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## **The First Amendment's Religion Clauses**

### **The Calvinist Document that Interprets Them Both**

Leah Farish

#### **Abstract**

This paper suggests that the Westminster Confession of Faith's provisions about church and state, revised in Philadelphia at the start of the Constitution's ratifying convention, furnished much of the syntax and vocabulary for the First Amendment's religion clauses. Recognizing the cultural links between the new American government and the Presbyterian Church, the author argues that it was natural for the founders to look to how the new Westminster Confession situated church and state. The author argues that Fisher Ames's proposed wording for the First Amendment won immediate adoption because it resonated with the Confession, standing as it did in that culture for unity and good sense.

#### **Introduction**

In May of 1787, national leaders gathered in Philadelphia to draft a new conception of liberty, of church/state relations, and of the relationships of powers that had been unknown to its predecessors in Britain. That document was the Westminster Confession of Faith.

[1] In this article we first explore how the widespread acceptance of the Westminster Confession of Faith made it familiar to almost everyone in American society – including politicians – during the founding period. The Confession had to adapt to the rapidly evolving American government; the First Amendment's two religion clauses (free exercise and no-establishment) were born simultaneously with the Confession. The two manifestos converge in a specific paradigm of church-state harmony, and they were able to do so because the cultural connotations of the Confession unified a badly divided Congress.

[2] To give adequate credit to the Confession will demand that we challenge the extent of James Madison's Enlightenment-oriented contributions to the First Amendment, noting instead how naturally Presbyterian thought surfaced in the First Amendment.

[3] In concluding, we suggest that much of the whole underlying church/state paradigm in the new Confession should be considered as part of the original intent of the Founding Fathers, resulting in a fresh interpretation and application of the Religion Clauses to American law and life.

[4] This article is not a polemic for "original intent," but rather seeks understanding of how important phrases of the Religion Clauses were used in society before they were incorporated into the Bill of Rights and how they were meant to operate after.

### The Widespread Westminster

[5] Most people know that the Constitution was drafted in Philadelphia in 1787. What many people do not know is that the parts of the Westminster Confession that deal with church and state began to be formally revised in Philadelphia at the same time as our Constitution. Both writings were significant departures from old structures. It is unlikely that they would have been written in disharmony with one another, since both were drafted by people free to create something entirely new. Thomas Paine's *Common Sense* exclaimed, "We have it in our power to begin the world over again. A situation similar to the present has not happened since the days of Noah until now" (Davis 2000: 72). In this atmosphere of idealism, novelty, and creativity, both documents to which we refer had their birth.

[6] The Westminster Confession, as its name indicates, did not originate in America. In 1643, the English Parliament gathered the Westminster Assembly to draft a statement of faith that would encourage unity with wary Scotland. Its most plentiful form was in catechisms, the most common called "the Shorter Catechism of the Assembly of Divines," (for older children) by a mixture of Presbyterians (the largest group), Episcopalians, Independents, and Erastians (those who believed the state should handle all matters of discipline and enforcement of church law.)

[7] In the New World, the Confession was adopted with slight variations by the Congregationalist, Baptist, and Presbyterian churches, and the colonies of Massachusetts and Connecticut designated it as state doctrine (Davis 2000: 28). By the mid-1770's, most of the colonial population lived under either an Anglican or a Congregational state establishment (Davis 2000: 28). Anglicans/Episcopalians such as many Virginians, including James Madison, remained at odds with Reformed thought over many liturgical issues, but they were comfortable with the precepts of the Catechisms, taught in the New England Primer. Some Anglicans were in fact Calvinists (Bonomi: 32). And immigration brought more sons of the Reformers between 1766 and 1776 – "Anglican sympathizers estimated that most new American residents were Presbyterians" (Hall: 266).

[8] Presbyterians outnumbered Quakers in Pennsylvania and Catholics in Maryland ten to one (Leyburn: 9; Bonomi: 22). According to the Constitution Society, there were four million people in the colonies around this time and there were five million copies of the Confession's Catechism in print (Gardiner). Reformed thought, with its emphasis on individual Scripture reading, naturally devoted itself to educating all children. In many towns,

officials would visit homes to assure themselves that the children were learning it (Gardiner). This process in turn helped to spread Reformed views. “The Reformed tradition was the religious heritage of three fourths of the American people in 1776 and the impact of the Confession both on the east coast and the frontier defied calculation” (Ahlstrom: 50). German historian Leopold von Ranke has said, “John Calvin was the virtual founder of America” (Carlson: 19). According to James H. Hutson, a common Reformed faith “was embraced by all of the major Protestant groups who settled America . . .” (quoted in Hall: 386). In New York and New Jersey, there was no single dominant denominational population (Davis 2000: 28), but the various Protestant sects had common ground in the Confession. To study at Harvard, Princeton, or Yale, one was required to assent to the Confession, sometimes with a signature (Leyburn: 9), and affirm something along the lines of these words from Declaration of Independence signer Robert Treat Paine: “I believe the Bible to be the written word of God and to Contain in it the whole Rule of Faith & manners: I consent to the Assemblys Shorter Catechism as being agreeable to the Reveal'd Will of God & to contain in it the Doctrines that are according to Godliness” (Ahlstrom: 50). Virtually every American – male and female – studied it; daily recitations of the omnipresent New England Primer were required in schools, and memorization of passages of the Confession were common assignments (Monroe).

[9] James Madison so appreciated the wisdom of the then-College of New Jersey that after earning his degree, he returned there to read law and theology with John Witherspoon (Knoll: 97). Madison never joined the Presbyterian Church but remained Episcopalian. However, like all the Founding Fathers, he was fully versed in the ideology. “There was not a person at Independence Hall in 1776 who had not been exposed to it, and most of them had it spoon fed to them before they could walk” (Gardiner).

[10] All this is to say that if a phrase from the Confession were used in the Constitution, much of the public would recognize the reference. “Meaning must be derived from usage” (Rakove: 8), and we may find fresh meaning in the Religion Clauses by tracing their phrases in previous key usages. So let us explore what the European and American Confessions say; we will eventually not only see that the Confession clarifies the First Amendment, but also understand that the First Amendment crystallized what the Confession meant.

### **The Confession at the Dawn of the Republic**

[11] For about 140 years after its inception, there were no significant revisions of the Confession, and none by American Presbyterians. But after the 1776 Revolution, clearly something was going to have to be done about the passages that related to the monarchy and church/state relations. Would there be another monarchy in the New World? What could or should be said about the Christian's place in the civil order when there was very little civil order around? “Presbyterians were faced with a puzzling new question: What did it mean to be an *American* Presbyterian?” (Balmer: 37). There was no appetite among them for establishing a Presbyterian state church – the Synod already “anticipated operating in states with established churches” (Peter Lillback, personal communication), none of which were of their denomination.

[12] The church's leaders said this in 1786: “The Synod of New York & Philadelphia adopt, according to the known & established meaning of their Terms, the Westminster confession

of Faith as the confession of their faith; save that every candidate for the gospel Ministry is permitted to except against so much of the twenty third Chapter as gives authority to the Civil Magistrate in matters of Religion. The Presbyterian Church in America considers the Church of Christ as a spiritual Society intirely distinct from the Civil Government; & having a right to regulate their own ecclesiastical policy independently of the Interposition of the Magistrate” (Klett: 604). This echoes Calvin’s *Institutes* in saying that the “common peace and safety” is the civil magistrate’s “only study” (VanDrunen: 758). This official was not to tread on church autonomy.

[13] The use of the words “Magistrate” and “commonwealth” are intriguing, since for over a hundred years these had referred to the monarchy and would have to take on a new denotation in the new regime. Should the revisers replace them with a reference only to the “national government”? Or to “his Excellency,” an anticipated executive? What about a legislative branch? The courts? And what about the states? Church structure might make a more anti-federalist approach attractive to them, so would the revisers accord more religious autonomy to states?

[14] Not knowing the form the new nation would take, the Presbyterians retained the original term “civil magistrate.” But did they mean a new federal government in all its parts, and its correspondent state governments? Even they could not know what they meant because it did not exist yet. The Synod adjourned weeks before the Congress did. This uncertainty notwithstanding, on May 28, 1787, three days after the Constitutional Convention opened, certain changes in the Confession were proposed, with the presbyteries asked to consider them. One year later in May, the Synod ratified the new version, detailed below, at the same time that the states were embarking upon ratifying the Constitution.

[15] It is highly unlikely that the clerics and the politicians ignored each other. The Presbyterian Synod of New York and Philadelphia had 1,000 copies of its proposed changes printed (Klett: 628). So some of those were doubtless furnished to the planners working down the street at Independence Hall. The framers of both documents would have rubbed elbows over supper and at the Communion table. The Synod was in such harmony with the earlier Continental Congress that when the Synod proposed a fast for a date in June 1775, it stated that the date would be withdrawn if the Congress set another, which it did (Davis 2000: 68).

### **Clergy and Congressmen**

[16] Presbyterian scholar John Witherspoon personally shuttled between the two conventions, prominently wearing his “large Geneva collar” (Morrison: 28), and was highly respected and influential in both gatherings, having taught several of the Constitutional drafters at Princeton and mentored James Madison. Some had been educated at Yale, where a past president of the school had urged “the civil magistrate” to “take Care for the Support of Religion . . . as Nursing Fathers,” according to a 1744 sermon by Elisha Williams (quoted in Hall: 389), using a special phrase from the Confession.

[17] During the days that both groups were in session, they would have naturally mingled at the Merchants’ Coffee House and Indian Queen Tavern, as well as at the Presbyterian church, which was in walking distance of Independence Hall. Peter Lillback says, “It was

natural that there must have been conversation” at least about what the Presbyterians were promulgating to their members about church/state relations (personal communication). Although the Congressmen were sworn to secrecy about their deliberations that summer, the Presbyterians were not so obliged about theirs. William Paterson and Jared Ingersoll and another 30% of Congressional delegates were Presbyterian (only 8% of the signers of the Articles of Confederation had been.) (Religion of Founding Fathers). The Presbyterian delegates would not have drafted one document to be in contradiction with the other – not when they had the complete freedom to harmonize them.

[18] Thus, chances are that the revised Confession sheds light on the meaning of the Constitution, especially on the Establishment and Free Exercise Clauses of the First Amendment. In fact, they are almost companion texts.

### From a European Ecumenism to an American Affirmation

[19] Let us now examine the changes that the revisers like Witherspoon made to the European Confession, tailoring it to the American nation. Compare the left with the right column to see the differences between the old order and the new.

### WCF XXIII – Of Civil Magistrates

#### *Original*

3. The civil magistrate may not assume to himself the administration of the Word and sacraments, or the power of the keys of the kingdom of heaven [1]: yet he hath authority, and it is his duty, to take order, that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses of worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed [2]. For the better effecting whereof, he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God [3].

#### *American*

3. Civil magistrates may not assume to themselves the administration of the Word and sacraments [1]; or the power of the keys of the kingdom of heaven [2]; or, in the least, interfere in matters of faith [3]. Yet, as nursing fathers, it is the duty of civil magistrates to protect the church of our common Lord, without giving the preference to any denomination of Christians above the rest in such a manner, that all ecclesiastical persons whatever shall enjoy the full, free, and unquestioned liberty of discharging, every part of their sacred functions, without violence or danger [4]. And, as Jesus Christ hath appointed a regular government and discipline in his church, **no law of any commonwealth, should interfere with, let, or hinder, the due exercise thereof** [emphasis added], among the voluntary members of *any* denomination of Christians, according to their own profession and belief [5]. It is the duty of civil magistrates to protect the person and good name of all their people, in such an effectual manner as

that no person be suffered, either upon pretence of religion or of infidelity, to offer any indignity, violence, abuse, or injury to any other person whatsoever: and to take order, that all religious and ecclesiastical assemblies be held without molestation or disturbance [6].

### WCF XXXI – Of Synods and Councils

#### *Original*

1. For the better government, and further edification of the church, there ought to be such assemblies as are commonly called Synods or Councils. [1]
2. As magistrates may lawfully call a synod of ministers, and other fit persons, to consult and advise with about matters of religion [2]; so if magistrates be open enemies to the church, the ministers of Christ, of themselves, by virtue of their office, or they, with other fit persons upon delegation from their churches, may meet together in such assemblies. [3]

#### *American*

1. For the better government and further edification of the church, there ought to be such assemblies as are commonly called synods or councils [1]: and it belongeth to the overseers and other rulers of the particular churches, by virtue of their office, and the power which Christ hath given them for edification, and not for destruction, to appoint such assemblies [2]; and to convene together in them, as often as they shall judge it expedient for the good of the church [3] (Irons; Smylie 1974: 311).

[20] In these changes we easily see the rejection of Erastian expectations that the civil government enforce sectarian law. The difference is evident where the new wording excludes all civil authority to “suppress . . . blasphemies and heresies” and to “prevent or reform” “abuses of worship and discipline.” These things were contemplated in the prior version so “that unity and peace be preserved in the Church.” But no longer is the civil magistrate to be concerned with church matters.

[21] On the other hand, the state’s protection of Christianity becomes more explicit. The comparison to government as “nursing fathers” (Isaiah 49:23) shifts from a scripture reference in the former rendering to the main body of the new Paragraph 3 (Library of Congress 2003). The syntax is very similar to a letter from Benjamin Franklin, which says, “O let not Britain seek to oppress us, but like an affectionate parent endeavor to secure freedom to her children . . .” (1753 letter to Peter Collinson, Philadelphia; 4.485-86). Earlier, John Locke had spoken of the public need for “nursing fathers tender and careful of the public weal.” The phrase was used in every colony which had established religions, as well as in New England Congregationalist and Anglican writings (Library of Congress 2003).

[22] Perhaps most significantly, in the later formulation of the Confession, religion is shielded: “. . . [n]o law of any commonwealth, should interfere with . . . , or hinder the due exercise thereof among the voluntary members of any denomination of Christians . . .”

Syntactically, this sentence is echoed in the First Amendment itself: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

[23] Government nurture of "the church of our common Lord" must take place "without giving the preference to any denomination of Christians above the rest," but clearly according to the Confession, it should take place. In many Founders' view, only the Christian religion merited such a relationship with the state, yet the state must protect "the person and good name" even of non-Christians, never allowing "any indignity, violence, abuse, or injury to any other person whatsoever." No support of non-Christian religious institutions is here contemplated, but the dignity of all individuals is affirmed.

[24] In WCF XXXI: "Of Synods and Councils", Paragraph 1 originally provided that state officials could "call a synod of ministers, and other fit persons, to consult and advise with about matter of religion; so if magistrates be open enemies to the church, the ministers of Christ . . . may meet together in such assemblies." The 1787 reading says that church leaders have the freedom "to appoint such assemblies; and to convene together in them, as often as they shall judge it expedient . . ." It is worth remembering that to the Founders, the word "assembly" frequently denoted a religious meeting. The connotations of the "freedom peaceably to assemble" in the First Amendment are expanded by this association (Kurland and Lerner; Smith and Sleeper; note that the Westminster confessions were also called an assembly).

[25] It is not only the Westminster Confession that reflects the break with monarchy; the Book of Common Prayer was also revised. However, being a prayer book, it does not discourse on political structures; it merely omits prayer for the king. Instead of beseeching that the Defender of the Faith "keep and strengthen in the true worshipping of thee," it asks that God "bless the honorable Congress with Wisdom to discern and Integrity to pursue the true interest of the United States" (Library of Congress 2003).

### The "New Deal" of the 1700s

[26] The deal that was struck between church and state in the new nation was that, for its part, the church would never again force its doctrines on anyone with the power of the sword, but in return, the state would protect the church since the church had agreed not to protect itself (Klett: 54-56). This is evident when we compare the old paragraph 3 of WCF XXIII with the new: in the old, the "civil magistrate" may use his power to suppress heresy, maintain the unity of the Church, and prevent or reform all corruption of worship; in the new, he (which becomes "they") has lost all power to address those areas, but instead has a new restriction from interfering in the least with matters of faith, and a new duty to protect the church.

[27] The Reformation had paved the way for separating church and state by separating church from *faith*. The Confession makes it clear that the only mediator between God and humans is Christ (WCF VIII and XXI). When the common man or woman could read a Bible or be absolved of sin without a priest, this located the spirit and conscience of an individual – and potentially of a society – both inside and outside the walls of a particular church. Until the Western Christian could apprehend that salvation and the Spirit were accessible to the individual, a divorced church and state were intolerable and unappealing



prospects. Only when those in that society knew they would not forfeit heaven by rebelling against government could they have revolted.

[28] Moreover, if eternal truth, morals, and the supernatural were only alive within the church, a state separated from the institutional church would be drained of spirituality, and would be an arid, dangerous place. But if the Spirit could blow wherever it would, a “separated” government could still be something positive. The faith of individuals could animate, assist, challenge, and guide civil authority – hence, the consistent affirmation in the Westminster Confession that Christians may serve in the civil government.

[29] This is perhaps the central contribution of the Confession to the Establishment Clause: an understanding that while the institutions of church and state are separate entities, faith and the state are not necessarily separate. David VanDrunen summarizes thus: “Generally speaking, Reformed Orthodox thought advocated a relation between church and state that, while keeping these institutions clearly distinct, was harmonious, collaborative, and mutually beneficial” (760; see also 747-48). For example, faith and morality could characterize the person called “the civil magistrate.” Significantly, government is thus referred to as a person – not the royal personage in whom all authority concentrates, but the ordinary, unnamed person who is a “public servant.” Says Bernard Bailyn, “There was no more familiar notion in 18<sup>th</sup> century political thought – it was propounded in every tract on government and every ministerial exhortation to the civil magistracy – than that those who wield power were ‘servants of society’ as well as ministers of God...” (308). Sermons of the day urged the novel notion that “lawful rulers are the servants of the people . . .” (Bailyn: 310-19; de Tocqueville: 271-72).

[30] Both the original and the revised Confessions maintain that Christians may serve in government, “according to the wholesome laws of each commonwealth” (General Assembly of the Presbyterian Church in America: 23). Yet the new version of the Catechism, in asking what violates the Second Commandment, omits part of the prior answer, “tolerating a false religion” (Irons). Clearly, American Christians were expected to tolerate them.

[31] On the other hand, in the Founding era, the question of whether clergy could serve in office was “a matter of some disagreement” (Davis 2000: 54), but the consistent approach of the Confession (XXIII) won out in the Constitution at Article VI, forbidding a religious test for office. Soon, Alexis de Tocqueville could observe that on church/state issues, Americans were of one mind: “[T]hey all agreed with each other except about the details; all thought that the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America, I met nobody, lay or cleric, who did not agree about that” (271-72).

[32] The Westminster Confession (XXV) describes the true, invisible church as opposed to the visible church, and points out that the invisible church is “not confined to one nation” and that the household of faith “consists of all those throughout the world that profess the true religion . . .” This concept reinforces the distinction between government and the people of God. Yet part XX (“Of Christian Liberty and Liberty of Conscience”) of the Confession says, “. . . the powers [of church and of state] which God hath ordained, and the liberty which Christ has purchased, are not intended by God to destroy, but mutually to uphold and preserve one another . . .”

[33] One could expect more explicit evidence than we have of the interaction between the Synod and the Congress. Two factors may explain the lack of it: First, the secrecy demanded of Congress for several weeks in 1787. This was honored. There may have been dialogue about principles, but information flowing from the Congressmen was shut off. Though he did not dominate in either, John Witherspoon adroitly straddled the parallel deliberations. His deep, albeit quiet, influence would have been felt every day.

[34] Another reason for less prominent evidence of cross-pollination may be that the two bodies knew they could not be reconciled on one critical issue: slavery. The Founders sidestepped the topic in their Constitution, but the Synod insisted on May 28, 1787 – the first Monday of the Constitutional Convention (National Archives) – that their members work to “use the most prudent measures consistent with the interests & the state of civil Society in the countries where they live, to procure eventually, the final abolition of Slavery in America” (Klett: 629). This firm resolve by the churchmen may have chilled relations in the short term, though influences endured.

[35] Nevertheless there may be a smoking gun that shows that the Confession made impact upon the Constitution: the words themselves. Let us now examine how the phrases “No law” and “free exercise” can be traced from the Confession to the Bill of Rights.

#### **“Free Exercise” Phrasing**

[36] The Maryland Toleration Act is the first American use of the phrase “free exercise thereof” (University of Virginia Library). The context was this: “. . . [N]o person or persons whatsoever within this Province, or the islands, ports, harbors, creekes, or havens thereunto belonging professing to believe in Jesus Christ, shall from henceforth be any waies troubled, molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof.”

[37] This was in 1649, just after the final form of the Westminster Confession of Faith landed from across the Atlantic. The Act was harsher and more specific than the Confession, decreeing that those uttering “reproachfull words or speeches” about Mary or the apostles should be “publically whipped.” The next significant activity on church/state matters in a document originating in the Colonies was the Virginia Declaration of Rights. George Mason drafted most of it, guaranteeing “the exercise of religion,” the “fullest toleration” all “according to the dictates of conscience.” James Madison, “being young,” did not participate directly in his state’s debates on the matter (Adair: 199). But he suggested a change to the body’s version that “jettisoned” the patronizing concept of toleration, affirming that all men are entitled to the “free exercise of religion” and attempting to essentially disestablish the state church of Virginia by forbidding “peculiar emoluments or privileges” on account of religion. His “free exercise” phrase was accepted by the legislature – which must have been a heady victory for the novice; his disestablishment attempt, though, was rejected (Dreisbach 1997).

[38] Then came the Declaration of Independence, in which the church/state issue is noticeably absent. Today, Thomas Jefferson is trumpeted as the enemy of all religious establishments, but in his long and elaborate list of grievances against the Crown, no objection to established religion appears. After a few years later in 1781, the Synod of New

York and Philadelphia “solemnly and publicly declare[d]” that “. . . every peaceable member of civil society ought to be protected in the full and free exercise of their religion” (Smylie 1996: 76).

[39] Once the Constitution had been drafted and the states began to propose amendments, Virginia debated a religion provision extensively, this time with James Madison involved. He was “originally lukewarm toward the addition of a bill of rights to the Constitution” (Schwartz 1992: 160). He declared, “There is not a shadow of a right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation” and he opined that, in Virginia, “. . . a majority of the people [were] decidedly against any exclusive establishment. I believe it to be so in the other states” (Schwartz 1971: 2.796). Madison seems to have misstated the temper of the land, since nine of the thirteen states had established religions (Balmer: 39). On the specific subject of religion, he claimed to his hearers that a “bill of rights would be a poor protection for liberty.” He also felt it necessary to reassure his audience that “I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom” (Schwartz 1971: 2.796).

[40] Usually when a politician has to speak thus, he is on the defensive, and having published his *Memorial and Remonstrance* against state support of religious training, Madison probably felt he was. George Clymer of Philadelphia wrote that Madison was “frightened with the antifederalism of his own state . . .” (Ames: 53). House member Fisher Ames, while doubting the motives of Madison, speculated that his new position “may get the mover some popularity which he wishes” (Ames: 53).

[41] After passionate debate, Virginia decided upon several amendments, including this: “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 have an equal, natural, and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religion, sect, or society ought to be favored or established by Law in preference to others” (Schwartz 1971: 842).

[42] Massachusetts, home of Fisher Ames, was the first state to make official proposals along with its ratification. It did not forward Samuel Adams’ safeguards for speech, press, and conscience. (It would later be the last state to disestablish its religion, about forty years later.) New Hampshire also ratified with extra wording: “Congress shall make no Laws touching Religion, or to infringe the rights of conscience.” Bernard Schwartz observes this was the “first use of the actual prohibitory language with which the First Amendment starts – a vast improvement from a legal point of view, in the language of the freedom of religion guarantee” (1971: 2.761). This may have been the first focus on the powers of Congress specifically vis-à-vis religious rights.

[43] Pennsylvania, where Quakers had criticized state leaders for seeking to govern “after the Model of a Geneva Republic” (Bonomi: 173), expressed the desire for a proto-establishment clause, prohibition of religious test for public service, and conscientious objection to military conscription (Schwartz 1992: 73). In Maryland, a proposal “That there be no national religion established by law, but that all persons be equally entitled to protection in their religious liberty” was “negatived by a majority” (Schwartz 1992: 734-35).

### **Madison Steps In – or into It**

[44] Public opinion began to favor a Bill of Rights to the point that Madison had had to run for re-election on a promise of securing such guarantees, even though he warned the Congress in June of 1789 that “two or three contentious additions would even now prostrate the whole project” (Schwartz 1992: 165). His correspondence with Jefferson “as well as political realities had caused him to modify his position” (Schwartz 1992: 160).

[45] Madison’s personal notes and letters often referred to “rights of conscience” rather than to religious freedom, perhaps echoing Jefferson. The fact that his personal papers reveal his attachment to this phrase, with its Enlightenment connotations of the dissenter and the minority view, indicates that he relished it more than perhaps other, more spiritual formulations. As we will see, it was not finally favored by the Congress – “[I]t could be argued that this language was abandoned since the framers did not intend to provide privileges for ‘rights of conscience’ that were not expressly religious in nature” (Dreisbach 1987: 64-65), or “unduly benefit the nonreligious” (Smith: 569, 608).

[46] The New York and Philadelphia Synod stated in 1775, “. . . [T]he greatest service which Magistrates or persons in authority can do with respect to the religion or morals of the people, is to defend and secure the rights of conscience in the most equal and impartial manner” (Klett: 545-46). But the language of conscience, equality, and minority/majority was not an emphasis of the Synod or the Confession. The central precept was the Golden Rule, the duty of all to treat others with dignity and kindness (McAllister: 38-39). Unlike the emphasis of the Presbyterians, Enlightenment theory about religion that Madison appreciated was all about the numbers, with competing interests keeping the majority at bay. He often quoted Voltaire’s maxim, “If one religion only were allowed in England, the government would possibly become arbitrary; if there were but two, the people would cut each other’s throats; but as there are such a multitude, they all live happy and in peace” (Dreisbach 1987: 146-47).

[47] In any case, when, on June 8, 1789, Madison proposed his Bill of Rights to his fellow Congressmen, it read as an affirmation of the individuals facing the power of the new federal government (Schwartz 1992: 166-67). In Article 1, Sec. 9: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed” (Schwartz 1971: 2.1028; 1992: 166-67; Library of Congress 1789a: 775-76). He also interjected another term: “[N]o state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases” (Schwartz 1971: 2.1028-29).

[48] His notes for that historic speech say, “Bill of Rights – useful not essential – fallacy in both sides, aspects [?]” (Schwartz 1971: 2.1042). (Let it not be forgotten that by calling the Bill of Rights “not essential,” he was including his attempted disestablishment of all churches.) In his remarks to Congress he referred to the amendments as “paper barriers” that might be “too weak to be worthy of attention” (Schwartz 1971: 2.1030). The phrase “free exercise” does not appear in Madison’s proposal although it had been part of other proposals.

[49] The debate surged forward: “Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments. . . Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience” (Kurland and Lerner). Despite Madison’s labors, he met with a poor reception. “Mr. Huntington said that he feared, with the gentleman first up on this subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion” (Kurland and Lerner). The “cantankerous” Elbridge Gerry (Siemers: 40) then rose and objected to the term “national.” Madison bowed to this objection by withdrawing his motion, “. . . but observed that the words ‘no national religion shall be established by law,’ did not imply that the Government was a national one . . .” (Kurland and Lerner).

[50] On August 15, Samuel Livermore of New Hampshire took a different tack, suggesting: “Congress shall make no laws touching religion, or infringing the rights of conscience” (Witte: 242). This merely reiterated New Hampshire’s ratification amendment. Though it did not mention free exercise, the House passed it. This was the first wording on religion that was structured somewhat like that of the Confession, though it did include “rights of conscience” language, and it was the first that passed. When the House considered it, it “may have left members unsatisfied as to the establishment issue” (Levy 2001: 87). As late as August 17, Madison was still hoping to disestablish the states. He grumbled, “If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments” (Schwartz 1992: 177).

[51] On August 20, Ames offered a refinement to Livermore’s phrasing: “Congress shall make no law establishing religion, or to prevent the free exercise thereof” (Library of Congress 1789a: 796). The similarities to the Confession were more obvious. It also passed, without debate (Witte: 742). It may have been preferable to Livermore’s in giving a sharper focus to the establishment issues rather than the other, “more categorical ‘no laws touching religion’” (Arkin: 769). Ames’ colleagues were familiar with New Hampshire’s proposal, which this revived, and it was not burdened with Madison’s attempted state disestablishment.

### **Enlightenment or Confession?**

[52] Regarding the wording of the amendment, a biographer of Madison has said, “There can be little doubt that this was written by Madison” (Brant 1950: 271). On the contrary, for many reasons, there can be little doubt that it was in fact written by Fisher Ames. First, Ames was educated in Presbyterian thought, and this wording most closely resembles that of the Confession – the relevant words are “And, as Jesus Christ hath appointed a regular government and discipline in his church, *no law of any commonwealth, should interfere with, let, or hinder, the due exercise thereof*” [emphasis added]. (Of course, for a church audience they would write that religion is *duly* exercised; they could only ask that it be *freely* exercised in a secular milieu.) That document had historically seemed to foster convergence and would naturally signal unity.

[53] Second, Fisher Ames was a gifted speaker and persuasive orator – he was chosen by Congress to speak upon Washington's retirement from the Presidency. His passionate eulogy of George Washington was later famed in Boston (Dunn: 124). He could make a strong case when he so desired. He did not need Madison in order to take this step, particularly when Madison was not making headway with his peers on this topic. Madison, on the other hand, was wandering further from, not closer to, what proved to be the winning approach when he tried to split the provisions, disestablish religions even at the state level, and insert his two ideas in various places in the text of the Constitution. Also he seemed to have only faint praise for his own ideas on August 15 when he said “. . . he thought it as well expressed as the nature of the language would admit” (Schwartz 1992: 174-75).

[54] Third, Madison never took the credit for this wording. He is known for keeping contemporaneous notes and subsequent commentary on his contributions to lawmaking – as when he “casually reported to Mason's grandson that the term ‘toleration’ ‘had been admitted into the original draft of the [Virginia] Declaration of Rights but on a suggestion from myself was readily exchanged for the phraseology excluding it’” (quoted in Brant 1941: 248). Yet he never laid claim to this even more historic contribution.

[55] Fourth, Madison had launched the whole Congressional debate on religion clauses with a conception significantly different from this wording. His starting point was up to him, and he did not start where Ames did. For example, he did not want the restraint on establishments to be limited only to “Congress.” See, for instance, his June 8 arguments: “I think there is more danger of those powers being abused by the State Governments than by the Government of the United States. The same may be said of other powers which they possess, if not controlled by the general principle, that laws are unconstitutional which infringe the rights of the community. I should therefore wish to extend this interdiction, and add, as I have stated in the 5th resolution, that no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases; because it is proper that every Government should be disarmed of powers which trench upon those particular rights” (Library of Congress 1789a: 458). Moreover, Madison's unique role in the summer debates was as champion of the disestablishment portion, which Ames was ignoring. No state had suggested it; it was “original with Madison” (Dreisbach 1987: 58; Koch: 31). He never gravitated to the “free exercise” wording, even though it had been part of most of the state proposals and some version of it occurred by then in every state constitution but Connecticut's (McConnell: 1455).

### **Ames Takes Aim**

[56] Furthermore, Fisher Ames had been openly challenging Madison's commitment to the Bill of Rights (Schwartz 1971: 2.1082). He voted contrary to Madison on almost every preliminary occasion in Congress. And his letters of the summer of 1789 express increasing exasperation at Madison for distorting federal powers and growing disdain for the Madisonian amendments themselves (Arkin: 779). It is difficult to picture Ames seeking out Madison, or vice versa, to hammer out a new draft with that offense between them. Rep. Ames might instead have consulted someone like Delaware's Gunning Bedford, Jr., who sat in the Senate, to gauge the prospects for success there. Ames may have felt sure of his House, and finding a Senate ally would be useful. Of Senator Bedford, Hendrik Hertzberg

says, "When it came to the composition of the Senate . . . the Gunning Bedford types [with a concern for states' rights] exerted far more influence than James Madison or Alexander Hamilton" (88). Perhaps they decided to neutralize Madison by pasting in his phrase about "rights of conscience," but setting it as a limit on Congress, not allowing it to range abroad in the states.

[57] Striking the balance this way between the state and the federal government was bound to find favor with Presbyterians and their kindred spirits, whose new Confession left ambiguous what the "civil magistrate" was. The legislators had restricted the federal government from the church, a non-negotiable that was true to their Confession, but had left intact the established religion of their home states. For now, "the civil magistrate" was the United States, but not the individual states.

[58] Besides, Livermore and Ames's wording rang with the tones of the Westminster Confession of Faith, and it is probable that Congressmen and the general society heard those tones. Ames's college preparation had been conducted by the moderate Calvinist Reverend Haven and had "an important role in Ames's intellectual development (Arkin: 132). Ames was sensitive to the "cultural presupposition" and political compromise that informed the adoption of the religion clauses (Arkin: 772). Interestingly, a friend of his noticed that Ames treated "the conscientious opinions *and phraseology of others on sacred subjects with tenderness*" [emphasis added] and that his "attention was always awake to grasp the materials that came to him from every source" (Kirkland: 29). Therefore it is sensible that he would welcome language suggestive of an eminent cultural source like the Confession.

[59] The words "free exercise," furthermore, serve to "extend the broader freedom of action to all believers" than do the words "rights of conscience," according to Michael W. McConnell. He points out that the "free exercise" locution is "more likely than mere liberty of conscience to generate conflicts with and claims for exemption from general laws and social mores" (1490).

[60] Such notables as Bernard Schwartz and Leonard Levy refer to the final modifications made to the Religion Clauses as "stylistic changes" (Schwartz 1992: 170-72; Levy 1994: 102). Yet they do not discuss the style involved, but obviously the style adopted is one based on the syntax and vocabulary of the newly-minted Confession. And it was wording so important to the House that they made it a bargaining chip with the Senate (the Senate debates were conducted in secrecy) (Levy 1994: 102).

[61] Accordingly, the House declared:

This House doth recede from their disagreement to the fast [sic], third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth:

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the People peaceably to assemble, and

to petition the Government for a redress of grievances” (Library of Congress 1789b).

[62] This results in an additional reason for the conjecture that Ames was behind the wording: The style and syntax may have been too close to the Confession for Madison’s comfort. He perhaps preferred a closer imitation of his submission of the wording for the Virginia Declaration, and his dearest phrase, the “rights of conscience,” does not even appear. The terminology about majorities, the individual, and sects is missing. In sum, Madison may have agreed to the Religion Clauses, but they were more than likely not his handiwork.

[63] On September 3, the Senate agreed to the House amendment with the words “nor shall the rights of conscience be infringed” eliminated (Schwartz 1992: 183). The Senate had out-Westminstered the House. With few changes, the ten prevailing amendments were adopted by the Congress in what one scholar calls a “somewhat hasty fashion” (Dreisbach 1987: 57). The amendments were submitted to the Senate, August 24, 1789, and returned from Conference Committee on September 24, where they were finally approved and sent on to the states for ultimate approval.

[64] What does this process show us about the place of religion in the evolving American society, then and now? Most surely, that a religious creed can unite, not always divide, a diverse people, and that it can afford liberty and civil rights where its ethic is the Golden Rule. The revised Confession was well suited to the needs of a government and society that was revising itself.

### **The Appeal of Reformed Thought for the Early Nation**

[65] Reformed thinkers drafted a Confession that united divergent factions on this continent as ably as they had in the Old World. This brand of Christianity was adept at influencing others in making policy decisions even when their religious distinctives were not shared. There are several reasons for this. First, they were able to appeal to a variety of epistemes in persuasion using basic reason and ordinary language. Benjamin Rush said of John Witherspoon that “His sermons are loaded with good sense,” and that he had heard few preachers equal to him (Butterfield: 321). Although the Westminster Confession of Faith is the Presbyterian creed, it never uses the word “Presbyterian” and never speaks of a certain named group as the church. It is a broad statement created for the promotion of unity, not uniformity. “Presbyterians,” says scholar James McAllister, “more than the members of any other religious body, were in touch with each other from Maine to Georgia . . .” (29). This gave them a broad database of information and sensitivities to many regional interests.

[66] Beyond this, their theology of original sin and of God who loves without regard to our merit appealed to the democratic instinct. As John Richard Green has said, “It was Calvinism that first revealed the worth and dignity of man. Called of God, and the heir of Heaven, the trader at his counter and the digger in his field suddenly rose in equality with the noble and the king” (Carlson: 18). Presbyterian preaching had such a broad appeal for the Founders that during the Constitutional Convention the place chosen for the July 4 oration was “the Reformed Calvinistic Church” in Philadelphia, where Rev. William Rogers prayed



in turn for “that august body, assembled in this city, who compose our Federal convention” (Morris: 254).

[67] Influence between the ecclesiastical and political thinkers flowed in both directions. For instance, in 1779, Jefferson said, “Almighty God hath created the mind free” (Thomas Jefferson Foundation). The revised Confession says, “God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men...” (XX, II; Smylie 1996: 310). The Confession also says, “The supreme judge, by which all controversies are to be determined, and all decrees of Councils . . . can be no other but the Holy Spirit . . .” (I, 10). Jefferson had appealed in the Declaration of Independence to “the supreme Judge of the universe” in the conduct of separating from Britain. Jefferson had in his Statute for Religious Freedom condemned any system that would “. . . suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles . . .” Far from attempting to impose its doctrine on others, the Confession says, “The requiring of an implicit faith, and an absolute blind obedience, is to destroy liberty of conscience, and reason also” (XX, II). One scholar who has observed mutual admiration and active correspondence between John Witherspoon and Thomas Jefferson says they shared a moral vocabulary and epistemology. The Declaration of Independence’s appeal to what “all experience hath shewn” and truths are “self-evident” would have reminded readers of Witherspoon’s famous “common sense” philosophy (Morrison: 45, 60-62) and of the Confession’s dictum that “The light of nature showeth that there is a God, who hath lordship and sovereignty over all . . .” (XXI, I). In addition, the Westminster Confession of Faith exerted a unifying influence on its cultures. David Hall observes, “Prior to the first Continental Congress in 1774 the only assembly that was in any way representative of all the thirteen states was the General Synod of the Presbyterian church. . . On the foundations laid by [pioneer] Francis Makemie, Presbyterianism had helped unite the states before there ever was a congress” (388).

### **Direction Derived**

[68] The Confession is a broad statement created for the promotion of unity, not uniformity. It leveled the field for social as well as political interaction. As Montesquieu observed, “When the Christian religion, two centuries ago, became unhappily divided into Catholic and Protestant, the people of the North [of Europe] embraced the Protestant, and those of the South adhered still to the Catholic. The Reason is plain: the people of the north [sic] have, and will forever have, a spirit of liberty and independence, which the people of the south have not; and therefore, a religion which has no visible head is more agreeable to the independence of the climate than that which has one. . . Calvin, having to do with people who lived under republican governments, or with obscure citizens in monarchies, might very well avoid establishing dignities and preferments” (31). The Confessors and the Constituters reinforced each other in this egalitarian tendency.

[69] Perhaps the firmest evidence of cross-pollination between the two bodies is John Witherspoon himself. Like the Confession, he seemed able to bring people together. When his arrival at Princeton was expected, Francis Alison remarked, “. . . all have high expectations from the Scots Doctor. I wish he may have skill to heal all our divisions”

Within two months Alison expressed enthusiasm for Witherspoon's ability to do just that (McCallister: 37).

### **Conclusion**

[70] When we imagine the kind of society the Framers probably intended, it does not look much like our own. The Religion Clauses seen through the lens of the Confession reveal a landscape where Christian presuppositions inform public policy and the nation's Christian heritage is remembered, not hidden in embarrassment. It is a place where houses of worship are given autonomy while they are peaceable, and diversity and dissent are afforded courtesy and meaningful procedural protection. One recalls Samuel Adams saying about public prayer from diverse participants, "I am no bigot, and can hear a prayer from a gentleman of piety and virtue who is at the same time a friend of his country" (Kimball: 139).

[71] The Founders' religious heritage motivated them to accord procedural protection for those who did not share their religion, because Reformed Christianity naturally spreads individual civil liberties and a concept of public service within a culture. The landscape of the Confessors and Founders is one in which Christian presuppositions underlie public policy, and the government avoids interfering with and even protects religious groups, to the degree of allowing local variations in what is understood to be an impermissible establishment of religion. It is a landscape where the Christian elements of the nation's heritage and traditions are affirmed. It even allows for a degree of preference and support for "the church of our common Lord" that today would not be tolerated by many Americans. Yet in the same landscape dwell those who deeply disagree with Christianity, and those who are undecided or uninterested in it. And those too are afforded freedom and safety.

[72] The thinking of the Framers was steeped in Reformed theology. The hard work of distilling a common philosophical ground on which to build a nation had been done in large part by the Westminster Confessors and those who revised it. In spite of Madison's attempts to reach for language with other connotations, the nation's founders fell back upon the hopeful and unifying language of the new Confession. Thus the best gloss on the religion clauses is the Westminster Confession of Faith as revised for the new nation.

[73] In a cheering procession of twenty thousand people welcoming the new President George Washington to Philadelphia,

the clergy formed a conspicuous part, manifesting by their attendance a sense of the connection between good government and religion. They marched arm in arm, to illustrate the General Union. Care was taken to associate ministers of the most dissimilar opinions with each other, to display the promotion of Christian charity by free institutions. "The rabbi of the Jews, with a minister of the gospel on each side, was a most delightful sight." It exhibited the political equality, not only of Christian denominations, but of worthy men of every belief (Morris: 256).

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