

**“PRIDE IGNORANCE AND KNAVERY”:  
JAMES MADISON’S FORMATIVE EXPERIENCES WITH  
RELIGIOUS ESTABLISHMENTS**

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For those who think and write about the meaning of the First Amendment’s Religion Clauses, Founding-era history continues to exercise a powerful pull. Each year, legal scholars produce a new crop of books and articles examining church-state relations in America from the colonial period through the early nineteenth century, hoping to shed more light on the constitu-

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tional guarantees.<sup>1</sup> Judges, too—particularly those sitting on the Supreme Court<sup>2</sup>—have continued to rely on the historical record as they render opinions defining the scope of religious freedoms afforded to twenty-first century litigants.<sup>3</sup> Perhaps no area of constitutional interpretation currently relies more heavily on Founding-era history.<sup>4</sup>

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1. The following selective list of materials, although admittedly incomplete, should give a good sense of the current interest in this area. Among others, the following books and articles, produced by leading scholars within just the past two years, devote a significant proportion of their coverage to an examination of Founding-era history as it relates to religious liberties: DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* (2010); STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* (2010); DOUGLAS LAYCOCK, *1 RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY* (2010); ELLIS M. WEST, *THE RELIGION CLAUSES OF THE FIRST AMENDMENT: GUARANTEES OF STATES' RIGHTS?* (2011); JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* (3d ed. 2011); Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489 (2011); Steven K. Green, *Understanding the "Christian Nation" Myth*, 2010 CARDOZO L. REV. DE NOVO 245 (2010); Michael W. McConnell, *Religion and Its Relation to Limited Government*, 33 HARV. J.L. & PUB. POL'Y 943 (2010); Mark A. Noll, *The Election Sermon: Situating Religion and the Constitution in the Eighteenth Century*, 59 DEPAUL L. REV. 1223 (2010); Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN'S L. REV. 407 (2011). Not long ago, a symposium at Notre Dame Law School took as its organizing theme the resurgence of historical scholarship among those who study and apply the Religion Clauses. See Symposium, *The (Re)turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697 (2006) (including articles by Lee J. Strang, Steven K. Green, Marci A. Hamilton and Rachel Steamer, Douglas Laycock, and Steven D. Smith).

2. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 703–04 (2012); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1446–47 (2011); *id.* at 1459, 1461–62 (Kagan, J., dissenting); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 638–39 (2007) (Souter, J., dissenting); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 876–80 (2005); *id.* at 881–85 (O'Connor, J., concurring); *id.* at 885–89, 893–98 (Scalia, J., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 685–88 (2005) (plurality opinion); *id.* at 722–31 (Stevens, J., dissenting); *id.* at 737 (Souter, J., dissenting); *Cutter v. Wilkinson*, 544 U.S. 709, 729–31 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26–27 (2004) (Rehnquist, C.J., concurring); *id.* at 49–54 (Thomas, J., concurring); *Locke v. Davey*, 540 U.S. 712, 722–23 (2004); *id.* at 727–28 (Scalia, J., dissenting).

3. See also *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 804–05, 808–09 app. A (7th Cir. 2011); *Catholic League for Religious and Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1054, 1057 n.62, 1059 (9th Cir. 2010); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1028–31 (9th Cir. 2010); *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1358–59 (11th Cir. 2009) (Marcus, J., concurring); *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 297 (6th Cir. 2009).

4. See DRAKEMAN, *supra* note 1, at vi, ix; Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223, 224–26 (2000); Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers*

Among Supreme Court Justices, at least, probably no individual Founder has occupied more attention in these historical studies than James Madison, the chief sponsor of the First Amendment in the First Congress.<sup>5</sup> As recently as January 2012, in its latest opinion interpreting the Religion Clauses, the Supreme Court pronounced Madison to be “the leading architect of the Religion Clauses of the First Amendment”<sup>6</sup>—a declaration it had made, verbatim, in three prior cases.<sup>7</sup> This time, the Court’s treatment of Founding-era history relied almost exclusively on Madison. In his opinion for a unanimous Court, Chief Justice Roberts first quoted remarks Madison made before Congress in defense of what would later become the Establishment Clause, and then went on to examine two other events from Madison’s public life, providing further quotes from Madison about each event to demonstrate Madison’s stances.<sup>8</sup> Rightly or wrongly, the Court largely equated Madison’s un-

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*That History Doesn’t Provide*, 2004 BYU L. REV. 1617, 1617 (2004); see also *Everson v. Bd. of Educ.*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting) (“No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.”). See generally Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court’s Use of History in Religion Clause Cases*, 85 OR. L. REV. 563 (2006) (collecting data on uses of history in Religion Clause opinions).

5. See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 703–04; *Winn*, 131 S. Ct. at 1446–47; *id.* at 1459, 1461–62 (Kagan, J., dissenting); *Hein*, 551 U.S. at 638–39 (Souter, J., dissenting); *McCreary Cnty.*, 545 U.S. at 876, 878–79; *id.* at 882–84 (O’Connor, J., concurring); *id.* at 888, 895–96 (Scalia, J., dissenting); *Van Orden*, 545 U.S. at 724–26 (Stevens, J., dissenting); *id.* at 737 (Souter, J., dissenting); *Cutter*, 544 U.S. at 729–30 (Thomas, J., concurring); *Elk Grove*, 542 U.S. at 53–54 (Thomas, J., concurring); *Davey*, 540 U.S. at 722–23; *id.* at 727–28 (Scalia, J., dissenting). Of course, this list represents only the most recent cases; many other Religion Clause opinions by the Supreme Court Justices have referenced Madison’s writings or actions as a source of authority. Three early opinions that used this approach, two written for the majority of the Court and one representing four justices in dissent, set the stage for the many opinions that followed. See *Reynolds v. United States*, 98 U.S. 145, 163–64 (1878); *Everson*, 330 U.S. at 11–13; *id.* at 31–46, 49, 51–55, 57–60, 63–72 app. (Rutledge, J., dissenting).

6. *Hosanna-Tabor*, 132 S. Ct. at 703 (quoting *Winn*, 131 S. Ct. at 1446).

7. See *Flast v. Cohen*, 392 U.S. 83, 103 (1968); see also *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 705–06 (1970) (quoting same passage from *Flast*). Chief Justice Rehnquist once famously tried to present a version of Founding-era history in which Madison played a reduced role in the First Amendment story, but he still felt compelled to acknowledge, in a slight adjustment of the quote from *Flast*, that “James Madison was undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights.” *Wallace v. Jaffree*, 472 U.S. 38, 97–98 (1985) (Rehnquist, J., dissenting).

8. *Hosanna-Tabor*, 132 S. Ct. at 703–04.

derstanding, thus derived, with the original meaning of the First Amendment. No one else from the Founding era was named or quoted, nor did the Court spend more than a portion of one paragraph canvassing any other events occurring between the year 1700 and the Civil War. It was a powerful statement, by a unanimous Court, of just how important Madison's views have become in the Court's Religion Clauses jurisprudence.

Whether the Supreme Court has been right or wrong to focus so heavily on Madison is not my present concern, although it is certainly a question worth asking (and plenty of critics have asked it, though few would be so bold as to claim that Madison's views should not be considered at all).<sup>9</sup> The fact remains, however, that the Court has focused on Madison and continues to do so—as do many other judges and commentators. By any measure, James Madison's views now wield an immense influence in Religion Clause jurisprudence. Such a development is, if not defensible, at least understandable, for Madison is surely an important source to consider. As Donald Drakeman once put it, “[w]hile Madison's views should not be treated as dispositive interpretations of the First Amendment, they should be accorded substantial weight as those of a profound thinker and statesman who influenced (to an indeterminate extent) the adoption of the First Amendment.”<sup>10</sup>

Although Madison's life and attitudes have been studied extensively, judges who cite Madison have tended to focus on the six-year period beginning with the publication in 1785 of his Memorial and Remonstrance against Religious Assessments and ending with the ratification of the Bill of Rights in 1791.<sup>11</sup>

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9. For over forty years, commentators have been criticizing what they deem to be an excessive focus on Madison and the Virginia disestablishment experience. See, e.g., GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 1–4, 10–13 (1987); DRAKEMAN, *supra* note 1, at 67–148; MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 1–12, 30–31, 172 (1st Phoenix ed. 1967); Dreisbach, *supra* note 4, at 240–41; Esbeck, *supra* note 1, at 490–92; Nancy H. Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U. L. REV. 207, 216–22 (1978); Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 77–78 (2005).

10. Donald Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427, 434 (1983).

11. See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 703–04; *Winn*, 131 S. Ct. at 1446; *id.* at 1459, 1461–62 (Kagan, J., dissenting); *Hein*, 551 U.S. at 638 (Souter, J., dissenting); *McCreary Cnty.*, 545 U.S. at 878–79; *id.* at 882–84 (O'Connor, J., concurring); *Van*

Occasionally some mention of his actions in national office or his later writings will be thrown in for good measure, as the Court did in *Hosanna-Tabor*.<sup>12</sup> Yet to this point, judges—and even scholars—have focused comparatively little attention on Madison’s early, formative years, the years leading to his interest in church-state issues and his entry into politics.

This inattention is a mistake. To understand Madison’s lifelong opposition to the mingling of church and state (and to understand what that meant to him), we must begin at what was, for him, the beginning. Uncovering his earliest experiences with religious establishments sheds new light on the well-known stances he took later in life. Madison came of age in colonial Virginia, where during those very years a bitter controversy was raging over the status and authority of the established Anglican Church.<sup>13</sup> Madison formed his earliest opinions of establishments of religion in that crucible, based on his experiences with the Anglican Church in Virginia and the controversies in which it became embroiled—including its persecution of religious dissenters, which reached a fever pitch just after he graduated from college.<sup>14</sup> Importantly, at this early age he extrapolated from his own experiences and those of his fellow Virginians to form various assumptions about the nature and tendency of all religious establishments, as well as as-

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*Orden*, 545 U.S. at 737 (Souter, J., dissenting); *Cutter*, 544 U.S. at 729–30 (Thomas, J., concurring); *Elk Grove*, 542 U.S. at 53–54 (Thomas, J., concurring); *Davey*, 540 U.S. at 722–23; *id.* at 727–28 (Scalia, J., dissenting); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852–58 (1995) (Thomas, J., concurring); *id.* at 868–73, 890–91 (Souter, J., dissenting); *Catholic League for Religious and Civil Rights v. City & Cnty. Of San Francisco*, 624 F.3d 1043, 1057 n.62 (9th Cir. 2010); *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 297 (6th Cir. 2009); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008); *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 294–95 (6th Cir. 2001); *Lamont v. Woods*, 948 F.2d 825, 836–37 (2d Cir. 1991). In the course of examining Madison’s views on church and state, a judge in the Seventh Circuit noted as early as 1987 that Madison’s *Memorial and Remonstrance* is a document “on which the Supreme Court has relied too many times to count.” *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 136 (7th Cir. 1987) (Easterbrook, J., dissenting). The judicial focus on the period 1785–1791 largely began with the majority and dissenting opinions in the Supreme Court’s landmark *Everson* case, in which the dissenting opinion went so far as to include, as appendices, the full text of Madison’s *Memorial and Remonstrance* and the Virginia assessment bill to which it responded. See *Everson*, 330 U.S. at 11–13, 31–42, 49, 51–55, 57, 63–74 app. (Rutledge, J., dissenting).

12. See *Hosanna-Tabor*, 132 S. Ct. at 703–04.

13. See *infra* Part I.

14. See *infra* Parts II and III.

sumptions about the nature of religious belief and the futility of using law either to support or oppose it.<sup>15</sup> In fact, his earliest involvement in politics was motivated by his zeal to oppose the religious persecutions he had witnessed in his own locality, which he attributed largely to the principles and practices of religious establishments.<sup>16</sup>

This Article seeks to uncover, or rediscover, the early influences on Madison's thought about religious freedom, particularly his early interactions with religious establishments. Part I describes the world into which Madison was born, a world that featured an Anglican establishment under increasing pressure from New Light religious dissenters—especially the Separate Baptists—and the harsh Anglican response that made use of the machinery of government to punish nonconformity. Turning then to Madison's own life, Part II outlines his earliest educational experiences, culminating in his graduation from the College of New Jersey and his subsequent independent studies at Montpellier. In particular, one notices the influence, for good and ill, of the established Church of England and its clergy on Madison's formal and informal education, and how they disposed him to certain critiques of established religion. Part III documents the final and brutal wave of establishment persecution of Baptists, a persecution which led directly to Madison's first interest in law and government and which subsided only when the Revolutionary War began. The approach and conduct of that war is the subject of Part IV, which examines Madison's reaction to the religious arguments made for and against the war by various clerical and lay parties. Part V then describes the proceedings of the Virginia Constitutional Convention of 1776, which produced the first Constitution for Virginia as well as the world-renowned Virginia Declaration of Rights. Madison was elected a delegate to the Convention, his first elected position outside his home county. Finally, his behind-the-scenes efforts at the Convention, in helping to draft the religion provisions in the Declaration of Rights, demonstrate the coalescence of his mature position on religion and the state—a position incorporating his philosophical objections to establishments of religion as well as his notions of the natural right of religious freedom held equally by each person.

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15. See *infra* Parts III and IV.

16. See *infra* Part IV.

## I. A WEAKENING ANGLICAN HEGEMONY

James Madison, Junior, was born in 1751 in King George County, Virginia, the first son of a well-respected tobacco planter.<sup>17</sup> By the end of his first month, little James was baptized into the Anglican Church, the legally established church of the colony, to which his parents and relatives also belonged.<sup>18</sup> The baptismal ceremony was conducted by Reverend William Davis, the rector of the local Hanover Parish Church, where Madison's relatives on his mother's side worshipped.<sup>19</sup> Such scenes would have been quite commonplace in Virginia at the time, for the majority of Virginia's white population were Anglicans as a matter of course<sup>20</sup>—a phenomenon largely attributable to the combined effect of a history of restrictive immigration policies and a variety of contemporary laws burdening non-Anglican residents.<sup>21</sup>

Toward the end of the seventeenth century, the colony had begun to loosen its decades-old immigration restrictions and allowed certain non-Anglicans to reside in Virginia.<sup>22</sup> Even so, colonial laws impeded the religious practice of non-Anglicans in many ways. Among other things, Virginia law prohibited dissenting congregations from owning property, and prohibited preaching that was inconsistent with Anglican doctrine.<sup>23</sup> Government authorities assessed taxes on every head of household and directed the revenue raised to the support of the Anglican Church alone; granted public land in every locality to the Anglican Church for the erection of a house of worship and a parsonage; required all houses of worship to obtain

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17. DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* 92 (2006)

18. IRVING BRANT, *JAMES MADISON: THE VIRGINIA REVOLUTIONIST* 30–32 (1941); HOLMES, *supra* note 17; RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 8–9 (1971).

19. KETCHAM, *supra* note 18, at 9.

20. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 *BYU L. REV.* 1385, 1418 (2004); HOLMES, *supra* note 17, at 22–23, 34.

21. SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY* 92–93, 98–99 (photo. reprint 1968) (1902).

22. COBB, *supra* note 21, at 98–99.

23. COBB, *supra* note 21, at 89–114; 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 209–10, 366–67 (1950); Michael W. McConnell, *Establishment and Disestablishment at the Founding; Part I: Establishment of Religion*, 44 *WM. & MARY L. REV.* 2105, 2163–65.

state licenses (which had often been refused to dissenting congregations); required marriages to be conducted by an ordained Anglican minister (or else the children of such a union would be deemed illegitimate at law); required official records of births and burials to be kept by local Anglican parish churches; and from time to time even punished some who preached or assembled for religious exercises without a license from the colonial government.<sup>24</sup>

The inequality of such a system meant that all dissenters were to some degree persecuted relative to Anglicans; yet, as Madison reached adulthood, members of one denomination would become the most persecuted of all: the so-called Separate Baptists.

#### A. *The Separate Baptists in Virginia*

Immigrants calling themselves Baptists had resided in Virginia for decades in small numbers, but the Great Awakening swelled their ranks, both in the northern colonies and in the South.<sup>25</sup> In addition, the Awakening created, or brought to light, theological divisions among Baptists, the most important of which were varying stances toward emotionalism in worship and a disagreement about whether to adhere to a confession of faith apart from the Bible.<sup>26</sup> Most American Baptists had previously subscribed, at least implicitly, to a confession dating from 1689 and later adopted in 1742 by the Baptist Association of Philadelphia.<sup>27</sup> But, a number of the new converts, moved by the themes of the Awakening preachers, leaned toward a more emotional revivalism and wished for no creed other than the Bible.<sup>28</sup> Many of these members traced their roots to the Sepa-

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24. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 3–5 (1st ed. 1986); McConnell, *supra* note 23, at 2118–19, 2164–66, 2175.

25. Regarding the Great Awakening and its effects in Virginia and elsewhere, see generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 100–04 (1986); MARK A. NOLL, NATHAN O. HATCH & GEORGE M. MARSDEN, *THE SEARCH FOR CHRISTIAN AMERICA* 48–66 (expanded ed. 1989); Esbeck, *supra* note 20, at 1416–20.

26. John Leland, *The Virginia Chronicle* (1790), in *THE WRITINGS OF JOHN LELAND* 105, 109–11 (photo. reprint 1969) (L.F. Greene ed., 1845); William L. Lumpkin, *Baptist Foundations in the South: Tracing through the Separates the Influence of the Great Awakening, 1754–87*, in *COLONIAL BAPTISTS AND SOUTHERN REVIVALS* 29 (Erwin Gaustad ed., 1980).

27. See Leland, *supra* note 26, at 104–05.

28. *Id.* at 105.



rate Congregational churches of New England, and became known as Separate Baptists.<sup>29</sup> The rest denoted themselves as Regular (or General) Baptists, and retained their existing Baptist associations and confession.<sup>30</sup>

The Baptists who populated Virginia before 1760, to the extent they were affiliated with one group or the other, were Regular Baptists.<sup>31</sup> Separate Baptists from New England moved south in the mid-1750s, eventually settling in North Carolina.<sup>32</sup> There they built an impressive following and, within just a few years, launched missionary efforts northward into southern and central Virginia.<sup>33</sup> By 1772 or shortly thereafter, Separate Baptists had spread all the way into the northern parts of the colony and counted as one of their converts William Marshall—uncle of the future Chief Justice John Marshall—who went on to become a Baptist preacher of some distinction.<sup>34</sup> Farther south, in Hanover County, another notable set of Baptist converts from this time period included the father, brother, and uncle of future statesman Henry Clay. All three of these men likewise became Baptist preachers, and there is even some evidence that Henry Clay's father John was imprisoned for his preaching.<sup>35</sup> The Separates grew far more quickly than the Regulars in Virginia, soon spreading their influence over much more territory in the colony.<sup>36</sup> The Regulars and Separates eventually united in 1787, but during the 1760s and 1770s, the division was trenchant.<sup>37</sup>

The Separates were especially distasteful to the Virginia authorities, probably for several reasons. Their commitment to emotionalism went even beyond that of most New Lights, and brought them sharp criticism for “enthusiasm” and the “convulsions” and “noise” produced in their assemblies.<sup>38</sup> Of course, their Baptist doctrine brought back unpleasant memories of the radical

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29. *Id.*

30. *Id.*

31. *Id.* at 104.

32. Lumpkin, *supra* note 26, at 28–30.

33. *See id.* at 33–49, 87–99.

34. *Id.* at 95–98; LEWIS PEYTON LITTLE, IMPRISONED PREACHERS AND RELIGIOUS LIBERTY IN VIRGINIA 197–98 (1938).

35. LITTLE, *supra* note 34, at 218–19.

36. Leland, *supra* note 26, at 105.

37. *Id.* at 113–14.

38. Leland, *supra* note 26, at 105; Lumpkin, *supra* note 26, at 67, 150.

Anabaptists of past centuries, opening old wounds by stressing that baptism was a total immersion in water and was not for infants or young children, but only for those who came to Christ through faith.<sup>39</sup> The average educational attainment among Separates was lower than among members of other denominations, so Anglicans were prone to brand them as ignorant and superstitious.<sup>40</sup> Separate Baptists had no strict rules setting educational or other qualifications for ministers and were notorious for encouraging even untrained farmers, mechanics, and other laborers to preach.<sup>41</sup> Their evangelistic fervor prompted them to itinerate, trying to win converts among all manner of other Christian groups; the Virginia authorities looked askance at such activities, believing a minister should be content to preach to his own flock at a fixed location.<sup>42</sup> Separates continually voiced strident public criticism of the religious establishment—especially its taxation of dissenters—and of particular establishment clergymen, who were often denounced as impious and unconverted in their hearts.<sup>43</sup> Baptists also posed a particular threat to the Virginia social order by preaching among the slaves and other social outcasts, baptizing them in large numbers, accepting them as equals in their assemblies, and even encouraging them to preach and take other positions in church leadership.<sup>44</sup> Most important for legal purposes, many Separates steadfastly refused to seek a license from the state for either their worship houses or their ministers, insisting that the state should have no authority over such spiritual matters.<sup>45</sup> Separate Baptists, perhaps more than any other denomination of the time, were known for insisting that law and religion should be kept separate.<sup>46</sup>

#### B. *Separate Baptist Activity near Madison's Home*

From the time Madison was about twelve years old, itinerant Baptist preachers, some of them Regular Baptists and some

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39. Lumpkin, *supra* note 26, at 17–18, 87–88. Other Anabaptist doctrines were widely denounced by the Separate Baptists, but such distinctions were often lost on outsiders.

40. *Id.* at 150–51.

41. *See id.* at 69, 150–51.

42. *Id.* at 110.

43. *Id.* at 110, 112, 118.

44. Lumpkin, *supra* note 26, at 107–08.

45. *Id.* at 110.

46. *Id.*

Separates, were holding meetings and making converts in Orange County, where he lived.<sup>47</sup> It did not take long for local government officials to react. The governmental persecutions of Separate Baptists in Virginia began in 1766 in Spotsylvania County, adjacent to Orange, when Madison was fifteen years old.<sup>48</sup> In fact, some of the worst of their confrontations with mobs and governing authorities occurred in counties near Orange.<sup>49</sup> Madison was intimately familiar with these events. Before the persecutions ended about ten years later, they would have a profound influence on his thought, confirming more deeply than ever his opposition to establishments of religion.<sup>50</sup>

It is striking that Madison's home county of Orange and its environs occupy such a central place in the history of the expansion and persecution of Separate Baptists in Virginia. Orange County was located in the north-central part of the colony.<sup>51</sup> Separate Baptists moved into Virginia's southern counties from North Carolina in the late 1750s, just as New Light Regular Baptists from New England were moving into Virginia's northern counties and itinerating around that region.<sup>52</sup> When, in 1763, a resident of Culpeper County, Allen Wyley, invited one of these Regular Baptist preachers from the north to come farther south and preach in Culpeper, a local mob seems to have gathered to prevent the preaching, causing the preacher to move on to the next county southward, Orange County, and preach to a crowd there, apparently unmolested.<sup>53</sup> Wyley was not to be deterred, however, and in 1765 turned southward for a minister.<sup>54</sup> In that year he brought Colonel Samuel Harris, a renowned Separate Baptist preacher from Pittsylvania County in southern Virginia, back to Culpeper. After Harris had preached one day in Culpeper, a mob once again gathered and threatened violence, so Harris also shifted into Orange County, perhaps upon Wyley's suggestion, and

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47. *Id.* at 91–92, 110.

48. *Id.* at 93.

49. *Id.* at 113 (explaining that imprisonment of preachers was frequent in Culpeper, Orange, Middlesex, Caroline, and Chesterfield counties).

50. See *infra* Part I.

51. See *Virginia County Boundaries based on a 1770 map*, LIBRARY OF CONG., available at [memory.loc.gov/ammem/collections/petitions/repecomp.html](http://memory.loc.gov/ammem/collections/petitions/repecomp.html).

52. See Lumpkin, *supra* note 26, at 90–91.

53. *Id.* at 91; see also LITTLE, *supra* note 34, at 44.

54. Lumpkin, *supra* note 26, at 92.

spent “many days” preaching and exhorting there.<sup>55</sup> Upon his departure a group of Baptists continued to meet “almost daily” in Elijah Craig’s tobacco house in Orange County; this group was led by Elijah and his brother Lewis Craig, who lived in the adjacent county of Spotsylvania.<sup>56</sup> The group soon felt itself at odds with the Regular Baptists and aligned itself with the Separates, inviting Harris and influential Separates from North Carolina to come preach in Orange.<sup>57</sup> In 1766 these preachers arrived, preached to “large congregations” in Orange County, and then moved on to preach in Spotsylvania, Caroline, and neighboring counties as they returned home.<sup>58</sup>

Lewis Craig must have been greatly encouraged by these visits and began to preach more often himself. Later that year Craig was preaching in his home county of Spotsylvania when he was charged by county officials with the crime of preaching without a license.<sup>59</sup> Craig’s prosecution appears to be the first brought against a Separate Baptist in Virginia—and again, this county was “next door” to Orange County, the home of the now-teenaged James Madison.<sup>60</sup> The grand jury in Craig’s case included a young man named John Waller, known locally as “Swearing Jack” Waller, who had a reputation not only for profanity but for vigorously opposing the Baptists.<sup>61</sup> Waller was so affected by Craig’s demeanor and words in the legal proceedings, however, that he determined to know more about Craig’s religion and began to attend Baptist meetings.<sup>62</sup> By 1767, when the Separate preachers from the South again arrived in Orange County, they baptized Waller there, and also took the opportunity to form the Upper Spotsylvania Church, the first Separate Baptist Church in Virginia located north of the James River.<sup>63</sup> The church seems to have been left in the pastoral care of Lewis

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55. *Id.*

56. *Id.* at 92, 94; ROBERT B. SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA 8–10, 414–15 (Richmond, Robert B. Semple 1810) [hereinafter SEMPLE, HISTORY (1810)]; LITTLE, *supra* note 34, at 45–47, 85–86, 131.

57. Lumpkin, *supra* note 26, at 92–93.

58. *Id.*; SEMPLE, HISTORY (1810), *supra* note 56, at 22–23.

59. Lumpkin, *supra* note 26, at 93.

60. *Virginia County Boundaries based on a 1770 map*, *supra* note 51.

61. Lumpkin, *supra* note 26, at 93.

62. *Id.* at 93–94.

63. *Id.* at 94; *see also* SEMPLE, HISTORY (1810), *supra* note 56, at 10, 25.

Craig.<sup>64</sup> In the meantime, John Waller, reputed to have an extraordinary gift for emotive preaching, almost overnight became one of the best-known Separate Baptist preachers in the region.<sup>65</sup> In Orange County, meanwhile, the Craig brothers joined with others in that same year to build the Mountain Run meeting house, with a new convert named Nathaniel Saunders shortly appointed as its first pastor.<sup>66</sup> Whether or not Madison personally knew these men at this time, he would certainly know them later.<sup>67</sup>

By early 1767 Saunders and his flock in Orange County had made waves among those of the established church.<sup>68</sup> The emerging conflict is documented by a letter written to Saunders in February by a Mr. William Green, who may have been a justice of the Culpeper County court.<sup>69</sup> The lengthy letter, which seems on the whole to seek reconciliation between Baptists and Anglicans, refers to “late disturbances which have happened between your congregation, and some of the Members of our Church.”<sup>70</sup> Green says he was told “that some of your Sect were the Aggressors, by Abusing the Minister of this Parish, and uttering many indecent and scandalous Invectives & Reflections against the Church, and its members.”<sup>71</sup> Apparently Green himself had not been party to the disputes but felt obligated to

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64. *Id.* at 95.

65. *Id.* at 94–95, 100; LITTLE, *supra* note 34, at 53–56.

66. LITTLE, *supra* note 34, at 77, 88; SEMPLE, HISTORY (1810), *supra* note 56, at 177.

67. For example, Elijah Craig, as the owner of a tobacco house in Orange County, was a business associate of the Madisons. He may also have been a good friend; he seems to have carried letters for Madison on occasion and conveyed news to the family. See Letter from J. Madison, Jr. to James Madison, Sr. (June 5, 1784), reprinted in 8 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 56, 56 (Robert A. Rutland et al. eds., 1962–91) [hereinafter MADISON PAPERS: CONGRESSIONAL SERIES]; Letter from Madison to James Madison, Sr. (June 15, 1784), reprinted in *id.* at 79, 79–80; Editorial Note to Letter from J. Madison Jr. to Caleb Wallace (Aug. 23, 1785), in *id.* at 357 n.1 and accompanying text; Letter from Caleb Wallace to Madison (Sept. 25, 1785), reprinted in *id.* at 369. Further, in a 1788 letter to Madison, Joseph Spencer reminded Madison that Nathaniel Saunders was one of the three leading Baptists in Orange County. Letter from Joseph Spencer to Madison (Feb. 28, 1788), reprinted in 10 MADISON PAPERS: CONGRESSIONAL SERIES, *supra*, at 540, 541.

68. LITTLE, *supra* note 34, at 78.

69. *Id.* at 78–82.

70. Letter from William Green to Nathaniel Saunders (Feb. 7, 1767), reprinted in *id.* at 78.

71. *Id.*

urge restraint upon Saunders and his congregation and also to issue a warning:

I know not whether the Informations I have had, are true or not: But if they are, worse could not be said of the Pagans & Idolators, who sacrificed their Children to Moloch, than has been said by some of your Society, concerning the Church and its Members; the Ministers not excepted. For my part, I think Men who will behave in such a Manner, cannot reasonably expect to be Treated with common decency or respect . . . . And I doubt not but you might enjoy your Religion in Peace & Quietness, if you would forbear to concern yourselves with those who are of the Church; who are Christians as well as yourselves . . . .<sup>72</sup>

It is uncertain whether this letter had any effect in moderating the Baptists' tone, but it is certain that they did not view members of the Anglican Church as being "Christians as well as [them]selves," and many felt they would be betraying their faith to keep silent about it. Additionally, Baptists found it difficult to comply with the licensing laws.<sup>73</sup> They were often disallowed licenses for preaching and meeting even when they applied for them,<sup>74</sup> and in any event it was impossible to obtain a license for every place one might feel a spontaneous call to preach or exhort. Thus, the peace Mr. Green hoped for did not materialize,<sup>75</sup> and the stage was set for dire conflict between the governing authorities, who necessarily defended the laws protecting the church establishment, and the Baptists.

### C. *Persecution of Separate Baptists*

The wave of persecutions that soon overtook Separate Baptists was almost exclusively local; the central colonial government took little official action regarding Baptists, one way or the other. But a number of local officials, under pressure from the Anglican clergy, felt their tolerance stretch beyond the breaking point and made it a special project to crush the Separate Baptists within their own counties. Orange County authorities were among the earliest to act. A grand jury convened in Orange County in late May of 1768 charged seven Separate

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72. *Id.* at 80–81.

73. Lumpkin, *supra* note 26, at 110.

74. *Id.*

75. LITTLE, *supra* note 34, at 91.

Baptists (including a third Craig brother) with “absenting themselves from the parish church.”<sup>76</sup> Some of these men later were allowed to exonerate themselves in the Orange County court by swearing the oath of loyalty prescribed in the Toleration Act of 1689.<sup>77</sup> Interestingly, they were joined by a member of the Upper Spotsylvania Church named Joseph Spencer,<sup>78</sup> who would later become a friend of James Madison.<sup>79</sup> Later that same summer, in late July of 1768, Elijah Craig, Allen Wyley, and two other Separate Baptists were convicted of unauthorized assembly, vagrancy, and other charges in the Orange County court.<sup>80</sup> The result seems to be that Allen Wyley and Elijah Craig, at least, would not promise to desist and were accordingly jailed for over two weeks.<sup>81</sup> Evidence also suggests that a justice of the peace in Orange County, who was ousted from his seat on the court in that year, may have been removed in part because he was “a promoter of schisms and particularly of the sect called Anabaptists.”<sup>82</sup>

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76. *Id.* at 91–92; see also Rhys Isaac, *The Rage of Malice of the Old Serpent Devil*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 140 (Merrill D. Peterson & Robert C. Vaughan eds., 1988) [hereinafter *VIRGINIA STATUTE*].

77. Isaac, *supra* note 76, at 141.

78. LITTLE, *supra* note 34, at 92.

79. See, e.g., Letter from Joseph Spencer to James Madison (Feb. 28, 1788), reprinted in *10 MADISON PAPERS: CONGRESSIONAL SERIES*, *supra* note 67, at 540 (showing that Madison and Spencer had become friends by the beginning of 1788).

80. LITTLE, *supra* note 34, at 135–36.

81. *Id.* at 131–36.

82. Order of Orange County Court (1768), quoted in WILLIAM WALLACE SCOTT, *A HISTORY OF ORANGE COUNTY, VIRGINIA* 50 (1907); see also LITTLE, *supra* note 34, at 92–93. The ousted justice was named Elijah Morton. Interestingly, James Madison, Sr., another Orange County justice, is mentioned in this order, and he must have given evidence in the case against Morton—although apparently not in connection with the religious charges. Apart from Morton’s religious views, the court order specifies that a separate reason for Morton’s removal was that he would not agree to Madison’s request to help make a quorum of justices to try a certain debtor’s case. Yet when Madison got another justice to accompany him to court to make the quorum, Morton showed up after all and sat on the case. The reason Morton had given for not originally agreeing to go was that one of the parties in the case did not want it tried that term. The implication in the court order is that Morton was not prepared to dispense disinterested justice in the case according to law. The order cited this as the first reason he was ousted, and his “Anabaptist” sentiments as the second reason. If this court order is evidence of a persecution of Morton for his religious beliefs, this seems to be the only evidence connecting either of the Madisons, father or son, with any persecutions against Baptists, whether in Orange County or elsewhere. On the contrary, the Baptists seemed to view the Madisons as friends and protectors. See BRANT, *supra* note 18, at 70, 410–11 n.11. And of course in the Morton

Simultaneously, the authorities in neighboring Spotsylvania County also lashed out. In early June, the sheriff appeared at the Upper Spotsylvania church and ordered five Separate Baptist preachers, including John Waller and Lewis Craig, to appear in court on the charges of disturbing the peace and "preaching the gospel contrary to law."<sup>83</sup> At court two days later, the prosecuting attorney argued that "these men are great disturbers of the peace: they can not meet a man upon the road, but they must ram a text of scripture down his throat!"<sup>84</sup> A persistent myth has it that Patrick Henry represented the men in court, but the earliest sources indicate that Henry was not present<sup>85</sup> and that the defense argument was presented by Waller himself.<sup>86</sup> His protest, however, was unavailing. The historical documents somewhat differ as to how many of the men went to jail, but the number was at least three of the five.<sup>87</sup> Two of the preachers (who were visiting from farther south) may have been released upon agreeing to a stipulation that they would not preach again in the county for a year and a day;<sup>88</sup> however, Waller, Craig, and the fifth preacher were residents of Spotsylvania and could not agree to the offer, so they (and perhaps the other two as well) were led off to prison, singing hymns as they went.<sup>89</sup>

This was only the beginning of Baptist troubles in Orange County and its environs. In May of the following year, as Madison was preparing to head off to New Jersey for college, a grand jury in Orange County presented two Baptists for "preaching from place to place contrary to the Law and without License."<sup>90</sup> Baptist sources record early anecdotal evidence that one of the men, Andrew Tribble, preached for a Baptist congregation in nearby Albemarle County, where Thomas Jefferson lived, and that around this time Jefferson (who had not

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order, the elder Madison is mentioned only in connection with the non-religious reason for ouster, not the religious reason.

83. COBB, *supra* note 21, at 113; Isaac, *supra* note 76, at 141; LITTLE, *supra* note 34, at 93–96; Lumpkin, *supra* note 26, at 94.

84. COBB, *supra* note 21, at 113; Lumpkin, *supra* note 26, at 94.

85. LITTLE, *supra* note 34, at 106–27.

86. 2 DAVID BENEDICT, A GENERAL HISTORY OF THE BAPTIST DENOMINATION IN AMERICA, AND OTHER PARTS OF THE WORLD 65 (1813); SEMPLE, HISTORY (1810), *supra* note 56, at 15.

87. Lumpkin, *supra* note 26, at 94.

88. See LITTLE, *supra* note 34, at 99; Lumpkin, *supra* note 26, at 94.

89. LITTLE, *supra* note 34, at 93–98; Lumpkin, *supra* note 26, at 94.

90. LITTLE, *supra* note 34, at 141.



yet met James Madison) attended some of Tribble's meetings and even invited Tribble to dinner at his home.<sup>91</sup> Madison did not likely know Tribble or the other Baptists but may have been generally aware of some of these actions of the Orange County court, where his father served from time to time as a justice.<sup>92</sup> At any rate, his information in future months would be more limited: he left for college shortly thereafter and arrived at Princeton probably late in July.<sup>93</sup> While he was away, the Baptist numbers grew. Supplementing the Mountain Run church pastored by Nathaniel Saunders, the Baptists constituted another church in Orange County late in 1769: the Blue Run church, where Elijah Craig served as pastor.<sup>94</sup> During Madison's college years, Nathaniel Saunders, Elijah Craig, and other Orange County Baptists were repeatedly harassed and threatened, by both governmental and private antagonists.<sup>95</sup> The persecutions spread to other counties as well, so that before Madison had finished college, "itinerant preachers in at least twenty cases had been bound over to keep the peace, and having refused to give bonds, were remanded to county jails."<sup>96</sup>

One of the most extreme altercations, however, occurred in the late spring of 1771, as Madison was embarking upon his final term before graduation.<sup>97</sup> On a Sunday in late April, John

91. *Id.* at 142.

92. See BRANT, *supra* note 18, at 410–11 n.11.

93. See *id.* at 81–82; Editorial Note to Letter from Madison to Reverend Thomas Martin (Aug. 10, 1769), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 44 n.8.

94. LITTLE, *supra* note 34, at 144; ROBERT BAYLOR SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA 240 (G.W. Beale ed., rev. ed. Pitt & Dickinson 1894) [hereinafter SEMPLE, HISTORY (1894)].

95. See, e.g., LITTLE, *supra* note 34, at 204–08 (Saunders threatened by letters from a sheriff, or some other analogous "officer of the law"); SEMPLE, HISTORY (1810), *supra* note 56, at 415–16 (Elijah Craig jailed in Culpeper County and in Orange County).

96. RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740–1790 193 (1982).

97. The summer-fall term at the College of New Jersey ended with the commencement ceremony for graduates, on the last Wednesday in September, and began twenty-one weeks before that date. BRANT, *supra* note 18, at 79. In 1771, then, which was the year of Madison's graduation, the term began on May 1 and ended on September 25. There is no reason to think that Madison arrived late for the term, and in fact he must have been in Princeton at or near the beginning of the term, as evidenced by a letter he wrote from Princeton to a Philadelphia linen draper on May 17, in which he refers to a letter written shortly before to the same recipient. Letter from James Madison to John Boyle (May 17, 1771), reprinted in 1 MADISON PAPERS, CONGRESSIONAL SERIES, *supra* note 67, at 60. The trip from Montpelier to Princeton in April would have taken about ten days even without

Waller was preaching in Caroline County, adjacent to his home county of Spotsylvania and two counties removed from Orange. He had mounted a stage for this purpose and was leading the congregation in singing when the Anglican parson of the parish, Reverend Morton, rode up to the gathering, accompanied by his clerk and the county sheriff.<sup>98</sup> While the sheriff stood at some distance, Morton rode directly up to the stage with his clerk, brandished his horse whip, “and with his whip tumbled over the leaves of the book as Mr. Waller was giving out the psalm.”<sup>99</sup> Waller nevertheless finished the song and then began to pray aloud—whereupon, according to eyewitness recollections gathered within a year of the occurrence,

his reverence Morton run the but end of his whip into Waller’s mouth and silenced him. After that the clerk . . . pulled him down and dragged him to the sheriff who stood at a distance, the sheriff immediately received him and whipped him in so violent a manner (without the ceremony of a trial) that poor Waller was presently in a gore of blood and will carry the scars to his grave. . . . However, Waller sore and bloody as he was, remounted the stage & preached a most extraordinary sermon . . . .<sup>100</sup>

This encounter was unusual for its violence, and also because the authorities acted without conducting a trial. Still, the malice was all too typical, as was the involvement of the established clergy. Although not all Anglican parsons supported the persecutions of Baptists, vivid tales like Waller’s probably served, in the minds of many, to link the establishment clergy with the persecutors.

Events such as this, far from silencing the Baptists, seemed to energize them. Beginning just two weeks later on May 11, near Elijah Craig’s Blue Run church in Orange County, Separate Baptists from all over Virginia held the first meeting of their

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lingering at any stops along the way and without allowing for any delays which the rainy season might have occasioned. KETCHAM, *supra* note 18, at 25. Therefore, it seems plain that Madison had already left Orange County by the last Sunday in April, which is the most probable date of Waller’s whipping in Caroline County.

98. LITTLE *supra* note 34, at 229.

99. *Id.*

100. *Id.*; see also ISAAC, *supra* note 96, at 177; Lumpkin, *supra* note 26, at 97–98.

new General Association.<sup>101</sup> They held the outdoor meeting from May 11 through 15.<sup>102</sup> Between four and five thousand participants attended on Sunday alone, forming what Rhys Isaac estimates was probably the biggest mass gathering ever assembled in Virginia to that date.<sup>103</sup> One of the five Baptist preachers addressing the crowd on that auspicious Sunday was William Marshall, uncle of the future Chief Justice John Marshall.<sup>104</sup> Irving Brant, a leading biographer of Madison, is surely correct to find significance in the fact that this meeting was held “without molestation, on Blue Run, within a few miles of the Madison estate.”<sup>105</sup> The location for this Separate Baptist meeting, held in the Madisons’ neighborhood during the thick of persecution, must have been carefully chosen; at any rate, the Madisons must not have been viewed as enemies.

## II. THE EDUCATION OF JAMES MADISON

### A. *Boarding School, Tutoring, and College*

In fact, the upbringing and family of James Madison, Jr., give some reason to believe that he was already forming distaste for the religious establishment and would have been sympathetic to those whom the establishment persecuted. In an age in which vestry and clergy were pitted against each other—as illustrated in the popular mind by the celebrated Parson’s Cause<sup>106</sup>—James Madison’s father was every bit a vestryman.<sup>107</sup>

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101. ISAAC, *supra* note 96, at 192; Isaac, *supra* note 76, at 172.

102. ISAAC, *supra* note 96, at 172.

103. Isaac, *supra* note 76, at 142; *see also* ISAAC, *supra* note 96, at 192; Journal of Elder John Williams (May 12, 1771), *quoted in* SEMPLE, HISTORY (1894), *supra* note 94, at 490.

104. Journal of Elder John Williams (May 12, 1771), *quoted in* SEMPLE, HISTORY (1894), *supra* note 94, at 490; *see also* LITTLE, *supra* note 34, at 197–98.

105. BRANT, *supra* note 18, at 70.

106. The Parson’s Cause was a highly publicized case filed in 1763, in which an Anglican clergyman sued his vestry in a Virginia county court to recover back wages allegedly owed him because the vestry had paid him in currency rather than tobacco during a tobacco shortage, as tobacco prices were rising sharply. Patrick Henry came to prominence in this case as the attorney for the vestry. Henry painted the case as a dispute between greedy ecclesiastics and hardworking poor laypeople. *See generally* COBB, *supra* note 21, at 108–11; ISAAC, *supra* note 96, at 144–46; FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 191–94 (2003); NANCY L. RHODEN, REVOLUTIONARY ANGLICANISM:

In a time when the forces of revolution decried everything that smacked of centralized British power, the established clergy in Virginia answered to the Bishop of London, and ultimately to the King; the Madison family, by contrast, would stand squarely against the King and his bishops and with the forces of Virginian independence.

Still, the Madisons did not abandon the Church of England; they apparently attended the parish church as required by law and sought the nearest Anglican parson for family funerals.<sup>108</sup> But the Madison's attitude toward the established church may be seen in their choice of tutors for young James. His elementary education was rather informal and may have been overseen by his grandmother.<sup>109</sup> From ages eleven to sixteen, he was not tutored by the parish rector but instead traveled to King and Queen County to enroll in the boarding school of Donald Robertson, a Scottish Presbyterian minister who had been trained at the University of Edinburgh.<sup>110</sup> In 1767, however, a new Anglican parson, Thomas Martin, was appointed to the Madisons' parish, and at that point Madison was called home to be tutored by Martin.<sup>111</sup> In fact, Madison's father hired Martin to be the tutor for all the children of the family.<sup>112</sup> This sudden change in educational plan is curious, until one notices that Thomas Martin was not the stereotypical Anglican parson. Thomas and his brother Alexander, who himself occasionally visited Montpelier, were both Anglicans who had shunned the College of William and Mary, the school founded by the religious establishment, to attend the college the New Light Presbyterians had established at Princeton, known today as Princeton University but at that time named the College of New Jersey.<sup>113</sup> Alexander later became governor of North Carolina, and in that capacity publicly defended the rights of religious dissenters.<sup>114</sup> Both brothers had known Samuel Davies, a

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THE COLONIAL CHURCH OF ENGLAND CLERGY DURING THE AMERICAN REVOLUTION 33–34 (1999); STOKES, *supra* note 23, at 367–68.

107. See BRANT, *supra* note 18, at 51.

108. See *id.* at 51–53.

109. See *id.* at 56–58.

110. See *id.* at 57–58; KETCHAM, *supra* note 18, at 19–21.

111. See BRANT, *supra* note 18, at 65.

112. See *id.*

113. *Id.* at 69–71.

114. *Id.* at 70–71

prominent New Light Presbyterian minister, when Davies served as president of Princeton, and both praised the school highly.<sup>115</sup> Reverend Thomas Martin was no persecutor, nor would he staunchly defend the legal establishment of religion. As Ralph Ketcham has observed, Martin was little like most of the indolent, parochial Anglican rectors and tutors in Virginia.<sup>116</sup> Madison studied under him for two years, until the time came to choose a college.<sup>117</sup>

Most Virginia boys in Madison's advantaged circumstances attended William and Mary, so here again his educational path stands as a striking contrast. Why Princeton? Why New Jersey rather than Virginia? Why a Presbyterian school rather than an Anglican school? In his old age, Madison explained the choice by referring to the unhealthiness of the Williamsburg climate for those, like himself, who had lived in a mountainous region; but he also stressed that the choice was made "by the advice of Mr. Martin, and his brother Alexander, both of whom had been educated at [Princeton]," and mentioned too that "Doctor Witherspoon was then President" of that college.<sup>118</sup> Surely, the advice of the Martin brothers had not centered on the health effects of the New Jersey weather. They were attached to Princeton because of a different kind of atmosphere that prevailed there, a vital energy that was now on the rise with the advent of Dr. John Witherspoon.

Dr. Witherspoon, like Donald Robertson, was a Presbyterian minister from Scotland.<sup>119</sup> Witherspoon had earned a doctorate in divinity and had published several tracts that had helped establish his reputation as an evangelical theologian.<sup>120</sup> He was widely known in America for a satirical pamphlet that criticized immoral clergymen who put on the airs of fine gentlemen but neglected orthodox Christianity as taught by the Scriptures.<sup>121</sup> This unflattering portrait of the established clergy rang true to the ears of many in Virginia and elsewhere. Witherspoon's arrival at Princeton in 1768 boosted the reputation of

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115. BRANT, *supra* note 18, at 70–71.

116. KETCHAM, *supra* note 18, at 21.

117. *Id.*

118. James Madison, *Autobiography*, in Douglass Adair, *James Madison's Autobiography*, 2 WM. & MARY Q. 191, 197 (1945) [hereinafter Adair].

119. See BRANT, *supra* note 18, at 73.

120. *Id.*

121. *Id.* at 74.

the school, which could now position itself as thoroughly Presbyterian and evangelical, and yet a growing center of serious scholarship as well.<sup>122</sup> This hopeful outlook stood in sharp contrast with the reputation of William and Mary, which had recently suffered from public spats among its faculty and governors and was presided over by an Anglican clergyman named James Horrocks who, according to rumor, wanted badly to be named the first American bishop of the Church of England.<sup>123</sup> Horrocks died in 1771.<sup>124</sup> John Camm, another prominent parson involved in lawsuits with the vestry and an outspoken Loyalist supporter of an American bishopric,<sup>125</sup> replaced him.<sup>126</sup> Horrocks and Camm presided over a mostly Loyalist faculty at William and Mary.<sup>127</sup> President Witherspoon, by contrast, was a rebel,<sup>128</sup> soon to be named a delegate to the Second Continental Congress in 1776<sup>129</sup> and the only active clergyman who signed the Declaration of Independence.<sup>130</sup> Witherspoon's Princeton stood for liberty: from church hierarchies and from British rule,<sup>131</sup> two authorities widely supported at William and Mary. It is easy to see which of these schools held more appeal for the Madisons in 1769.<sup>132</sup>

Madison matriculated at Princeton in the summer of 1769,<sup>133</sup> graduated in September 1771,<sup>134</sup> and pursued additional studies there until the spring of 1772,<sup>135</sup> when he returned to Mont-

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122. *See id.* at 75.

123. 1 WILLIAM C. RIVES, HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 11 (Boston, Little, Brown & Co. 1859).

124. 3 THE VIRGINIA HISTORICAL REGISTER, AND LITERARY NOTE BOOK 197 (William Maxwell ed., Richmond, MacFarlane & Fergusson 1850).

125. *See* J. DAVID HOEVELER, CREATING THE AMERICAN MIND: INTELLECT AND POLITICS IN THE COLONIAL COLLEGES 286 (2002) ("Camm also issued *An Appeal* to the southern clergy to ignite interest in the bishop cause.").

126. *Id.* at 287.

127. *See id.*

128. *See* BRANT, *supra* note 18, at 74–75.

129. *Id.* at 75.

130. *See* HOEVELER, *supra* note 125, at 309; *see also* BRANT, *supra* note 18, at 74–75.

131. *See* BRANT, *supra* note 18, at 73–75.

132. *See id.* at 68–75; *see also* Adair, *supra* note 118, at 193 n.9 (agreeing with Irving Brant that although the "unhealthful climate" of Williamsburg might have been a factor in Madison's decision to attend Princeton, "of equal importance was President Horrocks' reputation as a High Church Tory").

133. *Id.* at 72.

134. *See id.* at 78–79.

135. *See id.* at 79.

pelier. Witherspoon's presidency continued throughout this period and far beyond, and from the very beginning of his tenure Princeton became known widely, among its enemies as well as its friends, for its revolutionary and anti-authoritarian sympathies.<sup>136</sup> In the graduation exercises of 1768, student orators asserted the duty of risking one's life in defense of civil liberties.<sup>137</sup> In 1769, the school awarded an honorary Master of Arts degree to John Hancock, the Boston merchant who had become a symbol of American defiance when he was arrested that summer by British authorities for refusing to pay British taxes on the goods he brought into port.<sup>138</sup> In the summer of 1770, when New York merchants broke their earlier resolution not to import British goods and wrote a letter urging Philadelphia merchants to give in as well, Princeton students gathered in the college yard and burned a copy of the letter.<sup>139</sup> That fall, the graduation ceremony was marked by an oration delivered by Witherspoon's own son, affirming the proposition that "[s]ubjects are bound and obliged by the law of nature, to resist their king, if he treats them cruelly or ignores the law of the state, and to defend their liberty."<sup>140</sup> Other students delivered addresses praising the non-importation agreements and advancing the idea that all men are endowed with natural rights.<sup>141</sup> All of the graduates of 1770 eschewed British imports and wore only American cloth at the ceremony, in a widely published stance on principle.<sup>142</sup> And in the fall of the next year, Madison's own graduation featured a student oration entitled "The Rising Glory of America."<sup>143</sup> Critics blasted Witherspoon and his College of New Jersey for their impudent and offensive political contentions, but Madison's accounts of these events glow with pride at the patriotism exhibited by the school and his classmates.<sup>144</sup>

Even putting aside this evidence, however, Madison's developing sympathies during this period become evident when one

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136. *See id.* at 74–75, 102.

137. BRANT, *supra* note 18, at 92–93.

138. *Id.* at 93.

139. *Id.* at 91.

140. *Id.* at 94.

141. *Id.*

142. *Id.* at 91–92.

143. *Id.* at 96–97.

144. *Id.* at 91, 101–02.

examines his extracurricular activity at Princeton, the bulk of which involved membership and writings for a student group styling itself the American Whig Society.<sup>145</sup> This group was founded in June 1769,<sup>146</sup> just before Madison matriculated. Their archrivals on campus became the Cliosophic Society, founded one year later; the battles or “wars” that took place between them were waged on paper, in the form of satirical poems or orations that were read aloud (but usually not by the author) in an all-school assembly.<sup>147</sup> Madison became a principal contributor to these derisive volleys, often lampooning Clio opponents as “Tories” whose outward religious affectations cloaked debauchery or cowardice.<sup>148</sup> These episodes tell us something about Madison’s predispositions, although the slanders against his Clio classmates were undoubtedly exaggerated for comic effect.

But the name the American Whigs chose for their society is perhaps the most telling of all. “The American Whig” was the pen name used by William Livingston, a well-known Presbyterian lawyer and essayist in New York.<sup>149</sup> As it happened, Livingston moved to New Jersey just after Madison’s graduation from Princeton, shortly became the New Jersey governor and later attended the Philadelphia Constitutional Convention with Madison, where both signed the U.S. Constitution.<sup>150</sup> When the American Whig Society chose its name, however, Livingston was known primarily for his repeated public attacks on establishments of religion, and particularly the Anglican establishment.<sup>151</sup> His first public attention had come from editing and writing during the 1750s for a journal of opinion called the *Independent Reflector*, in which he had strenuously opposed Anglican attempts in New York to control King’s College (the forerunner of Columbia University), a new state-funded school of higher learning.<sup>152</sup> Anglicans argued that the Church of England, hav-

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145. *See id.* at 79.

146. *See id.* at 80.

147. *Id.* at 79–80.

148. *See id.* at 84, 86 (describing Madison’s lampooning of the Clios as Tories as “relentless false labeling”).

149. *Id.* at 84.

150. THEODORE SEDGWICK, A MEMOIR OF THE LIFE OF WILLIAM LIVINGSTON 155–56, 204–05, 416–20 (1833).

151. BRANT, *supra* note 18, at 84–85.

152. *Id.*



ing been established by law as the official church of New York, should control the new college funded by the state.<sup>153</sup> Livingston argued vigorously that the Church of England had never been established by law in New York; that Anglican control of this college would in itself be an impermissible establishment of religion, because the college was founded with public money; and that even the smallest such attempt to establish religion should be opposed, as limited establishments readily open the door to more pervasive, intolerant establishments.<sup>154</sup> His writings in the *Reflector* were known widely enough to be recited almost twenty years later in public declamations by Princeton students during Madison's undergraduate years.<sup>155</sup>

Undoubtedly the American Whigs' choice of name was most influenced by Livingston's more recent attacks on establishments, which had captured widespread public attention during the year before the society was formed.<sup>156</sup> The buzz was about a series of popular articles Livingston had written for the *New York Gazette*, this time adopting the pseudonym "The American Whig."<sup>157</sup> In these passionate essays he opposed the creation of an American bishop of the Church of England, yet another project he viewed as an establishment of religion by law and a dangerous step toward religious and political tyranny.<sup>158</sup> The American Whig Society at Princeton, then, had chosen a name that connoted, first and foremost, uncompromising opposition to establishments of religion, even in supposedly minimal and tolerant forms.

Despite ill health, Madison planned to stay in Princeton for a few more months after his graduation, doing readings in history, moral philosophy, and divinity, and perhaps learning a bit of Hebrew as well.<sup>159</sup> He continued there probably until the end of the term, in late March or early April of 1772, at which

153. CURRY, *supra* note 25, at 121–24.

154. *Id.* See William Livingston, Number XVIII: A Continuation of the same Subject (Mar. 29, 1753) (continuing from a previously printed paper entitled "Remarks on Our Intended College"), reprinted in *THE INDEPENDENT REFLECTOR*, 178, 178–83 (Milton M. Klein ed., 1963).

155. BRANT, *supra* note 18, at 85.

156. CURRY, *supra* note 25, at 122.

157. ARTHUR LYON CROSS, *THE ANGLICAN EPISCOPATE AND THE AMERICAN COLONIES* 195–97 (1902).

158. See BRANT, *supra* note 18, at 84–85; CURRY, *supra* note 25, at 127–29; see also CROSS, *supra* note 156, at 195–99.

159. See BRANT, *supra* note 18, at 78–79, 109–11.

time he returned home to Montpelier.<sup>160</sup> He had hoped to convince his father to allow him to return to Princeton for the upcoming summer and fall as well.<sup>161</sup> Apparently, though, his father did not acquiesce, likely because of concerns about Madison's poor health and the educational needs of Madison's younger siblings, who had needed a new tutor since the sudden death of the Madisons' esteemed parson, Thomas Martin.<sup>162</sup> By April or early May 1772, then, Madison regretfully left Princeton for good. Except for a summer trip for his health, to Berkeley Warm Springs in western Virginia,<sup>163</sup> Madison resided at the family home in Orange County, tutoring his siblings in "some of the first rudiments of literature" but also finding time to continue his studies on his own, when suitable reading materials were available, and to maintain correspondence with college friends, notably William Bradford of Philadelphia.<sup>164</sup>

B. *Philosophy and Correspondence at Montpelier*

The earliest extant letter from Madison to Bradford, written in November 1772, shows Madison to be preoccupied with worries about his health, so much so that he anticipated an early death. His outlook is philosophical as he counsels Bradford to follow his example and adopt an eternal perspective in planning for the rest of his life: "[A] watchful eye must be kept on ourselves," Madison warns, "lest while we are building ideal monuments of Renown and Bliss here we neglect to have our names enrolled in the Annals of Heaven."<sup>165</sup> The religious undertones in Madison's writing sound curious when compared to the writings of Madison and his American Whig classmates at Princeton, who were more likely than not to criticize or lampoon their Cliosophic peers for their "religious enthusiasm."<sup>166</sup> Nevertheless, several of the Whigs went on to become devout clergymen, and the correspondence between Madison and

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160. *Id.* at 109.

161. Letter from James Madison, Jr. to James Madison, Sr. (Oct. 9, 1771), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 68, 68–69.

162. BRANT, *supra* note 18, at 122–23.

163. *Id.* at 108; Letter from William Bradford to James Madison (Oct. 13, 1772), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 72, 72.

164. See Letter from James Madison, Jr. to William Bradford (Nov. 9, 1772), reprinted in MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 74, 74–76.

165. *Id.* at 75.

166. See BRANT, *supra* note 18, at 114–15.

Bradford shows that religious belief itself was not an object of their scorn. On the contrary, fellow Whig Bradford (who graduated in September 1772) stayed at Princeton to study “History and the Science of Morals,” a choice that Madison praised, because those subjects

seem to be of the most universal benefit to men of sense and taste in every post and must certainly be of great use to youth in settling the principles and refining the Judgment as well as in enlarging Knowledge & correcting the imagination. I doubt not but that you design to season them with a little divinity now and then, which like the philosopher’s stone, in the hands of a good man will turn them and every lawful acquirement into the nature of itself, and make them more precious than fine gold.<sup>167</sup>

Hence Madison and Bradford valued religion, and even the study of divinity, so long as these were handled knowledgeably and with good judgment—that is, by a good man. In subsequent letters the two also praised the ministerial calling. In an exchange in the fall of 1773, Bradford avers that he would certainly enter the clergy if he could “think [him]self properly qualified for the ministry,” because “in [his] opinion a divine may be the most useful as well as the most happy member of society.”<sup>168</sup> Madison expresses regret that Bradford feels unqualified for the ministry, but concurs in Bradford’s esteem for the clerical office and the study of divinity:

I can only condole with the Church on the loss of a fine Genius and persuasive Orator. I cannot however suppress thus much of my advice on that head that you would always keep the Ministry obliquely in View whatever your profession be. This will lead you to cultivate an acquaintance occasionally with the most sublime of all Sciences and will qualify you for a change of public character if you should hereafter desire it. I have sometimes thought there could not be a stronger testimony in favor of Religion or against temporal Enjoyments even the most rational and manly than for men who occupy the most honorable and gainful departments and are rising in reputation and wealth, publicly to declare their unsatisfactoriness by becoming fervent Advo-

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167. Letter from James Madison Jr. to William Bradford (Nov. 9, 1772), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 74, 75.

168. Letter from William Bradford to James Madison (Aug. 12, 1773), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 90, 91.

cates in the cause of Christ, & I wish you may give in your Evidence in this way. Such Instances have seldom occurred, therefore they would be more striking and would be instead of a "Cloud of Witnesses["].<sup>169</sup>

Madison goes on in the same letter to recommend the study of law over "Merchandize" and "Physic," in light of Bradford's talents, knowledge, and interests. He notes that law "is a sort of General Lover that woos all the Muses and Graces," which "cannot be said so truly of commerce and Physic."<sup>170</sup> Beyond this, however, he does not praise the intrinsic merits of legal study or seem especially interested in law himself.<sup>171</sup> When at the end of the letter he tersely mentions economic and political matters, he is apologetic: "We have a very great scarcity of circulating cash in this colony which has reduced the price of provisions & other commodites more than half: I do not meddle with Politicks but this Calamity lies so near the heart of every friend of the Country that I could not but mention it."<sup>172</sup>

Indeed, consistent with Madison's commitment not to "meddle with Politicks," the several letters exchanged between Madison and Bradford up until December 1773 contain little discussion of law or politics. The letters focus primarily on news about their college and those they knew there, plans and advice about courses of study and careers, and philosophical musings about life and death.

But suddenly, in a letter to Bradford penned on December 1, 1773, Madison brings up law and politics unapologetically and at some length, revealing for the first time that he himself intends to study law independently at Montpelier. Acknowledging Bradford's expressed determination to follow his advice and study law, Madison responds with congratulations on the choice, new praise for the study of law, and a curious request:

I am glad you have . . . come to a determination to engage in the study of the Law, which I hope you had better reasons for chusing than I could suggest. I intend myself to read Law occasionally and have procured books for that purpose so

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169. Letter from James Madison Jr. to William Bradford (Sep. 25, 1773) (second alteration in original), *reprinted in* 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 95, 96.

170. *Id.*

171. *See id.*

172. *Id.* at 97.

that you need not fear offending me by Allusions to that science. Indeed any of your remarks as you go along would afford me entertainment and instruction. The principles & Modes of Government are too important to be disregarded by an Inquisitive mind and I think are well worthy [of] a critical examination by all students that have health & Leisure. I should be well pleased with a scetch of the plan you have fixed upon for your studies, the books & the order you intend to read them in; and when you have obtained sufficient insight into the Constitution of your Country and can make it an amusement to yourself send me a draught of its Origin & fundamental principals of Legislation; particularly the extent of your religious Toleration. Here allow me to propose the following Queries. Is an Ecclesiastical Establishment absolutely necessary to support civil society in a supream Government? & how far it is hurtful to a dependant State? I do not ask for an immediate answer but mention them as worth attending to in the course of your reading and consulting experienced Lawyers and Politicians upon. When you have satisfied yourself in these points I should listen with pleasure to the Result of your reserches.<sup>173</sup>

The shift is striking between Madison's December 1 letter and his previous letter, written barely two months earlier, professing his determination not to "meddle with Politicks." Why the sudden interest in politics and law, which continues in even more force in his next letter in January 1774? The editors of Madison's *Papers* suggest in one place it is due to news of the Boston Tea Party and its aftermath.<sup>174</sup> But the Tea Party did not occur until December 16, *after* Madison had written his December 1 letter. Moreover, the Tea Party had nothing to do with religious toleration, which is Madison's chief legal and political concern in both the December 1773 and January 1774 letters. And again, Bradford had said nothing in his intervening letters to encourage the church-state line of discussion. If the "Tea Party and its after-

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173. Letter from James Madison Jr. to William Bradford (Dec. 1, 1773) (alteration in original), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 100, 100-01.

174. Editorial Note to Letter from James Madison Jr. to William Bradford (Sept. 25, 1773), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 97 n.8. *But see* Editorial Note to Letter from James Madison Jr. to William Bradford (Jan. 24, 1774), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 107 n.9 ("Apparently it was religious issues, more than tax and trade regulation disputes with England, which were rapidly luring JM away from his beloved studies and arousing his interest in contemporary politics.").

math" did not prompt Madison's interest in politics and law, what impelled him toward this first expressed interest in political and legal matters, with a particular focus on religion, no less?

### III. A NEW WAVE OF PERSECUTIONS

Most likely, the imprisonment of several Separate Baptists in Orange County and neighboring Culpeper County provided the catalyst. First, about the time Madison was writing his September 25th letter to Bradford (recommending that Bradford study law but refusing to "meddle with Politicks" himself), the Culpeper County court convicted Nathaniel Saunders, pastor of the Mountain Run Church in Orange County, of unlawful preaching and sedition.<sup>175</sup> Apparently, as was the wont of itinerant Baptist preachers, Saunders sometimes preached in Culpeper as well as Orange, and had been doing so for some time. The Culpeper authorities had been frustrated in their attempts to call Saunders to account. A year earlier, in August 1772, the clerk of Culpeper County had issued a "command" to the sheriff of Orange County to "summons" Saunders to appear before the Culpeper court, to answer a grand jury presentment for "unlawful preaching."<sup>176</sup> This sort of "command" no doubt posed jurisdictional problems, however, and there is no evidence that the Orange County sheriff did anything in response to it.<sup>177</sup> But finally, in 1773, Culpeper authorities apparently found Saunders within Culpeper County and seized him under a new arrest warrant. Holding a trial on September 20, the Culpeper court found Saunders guilty and set a bond of two hundred pounds to assure future good behavior.<sup>178</sup> As Saunders was unwilling or unable to pay that mammoth sum, he was accordingly confined in the Culpeper County jail, possibly with a codefendant named William McClannahan.<sup>179</sup> No one knows how long Saunders was held there, but it could easily have been a period of some weeks during October and No-

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175. The court rendered its verdict on September 20, 1773. LITTLE, *supra* note 34, at 371-72.

176. *Id.* at 319-20.

177. *Id.* at 319-20, 368.

178. *Id.* at 371-72.

179. On August 21, a warrant had been issued by the Culpeper authorities for the arrest of Nathaniel Saunders and William McClannahan. *Id.* at 368-71. The warrant is reproduced in SEMPLE, HISTORY (1894), *supra* note 94, at 481.

vember, during which Madison might well have been informed about the case; indeed, Madison may even have been generally familiar with Saunders's activities in Orange County.

The case that hit closest to home, though, was surely the one involving Joseph Spencer, another Separate Baptist from Orange County. Spencer had come before the Orange County authorities before, having escaped by swearing a modified Toleration Act oath back in 1768.<sup>180</sup> Now, in 1773, he had been arrested and was made to appear before the Orange County court on October 28. He was charged with "a Breach of his Good Behaviour in teaching & Preaching The Gospel as a Baptist not having a License."<sup>181</sup> The seven justices in Spencer's case included Rowland Thomas, who had signed the warrant for Spencer's arrest.<sup>182</sup> Notably, the group of justices that day did not include James Madison, Sr., who was perceived to have been friendly toward dissenters, or at least not unfriendly.<sup>183</sup> Interestingly, Madison, Sr., had attended court on the previous day it was in session (which had been a month earlier, on September 24) and had even signed the minutes for that day in the Order Book, as he often did on days he was in attendance.<sup>184</sup> The outcome in Spencer's case might well have been different if the elder Madison had been present in court on the fateful day of Spencer's appearance in October.

The justices who presided at this trial were not favorably disposed to Spencer. The court ordered Spencer to post bond in the amount of one hundred pounds to guarantee that he would not

180. See *supra* notes 79–80 and accompanying text.

181. ORDER BOOK OF ORANGE COUNTY, VIRGINIA, 1769–1777 287 (Oct. 28, 1773) [hereinafter ORDER BOOK]; accord LITTLE, *supra* note 34, at 381.

182. Four justices were present at the beginning of the day's session on October 28. These are listed in ORDER BOOK, *supra* note 181, at 284 (Oct. 28, 1773); accord LITTLE, *supra* note 34, at 381. They were Rowland Thomas, Reuben Daniel, Thomas Bell, and William Bell. Three more justices, Lawrence Taliaferro, Johnny Scott, and Thomas Barbour, arrived later that day but still before Spencer's case was heard. ORDER BOOK, *supra* note 181, at 285. William Bell signed the minutes for that day. *Id.* at 287. The entry in the Order Book for Spencer's case specifies that the arrest warrant had been signed by Rowland Thomas. See *id.*; see also WILLIAM WALLACE SCOTT, A HISTORY OF ORANGE COUNTY, VIRGINIA 50 (1907), quoted in LITTLE, *supra* note 34, at 380.

183. See BRANT, *supra* note 18, at 70, 410–11, 411 n.11.

184. The elder Madison's late arrival to court that day (but still before much business was conducted) is noted in ORDER BOOK, *supra* note 181, at 277 (Sep. 24, 1773). His signature is found at the end of the day's minutes in the Order Book. *Id.* at 284.

teach again without a license.<sup>185</sup> Because Spencer was either unwilling or unable to pay this amount on these terms, he was committed to the Orange County jail.<sup>186</sup> The court agreed to allow him freedom to roam “the Bounds” around the jail if he would post a separate security of fifty pounds; however, Spencer again was unwilling or unable to do this, and so he was held in close confinement—in a cell inside the jailhouse—for nearly a month.<sup>187</sup>

Considering the correspondence between Madison and Bradford, including Madison’s sudden interest in religious liberty and religious establishments in early December, the timing of Spencer’s case appears anything but coincidental to Madison’s interests. Madison’s newfound interest in law and religious liberty, originating sometime between September 25 and December 1, may very well have been kindled by Joseph Spencer’s trial and imprisonment in Orange County in October and November.

Notably, Spencer and Madison evidently became friends at some point before 1788. In that year, Spencer wrote to Madison as one would write to a good friend, urging Madison to hasten home to campaign among the Orange County Baptists for election to Virginia’s Constitutional Ratification Convention.<sup>188</sup> The wording and nature of the letter, as well as Spencer’s boldness in presuming to offer James Madison political advice, suggest that the two had formed some sort of bond beyond neighborly acquaintance.

In his old age, Madison recalled not only that he had discussed these matters with his family, but that he had been active in trying to help the persecuted Baptists in Orange County, although he did not mention Spencer or any other Baptists by name. In a short autobiographical sketch (written in third person), Madison related that when he returned home from college,

he entered with the prevailing zeal into the American Cause; being under very early and strong impressions in favour of Liberty both Civil & Religious. His devotion to the latter found a particular occasion for its exercise in the persecution instituted in his County as elsewhere against the preachers belonging to the sect of Baptists then beginning to spread

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185. ORDER BOOK, *supra* note 181, at 287 (Oct. 28, 1773); LITTLE, *supra* note 34, at 381.

186. See LITTLE, *supra* note 34, at 382 (stating that Joseph Spencer appears to have remained in close confinement for nearly a month).

187. ORDER BOOK, *supra* note 181, at 287 (Oct. 28, 1773); see also LITTLE, *supra* note 34, at 380–82.

188. See Letter from Joseph Spencer to James Madison (Feb. 28, 1788), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 540, 540–41.



thro' the Country. Notwithstanding the enthusiasm which contributed to render them obnoxious to sober opinion as well as to the laws then in force, against Preachers dissenting from the Established Religion, he spared no exertion to save them from imprisonment & to promote their release from it. This interposition tho' a mere duty prescribed by his conscience, obtained for him a lasting place in the favour of that particular sect.<sup>189</sup>

This final observation is especially cogent. Although there may have been many reasons for their feelings, the Virginia Baptists have always lauded Madison as a particular friend and hero to their cause,<sup>190</sup> notwithstanding the fact that he never became a Baptist.

If it is true, as Madison claimed, that as a fresh college graduate he "spared no exertion" on behalf of the Baptists who were being persecuted "in his County," and if his interest in religious toleration and law became acute sometime between September and December 1773,<sup>191</sup> then Joseph Spencer's imprisonment in October and November very likely induced Madison to investigate law and religious establishments, and, further, that Madison tried to intervene in some manner on Spencer's behalf.

189. James Madison, *Autobiography*, in Adair, *supra* note 118, at 198–99.

190. Of course, this esteem might not be attributable solely to whatever stand he took on the Baptists' behalf before the Revolution. For demonstrations of the high regard early Baptists and Baptist historians have had for Madison, see, for example, BENEDICT, *supra* note 86, at 84 (describing memorials of Baptists and others presented to Virginia's General Assembly in the religious assessment controversy and stating: "But a paper drawn up by Col. James Madison . . . entitled a Memorial and Remonstrance . . . was the most distinguished instrument. The style is elegant and perspicuous, and for strength of reasoning and purity of principle, it has seldom been equalled, certainly never surpassed, by any thing on the subject in the English language"); LITTLE, *supra* note 34, at xx (pictures of Madison, Patrick Henry, Thomas Jefferson, and George Washington, with the caption "Faithful Allies of the Baptists During Their Struggle for Religious Liberty"); L.H. Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 PROC. AM. ANTIQUARIAN SOC'Y 194 n.98 and accompanying text (1952) (quoting 6 WILLIAM B. SPRAGUE, *ANNALS OF THE AMERICAN BAPTIST PULPIT* 180 (New York, Robert Carter & Bros. 1860) (reporting that John Leland reportedly said in old age that "for candour, integrity, and intelligence, he [Leland] placed Mr. Madison before any of our statesmen whom he had ever known")). Moreover, the sole document appearing in the "Appendix" to Semple's very early volume of Virginia Baptist history is Madison's 1785 *Memorial and Remonstrance Against Religious Assessments*. See SEMPLE, *HISTORY* (1810), *supra* note 56, at 435–44.

191. See James Madison, *Autobiography*, in Adair, *supra* note 118, at 198–99.

Moreover, Madison's exertions may have been effective, at least in Spencer's case. Orange County court records show that after a month of close confinement, Spencer petitioned the court to allow him to live in the courthouse rather than the jail.<sup>192</sup> On November 25, the court granted this unusual petition, subject to the requirement that he provide restitution to the county for any damage he might cause to the courthouse.<sup>193</sup> What happened next was even more amazing. On the following day Spencer made a new petition to the court, this time asking for a reduction in the amount of the bond and security set by the court a month before.<sup>194</sup> And the court once again agreed, ordering that

for reasons now offered [the bond amount of one hundred pounds] is to be Lessened to the Sum of Twenty pounds and two Securities In the Sum of Ten pounds Each Whereupon the s.d Spencer with Wm. Morton and Jonathan Davis his Securities came into court and acknowledged Themselves Indebted to our Sovereign Lord the King in the above mentioned Sums respectively to be Levied of their Goods and Chattels Land & Tenements And this recognizance to be Forfeited if the s.d Spencer is Guilty of a Breach of his Good Behaviour According to a Former Order.<sup>195</sup>

Apparently, Spencer was released at this court appearance on November 26, as he and his securities gave their respective bonds in court at the reduced sum. The turnaround in the court's attitude toward Spencer in one month's time is nothing short of astounding. Circumstantial evidence suggests that the Madisons may have been largely responsible. In addition to the younger Madison's "exertion" on behalf of persecuted Baptists "in his County," one finds on close examination of the record that the elder Madison returned to court and was present on November 25 and 26—the very days on which Spencer reappeared after a month in jail and successfully petitioned for clemency.<sup>196</sup> It seems

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192. LITTLE, *supra* note 34, at 382.

193. ORDER BOOK, *supra* note 181, at 295 (Nov. 25, 1773); *see also* LITTLE, *supra* note 34, at 382; SCOTT, *supra* note 82, at 50.

194. *See* LITTLE, *supra* note 34, at 382.

195. ORDER BOOK, *supra* note 181, at 299 (Nov. 26, 1773); *see also* LITTLE, *supra* note 34, at 382.

196. The elder Madison's presence on each of these days is noted in ORDER BOOK, *supra* note 181, at 293 (Nov. 25, 1773) (late arrival); *id.* at 296 (Nov. 26, 1773). In fact, he signed the official minutes for both days. *Id.* at 296 (Nov. 25, 1773); *id.* at 300 (Nov. 26, 1773).

fair to conclude either that the younger Madison's exertions had moved his father, or that the father's views on religious liberty were bearing fruit in the son. Perhaps both assertions are true.

Within two years of his release from prison, as the Revolutionary War was beginning, Joseph Spencer was serving as a captain in a Virginia military company from Orange County.<sup>197</sup> Virginia Baptists were commonly warm supporters of the revolutionary cause, and it seems that Spencer was no exception.<sup>198</sup> If Madison's early defense of persecuted Baptists earned him a lasting place in their favor, the Baptists' early and consistent support of the revolution against Britain probably earned them a place in Madison's favor (and his father's) as well.

Madison's December 1 letter to William Bradford,<sup>199</sup> apparently written just after Spencer's release from prison, prompted a reply from Bradford later that month.<sup>200</sup> Bradford enclosed a newspaper account of the Boston Tea Party, along with his own description of Philadelphia's recent refusal to allow a similar tea shipment to be unloaded in that city.<sup>201</sup> But the other main subject of the letter was Madison's determination to "cultivate an acquaintance with the Law," a decision Bradford praised.<sup>202</sup> Alluding to Madison's request for information about the origins and principles underlying "the Constitution of your country" and "particularly the extent of your religious Toleration,"<sup>203</sup> Bradford replied that he had no information to share as of yet, as he had been reading classical history instead, in an abortive attempt to approach legal history chronologically.<sup>204</sup> Perhaps misunderstanding Madison's references to "your country" and "your religious Toleration" as an inquiry regarding the constitution and laws of Britain, he proposed to read Hume's five-volume *History of England* "as soon as time will

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197. LITTLE, *supra* note 34, at 383.

198. See generally Rhys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775*, 31 WM. & MARY Q. 345 (1974).

199. Letter from James Madison Jr. to William Bradford (Dec 1, 1773), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 100, 100-02.

200. Letter from William Bradford to James Madison (Dec. 25, 1773), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 102, 102-03.

201. See *id.*

202. See *id.*

203. Letter from James Madison Jr. to William Bradford (Dec 1, 1773), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 100, 100-01.

204. Letter from William Bradford to James Madison (Dec. 25, 1773), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 102, 102-03.

permit” and apologized for “not [having had] time to investigate the principles of Government & the English constitution with that accuracy I intend hereafter to do.”<sup>205</sup>

A month later Madison wrote back, this time with new fervor. Although the patriots’ fiery responses to the tea tax were obviously one of Bradford’s consuming interests at the moment—in part, perhaps, because his father apparently led the contingent that turned back the tea shipment in Philadelphia<sup>206</sup>—Madison can hardly mention these events without drawing a connection to his own consuming interest, religious liberties:

I congratulate you on your heroic proceedings in Philada. with regard to the Tea. I wish Boston may conduct matters with as much discretion as they seem to do with boldness: They seem to have great Tryals and difficulties by reason of the obduracy and *ministerialism* of their Governour. However Political Contests are necessary sometimes as well as military to afford excercise and practise and to instruct in the Art of defending Liberty and property. I verily believe the frequent Assaults that have been made on America[,] Boston especially[,] will in the end prove of real advantage. If the Church of England had been the established and general Religion in all the Northern Colonies as it has been among us here and uninterrupted tranquility had prevailed throughout the Continent, It is clear to me that slavery and Subjection might and would have been gradually insinuated among us. Union of Religious Sentiments begets a surprizing confidence and Ecclesiastical Establishments tend to great ignorance and Corruption all of which facilitate the Execution of mischievous Projects. But away with Politicks! Let me address you as a Student and Philosopher & not as a Patriot now.<sup>207</sup>

This is the first time we see a written assertion by Madison of his view of religious establishments, and it is decisive. No longer is he requesting research into the history and necessity of establishments; he now appears to have answered the question for himself. At the age of twenty-two, he has made up his mind that religious establishments are not only unnecessary, but a bulwark of tyranny. Establishments might produce a superficial “tran-

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205. *Id.*

206. Editorial Note to Letter from William Bradford to James Madison (Dec. 25, 1773), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 102, 104 n.11.

207. Letter from James Madison to William Bradford (Jan. 24, 1774) (alteration in original), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 104, 105.

quility" through a coerced "Union of Religious Sentiments," but this seeming unity cloaks an ugly hegemony lurking just below the surface. Without "Political Contests" to challenge the establishment's notions of true doctrine and church authority, there can be no opportunity to "exercise and practise and to instruct in the Art of defending Liberty and property." When diverse religious sentiments are not freely expressed, when religious disputes are not aired, when there can be no religious debate or conflict in public, the results are both "ignorance" and "Corruption," which lead to the "Execution of mischievous Projects." And the final result of religious uniformity is "slavery and Subjection." Here we see shades of *Federalist* 10, in which Madison would argue years later that representative democracies should be large, because a wide diversity of opinions is the greatest security against the tyranny of the majority.<sup>208</sup>

At this point in the letter Madison does indeed stray away from "Politicks," but not for long. His ensuing nonpolitical "address" to Bradford offers mock sympathy for the tedious legal texts Bradford must now endure, contrasting "the coarse and dry study of the Law" with "the refined & exquisite enjoyments" to be found in "Poetry wit and Criticism Romances Plays &c."<sup>209</sup> Yet he congratulates Bradford on his choice to take the more difficult path.<sup>210</sup> Despite the allures of more artistic and lightweight fare, he writes, the two of us must keep our noses to the grindstone.<sup>211</sup> In Madison's view, it would be improper for a "Scholar and man of Business" to "feed his Mind with nothing but such Luscious performances," just as it would be improper for a "labouring man to have nothing but flowers in his Garden or to determine to eat nothing but sweet-meats and Confections."<sup>212</sup> He describes this conclusion as a dawning awareness, a truth he is "begin[ning to] discover" even as he writes the letter: "I myself use to have too great a hankering after those amusing Studies. [They] captivated me much: but I begin [to] discover that they deserve but a moderate portion of

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208. See THE FEDERALIST NO. 10, at 77, 82–84 (James Madison) (Clinton Rossiter ed., 1961).

209. Letter from James Madison to William Bradford (Jan. 24, 1774), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 104, 105–06.

210. *Id.*

211. *Id.*

212. *Id.*

a mortal's Time. and that something more substantial more durable more profitable befits a riper Age."<sup>213</sup>

That "something," apparently, was study and activity in the realms of law and politics—pursuits that now, in light of the horrible religious persecutions continuing "in his County,"<sup>214</sup> seemed unquestionably urgent. And here Madison cannot resist turning once again to "Politicks" and established religion, this time to describe the recent experiences that justified his unseemly vociferation as well as his mood. Expressing his intention to travel to Philadelphia in April to visit Bradford, he laments:

I want again to breathe your free Air. I expect it will mend my Constitution & confirm my principles. I have indeed as good an Atmosphere at home as the Climate will allow: but have nothing to brag of as to the State and Liberty of my Country. Poverty and Luxury prevail among all sorts: Pride ignorance and Knavery among the Priesthood and Vice and Wickedness among the Laity. This is bad enough But It is not the worst I have to tell you. That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business. This vexes me the most of any thing whatever. There are at this [time] in the adjacent County not less than 5 or 6 well meaning men in close Goal for publishing their religious Sentiments which in the main are very orthodox. I have neither patience to hear talk or think of any thing relative to this matter, for I have squabbled and scolded abused and ridiculed so long about it, [to so lit]tle purpose that I am without common patience. So I [leave you] to pity me and pray for Liberty of Conscience [to revive among us.]<sup>215</sup>

Unfortunately, little is known about the identities of the "5 or 6 well meaning men" imprisoned in "the adjacent County," or the circumstances under which they were jailed. This clearly does not refer to Joseph Spencer, who was imprisoned in Orange County itself and had been released almost two months earlier.<sup>216</sup> There were five counties adjacent to Orange: Culpep-

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213. *Id.*

214. See James Madison, *Autobiography*, in Adair, *supra* note 118, at 198.

215. Letter from James Madison to William Bradford (Jan. 24, 1774) (alteration in original), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 104, 106.

216. ORDER BOOK, *supra* note 181, at 299 (Nov. 26, 1773); see also LITTLE, *supra* note 34, at 382 (explaining that, according to the Order Book, Spencer had "Leave to Live" in the courthouse as of November 25, 1773).

er, Spotsylvania, Louisa, Albemarle, and Augusta.<sup>217</sup> In his very thorough study of Baptist imprisonments during this period, Lewis Peyton Little speculated that “the adjacent County” must have been Culpeper.<sup>218</sup> He seemed to reach this conclusion based on the facts that the other four counties did not record Baptist imprisonments that would have continued during January 1774, and that the Culpeper court order books for dates prior to 1798, which might have verified the truth of his assumption, have all been destroyed.<sup>219</sup> Indeed, according to Little’s study, Culpeper County imprisoned more Baptists than any other county in Virginia,<sup>220</sup> making Culpeper a good guess. The editors of Madison’s *Papers* have agreed.<sup>221</sup> Although acknowledging that the imprisoned men cannot be identified “with certainty,” Little offers other evidence suggesting that “we shall perhaps not be very far wrong” in asserting that “*probably* those who were imprisoned in Culpeper at the time” were Thomas Ammon, Anderson Moffett, Thomas Maxfield, Adam Banks, John Delaney, and Elijah Craig.<sup>222</sup> Elijah Craig, of course, will be remembered as the pastor of the Baptist church of Blue Run in Orange County.<sup>223</sup> Evidence suggests that Elijah Craig was actually pulled down from a pulpit of the Rapidan church in Culpeper County, just across the river from Orange County, to be carried off to a Culpeper jail.<sup>224</sup> Such an incident might well have attracted Madison’s attention, especially in the immediate wake of Spencer’s imprisonment and release.

As noted by the editors of Madison’s *Papers*, if one is to judge by this letter, Madison “was already conspicuous in his own locality as a defender of religious dissenters.”<sup>225</sup> Here too Madison has determined in his own mind that the blame for these persecutions lies squarely with the established church and the laws of his col-

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217. See *Map of Virginia Historical Counties as of Jan. 24, 1774*, NEWBERRY LIBRARY, available at <http://historical-county.newberry.org/website/Virginia/viewer.htm>.

218. LITTLE, *supra* note 34, at 418–20.

219. See *id.*

220. *Id.* at 418.

221. Editorial Note to Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 107 n.8.

222. See LITTLE, *supra* note 34, at 420–21.

223. See *id.* at 131.

224. SEMPLE, HISTORY (1894), *supra* note 94, at 238.

225. Editorial Note to Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 107 n.9.

ony that prop it up. The “Priesthood” and “Clergy” to which he refers in his January 24, 1774, letter to William Bradford is clearly the clergy of the Anglican establishment. Madison, like his father and many other Virginia vestrymen at the time, paints the established clergy with a broad brush, viewing the lot of them in negative terms: full of “Pride ignorance and Knavery” and furnishing “their Quota of Imps” to do the persecuting, or to goad the state into it. Madison’s initial queries, in his earlier letter to Bradford on December 1, 1773, were whether “an Ecclesiastical Establishment” is “absolutely necessary to support civil society in a supream Government,” and whether it might not be particularly “hurtful to a dependant State.” By the time he writes his January letter to Bradford, Madison has worked out that “Ecclesiastical Establishments” are inherently dangerous, in any state, and that they always “tend to great ignorance and Corruption all of which facilitate the Execution of mischievous Projects.”<sup>226</sup>

Interestingly, in describing some of these “Projects,” Madison distinguishes between persecution and the numerous other ill effects of established religion.<sup>227</sup> These other ill effects, such as “Pride ignorance and Knavery among the Priesthood and Vice and Wickedness among the Laity,” are “bad enough,” as they threaten “Liberty.”<sup>228</sup> But persecution makes the situation even worse. Persecution is clearly the “worst” evil.<sup>229</sup> Yet Madison believes liberty is abridged by the “Ecclesiastical Establishment” itself, with or without persecutions.

Why should this be? Was not religious intolerance, and attendant persecution of dissenters, the precise problem with the Virginia establishment? Madison’s letter shows us that, as he thought about these issues in 1774, it was merely the *worst* problem, not the only problem. The government-sponsored priests, he says, are characterized by “Pride ignorance and Knavery” — and each of these is an important word signifying a separate failing of the priests and of the system providing them public support, whether or not they persecuted anyone. The government funding that the priests received was intended to create a priesthood characterized by integrity, learning, and

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226. Letter from James Madison to William Bradford (Jan. 24, 1774), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 104, 105–06.

227. *See id.*

228. *Id.*

229. *See id.*



professionalism; obviously, Madison believes the funds have instead created a proud class of wealthy clerics, prone to vice and ignorant of the scriptures they are authorized to teach.<sup>230</sup> Moreover, both “Poverty and Luxury prevail among all sorts”—the implication being that the established clergy are neither using their resources and influence to help the poor, nor encouraging others to do so, as would be expected of good shepherds entrusted with the care of the flock. Meanwhile, the laity continue in “Vice and Wickedness”—again an indictment of the establishment, because (according to establishment theory) one of the main benefits of an established church is to place a state-supported authority figure in a position of local oversight so as to instruct and chasten all the local citizenry, encouraging them in virtue and curbing their vices. Established churches were supposed to make citizens and communities more virtuous; Madison, however, sees them as having precisely the opposite effect. And all this is *before* one considers the establishment-sponsored religious persecutions, which to Madison are a separate (and even more serious) matter.<sup>231</sup>

Madison’s experiences as a young man, particularly his experiences with the Baptists and their oppressors, certainly led him to believe that religious establishments tended to foster religious persecutions. This is one reason he feared establishments. But it was not the only reason. Just as surely, his experiences in Virginia had convinced him, by the time he was twenty-two years old, that religious establishments were flawed in their very principles. These experiences compelled him to say later that even “a legal establishment of religion . . . with a toleration” produced great mischief and should be avoided.<sup>232</sup>

Whether or not a particular religious establishment authorized outright persecution of dissenters, Madison concluded that it was incapable of producing the good fruit which was its

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230. See Letter from James Madison to Robert Walsh (Mar. 2, 1819), reprinted in 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 427, 427–30 (David B. Mattern et al. eds., 2009) (describing deficiencies of established clergy in colonial Virginia, in contrast to the improved state of religion and the clergy in Virginia after disestablishment).

231. Letter from James Madison to William Bradford (Jan. 24, 1774), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 104, 105–06.

232. Letter from James Madison to Edward Everett (Mar. 19, 1823), reprinted in 9 THE WRITINGS OF JAMES MADISON: 1819–1836 124, 127 (Gaillard Hunt ed., 1910) [hereinafter MADISON’S WRITINGS].

reason for existence. In fact, in Madison's experience, the effects of religious establishment were harmful. Far from producing a noble, knowledgeable priesthood and a virtuous citizenry, legal support of religion produced ignorance and corruption, a host of "mischievous Projects," and eventually, through a pretended "Union of Religious Sentiments," subjugation and tyranny. Madison's experiences with the Virginia establishment, in contrast to what he knew of Pennsylvania, New Jersey, and other colonies, caused him very early to conclude that all religious establishments were pernicious. In addition, he now increasingly associated religious establishments with religious persecutions and tyranny, believing that sooner or later, such must be their natural result.

#### IV. THE COMING REVOLUTION

##### A. *Dissenting Outcries on the Eve of War*

Madison's despairing letter to Bradford in January prompted a sympathetic response. Although a substantial portion of it was devoted to news of mutual friends (and some further musings on the value of legal studies), in one paragraph Bradford reacted to Madison's news of Virginia's intolerance:

I am sorry to hear that Persecution has got so much footing among you. The description you give of your Country makes me more in love with mine. Indeed I have ever looked on America as the land of freedom when compared with the rest of the world, but compared with the rest of america Tis Pennsylvania that is so. Persecution is a weed that grows not in our happy soil: and I do no[t] remember that any Person was ever imprisoned here for his religious sentiments however heretical or unepiscopal they might be. Liberty . . . [is] the Genius of Pennsylvania; and it[s] inhabitants think speak and act with a freedom unknow[n elsewhere in America]—I do indeed pity you; & long to see you according to your own expression, "breathing our purer air."<sup>233</sup>

Pennsylvania—Bradford's "country"—indeed prided itself on having no established church. Having been founded and nour-

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233. Letter from William Bradford to James Madison (Mar. 4, 1774) (first three alterations in original), *reprinted in* 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 108, 109.

ished on Quaker ideals, the colony from the beginning had strictly avoided both religious persecution and governmental funding of churches.<sup>234</sup> True, some of its laws did draw lines based on religious beliefs. For example, the colony's Charter of Privileges required governmental officeholders to aver a belief in Christ, and William Penn had years before passed laws forbidding swearing, card playing, and stage plays.<sup>235</sup> Still, as a practical matter, the colony provided "perhaps the broadest religious liberty in colonial America."<sup>236</sup> Literally hundreds of different religious sects were represented in the population;<sup>237</sup> sometimes several sects were represented among members of the same household.<sup>238</sup> Moreover, the colony thrived. Among the English colonies, it ranked second only to Virginia in terms of population, and Philadelphia was in fact the largest of the American cities.<sup>239</sup> Advocates of religious liberty, such as Thomas Jefferson and Adam Smith, would soon point to the example of prosperous Pennsylvania to show that religious liberty was not only compatible with orderly progress, but conducive to it.<sup>240</sup>

Madison himself had already arrived at this conclusion, however, making this same observation in his letter of reply to Bradford in April 1774:

You are happy in dwelling in a Land where . . . [the] public has long felt the good effects of their religious as well as Civil Liberty. Foreigners have been encouraged to settle among you. Industry and Virtue have been promoted by mutual emulation and mutual Inspection, Commerce and the Arts have flourished and I can not help attributing those continual exertions of Gen[er]al Genius which appear among you to the inspiration of Liberty and that love of Fame and Knowledge which always accompany it. Religious bondage shackles and

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234. CURRY, *supra* note 25, at 72–77.

235. *Id.* at 75.

236. *Id.*

237. WILLIAM LEE MILLER, *THE FIRST LIBERTY: AMERICA'S FOUNDATION IN RELIGIOUS FREEDOM* 36 (rev. ed. 2003); 1 STOKES, *supra* note 23, at 208.

238. LAMBERT, *supra* note 106, at 109.

239. BENJAMIN L. CARP, *REBELS RISING: CITIES AND THE AMERICAN REVOLUTION* 225 app. (2007); CURRY, *supra* note 25, at 76.

240. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA, QUERY 17*, 157–61 (1784), reprinted in 5 *THE FOUNDERS' CONSTITUTION* 79, 80 (Philip B. Kurland & Ralph Lerner eds., 1987); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776), bk. 5, ch. 1, pt. 3, art. 3, in 5 *THE FOUNDERS' CONSTITUTION*, *supra*, at 72, 74.

debilitates the mind and unfits it for every noble enterprize every expanded prospect.<sup>241</sup>

Virginia's continuing system of "religious bondage," as Madison noted in the same letter, was soon to be debated again in the Virginia General Assembly.<sup>242</sup> Beset by the growing number of persecutions, and seeing their numbers swelling, Virginia Baptists had for four years previous become so bold as to petition the lower, elected house, the House of Burgesses, for legislative relief.<sup>243</sup> These written petitions or "memorials" originated sometimes with the churches of a single county and sometimes with a larger, regional association of churches.<sup>244</sup> They requested, among other things, that Baptists be treated equally with other Protestant dissenters in the colony; that Baptists be granted all the benefits of the Toleration Act of 1689; and that Baptists be allowed to obtain licenses for more than one meeting house in a single county.<sup>245</sup>

The House of Burgesses was not wholly insensitive to the growing political strength of the Baptists and had never itself taken a strong stance in favor of persecution. Still, the questions were too new, and House members too divided,<sup>246</sup> for the Baptists to have much hope of immediate success. In 1772 the House drafted a bill attempting to address the religion problem, but in an unusual move, the members voted to submit the bill to the public for comment before sending it on to the upper house—demonstrating how divisive the issue had become.<sup>247</sup> The bill provided toleration to all religious dissenters but tacked on new prohibitions banning night meetings and participation by slaves who did not have permission from their owners.<sup>248</sup> Baptists protested against the added strictures of the bill, and so did Presby-

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241. Letter from James Madison to William Bradford (Apr. 1, 1774) (second alteration in original), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 111, 112–13.

242. *Id.*

243. GARNETT RYLAND, THE BAPTISTS OF VIRGINIA: 1699-1926, at 92–96 (1955); Lumpkin, *supra* note 26, at 113; G. Hugh Wamble, *Virginia Baptists and Religious Liberty, 1765 to 1802*, 1 J. BAPTIST STUD. 38, 41–42 (2007).

244. See RYLAND, *supra* note 243; Wamble, *supra* note 243.

245. ISAAC, *supra* note 96, at 201; Lumpkin, *supra* note 26, at 113; Wamble, *supra* note 243, at 41–42.

246. See ISAAC, *supra* note 96, at 202.

247. ISAAC, *supra* note 96, at 201–02.

248. *Id.*

terians.<sup>249</sup> Meanwhile, in August of 1772, another James Madison, a cousin of the subject of this article and a recent graduate of William and Mary, delivered an oration at the college in which he blasted religious intolerance, advising civil magistrates to mind their own nonreligious business.<sup>250</sup>

James Madison of Orange County was well aware of the ongoing political controversy. His letter to Bradford in April of 1774 shows that he had kept himself informed of the proceedings in the House of Burgesses that affected religious freedom—and, importantly, that he maintained sufficient contacts with the Baptists to have some knowledge of the petition drives being conducted among the Baptist faithful:

Our Assembly is to meet the first of May When It is expected something will be done in behalf of the Dissenters: Petitions I hear are already forming among the Persecuted Baptists and I fancy it is in the thoughts of the Presbyterians also to intercede for greater liberty in matters of Religion. For my part I can not help being very doubtful of their succeeding in the Attempt. The Affair was on the Carpet during the last Session; but such incredible and extravagant stories were told in the House of the monstrous effects of the Enthusiasm prevalent among the Sectaries and so greedily swallowed by their Enemies that I believe they lost footing by it and the bad name they still have with those who pretend too much contempt to examine into their principles and Conduct and are too much devoted to the ecclesiastical establishment to hear of the Toleration of Dissentients, I am apprehensive, will be again made a pretext for rejecting their requests.<sup>251</sup>

Of course, these pretexts would never persuade those supporters devoted to a “liberal” and “equitable way of thinking as to the rights of Conscience,” such as prevailed in Pennsylvania; however, among Virginians “of Fortune and fashion,” Madison reported, such thinking was not prevalent.<sup>252</sup> The Virginia gentry were, by and large, “zealous adherents to our Hierarchy,” a telling synonym for the religious establishment.<sup>253</sup>

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249. *Id.*; Isaac, *supra* note 76, at 142–44; Wamble, *supra* note 243, at 42.

250. ISAAC, *supra* note 96, at 203; LITTLE, *supra* note 34, at 323–24; see Isaac, *supra* note 76, at 144.

251. Letter from James Madison to William Bradford (Apr. 1, 1774), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 111, 112.

252. *Id.*

253. *Id.*

The established clergy wielded great influence “by reason of their connection with & dependence on the Bishops and Crown and will naturally employ all their art & Interest to depress their rising Adversaries; for such they must consider dissenters who rob them of the good will of the people and may in time endanger their livings & security.”<sup>254</sup> Exceptions existed, both among the clergy and the laity—but these were exceptions: “We have it is true some persons in the Legislature of generous Principles both in Religion & Politicks but number not merit you know is necessary to carry points there.”<sup>255</sup>

Madison’s predictions of legislative inertia turned out, for the 1774 session, to be correct: The Virginia legislature did not grant the remedy the Baptists requested.<sup>256</sup> To the Baptists’ relief, the legislature also did not act further on the 1772 bill circulated for public comment.<sup>257</sup> The legislature had good reason for inaction. In May, Virginia’s royal governor, Lord Dunmore, dissolved the General Assembly, and little was accomplished during the remainder of the year except to formulate the colony’s response to the British threat, through the vehicles of informal tavern meetings and the formation of the Continental Congress.<sup>258</sup> Thereafter, in 1775 and 1776, Virginia’s legislative assemblies were styled “conventions” and met without authority of the royal governor; the convention of 1776, however, drafted a new constitution for Virginia which reestablished the General Assembly with a lower house now called the House of Delegates.<sup>259</sup> The first session of the new state’s legislature was convened in October of that year.<sup>260</sup> But in 1774, all this work was yet to be done. Little existed in the way of a colonial or state legislature during this pivotal year, and in any event, the question of how to treat dissenters seemed, at least for the moment, insoluble, due to great differences of opinion among the delegates.<sup>261</sup>

In the following months, as the Revolutionary War loomed, Madison’s correspondence with Bradford was increasingly de-

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254. *Id.*

255. *Id.*

256. Wamble, *supra* note 243, at 42.

257. *Id.*

258. HAMILTON JAMES ECKENRODE, THE REVOLUTION IN VIRGINIA 33–37 (1916); RYLAND, *supra* note 243, at 93–94.

259. ECKENRODE, *supra* note 258, at 45, 54–56, 150, 160–65.

260. *Id.* at 169.

261. *Id.* at 33–35; Isaac, *supra* note 76, at 143–46; Wamble, *supra* note 243, at 42.

voted to British provocations, patriotic defiance, Indian uprisings, and other events implicating domestic security.<sup>262</sup> Although his illness (which apparently continued through this period) prevented him from serving in the Continental army,<sup>263</sup> Madison initially trained with a Virginia rifle company, learning to shoot sufficiently well that by June of 1775 he boasted he could usually hit a target the size of a man's face at one hundred yards.<sup>264</sup> By this time he had been elected to the Orange County Committee of Safety (chaired by his father),<sup>265</sup> and would shortly be commissioned as a colonel in the Orange County Militia.<sup>266</sup> Bradford, for his part, delayed his law practice to serve in the patriot army.<sup>267</sup> During 1774 and 1775, both men were increasingly consumed with patriotic fervor, or what Madison later called "the spirit of the epoch."<sup>268</sup>

Yet even during this period Madison remained concerned about the rights of conscience and the problems of religious establishment. He rejoiced to hear from Bradford that their close college friend and fellow American Whig, Hugh Henry Brackenridge, had spoken to a Philadelphia printer about "publishing a Satire he had written against some drunken, swearing ministerial parsons who infested his neighborhood."<sup>269</sup> Madison also praised the "very sensible remarks" of Charles Lee, recently published in Virginia newspapers, in which Lee had criticized the established clergy and King Charles I; however, Madison complained that "[s]ome of our old bigots did not altogether approve the Strictures on the Clergy and King Charles . . . ."<sup>270</sup> He also continued his research

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262. See generally correspondence between James Madison and William Bradford between the dates of July 1, 1774, and July 28, 1775, reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 114–61.

263. Adair, *supra* note 118, at 199.

264. Letter from James Madison to William Bradford (June 19, 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 151, 153.

265. Editorial Note to Address to Patrick Henry (May 9, 1775), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 147 n.1.

266. Commission as Colonel of Orange County Militia (Oct. 2, 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 163, 163.

267. Editorial Note to Letter from William Bradford to James Madison (Mar. 3–6, 1775), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 140 n.9.

268. Adair, *supra* note 118, at 199.

269. Letter from William Bradford to James Madison (Jan. 4, 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 131, 132.

270. Letter from James Madison to William Bradford (Mar. 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 141, 141.

into religious liberties and the justification for religious establishments. As late as the summer of 1775, after the war had begun, he asked for Bradford's help in procuring Joseph Priestly's *An Essay on the First Principles of Government; and on the Nature of Political, Civil, and Religious Liberty*,<sup>271</sup> as well as two pamphlets: *An apology for the Church of England as by Law Established* by Josiah Tucker, and *An Essay on Toleration: With a Particular View to the Late Application of the Dissenting Ministers to Parliament* by Philip Turneaux.<sup>272</sup>

Madison's thoughts were undoubtedly still consumed with the plight of the Baptists and the weighty questions of religious liberty even during the months leading up to the War of Independence. In November of 1774, Madison had gotten wind of a memorial presented by New England Baptists to members of the Continental Congress itself. He pressed his Philadelphia friend for further details: "I was told by a Quaker Gentleman from Philada that a complaint of being persecuted in New-England was laid before the Congress by the People called baptists. Did Truth or prejudice dictate to the Quaker in his report."<sup>273</sup> Bradford replied after investigation, "With regard to the Complaints of New-England Baptist I can learn nothing. I believe there was none."<sup>274</sup>

Although Madison could not have known it, in October the Baptist minister Isaac Backus from Massachusetts had in fact led a delegation of New England Baptists and Pennsylvania Quakers to meet with several congressional delegates from the northern and middle colonies.<sup>275</sup> The Baptists, with the Quakers acting as their local agents, had presented memorials at this meeting urging legal reforms in Massachusetts: These reforms would abolish the special privileges that some religious sects enjoyed and place all sects on equal footing.<sup>276</sup> The assembled

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271. Letter from James Madison to William Bradford (May 9, 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 144, 145 & n.8.

272. Letter from James Madison to William Bradford (July 28, 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 159, 160.

273. Letter from James Madison to William Bradford (Nov. 26, 1774), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 129, 130.

274. Letter from William Bradford to James Madison (Jan. 4, 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 131, 131.

275. Editorial Note to Letter from James Madison Jr. to William Bradford (Nov. 26, 1774), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 131 n.11.

276. *Id.*



delegates listened patiently, and the Massachusetts members promised to bring the matter up in Massachusetts at some later time, but otherwise the delegates promised little—and in fact Congress itself had little authority over Massachusetts laws governing religion.<sup>277</sup> Any reform would have to be accomplished by the Massachusetts General Assembly, a prospect that must have seemed remote to many delegates. John Adams, at least, doubted that much would be done to weaken what he saw as an already tolerant religious establishment in his home colony of Massachusetts: Backus reported that Adams told the Baptists at this meeting that they “might as well expect a change in the solar system as to expect [Massachusetts] would give up their establishment.”<sup>278</sup> Moreover, the Baptists had not helped their case with the Massachusetts delegation by recruiting the aid of the Quakers, a sect reputed to be unreliable in their support of a war for independence.<sup>279</sup> The meeting seems to have caused some delegates to question the Baptists’ own patriotism—an inaccurate assumption, it would turn out, as to Baptists.<sup>280</sup> But unquestionably, those who called for religious toleration and equality during this time made their arguments stronger, and made their sects more sympathetic, by simultaneously taking a strong stance in favor of the American cause in the war.<sup>281</sup>

Although he was skeptical of the “religious enthusiasm” of the Baptists and other New Light sects, Madison never wavered in his support for their complete religious freedom. He had more than one reason for taking their side. On the one hand, he supported their rights even before he was fully caught up in the revolutionary fever of the day. His earlier support for religious freedom indicates that he grounded his stance in principles of religious liberty, even apart from the political

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277. CURRY, *supra* note 25, at 131–33; Editorial Note to Letter from James Madison Jr. to William Bradford (Nov. 26, 1774), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 131 n.11; see Esbeck, *supra* note 20, at 1435–38.

278. CURRY, *supra* note 25, at 132 (quoting 2 DIARY OF ISAAC BACKUS 917 (William G. McLoughlin ed., 1979)).

279. *Id.* at 131–32; Esbeck, *supra* note 20, at 1437–38.

280. CURRY, *supra* note 25, at 131–32; Esbeck, *supra* note 20, at 1437–38. Regarding the Baptists’ loyalty to the Revolutionary cause, see S.D. MCCONNELL, HISTORY OF THE AMERICAN EPISCOPAL CHURCH: 1600–1915, at 204–05 (11th ed. 1916); JOHN A. RAGOSTA, WELLSPRING OF LIBERTY: HOW VIRGINIA’S RELIGIOUS DISSENTERS HELPED WIN THE AMERICAN REVOLUTION AND SECURED RELIGIOUS LIBERTY 87–107 (2010).

281. RAGOSTA, *supra* note 280, at 49–70.

views of the Baptists. But he cannot have failed to notice that they were what he considered to be good patriots. Far from being a danger to the body politic, they would be valuable allies in the upcoming conflict with Britain. As we have noted, Baptists in Virginia were among the most ardent supporters of the revolutionary cause,<sup>282</sup> a fact which no doubt made them more sympathetic in the eyes of Madison as well as many other Virginians. Moreover, their arguments against religious establishments and the established clergy fell neatly in line with revolutionary criticism of the King and his ministers.<sup>283</sup> Thus Madison, and the Baptists as well, could view “liberty” as a unitary good to be advanced in each of its aspects, whether “civil or religious.”<sup>284</sup> Of course, there can be little doubt that a gentleman of the Virginia gentry, even a patriotic Whig, would feel negative social pressure if he stood to defend the rights of Baptists in 1773 to 1774.<sup>285</sup> But Baptists at least were no true threat; their doctrines, as Madison put it, were “in the main . . . very orthodox,”<sup>286</sup> and more importantly, they were staunch patriots, warm supporters of the revolution. The established clergy itself, which Madison regarded as disproportionately filled with Loyalists, was a much bigger danger.<sup>287</sup>

Therefore, it was this latter group, along with other Loyalist and pacifist clergymen, who would pose the biggest test of Madison’s own commitment to liberty of conscience—and his marks on this test, coming as it did during his youth, in the heady atmosphere accompanying the Revolutionary War, were mixed.

### B. Religious Opposition During the War

During the War of Independence, the Quakers were under suspicion for the pacifist stance many of them had taken in op-

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282. S.D. MCCONNELL, *supra* note 280, at 204–05; RAGOSTA, *supra* note 280, at 87–107.

283. See *supra* notes 121–22 and accompanying text; notes 131–45 and accompanying text; note 225 and accompanying text.

284. See James Madison, *Autobiography*, in Adair, *supra* note 118, at 198 (recalling “being under very early and strong impressions in favour of Liberty both Civil & Religious”).

285. See ISAAC, *supra* note 96, at 164–77 (describing stark cultural contrasts and conflicts between Separate Baptists and the Virginia gentry during the years just before the Revolution).

286. Letter from James Madison to William Bradford (Jan. 24, 1774), *reprinted in* 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 104, 106.

287. See *infra* Part IV.B.

position to the war.<sup>288</sup> Although in many counties men were organizing into companies and beginning military training, Quakers in Philadelphia determined at their annual meeting to refrain from joining the effort.<sup>289</sup> Madison was not unfriendly toward the sect; in fact, he would later marry a Quaker, Dolley Payne Todd.<sup>290</sup> But he told Bradford he suspected that the most ardent Quaker opponents of the war might be motivated not solely by their religious views, but by economic interests as well.<sup>291</sup> Bradford, living near the most sizable and outspoken Quaker community in America, agreed with this assessment: “‘Their dear delight is peace,’ for which I beli[e]ve (with you) they have more reasons than one.”<sup>292</sup> Madison went further; he suspected that the Quaker leadership in Philadelphia was exercising “controll and direction” over Virginia Quakers in matters not directly prescribed by the Quaker religion, forbidding the Quakers of Virginia from publicly agreeing to abide by the boycott rules promulgated by the Continental Association and enforced by the county committees of safety.<sup>293</sup> Madison reached this conclusion because “I take those of them that we have to be too honest and simple to have any sinister or secret Views and I do not observe any thing in the Association inconsistent with their Religious princ[i]ples.”<sup>294</sup> Now on the Orange County Committee of Safety, Madison would have been responsible for encouraging county householders to sign a document containing the Association restrictions symbolizing their commitment to the Patriot cause, and he may well have confronted some Quakers who refused to sign. It seems neither he nor other members of the committee forced any Quakers to sign or punished those who did not. Importantly, Madison attributed the Virginia Quakers’ stance to the pernicious influence of a reli-

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288. Letter from James Madison to William Bradford (Nov. 26, 1774), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 129, 129–30.

289. *Id.*

290. IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 401–12 (1950).

291. Letter from James Madison to William Bradford (Nov. 26, 1774), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 129, 129.

292. Letter from William Bradford to James Madison (Jan. 4, 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 132; *id.* at 131, 132.

293. Letter from James Madison to William Bradford (Jan. 20, 1775) (alteration in original), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 134, 135.

294. *Id.*

gious hierarchy (albeit a private one not enforced by law), rather than any deeply felt religious principles of their own. By the time war broke out, even many of the Pennsylvania Quakers had renounced their opposition to military involvement; in June of 1775 Bradford reported the formation of “two Companies composed intirely of Quakers, who dress in a neat uniform & many others of that society are in the other Companies.”<sup>295</sup>

But there were others, particularly Anglican parsons, who claimed to oppose the Revolution on religious grounds. Madison perceived a different situation altogether in their case.<sup>296</sup> Perhaps, indeed, this illustrates the degree to which he had become antagonistic toward religious establishments—or at least the one in Virginia. The Quakers might have been stubborn and self-interested, even treasonous, but their sect was not preferred by law. Anglican parsons, by contrast, had all the privileges and political power a legal establishment could confer, which perhaps made their loyalty to the crown seem all the more selfish, their admonitions all the more prideful, their consciences all the less tender. Parsons of Scottish extraction seem to have been especially intransigent; as early as July of 1774, in the wake of the House of Burgesses’s proclamation of a day of prayer and fasting to show solidarity with Boston, Madison reported a rumor “that the appointed Fast was disregarded by every Scotch Clergyman though it was observed by most of the others who had timely notice of it. I cannot avouch it for an absolute certainty but it appears no ways incredible.”<sup>297</sup>

In June of the following year, the Continental Congress made a similar proclamation, designating July 20, a Thursday, as a day of public fasting and prayer.<sup>298</sup> Once again Madison reported—this time, it seems, from personal knowledge—that a Scotch parson, Reverend James Herdman of Bromfield Parish, had refused to participate.<sup>299</sup> Bromfield Parish included a portion of Culpeper County, and the Culpeper County Committee

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295. Letter from William Bradford to James Madison (June 2, 1775), *reprinted in* 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 148, 149.

296. S.D. MCCONNELL, *supra* note 280, at 204–08; RHODEN, *supra* note 106, at 11–12, 64–87, 122.

297. Letter from James Madison to William Bradford (Jul. 1, 1774), *reprinted in* 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 114, 115.

298. Editorial Note to Letter from James Madison Jr. to William Bradford (July 28, 1775), *in* 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 162 & n.10.

299. *Id.*

of Safety later expelled Herdman from the county.<sup>300</sup> This is Madison's report of the parson in July:

A Scotch Parson in an adjoining County refused to observe the fast or preach on that day. When called on he pleaded Conscience, alledging that it was his duty to pay no regard to any such appointments made by unconstitutional authority. The Committee it seems have their Consciences too: they have ordered his Church doors to be shut and his salary to be stopped, and have sent to the convention for their advice. If the Convention should connive at their proceedings I question, should his insolence not abate if he does not get ducked in a coat of Tar & surplice of feathers and then he may go in his new Canonicals and act under the lawful Authority of Gen. Gage if he pleases.<sup>301</sup>

Here, Madison meted out much harsher treatment than the Virginia Quakers received for their disloyalty to the patriotic cause. At first, the closing of the parson's church sounds like another form of religious persecution. It must be remembered, however, that this parson's church, unlike the meeting places of Quakers, Baptists, and other dissenters, was a creature of the state. As such, local government—in the form of the vestries—held authority to create and perpetuate ministerial vacancies in parish churches and stop ministers' salaries, and they exercised this authority routinely even before war with Britain was contemplated.<sup>302</sup> Not without reason, the county committees likely viewed themselves as holding similar authority to the vestries within their own counties. In a real sense the county committees were arms of local government; the committees were established under authority of the state, their members were elected by the freeholders of the county, and they were composed almost exclusively of vestrymen, sheriffs, justices, and other local governmental officeholders.<sup>303</sup> Thus, the committees would not hesitate to regulate the activities of the established church and its minister in their county. The tar and feathers, of course, were remedies outside of law, but nevertheless were

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300. *Id.*

301. Letter from James Madison to William Bradford (Jul. 28, 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 161.

302. THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787, at 10 (1977); RHODEN, *supra* note 106, at 13-15; McConnell, *supra* note 23, at 2138-42.

303. ECKENRODE, *supra* note 258, at 36-38, 41-45.

often applied during this period by unruly mobs confronting suspected British sympathizers.<sup>304</sup>

Immediately following his account of Reverend Herdman, Madison offered this intriguing account of another Anglican parson even closer to home: "We have one of the same Kidney in the parish I live in. He was sometime ago published in the Gazette for his insolence and had like to have met with sore treatment; but finding his protection to be not so much in the law as the favor of the people he is grown very supple and obsequious."<sup>305</sup> Madison did not provide further details, but the report in the Virginia Gazette makes clear that the offending minister was another "Scotch parson," Reverend John Wingate,<sup>306</sup> who had assumed the rectorship of St. Thomas Parish following the untimely death of the Madisons' close friend and tutor, Reverend Thomas Martin,<sup>307</sup> and the one-year tenure of his replacement, Reverend John Barnett.<sup>308</sup> The Gazette reported that the Orange County Committee of Safety, acting upon information reaching them, met with Reverend Wingate at the county courthouse and respectfully asked that he surrender certain Tory pamphlets in his possession.<sup>309</sup> Wingate refused, claiming that the pamphlets were the private property of an out-of-town merchant.<sup>310</sup> The committee tried to persuade Wingate by appealing to his "association engagements" and his patriotism, promising to compensate the merchant-owner for the pamphlets if he wished.<sup>311</sup> Wingate still refused to surrender them, but offered to allow the committee to view the pamphlets as long as they would not be damaged.<sup>312</sup> This, however, was not what the committee wanted. In the end, the committee "peremptorily demanded" the pamphlets, confiscated them, and publicly burned them a couple of weeks later, following up this action by

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304. See generally Benjamin H. Irvin, *Tar, Feathers, and the Enemies of American Liberties, 1768–1776*, 76 *NEW ENG. Q.* 197 (2003).

305. Letter from James Madison to William Bradford (Jul. 28, 1775), reprinted in 1 *MADISON PAPERS: CONGRESSIONAL SERIES*, *supra* note 67, at 161.

306. Francis Taylor, *VA. GAZETTE*, Apr. 15, 1775, at 1–2.

307. *BRANT*, *supra* note 18, at 122–23.

308. See Otto Lohrenz, *The Reverend John Wingate: An Economic Casualty of Revolutionary Virginia*, 18 *J. AM. CULTURE*, Winter 1995, at 43, 43–45 (1995).

309. Taylor, *supra* note 306, at 2.

310. *Id.*

311. *Id.*

312. *Id.*

publishing in the Gazette an open letter explaining the situation.<sup>313</sup> The pamphlets, said the committee, were full of “the most impudent falsehoods and malicious artifices” along with “audacious insults on that august body (the Grand Continental Congress),” and therefore “they deserved to be publicly burnt, as a testimony of the committee’s detestation and abhorrence of the writers and their principles . . .”<sup>314</sup> Apparently, as Madison remarked, after this incident Wingate complied with all expectations of the revolutionaries and had no further confrontations with them, although he (like many Anglican parsons) moved back to Great Britain during the war.<sup>315</sup>

Thus it seems that, in sharp contrast to the “honest and simple” Virginia Quakers, the Anglican parsons of Virginia received no generous assumptions in their favor, not even the assumption that their treason was somewhat excusable due to pressures from the religious hierarchy in England. Madison never mentions such pressures, nor does he opine as to whether their anti-war stance was truly dictated by religious scruples. This may have been because Madison so readily assumed that baser interests, and not religion, motivated them; this is surely the unstated implication of these accounts. But, of course, it may have been that he simply did not care one way or the other whether they held religious scruples. This latter attitude, if true, would be more troubling; nonetheless, we may at least observe that he was quite young, and the country was at war, in danger of imminent destruction. In later years, in writings such as his opposition to the Sedition Act of 1798<sup>316</sup> and his careful wording of prayer proclamations during the War of 1812,<sup>317</sup> Madison revealed a willingness to allow both political

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313. *Id.*

314. Lohrenz, *supra* note 308, at 45–46; Taylor, *supra* note 306, at 2.

315. Lohrenz, *supra* note 308, at 46–47; see also Letter from James Madison to William Bradford (July 28, 1775), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 161.

316. See GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 44–45 (2004).

317. See IRVING BRANT, JAMES MADISON: COMMANDER IN CHIEF 27–28 (1961); IRVING BRANT, THE FOURTH PRESIDENT: A LIFE OF JAMES MADISON 502, 546–47 (1970); Andy G. Oree, *James Madison and Legislative Chaplains*, 102 NW. U. L. REV. 145, 191–92, 192 n.252 (2008); see also Letter from James Madison to Edward Livingston (Jul. 10, 1822), reprinted in 9 MADISON’S WRITINGS, *supra* note 232, at 98, 100–01 (containing Madison’s own recollection that he “was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory”).

and religious dissent, even in wartime, in order to afford a greater scope for the rights of conscience. Perhaps these more nuanced views of religious toleration were not fully developed in him at the age of twenty-four, caught up as he was in revolutionary fervor. Or perhaps even in later years he saw his harsh stance toward the Anglican parsons as uniquely justifiable—because the public welfare was so imminently threatened, because Anglican parsons were uniquely privileged by the state and accountable to it, or because he believed the parsons were not truly motivated by religious beliefs.

But one conclusion is inescapable: By 1775, James Madison viewed the religious establishment in Virginia as a particular and dangerous enemy. He could defend the religious liberties of Baptists, who posed no danger to the public welfare. He could even tolerate Quaker pacifism, disloyal and dangerous though he deemed it to be during wartime. But, legally privileged agents of the established religion, crying for appeasement of the Crown that sponsored them, were an entirely different question. As far as we know, the only pleas for religious liberty to which Madison turned a deaf ear were those raised by Anglican clergymen—the very group that had long denigrated religious toleration and were now trying to claim the benefit of it, the group that had furnished its “Quota of Imps” for horse-whipping others but protested loudly against reductions in their own clerical incomes, the group that had long benefitted from legal privileges jealously denied to the rest of the religious world. If Madison bent his principles in 1774 to 1775, it seems to have been with respect to this group, and no other.

In any case, Madison emerged from these events more committed than ever to disestablishment. The root of the problem, to him, was “Ecclesiastical Establishment[s],” just as he had suggested over a year earlier when he first broached the subject of “Politicks” with Bradford.<sup>318</sup> He posited that religious liberty and equality must be assured for all sects, and, to that end, religious establishments must be torn down. Once they were, Madison would hold no animosity toward Anglican or Episcopalian clergymen. But as long as the Anglican Church was privileged at law, these incidents involving disloyal Anglican parsons seemed to confirm all Madison’s fears of the dangers of establishments,

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318. Letter from James Madison to William Bradford (Dec. 1, 1773), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 100, 101.



and he was not disposed to be merciful toward these privileged clerics or the establishment they represented.

Meanwhile, undeterred by the legislative inaction of 1774, the Baptists nevertheless believed they smelled blood in the water as war approached. Accordingly, they continued to petition the House of Burgesses for reforms granting religious liberty.<sup>319</sup> The onset of war against England was surely a propitious time to press their criticisms of the privileged position of the Church of England. Accordingly, Baptists from all over Virginia met in August of 1775 in Cumberland County and boldly resolved for the first time to petition the General Assembly for the complete disestablishment of religion in Virginia.<sup>320</sup> For this purpose, they spent the following year circulating petitions among their growing membership throughout the colony. Several of these would be presented to the Assembly in the fall of 1776.<sup>321</sup> One of them garnered nearly ten thousand signatures.<sup>322</sup> Perhaps influenced by the Baptists, other religious sects, such as Presbyterians and Lutherans, simultaneously prepared similar petitions calling for disestablishment.<sup>323</sup>

#### V. THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1776

As the Baptists were circulating their petitions (and the Continental Congress was approving the Declaration of Independence) in the summer of 1776, Madison was serving in the Virginia Constitutional Convention in Williamsburg, his first elected position outside Orange County.<sup>324</sup> Virginia's "Convention," the temporary successor to the General Assembly, during the previous fall had voted that another Convention be convened in May 1776, with delegates to be selected in April by countywide elections.<sup>325</sup> This convention would almost certainly be framing a new government. Early in the year, Governor Dunmore had ordered the sack of Norfolk, Virginia's largest city, and a few days later Thomas Paine's *Common Sense* had

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319. SEMPLE, HISTORY (1810), *supra* note 56, at 62.

320. *Id.*

321. ISAAC, *supra* note 96, at 280.

322. BUCKLEY, *supra* note 302, at 25–26; ISAAC, *supra* note 96, at 280.

323. BUCKLEY, *supra* note 302, at 26.

324. BRANT, *supra* note 18, at 190.

325. *Id.* at 192.

made its appearance all over Virginia.<sup>326</sup> By April, consumed with the growing spirit of revolution, Virginia's freeholders were determined to elect the most ardent supporters of independence, almost taking for granted that the Convention that summer would be calling for the creation of an independent state and would be drafting a constitution to bring it into being.<sup>327</sup> With Orange County's prior burgesses both serving in the army, James Madison, Jr., now twenty-five years of age, was easily elected to one of the two newly available seats for the Convention.<sup>328</sup> This election marked the true beginning of Madison's long political career.

This beginning was auspicious because, of all the important business before the Convention at this remarkable time, Madison asserted himself most strongly on one issue: the treatment of religion.<sup>329</sup> This gives us an important insight, once again, into his priorities in his youth. He often remarked that he was by nature shy, had a weak voice, and felt himself ungifted as a public speaker.<sup>330</sup> As a neophyte delegate among so many luminaries of Virginia politics, he would have felt reluctant to take an active role in the proceedings of the convention.<sup>331</sup> Yet, somehow, on May 16, after the delegates had voted to declare the colony's independence from Great Britain, Madison was appointed to the important committee charged with proposing a new state constitution and an accompanying Declaration of Rights.<sup>332</sup> As on so many future occasions, Madison would exercise a great influence in this committee work behind the scenes. He appears to have had very little influence on the rest of the proceedings, but his work on the religion provision of the Virginia Declaration of Rights changed history.

By this time, as Lance Banning has noted, "Madison's mature position on religious freedom was probably complete in its essen-

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326. *Id.* at 192–93.

327. *Id.* at 194, 196–97.

328. *Id.* at 198.

329. *Id.* at 201, 205–06, 234, 241–48.

330. *Id.* at 201, 246; BRANT, *THE FOURTH PRESIDENT*, *supra* note 317, at 210.

331. See James Madison, *Autobiography*, in Adair, *supra* note 118, at 199 (stating that Madison recalled his service in the Virginia Constitutional Convention of 1776 as follows: "Being young & in the midst of distinguished and experienced members of the Convention [I] did not enter into its debates; tho' [I] occasionally suggested amendments").

332. KETCHAM, *supra* note 18, at 71.

tials,"<sup>333</sup> and he brought these views immediately to bear in committee. Madison demonstrated above all else a continuing interest in religious liberty, an interest that made him so bold as to critique the work of the eminent George Mason. Mason, who was twenty-five years older than Madison and much better known at the time, arrived at the Convention two days after Madison's committee appointment and was immediately appointed to the committee himself, effectively assuming leadership of it.<sup>334</sup> Widely acknowledged to be the most knowledgeable political theorist in Virginia, Mason's proposals formed the basis for the committee's Declaration.<sup>335</sup> Yet Madison could not forbear suggesting improvements to Mason's draft of the article on religious liberty. In the short operative clause, Mason had written that "all men shou'd enjoy the fullest toleration in the exercise of religion,"<sup>336</sup> but Madison insisted that the article should guarantee not mere toleration, but "the full and free exercise of religion"<sup>337</sup>—a phrase that ultimately found its way, in shortened form, into the First Amendment of the U.S. Constitution.<sup>338</sup>

Madison's amendment was important because it implied a distinction between the establishment-oriented idea that the government should graciously tolerate religious minorities and the idea that each individual possesses a natural right of freedom of religion.<sup>339</sup> "Toleration," to Madison, implied a reference point of privilege and power; it implied the existence of a religious group that did the tolerating and that might choose to tolerate (or not) because it wrote the laws.<sup>340</sup> In short, toleration was

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333. LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 86 (1995).

334. KETCHAM, *supra* note 18, at 71.

335. BUCKLEY, *supra* note 302, at 17; KETCHAM, *supra* note 18, at 71.

336. George Mason's Proposed Declaration of Rights (May 20–25, 1776), *reprinted in* 1 *MADISON PAPERS: CONGRESSIONAL SERIES*, *supra* note 67, at 172, 172–73.

337. *See* Committee's Proposed Article on Religion (May 27–28, 1776), *reprinted in* 1 *MADISON PAPERS: CONGRESSIONAL SERIES*, *supra* note 67, at 173; Madison's Amendments to the Declaration of Rights, Version A (May 29–June 12, 1776), *reprinted in id.* at 173, 174.

338. U.S. CONST. amend. I.

339. *See* Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 *HARV. L. REV.* 1409, 1443 (1990).

340. BRANT, *supra* note 18, at 243–50; BUCKLEY, *supra* note 302, at 18; COBB, *supra* note 21, at 492; James Madison, Independence and Constitution of Virginia, *reprinted in* 1 *MADISON PAPERS: CONGRESSIONAL SERIES*, *supra* note 67, at 175, 177 ("This variation [from toleration to free exercise] . . . is recollected to have been brought forward . . . with a view, more particularly to substitute for the idea, ex-

an establishment idea. For this reason, Madison felt that it must be opposed. Madison held that Baptists, Quakers, and Presbyterians were, not “dissenters” to be “tolerated,” but equal human beings with a natural right to form and publish their own religious sentiments—just like Anglicans. Thus, in the new Virginia, no one’s religious convictions would be merely *tolerated* by the law; rather, the law would simply leave everyone alone to exercise their natural rights.<sup>341</sup> Interestingly, Baptist petitions circulating at just this moment were likewise expressing dissatisfaction with the idea of “mere toleration”—a principle that Baptists knew “from experience . . . was not a sufficient check, having been imprisoned at a time, when that law [the Toleration Act] was considered by many as being in force.”<sup>342</sup> Like Madison, Baptists were avowing that religious liberties would never be safe until all religious establishments were dissolved.

The change from “toleration” to “free exercise of religion” was undoubtedly a significant shift, but even this was not enough for Madison. The natural right to freedom of religion might well *imply* that religious establishments were illogical, but he wanted to disestablish religion in direct terms, and he wanted to attempt it at that moment. This fact shows that the battle against religious establishments was not something Madison took up only late in life, after the Jeffersonian “wall of separation” metaphor had gained such popularity among Americans. Instead, Madison began the fight in his first legislative assembly, at the age of twenty-five, when the outcome was anything but certain.

More than two years before, after having “squabbled and scolded abused and ridiculed so long about [religious persecutions],” Madison had reported to Bradford that he was “without common patience.”<sup>343</sup> The established clergy’s role in the persecutions, he had confided, “vexes me the most of any thing what-

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pressed by the term ‘*toleration*,’ an absolute and equal right in all, to the exercise of religion according to the dictates of conscience.”); Lance Banning, *James Madison, the Statute for Religious Freedom, and the Crisis of Republican Convictions*, in *VIRGINIA STATUTE*, *supra* note 76, at 109, 111–13; Irving Brant, *Madison: On the Separation of Church and State*, 8 *WM. & MARY Q.* 3, 6 (1951); McConnell, *supra* note 339, at 1443.

341. See CURRY, *supra* note 25, at 135 (quoting Mason’s draft and Madison’s proposed revisions to show that “[i]n 1776 . . . Virginia rejected toleration as an acceptable framework for Church and State”).

342. SEMPLE, *HISTORY* (1810), *supra* note 56, at 62.

343. Letter from James Madison to William Bradford (Jan. 24, 1774), reprinted in 1 *MADISON PAPERS: CONGRESSIONAL SERIES*, *supra* note 67, at 104, 106.

ever.”<sup>344</sup> In Madison’s view, the persecutions were insuperably tied to the religious establishment, and he found it unbearable to wait patiently and trust the establishment to correct itself, even if the new constitution were to guarantee equal liberty in religious practices. “free exercise of religion” was impossible as long as a religious establishment continued because establishment insiders could never be trusted to leave dissenters alone, as the right to “Free exercise of religion” demanded. Moreover, religious establishments denied freedom of religion to the members of the established church as well, since their religious doctrines and practices must by necessity be fixed by the state.<sup>345</sup>

More fundamentally, the whole notion of a natural right to freedom of religion depended on a theoretical understanding of states as relegated, by the social contract, to a secular jurisdiction. If religious liberty was an inalienable natural right—if states therefore were never authorized by “the governed” to make judgments about true religion—how then could a state presume to embrace, even non-coercively, a particular church or religious doctrine? For this reason, Madison believed the natural “rights of Conscience, not included in the surrender implied by the social State, [are] more or less invaded by *all* religious Establishments . . . .”<sup>346</sup> Even non-coercive or “tolerant” establishments violated natural rights, because they constituted unwarranted forays by the state outside its secular jurisdiction. Persuaded that “religion is essentially distinct from Civil Govt. and exempt from its cognizance,” Madison was led to conclude that “a connexion between them is injurious to both . . . . [A] legal establishment of religion without a toleration could not be thought of, and with a toleration, is no security for public quiet & harmony, but rather a source itself of discord & animosity . . . .”<sup>347</sup> A governmental attempt to take cognizance of religious matters, even by a mere non-coercive declaration of religious truth,

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344. *Id.*

345. See McConnell, *supra* note 23, at 2132–44 (describing governmental control over the doctrines, liturgy, and hierarchy of the Church of England during the Colonial and Revolutionary eras, both in Britain and in British colonies in North America).

346. Letter from James Madison to Rev. Adams (1832), reprinted in 9 MADISON’S WRITINGS, *supra* note 232, at 485 (emphasis added).

347. Letter from James Madison to Edward Everett (Mar. 19, 1823), reprinted in *id.* at 124, 126–27.

implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.<sup>348</sup>

Now, with an opportunity to influence the wording of the new state constitution, and perhaps sensing an opportunity in the pro independence, anti clerical spirit imbuing the convention, Madison determined to attack the establishment directly.<sup>349</sup> His first redraft of Mason's religion article specified that "no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges . . ." <sup>350</sup> Importantly, this provision might well have forbidden not only those "emoluments or privileges" financed at taxpayer expense, but also those, such as government-awarded titles or accolades, which served to designate a privileged religious affiliation or doctrine but coerced no one and cost the taxpayers nothing. Here Madison anticipated the most radical disestablishment pleas of the Baptists and other religious dissenters even before they were presented to the state legislature.

As a junior delegate who doubted his own forensic skills, he could not propose his redraft from the floor. Instead, he convinced another member of the committee to do it. His choice of mouthpiece could not have been more strategic: He used Patrick Henry, already acclaimed as the leading orator among Virginia statesmen, a defender of persecuted Baptists in his law practice, and personally known to Madison for at least a year.<sup>351</sup> Whether

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348. See James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in 8 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 295, 301 (arguing that these were reasons to oppose the general assessment bill being considered in Virginia).

349. CURRY, *supra* note 25, at 135; Editorial Note to Declaration of Rights and Form of Government of Virginia (May 16–June 29, 1776), in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 170–72; BRANT, *supra* note 18, 243–45; BUCKLEY, *supra* note 302, at 18–19.

350. Madison's Amendments to the Declaration of Rights, Version A (May 29–June 12, 1776), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 174, 174.

351. Madison and Henry had met before—it is certain that Henry carried to Philadelphia that summer a letter from Madison to Bradford, as Henry travelled to take his seat in the Second Continental Congress. BRANT, *supra* note 18, at 177–84; Editorial Note to Address to Captain Patrick Henry and the Gentlemen Independents of Hanover, in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note

Henry understood the disestablishment thrust of Madison's draft is open to question; in the end, though, Henry agreed to introduce the amendment on the floor. Yet, even Henry's sponsorship could not induce the Convention to support such a radical measure, particularly when he backpedaled after introducing it. As soon as Henry had introduced Madison's proposal, a delegate—perhaps remembering Henry's inflammatory aspersions on the characters of the established clergy in the Parson's Cause—asked whether Henry's intent was to disestablish the church.<sup>352</sup> According to Edmund Randolph's eyewitness account, Henry "disclaimed such an object."<sup>353</sup> Because many of the delegates understood that the proposed language would accomplish precisely that "object," the amendment as Madison had drafted it was now dead in the water.<sup>354</sup> Recognizing this, Madison quickly produced a second redraft of the religion amendment, still providing that "all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience," but this time dropping the ban on investing a "man or class of men . . . on account of religion" with "peculiar emoluments or privileges."<sup>355</sup> This version, with slight stylistic alterations, was adopted by the Convention and took its place as Article 16 of the Virginia Declaration of Rights.<sup>356</sup>

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67, at 147 n.1. Regarding Henry's legal defense of Baptists, see, for example, LITTLE, *supra* note 34, at 325, 345–47, 388–91; 1 ROBERT DOUTHAT MEADE, PATRICK HENRY: PATRIOT IN THE MAKING 245–50, 287 (1957); SEMPLE, HISTORY (1810), *supra* note 56, at 24, 65–66; 1 STOKES, *supra* note 23, at 312.

352. 6 COLLECTIONS OF THE VIRGINIA HISTORICAL SOCIETY 35 n.53 (R. A. Brock ed., Richmond, Va. Historical Soc'y 1887).

353. *Id.*

354. The quick defeat of the Madison-Henry proposal may be explained by noting that, at least according to Thomas Jefferson, the Anglican supporters of religious establishment still constituted a majority of the delegates to the Convention, even though dissenters now outnumbered them in the population as a whole. THOMAS JEFFERSON, *Autobiography* (1821), in 1 WRITINGS OF THOMAS JEFFERSON 58 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903); see also BRANT, *supra* note 18, at 295–96.

355. Madison's Amendments to the Declaration of Rights, Version B (May 29–June 12, 1776), reprinted in 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 174, 174–75.

356. BUCKLEY, *supra* note 302, at 18–19; CURRY, *supra* note 25, at 135; Article on Religion Adopted by Convention (Jun. 12, 1776), in *id.* at 174, 175; Editorial Note to Madison's Amendments to the Declaration of Rights, in 1 Madison PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 171; Banning, *supra* note 340, at 112; Brant, *supra* note 340, at 6; BRANT, *supra* note 18, at 245–47.

That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.<sup>357</sup>

Although the provision did not disestablish the church, and implementation of the provision would now be left to the House of Delegates and local magistrates, the recognition of a natural right of religious exercise in the new state's organic law was a huge early victory for the forces of disestablishment in Virginia. As Jack Rakove notes, although Madison's disestablishment proposal was defeated in the Convention, the adoption of his "free exercise" language "laid the intellectual basis for disestablishment" nonetheless.<sup>358</sup> Besides being later cited by numerous petitioners in the successful push for disestablishment in Virginia,<sup>359</sup> the free exercise clause of the Virginia Declaration of Rights served as the model for numerous other states as they adopted or amended their own constitutions,<sup>360</sup> and ultimately the language found its way into the First Amendment of the U.S. Constitution as well.<sup>361</sup> The stage was now set in Virginia for explicit disestablishment, a principle many dissenters believed to be already implied by the new religious liberty article and its foundation in a natural liberty of conscience. Madison, for his own part, "contended steadily thereafter that any form or degree

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357. 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 111–12 (William Waller Hening ed., Richmond, J & G Cochran 1819–1823).

358. See JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 13 (1990).

359. Brant, *supra* note 340, at 6.

360. BRANT, *supra* note 18, at 247–49. Between 1776 and 1791, when the Bill of Rights for the Constitution was ratified, a number of states included the "free exercise" language in their new constitutions. See, e.g., THE AMERICAN CONSTITUTIONS AND RELIGION: RELIGIOUS REFERENCES IN THE CHARTERS OF THE THIRTEEN COLONIES AND THE CONSTITUTIONS OF THE FORTY-EIGHT STATES 47–49, 53, 55 (Conrad Henry Moehlman ed., reprint 2007). Among the states that did not adopt the term "free exercise," several nevertheless adopted the principle, by stipulating that religious freedom was a natural and inalienable right rather than a matter of toleration by the state. See, e.g., *id.* at 44, 50, 51 (N.C. CONST. of 1776, art. XIX; N.H. CONST. of 1784, art. I, §§ 4-5; PA. CONST. of 1776, art. II).

361. U.S. CONST. amend. I.



of church establishment violated the rights of conscience, and was unconstitutional under the article actually adopted."<sup>362</sup>

## VI. CONCLUSION

The Anglican establishment in colonial Virginia promised order, religious uniformity and orthodoxy, a sense of common religious community, and the promotion of virtue. But, as Madison grew up, the establishment was failing to deliver on these central promises. Not only was it ineffective, but in the minds of many Virginians, it affirmatively caused harm. As more time passed and anti-Crown sentiment grew, the Crown's church drew additional criticism from political firebrands who believed the Anglican Church was a puppet of the Crown, its priests and bishops little more than greedy British government ministers by another title. This situation was the legal establishment of religion as Madison first knew it—and then he watched in disbelief as it stretched out its privileged arm to persecute mostly poor, unschooled farmers and tradesmen in and around his home county for the crime of preaching and practicing their religious beliefs, which Madison found to be "in the main . . . very orthodox."<sup>363</sup>

The early history of Madison's life demonstrates that he formed an opposition to both religious establishments and religious persecutions early in life, and in fact associated them with one another. This development did not cause him to view religious establishments as permissible whenever they did not persecute anyone; on the contrary, it caused him to oppose even supposedly tolerant religious establishments as violations of the natural right of religious liberty. Between his graduation from college and his service in the Virginia Constitutional Convention of 1776, he came to oppose on principle all intrusions of law into what he saw as the realm of religion. The religious establishments Madison knew were arms of the government that claimed to support religion while actively persecuting those holding disfavored religious beliefs. Madison found this illogical and infuriating. Beyond this, he noted that the privileges conferred by religious establishments promoted pride, sloth, ignorance, and

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362. Brant, *supra* note 340, at 6.

363. Letter from James Madison to William Bradford (Jan. 24, 1774), *reprinted in* 1 MADISON PAPERS: CONGRESSIONAL SERIES, *supra* note 67, at 104, 106.

impiety among the privileged group—in fact corrupting religion—without delivering the societal benefits which establishments were widely assumed to produce. The solution, for him, was not to limit the persecuting power of religious establishments, but to limit law and government to their proper sphere, a sphere that did not include religious matters at all.

For Madison, there could be no such thing as a legal system that protected religious liberty while also establishing religion. Unlike some of his contemporaries, Madison did not oppose religious establishments because, and only to the extent that, their physical persecutions prevented the free exercise of religion. Rather, he opposed religious establishments because *the fact of establishment itself* infringed the natural right of religious liberty, by purporting to endow the civil magistrate with a jurisdiction over spiritual affairs. This endowment alone was a usurpation, with or without further coercion. Madison understood that outright persecution, such as imprisonments or fines, was only one way the law might infringe the natural rights of conscience.