disestablishment strengthens religion).

371. See GARRY WILLS, JAMES MADISON 18 (2002) (commenting on Madison's view that freedom of religion leads to "sincerity of religious practice" that energizes religion).

disestablishment, that is hostile to religion. An unarticulated assumption underlying an establishment is that God is satisfied with humankind's interpretation of his revelations, that God has ceased to be active in worldly events, and that therefore no further divine revelations will be forthcoming.³⁷² Thus, religion can be frozen into the form acceptable to the establishment. Disestablishment and a guarantee of religious freedom, by their avoidance of pressuring society in a religious direction, not only free government from domination by religion but also free individuals to either ignore religion or to conduct their own search for God's message, rather than having to make do with a prefabricated, watered-down version. Furthermore, an establishment, by combining civil and spiritual authority in the same hands, brings about a dangerous concentration of power that inspires such overconfidence in officials that they believe that they can ignore the needs of their constituents.³⁷³ The disestablishment achieved by the Constitution of 1790 signified an appreciation of the dangers of such concentrations of religious and secular power in a society of varied beliefs and guarded against them by a generous grant of religious freedom.

372. See WILLIAM PENN, *The Great Case of Liberty of Conscience* (1670), in *THE POLITICAL WRITINGS OF WILLIAM PENN* 88 (2002) (arguing that government sanctions that invade liberty of conscience "overturn the Christian Religion" by discouraging new "discoveries" of God's will).

373. One powerful religious figure, Pope Gelasius I, expressed misgivings about permitting the two swords of authority, political and spiritual, to be wielded by the same set of fallible human hands. See 1 SIR. R.W. CARLYLE & A.J. CARLYLE, *A HISTORY OF MEDIAEVAL POLITICAL THEORY IN THE WEST* 190 (3rd ed. 1930) (discussing Pope Gelasius I's view); see also *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (noting the importance of avoiding a unification of secular and sectarian power in an opinion striking down a law granting churches a role in licensing decisions concerning saloons that would operate near them).