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EQUALITY AND DIVERSITY: THE
EIGHTEENTH-CENTURY DEBATE
ABOUT EQUAL PROTECTION
AND EQUAL CIVIL RIGHTS

Living, as we do, in a world in which our discussions of equality often lead back to the desegregation decisions, to the Fourteenth Amendment, and to the antislavery debates of the 1830s, we tend to allow those momentous events to dominate our understanding of the ideas of equal protection and equal civil rights. Indeed, historians have frequently asserted that the idea of equal protection first developed in the 1830s in discussions of slavery and that it otherwise had little history prior to its adoption into the U.S. Constitution.¹ Long before the Fourteenth Amendment, however—long before even the 1830s—equal protection of the laws and equal civil rights were hardly notions unknown to Americans, who used these different standards of equality to address problems of religious diversity. In late eighteenth-century America—a na-

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¹ For example, Howard J. Graham, *The Early Anti-Slavery Background of the Fourteenth Amendment*, in *Everyman's Constitution*, Leonard W. Levy, ed (State Historical Soc of Wisc, 1968) ("*Everyman's Constitution*"); Jacobus Ten Broek, *Equal Under Law* (Collier Bks, 1951, republished 1965) (Ten Broek, "*Equal Under Law*").

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scent nation in which territories, peoples, and religions were multiplying—Americans employed ideas of equal protection and equal civil rights to discuss their heterogeneity, and the ways in which they did this cannot help but be of interest. By examining how Americans used different standards of equality to address their diversity, we will be able, among other things, to observe the early development of ideas that have become increasingly central to our perceptions of ourselves and our polity and thereby have affected the development of our nation. Although more spacious than two hundred years ago, America is also more crowded with people and their perceptions of their differences, and, therefore, the history of how we addressed our heterogeneity in the eighteenth century may be of greater interest now than at any time before.

It is unavoidable that this inquiry concentrate on eighteenth-century debates concerning religious liberty. During the nineteenth century, Americans engaged in a variety of controversies—most dramatically that concerning slavery—in which they discussed versions of the ideas of equality examined here: equal protection and equal civil rights. Nonetheless, slavery will not be the focus of this article, for, in the eighteenth century, it was the diversity of Christian sects rather than racial differences that prompted Americans to contend over equal protection and equal civil rights.² The familiarity of much of the clergy with the state-of-nature analysis, the alignment of interests among religious sects, and the nature of the controversy about religious freedom permitted eighteenth-century Americans to engage in remarkably sophisticated, albeit polemical debates about equal protection and equal civil rights. Therefore, to study the early history of these notions of equality, we must turn to the eighteenth-century debates about religious freedom.³

In recent decades, historians have produced a substantial and important body of literature on equality. Historians of the Fourteenth Amendment, including Howard Jay Graham, Jacobus Ten Broek, and Earl Michael Maltz, have shown that equal protection

² Of course, religious differences frequently were associated with ethnic and other social differences.

³ The Massachusetts controversy about equal rights of suffrage is of great interest to historians of equality, but it did not generate debate between advocates of equal protection and advocates of equal civil rights.

was discussed in connection with slavery already in the 1830s.⁴ They have not, however, traced the idea back to the eighteenth-century disputes about religious equality. In contrast, historians of religious liberty in the eighteenth century have discussed the general notion of equality, yet they have not focused on the idea of equal protection. For example, Nathan Hatch has traced the "democratization" of religion in America, including the attempts of late eighteenth- and especially early nineteenth-century preachers to encourage religious sentiments among all Americans.⁵ In eliciting expressions of religious feeling among a wide variety of Americans, these preachers drew upon desires for political and social equality that, although hardly new, had new potency as a result of America's changing demographics. Of particular importance for this article is the work of William G. McLoughlin and Thomas E. Buckley, who have examined how legal developments came to reflect expectations of equality.⁶ Buckley has shown that the notion of equality was of central importance in the Virginia debates about religious freedom, and McLoughlin has traced in rich detail its crucial role in New England. On the whole, however, just as scholars of equality have not sufficiently explored the eighteenth-century debates about religion, so students of religious liberty have not attempted systematically to differentiate the standards of equality for which various religious groups were contending. In particular, they have not examined the idea of equal protection or how it differed from the notion of equal civil rights. Thus, the eighteenth-century history of the idea of equal protection remains unknown to historians of the Fourteenth Amendment and unexplored by historians of religion.⁷

⁴ Howard J. Graham, *The Early Anti-Slavery Background of the Fourteenth Amendment*, in *Everyman's Constitution*; Ten Broek, *Equal Under Law*; Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 *Am J Legal Hist* 305 (1985). J. R. Pole writes that "Jackson introduced the phrase 'equal protection.'" J. R. Pole, *The Pursuit of Equality in American History* 146 (U of Calif, 1979). Obviously, Pole could have pursued equal protection farther than he did.

⁵ Nathan Hatch, *The Democratization of American Christianity* (1989).

⁶ William G. McLoughlin, *New England Dissent, 1630-1833* (Harv U, 1971) (McLoughlin, "New England Dissent"); Thomas E. Buckley, S.J., *Church and State in Revolutionary Virginia, 1776-1787* (U of Va, 1977) (Buckley, "Church and State in Revolutionary Virginia"). See also Thomas J. Curry, *The First Freedoms* (Oxford U, 1986).

⁷ For a brief recognition of the connection, see Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication* 61 *Notre Dame L Rev* 311, 326 (1986). Paulsen notes Madison's use of equal protection in his 1785

A joint examination of these two subjects—religion and equality—provides an opportunity for each to be illuminated by the other. For example, in eighteenth-century debates about religious liberty, Americans employed the ideas of equal protection and equal civil rights and, in so doing, repeated and refined formulations that remain familiar and that have contributed much to our perceptions of equality and our response to the variegated character of our nation. Conversely, eighteenth-century discussions of equality can reveal much about early views of religious liberty. Indeed, an examination of how eighteenth-century Americans understood different standards of equality can shed light on some of their various state and federal guarantees of religious freedom.

It cannot be over-emphasized that modern egalitarian assumptions must be put aside. Americans debated about equal protection and equal civil rights during the ferment of the Great Awakening and then, more prominently, during the revolutionary turmoil of the 1770s, when, having begun to demand equal rights from Britain, Americans increasingly also sought equal rights from their domestic governments. In the context of these stirrings of egalitarian desires and these suggestions that equality could and should be demanded as a right, eighteenth-century Americans who claimed equality with respect to religion can be viewed as having contributed to the much broader social and cultural developments that have made egalitarianism so important for our understanding of American law. Yet eighteenth-century Americans often gave their ideas of equality a relatively narrow focus. Among other things, when they adopted positions on equality, they tended to assume that government had relatively limited purposes and capabilities. Therefore, we should not be surprised if the ideas eighteenth-century Americans called “equal protection” and “equal civil rights” were less egalitarian or were egalitarian in different ways than the ideas we associate with these phrases.⁸

A willingness to put aside modern assumptions is particularly

Memorial but appears to equate equal protection with an equality of civil rights. For scholarship on the use of equal protection in the nineteenth century, see note 173 and accompanying text.

⁸ This study is in accord with Professor Stanley N. Katz's argument that eighteenth-century Americans typically did not seek to establish social equality by law. Stanley N. Katz, *The Strange Birth and Unlikely History of Constitutional Equality*, 75 J Am Hist 747 (1988). Katz writes that “[t]here was a constant attempt to rein in the notion of social equality.” *Id.* at 752.

important if we are to distinguish between “equal protection” and “equal civil rights.” Today, these phrases are often considered almost interchangeable labels for an undefined, broad egalitarianism. In the eighteenth century, however, these terms referred to two distinct standards of equality, the one requiring equality with respect to only a portion of the legal rights for which equality was required by the other. Equal civil rights was a standard demanding that civil law treat individuals the same—that it not distinguish among individuals on the basis of their religious differences.⁹ By comparison, equal protection of the laws was a lesser degree of equality—an equality only of the protection provided by civil law for natural liberty. As a result of this definition, equal protection allowed preferences or unequal privileges—that is, it permitted inequalities in rights not existing in the state of nature.¹⁰ Thus, equal civil rights was a standard so rigorous it prevented civil laws from allocating either protection or privileges on the basis of religious differences, and equal protection was so lax it generally permitted civil laws to distribute privileges unequally. The struggle between dissenters and establishments over these two standards of equality and over related approaches for harmonizing religious differences is the primary subject of this study.

I. THE STATE-OF-NATURE ANALYSIS AND THE IDEA OF PROTECTION

When eighteenth-century Americans spoke about equal protection, they drew upon a political theory derived from assumptions about the state of nature. On the assumption that natural

⁹ Today, the phrase “civil rights” refers to only some of our legal rights; in the eighteenth century, at least in the context of the debates about religious liberty, it often referred to all legal rights—the rights held by individuals under the civil laws of civil government. (This usage was related to English discussion of the need to end the “civil disabilities” of dissenters—to give them the same “civil capacities” as Anglicans.) Already in the eighteenth century, however, the phrase “civil rights” could, in many circumstances, be ambiguous. Although it sometimes clearly referred to legal rights in general, it also could refer either to privileges or merely to the natural rights held under civil government. The last of these usages prevailed in the nineteenth century. See text at notes 229–33.

¹⁰ Americans often used the word “privileges” to refer to rights individuals could only acquire by leaving the state of nature—those rights held under the laws of civil government that could not be enjoyed in the state of nature. It is in this sense that the word is used here. In contrast, it should be noted, Americans often used the word to refer to natural rights or rights in general.

liberty was the freedom of individuals in the state of nature, many Americans held that individuals sought protection for their natural liberty by submitting some of it to government to be controlled or "restrained" by the laws. Protection thus was the protection for natural liberty obtained by means of government and its legal restraints on the sacrificed portion of such freedom. More generally, Americans who discussed the protection of natural liberty appear to have assumed that it was a goal of government rather than a legally enforceable right to a particular degree of liberty or of protection.¹¹ They seem to have taken for granted that the different laws of different societies would protect natural liberty in varying ways and to varying degrees.¹²

Although the word "protection" will be described here as a term of art in the state-of-nature or contract theory of government, it hardly requires to be noted that Americans also often used the word in other ways. For example, any constitution or law could be said to protect various rights. Moreover, all legal rights were protected by courts and judicial process. These ordinary senses of the word "protection" must be distinguished from the specialized sense discussed in the following pages, that is, the protection of government and its laws for natural liberty.¹³

¹¹ Although protection certainly was, in a sense, a "benefit" of government, it was not a legal right or legally enforceable benefit of government. See text at notes 44–46.

¹² The importance of the state-of-nature analysis for the idea of protection has been recognized by Stephen J. Heyman, who points out that protection was considered the initial purpose, duty, or obligation of government and, accordingly, was a right of individuals. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment* 41 Duke L. J. 507 (1991) (Heyman, "First Duty of Government"). Although Heyman's discussion of the idea of protection is detailed and interesting, another point of view is possible. For example, Heyman argues that protection was typically understood to be a potentially enforceable legal right of individuals to an ascertainable degree of what might otherwise be considered discretionary police intervention or "protection." Yet the American and English material emphasized by Heyman and the American sources discussed here indicate, on the contrary, that protection, as such, was considered a "moral" rather than a legally enforceable right and that protection was not typically understood to be a particular degree of protection. (See text at notes 25–49 & 184–90.) Second, although Heyman focuses on historical evidence concerning protection rather than equal protection, his argument assumes that *equal* protection was the right of each individual to a particular degree of protection. Yet, as will be seen, Americans who talked about equal protection appear to have assumed that equal protection was merely an equality of such protection as was provided by government and the laws. (See text at notes 185–89.) Third, Heyman assumes that protection, in the sense of police or, more generally, executive branch intervention, was the protection of the laws mentioned in the Fourteenth Amendment. In the nineteenth century, however, Americans, particularly those who campaigned against slavery, often distinguished between the protection of the laws and the protection of government—and only the second of these categories included police or executive protection. (See text at notes 174–84.)

¹³ This article focuses on the common notion that government was instituted for the

The eighteenth-century Americans who discussed "protection" each, surely, talked about this subject on the basis of somewhat different assumptions. Nonetheless, large numbers of these Americans appear to have shared at least some assumptions relating to protection, and it is these commonly held views that this article will attempt to elucidate. Of course, religious and political differences divided the Americans who talked in terms of the state-of-nature analysis, but these religious and political distinctions do not appear to have prevented such Americans from sharing many ideas about the state of nature and about the protection of natural liberty. Although some Baptists and some new lights, for example, did not use the relatively secular, state-of-nature analysis as frequently or with as much sophistication as did some other Protestants,¹⁴ and although individuals of different theological persuasions tended to use the analysis for different reasons and in different ways, more or less all who employed the theory appeared to have done so on the basis of some common suppositions, and these are what will be examined here.¹⁵

protection of natural rights. Some writers also argued that, once government was established, it acquired other, additional obligations, which could be discussed in terms of protection. In particular, some writers pointed out that government had to protect itself. See, e.g., quotation from the 1780 Massachusetts Constitution in note 46. So too, government was expected to protect individuals in the rights they had under its laws, including privileges. Nonetheless, as a term of art, "protection" typically referred to the protection of natural rights.

¹⁴ For example, readers may question whether the Baptist leader, Isaac Backus, employed the state-of-nature analysis. Yet he could propose a bill of rights that began: "All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety." *Isaac Backus's Draft for a Bill of Rights for the Massachusetts Constitution, 1779* § 1 in William G. McLoughlin, ed., *Isaac Backus on Church, State and Calvinism* 486 (Harvard U, 1968) ("Backus on Church, State, and Calvinism"). See also §§ 2, 4, & 7, id. at 486–87. Other Baptists, moreover, such as John Leland and Samuel Stillman, employed the state-of-nature analysis with considerable sophistication. John Leland, *The Rights of Conscience Inalienable* (1791), in *The Writings of the Late Elder John Leland 179–81* (1845) ("Writings of Leland"); Samuel Stillman, *A Sermon* 8–10 (Mass election sermon 1779) (Evans 16537).

Although the division between supporters and opponents of establishments will receive much attention in this account, more detailed distinctions relating to religion are approached here with considerable caution, for the theological opinions of late eighteenth-century Americans cannot always be summarized with brief and convenient labels. For example, among Congregationalists, theological divisions were extensive and subtle, and only the broadest differentiations can be captured by distinguishing between new lights and old lights or between "consistent Calvinists" and so-called "Arminians." Theological differences among the persons quoted will be mentioned only occasionally, when the differences seem particularly relevant.

¹⁵ Of course, some Americans expressly rejected the notion of a state of nature, and yet they did not thereby necessarily abandon the analysis traditionally drawn from suppositions

Following European writers, large numbers of Americans assumed that individuals established government to obtain protection for the liberty enjoyed in the state of nature.¹⁶ In the state of nature, said Americans, individuals were equally free.¹⁷ The 1776 Virginia Declaration of Rights, for example, declared that "all Men are by nature equally free and independent."¹⁸ This equal freedom

about the state of nature. For example, in 1794, Timothy Ford argued that the state of nature was a "fairy tale." "Americanus" [i.e., Timothy Ford], *The Constitutionalist: Or, An Inquiry How Far It Is Expedient and Proper to Alter the Constitution of South Carolina*, City Gazette and Daily Advertiser (Charleston, 1794), in 2 *American Political Writing of the Founding Era, 1760-1805* 902 (Liberty Press, 1983) (hereafter "*American Political Writing*"). Even while denying the existence of the state of nature, however, he argued on the basis of the assumption that "[t]he natural rights of men undoubtedly form the rational foundation of the social compact." *Id.* at 906. As he explained, he did not consider the state of nature an essential part of the analysis: "It is not requisite to frame the fanciful system of a *state of nature*, in order to learn what these [natural rights] are" *Id.* For a brief discussion of how Americans could reject the idea of the state of nature but still retain much of the rest of the state-of-nature analysis, see note 197.

Note that this article draws evidence of the state-of-nature analysis and the idea of protection largely from the states in which Americans debated equal protection. To avoid reproducing familiar sources and to illustrate the extent to which American ministers were acquainted with the state-of-nature analysis, this article frequently quotes sermons. Evidence of the state-of-nature analysis could have been taken, however, from a broader array of states and from a great number of exclusively secular sources.

¹⁶ Incidentally, the word "men" is used here to refer to individuals without regard to their sex. In modern analysis relating to the state of nature, the word "individual" is useful for its greater clarity. In descriptions of eighteenth-century accounts of that analysis, "men" can be useful for its capacity to suggest eighteenth-century conventions and, sometimes, ambiguities.

¹⁷ Note that Locke wrote: "Though I have said . . . *That all Men by Nature are equal*, I cannot be supposed to understand all sorts of *Equality* . . . [T]he *Equality* I there spoke of, as proper to the Business in hand, [was] that *equal Right* that every Man hath, to his *Natural Freedom*, without being subjected to the Will or Authority of any other Man." John Locke, *Two Treatises of Government*, bk II, ch vi, § 54, at 346, Peter Laslett, ed (Mentor, 1963) (Locke, "*Two Treatises of Government*").

¹⁸ Va Decl of Rights of 1776, § 1. It continued: "and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity" *Id.* This language was designed to reflect an assumption that slaves were not parties to the compact and had not become members of society.

So common was the assumption of equal freedom in the state of nature that "[n]o man denies but that *originally* all were equally free." Samuel Webster, *A Sermon* 22 (Mass election sermon 1777) (Evans 15703). In the 1787 Constitutional Convention, Luther Martin addressed the issue: "In order to prove that individuals in a State of nature are equally free & independent he read passages from Locke, Vattel, Lord Summers—Priestly." Max Farrand, ed, 1 *Records of the Federal Convention of 1787* 437 (Madison's notes, June 27, 1787) (Yale, 1974) (hereafter "Farrand"). At Princeton, Witherspoon lectured that "men are originally and by nature equal, and consequently free." John Witherspoon, *An Annotated Edition of Lectures on Moral Philosophy*, Lect X, at 124, ed Jack Scott (U of Del, 1982) (Witherspoon, "*Lectures*"). A leading Anti-Federalist, "Brutus," wrote: "If we may collect the sentiments of the people of America, from their own most solemn declarations, they hold this truth as self evident, that all men are by nature free." "Brutus," Herbert J. Storing, ed, 2 *The Complete Anti-Federalist* 372 (Chicago, 1981) ("*Complete Anti-Federalist*"). Quoting Locke, the Rev. Stillman—a Baptist—said that ". . . 'creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should

of individuals in the state of nature from subordination to other humans was the basis of their natural liberty—what frequently was described as their life, liberty, and property, or more simply (in the language of Locke) their property.¹⁹ Unfortunately, if individuals in the state of nature had no common superior, some would use their freedom to injure other individuals. The state of nature was, therefore, if not a “state of war,” at least a situation of “inconvenience,” in which natural liberty was insecure.²⁰ On this account,

also be equal one amongst another without subordination or subjection . . . we ought firmly to maintain the *natural equality* of all men.” Samuel Stillman, *A Sermon* 8 (Mass election sermon 1779) (Evans 16537). Many examples have survived in the election sermons of establishment New England ministers: Israel Evans, *A Sermon* 9–10 (NH election sermon 1791) (Evans 23358); Asa Burton, *A Sermon* 110 (Vt election sermon 1786) (Evans 19536); Peter Powers, *Jesus Christ the True King and Head of Government* 10 (Vt election sermon 1778) (Evans 16019); Gershom C. Lyman, *A Sermon* 6 (Vt election sermon 1784) (Evans 18566); Jonas Clark, *A Sermon* 9 & 11 (Mass election sermon [1781]) (Evans 17114); Henry Cumings, *A Sermon* 6 (Mass election sermon 1783) (Evans 17899).

¹⁹ Locke, *Two Treatises of Government*, bk II, ch v, § 27, at 328. For American illustrations, see note 22.

²⁰ In the tradition of Hobbes, some Americans said that the state of nature was a state of war. E.g., “Philodemus” [i.e., Thomas Tudor Tucker], *Conciliatory Hints* (Charleston, 1784), in 1 *American Political Writing* 613. Many examples of this point of view have been preserved among the printed sermons of New England ministers. E.g.: “Government is necessary, . . . is founded in the corruption and vices of human nature; for if mankind were in a state of rectitude there would be no need of the sanctions of human laws But in the present disordered state of our nature there would be no safety of life or property without the protection of law. A state of nature would be a state of continual war and carnage.” Samuel McClintock, *A Sermon* 44 (1784) (Evans 18567). See also: Joseph Lyman, *A Sermon* 9 (Mass election sermon 1787) (Evans 20469); Zabdiel Adams, *A Sermon* 35 (Mass election sermon [1782]) (Evans 17450); William Welsted, *The Dignity & Duty of the Civil Magistrate* 32 (Mass election sermon 1751) (Evans 6793). For the influence of Hobbes, see Walter Berns, “The New Pursuit of Happiness,” *Const Comm* 65, 67–69 (1987).

Many other Americans, including many New England ministers, described men as social, but these authors also viewed society as safer than the state of nature. E.g., “[T]he social Nature of Man, and his natural Desire of Happiness, strongly urge him to Society as eligible;—to which, if we add, the natural Principle of Self-Preservation, the Dangers Mens Lives and Properties are exposed to, when considered as unconnected with others, Society will appear necessary.” Abraham Williams, *A Sermon* 4 (Mass election sermon 1762) (Evans 9310). See also: Noah Hobart, *Civil Government the Foundation of Social Happiness* 1, 15, and 16 (Conn election sermon 1750, printed 1751) (Evans 6692); “The Preceptor” II in *Mass Spy* (May 21, 1772), in 1 *American Political Writing* 176.

Even with differing views of the state of nature, American commentators often emphasized either the violence or at least the sinfulness of men in the state of nature, as this permitted the commentators to describe the necessity of government in terms of man’s fallen character. For example, Thomas Paine wrote that “[s]ociety is produced by our wants, and government by our wickedness; . . . Government, like dress, is the badge of lost innocence; . . .” Thomas Paine, *Common Sense* 65, ed Isaac Kramnick (Penguin, 1986) (Paine, “*Common Sense*”). New England ministers were particularly eloquent on the subject. E.g.: “Were mankind perfect in wisdom and virtue, civil laws and rulers would be needless.” Gershom C. Lyman, *A Sermon* 6 (Vt election sermon 1782, printed 1784) (Evans 18566). “[W]hile this womb of hell, the selfish heart, is ever pregnant, and ever bringing forth such trains of destructive evils, there can be no safety in the enjoyment of the blessings of heaven in a *state of nature*. In any state, men, like beasts, would destroy each other, unless the

as Americans noted again and again, individuals sought protection for their natural freedom by sacrificing a portion of it for the creation of government. According to a common maxim, "[w]hen people enter into society, they must, in order to obtain protection, give up some part of their natural liberty, in order to secure the rest."²¹ Put another way, individuals created government to protect their "life, liberty, and property,"²² to secure happiness, or to enable themselves to pursue happiness.²³

corrupt heart is under some powerful restraint. This was the case in fact in the early ages of the world, before government was formed . . . 'the earth was filled with violence.' In such a state neither the lives, liberty, rights, or property, or any thing man possesses is secure or safe one moment." Asa Burton, *A Sermon* 9–10 (Vt election sermon 1785, printed 1786) (Evans 19536). "Government then is a necessary evil; a scheme invented to supply the want of true virtue . . ." Id. at 11. "[A]ll the social affections concur to urge the importance of civil government. But . . . these arguments . . . would be, at best, but a feeble support to the peace and order of society,—would never have availed to establish government, over the lawless lusts of vicious, aspiring, or blood-thirsty men.—It is *Necessity, Necessity alone*, which combines men in society . . ." Jonas Clark, *A Sermon* 8–9 (Mass election sermon [1781]) (Evans 17114). See also: Josiah Whitney, *The Essential Requisites* 11 (Conn election sermon 1788) (Evans 21601); Timothy Stone, *A Sermon* 9 (Conn election sermon 1792) (Evans 24820).

²¹ "Publicola" [Archibald Maclaine], *An Address to the Freemen of North Carolina* (State Gaz of NC, March 20, 1788), in John P. Kaminski et al, eds, 16 *Documentary History of the Ratification of the Constitution* 437 (State Historical Society of Wisconsin, 1986) ("Documentary History").

²² For some relatively unfamiliar, clerical examples from New England, see the following: "[T]he great and only design of government," said the Rev. Webster, was "*the security of the lives, liberty and property of the people*." Samuel Webster, *A Sermon* 12 (Mass election sermon 1777). "And the most barbarous heathen nations have found it necessary to have established rules and customary laws strictly observed for the punishment of vice, and for the safety of life, and preservation of property. . . . The people of any nation, country or community, have an undoubted right to set upon such form of government as they judge will most effectually secure their safety, prosperity and happiness . . ." Peter Powers, *Jesus Christ the True King and Head of Government* 12 (Vt election sermon 1778) (Evans 16019). "Were there no civil government, laws, magistracy, nor *Shields of the earth*, for the preservation of peace, the guard of liberty, the protection of property and the defence of life, it is easy to see . . . that anarchy, confusion, blood and slaughter, waste and destruction, would soon take place in the earth." Jonas Clark, *A Sermon* 8 (Mass election sermon [1781]) (Evans 17114). "The protection of life, liberty and property, is the principal object of law and government." William Morrison, *A Sermon* 13–14 (NH election sermon 1792) (Evans 24563). See also Noah Hobart, *Civil Government the Foundation of Social Happiness* 9 & 16 (Conn election sermon 1750, printed 1751) (Evans 6692).

Some spoke of protection for "property." E.g., "The great Design of mens coming *into Society*, and making up one civil Polity, is the preservation of their Property, which in the *state of Nature*, they could not Singly, and each one by himself Defend." Benjamin Lord, *Religion and Government Subsisting Together in Society, Necessary to their Compleat Happiness and Safety* 26 (Conn election sermon for 1751, printed 1752) (Evans 6868). Thomas Paine wrote of "man" that "he finds it necessary to surrender up a part of his property to furnish means for the protection of the rest; . . ." Paine, *Common Sense* 65. He added that "security" is "the true design and end of government." Id.

²³ According to the Pennsylvania Constitution, "all men . . . have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty,

Of course, the necessity of sacrificing natural liberty in order to secure it was no paradox. Individuals seeking protection for their natural liberty from the depredations of others sacrificed a portion of it in a constitution, which authorized government to impose legal obligations in restraint of the sacrificed portion of their natural liberty. Some of these restraints were, for example, the laws prohibiting violence and the laws requiring military service and payment of taxes.²⁴ By restraining some natural lib-

acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Pa Const of 1776, Declaration of Rights, Art 1. In emphasizing the differences among writers, one began by admitting that they agreed about happiness: "Although all writers agree in the object of government, and admit that it was designed to promote and secure the happiness of every member of society, yet their opinions, as to the systems most productive of this general benefit, have been extremely contradictory." "A Native of this Colony" [i.e., Carter Braxton], *An Address to the Convention of the Colony and Ancient dominion of Virginia* . . . (1776), in 1 *American Political Writing* 330. See also Declaration of Independence; "Brutus," in 2 *Complete Anti-Federalist* 373; James Iredell, Charge to the Grand Jury of the Circuit Court for the District of Massachusetts (Oct 12, 1792), in Maeva Marcus, ed, 2 *Documentary History of the Supreme Court of the United States* 310 (Columbia U, 1988) ("Documentary History of the Supreme Court"); Morton White, *The Philosophy of the American Revolution* 162-64 (Oxford U, 1978).

For the views of New England ministers of varying religious perspectives, see, e.g., the following: "Public Happiness is the original Design and great End of Civil Government." Noah Hobart, *Civil Government the Foundation of Social Happiness* 3 (Conn election sermon 1750, printed 1751) (Evans 6692). "[T]he true original end of civil government was, the safety and happiness of the people; that every man, so far as possible, might enjoy his immunities and privileges in peaceable and quiet possession." Peter Powers, *Jesus Christ the True King and Head of Government* 11 (Vt election sermon 1778) (Evans 16019). "As their leaving a state of nature for a state of civil society, is a matter of their own choice, so they are equally free to adopt that form of government which appears to them the most eligible, or the best calculated to promote the happiness of themselves and of their posterity." Samuel Stillman, *A Sermon* 9 (Mass election sermon 1779) (Evans 16537).

Some writers said that safety was the original reason for establishing government and that happiness became a purpose of government only subsequently. Typically, this distinction is not apparent in American writing. Note, however, this example: "The *immediate end* of government was then at first designed, as it is now, to be a restraint upon the human heart, to keep it from breaking forth into violent outrages But the *ultimate end* of government is the happiness or well-being of men in this world. In order to this, it is not only necessary that mens lives, property, and natural rights should be safe guarded; but also, that they should discharge the duties, and grant that help and assistance which they in justice owe each other. Government then by restraining the selfish heart, and by obliging men to perform acts of kindness and benevolence, (seemingly so if no more) and to discharge the duties they owe each other, reaches its final term, *the promotion of the happiness and well-being of the world*." Asa Burton, *A Sermon* 10 (Vt election sermon 1785, printed 1786) (Evans 19536).

²⁴ Civil "restraints" on natural liberty included not only negative commands but also other laws controlling or restricting an individual's liberty as it existed in the state of nature. Thus, such restraints consisted of all civil obligations, if these are understood as the duties imposed by law on individuals—not including, however, conditions on privileges.

Of course, the obligations included moral duties. In this regard note that ministers of established churches, at least in New England, sometimes suggested that dissenters took a position on religious liberty that was incompatible with moral regulation. In response to dissenters' arguments that civil governments should only regulate civil matters, some mem-

erty, these laws protected or at least facilitated protection of the remainder.

As has already been suggested, the sacrifice of natural liberty was assumed to occur by means of a contract, fundamental law, or constitution, in which the people stipulated what they gave up and what they retained.²⁵ In the words of one Anti-Federalist, "[a]

bers of establishments justified state support for their establishments by saying, *inter alia*, that the regulation of morality was a regulation of religion and that, therefore, civil government had to be able to regulate religion in order to achieve its civil purposes. With this argument, establishment writers could simultaneously justify an establishment and could suggest that dissenters were against moral regulation. E.g., "[I]t is the duty of rulers to give all that countenance and support to religion that is consistent with liberty of conscience. And it is perfectly consistent with that liberty and equal protection which are secured to all denominations of christians, by our excellent constitution, for rulers in the exercise of their authority to punish profane swearing, blasphemy, and open contempt of the institutions of religion, which have a fatal influence on the interests of society, and for which no man, in the exercise of reason, can plead conscience." Samuel McClintock, *A Sermon* 33 (1784) (Evans 18567). "With respect to articles of faith or modes of worship, civil authority have no right to establish religion. The people ought to choose their own ministers, and their own denomination, as our laws now permit them; but as far as religion is connected with the morals of the people, and their improvement in knowledge, it becomes of great importance to the state; and legislators may well consider it as part of their concern for the public welfare, to make provision that all the towns may be furnished with good teachers" Samuel Langdon, *A Sermon* 47-48 (NH election sermon 1788) (Evans 21192).

Few canards were more annoying for dissenters than to suggest that their opposition to government tax support for religion would destroy the state's right to regulate morality. Dissenters, illustrated by the two Baptists quoted below, tended to justify moral regulation as relating to civil interests. According to Caleb Blood, the government's obligation to treat people equally notwithstanding religious differences "by no means prohibits the civil magistrate from enacting those laws that shall enforce the observance of those precepts in the christian religion, the violation of which is a breach of the civil peace; viz. such as forbid murder, theft, adultery, false witness, and injuring our neighbor, either in person, name, or estate. And among others, that of observing the Sabbath, should be enforced by the civil power. . . . As to the aid of the civil power to force men to support gospel ministers, I humbly conceive that it can never be necessary." Caleb Blood, *A Sermon* 35 (Vt election sermon [1792]) (Evans 24126). When Stillman—a leading Baptist—preached an election sermon, establishment critics allegedly said: "That upon the principles contained in the sermon, the civil magistrate ought not to exercise his authority to suppress actions of immorality." Stillman responded that had his words been "properly observed, this objection had been superseded. Immoral actions properly come under the cognizance of civil rulers, who are the guardians of the peace of society. For then I beg leave to observe in the words of Bishop Warburton, 'That the magistrate punishes no bad actions, as sins or offenses *against God*, but only as crimes injurious to, or having a malignant influence on society.'" Samuel Stillman, *A Sermon* 20 note (Mass election sermon 1779) (Evans 16537).

²⁵ A contrary interpretation, according to which Americans desired or assumed an unwritten constitution, has been suggested by Bernard Bailyn, Gordon Wood, Thomas Grey, and, more recently, Susanna Sherry. Bernard Bailyn, *The Ideological Origins of the American Revolution* 175-89 (1967); Gordon Wood, *The Creation of the American Republic 1776-1787* 259-305 (1969); Thomas Grey, *Do We Have an Unwritten Constitution*, 27 *Stan L Rev* 703, 715-16 (1975); Susana Sherry, *The Founders' Unwritten Constitution*, 54 *U Chi L Rev* 1127 (1987). See, however, Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 3 *Supreme Court Review* 49 (1982); Isaac Kramnick, *Republican Revisionism Revisited*, 87 *Am Hist Rev* 629 (1982); Helen K. Michaels, *The Role of Natural Law in Early American Constitu-*

people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society. . . . They are conveyed by a written compact, expressing those which are given up, and the mode in which those reserved shall be secured."²⁶

Because the people sacrificed their natural liberty by means of constitutions made by themselves, they could exercise their remaining natural liberty—it was protected—only in accord with

tionalism: Did the Founders Contemplate Judicial Enforcement of 'Unwritten' Individual Rights? 69 NC L Rev 421 (1991); Ronald M. Peters, Jr., *The Massachusetts Constitution of 1780: A Social Compact* (1978); Rozann Rothman, *The Impact of Covenant and Contract Theories on Conceptions of the U.S. Constitution*, Publius 149 (Fall 1980); see also Gary J. Schmitt and Robert H. Webking, *Revolutionaries, Antifederalists, and Federalists: Comments on Gordon Wood's Understanding of the American Founding*, Political Sci Reviewer 195 (Fall 1979).

A brief sampling of some the evidence can be presented here. In 1771, Josiah Tucker preached that "the fundamental laws, which are the basis of government, and form the political constitution of the state,—which mark out, and fix the chief lines and boundaries between the authority of Rulers, and the liberties and privileges of the people, are, and can be no other, in a free state, than what are mutually agreed upon and consented to." Josiah Tucker, *An Election Sermon* (Boston, 1771), in 1 *American Political Writing* 162. After urging that a "continental conference" should meet, Thomas Paine said that "their business" should "be to frame a CONTINENTAL CHARTER, or Charter of the United Colonies; (answering to what is called the Magna Charta of England) fixing the number and manner of choosing members of Congress, members of Assembly, . . . Securing freedom and property to all men, and above all things the free exercise of religion, according to the dictates of conscience . . ." Paine, *Common Sense* 97. This charter was a "constitution." *Id.* at 98. See also *id.* at 109. Another author wrote: "The constitution is a social covenant entered into by express consent of the people, upon a footing of the most perfect equality with respect to every civil liberty." "Philodemus" [i.e., Thomas Tudor Tucker], *Conciliatory Hints* (1784), in 1 *American Political Writing* 612. On the commencement of the New Hampshire Constitution, the Rev. McClintock preached: "Were it necessary, I might shew with what precision the rights belonging to men in a state of society are defined in the *Declaration of Rights*, and the life, liberty and property of the subject guarded with a jealous care against oppressive power . . ." Samuel McClintock, *A Sermon* 23–24 (1784) (Evans 18567). Witherspoon said: "Society I would define to be an association or compact of any number of persons, to deliver up or abridge some part of their natural rights, in order to have the strength of the united body, to protect the remaining, and to bestow others." Witherspoon, *Lectures*, Lect X, at 123. Nathaniel Chipman wrote: "In the exercise of this right of free consent by the people, . . . constitutions of government are formed. The constitution is no other than the fundamental law made and ratified by such compact." Nathaniel Chipman, *Sketches of the Principles of Government* 116 (1793). Thomas Reese—a Presbyterian minister in Salem, South Carolina—noted that "[i]f Mr. Locke, and the American politicians, argue right, all legitimate government is originally founded on compact." Thomas Reese, *An Essay on the Influence of Religion in Civil Society* 20 (1788) (Evans 21418). See also notes 26–29 & 39.

²⁶ "John De Witt," 4 *Complete Anti-Federalist* 21. He continued: "Language is so easy of explanation, and so difficult is it by words to convey exact ideas, that the party to be governed cannot be too explicit. The line cannot be drawn with too much precision and accuracy." *Id.* He also wrote that the only difference between a constitution for the United States and an individual state is "in the numbers of the parties concerned; they are both a compact between the Governors and Governed, the letter of which must be adhered to in discussing their powers. That which is not expressly granted, is of course retained." *Id.*

the varying demands of different constitutions. As the Rev. Moses Hemmingway told the Governor and legislature of Massachusetts:

Though the *natural rights* of men may, in general, seem much alike, they being, in this respect, "all FREE and EQUAL;" yet it is in different degrees that they are permitted to use them. According to the different civil constitutions which men are under, their *civil liberty* is larger, or more restricted.²⁷

Anti-Federalists had frequent occasion to use this analysis. For example, a constitution that granted broad powers and failed to mention freedom of the press worried Anti-Federalists because "[t]he people's or the printers claim to a free press, is founded on the fundamental laws, that is, compacts, and state constitutions. . . . The people, who can annihilate or alter those constitutions, can annihilate or limit this right." "Federal Farmer," 2 *Complete Anti-Federalist* 329. The "Federal Farmer" also wrote: "The constitution, or whole social compact, is but one instrument, no more or less, than a certain number of articles, or stipulations agreed to by the people, whether it consists of articles, sections, chapters, bills of rights, or parts of any other denomination, cannot be material." *Id.* at 323; see also *id.* at 325. Another Anti-Federalist wished "that the freedom of the press may be *previously* secured as a *constitutional and unalienable right*, and not left to the precarious care of popular privileges [i.e., public opinion about rights] which may or many not influence our new rulers." "Cincinnatus," 6 *id.* at 11. Speaking of natural rights in general, the "Impartial Examiner" wrote: "There can be no other just origin of civil power, but some such mutual contract of all of the people: and although their great object in forming society is an intention to secure their natural rights; yet the relations arising from this *political union* create certain duties and obligations to the state, which require a sacrifice of some portion of those rights and of that exuberance of liberty, which obtains in a state of nature.—This, however, being compensated by certain other adventitious rights and privileges, which are acquired by the social connection; . . . they ought to give up no greater share than what is understood to be absolutely necessary:—and they should endeavor so to organize, arrange and connect it's several branches, that when duly exercised it may tend to promote the *common good* of all, . . . It is evident, therefore that they should attend most diligently to those sacred rights, which they have received with their birth, and which can neither be retained to themselves, nor transmitted to their posterity, unless they are *expressly reserved*: for it is a maxim, I dare say, universally acknowledged, that when men establish a system of government, in granting the powers therein they are always understood to surrender whatever they do not so expressly reserve." "Impartial Examiner," 5 *Complete Anti-Federalist* 176; see also *id.* at 177 & 185. According to "An Old Whig," "To define what portion of his natural liberty, the subject shall at all times be entitled to retain, is one great end of a bill of rights." "An Old Whig," 3 *id.* at 33. "Brutus" wrote that "the portion of their natural liberty, which they give up for the enjoyment of civil government, should be expressly mentioned, in the constitution." "Brutus," in 8 *Documentary History* 212. Federalists did not disagree that natural rights were retained only to the extent they were reserved in the Constitution, but they argued that the unamended federal Constitution adequately reserved natural liberty and that the spirit of the people was a more important means of preserving rights than any paper guarantees.

²⁷ Moses Hemmingway, *A Sermon* 29–30 (Mass election sermon 1784) (Evans 18526). See also *id.* at 13–14. Josiah Whitney said: "Nations or states are left to chuse and adopt such [forms of government] as are most agreeable to their genius and circumstances. [New ¶] Some natural rights are to be given up into the hands of one, or more, for the preservation of the rest. [New ¶] One form may be best for one people, and a different one for another. In general, that ought to have the preference, which best secures the lives, liberties, and properties of men." Josiah Whitney, *The Essential Requisites to Form the Good Ruler's Character* 12 (Conn election sermon 1788) (Evans 21601).

Similarly, when George Washington transmitted the product of the 1787 Constitutional Convention to the Congress, he mentioned the difficulties the framers had encountered in attempting to delineate the sacrifice of natural rights to the Federal government:

Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several States as to their situation, extent, habits, and particular interests.²⁸

More generally, in the words of Jefferson's 1790 official opinion on the right of Congress to adjourn itself: "It is a natural right and, like all other natural rights, may be abridged or regulated in its exercise by law."²⁹ The degree of natural liberty protected and enjoyed under government depended upon the varying requirements of the constitutions and other laws adopted in different societies.

According to Americans who employed the state-of-nature analysis, the limited natural liberty permitted and protected by the laws of civil government was much preferable to the insecure liberty enjoyed in the state of nature.³⁰ Because of civil government and because of the obligations or "restraints" of civil laws, such natural liberty as the civil laws left to individuals was protected. Moreover, because of this security, liberty was more assured when

²⁸ George Washington, letter to the President of Congress, Sept. 17, 1787, in 1 *Documentary History* 305.

²⁹ Thomas Jefferson, Opinion on the Constitutionality of the Residence Bill, 17 *Papers of Thomas Jefferson* 197, Julian P. Boyd, ed (Princeton U, 1965). He also wrote: "This like all other natural rights, may be abridged or modified in its exercise, by their own consent, . . . but so far as it is not abridged or modified, they retain it as a natural right . . ." Id at 195. Jefferson also wrote that "our rulers can have authority over such natural rights, only as we have submitted to them." Thomas Jefferson, *Notes on the State of Virginia*, Paul L. Ford, ed, Question 17, at 197 (1894).

³⁰ In this sense, Americans were not exclusively "individualistic" or "communitarian," and, for this reason, it can be anachronistic to speak of competing ideologies of liberalism and republicanism. See Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of John Locke* (U of Chi, 1988). The differences among most eighteenth-century Americans on these issues can easily be overdrawn or depicted in modern terms that obscure the extent to which those older Americans held shared assumptions.

subject to government than when it was not; there was a greater enjoyment of liberty under the restraints of law than independent of law.³¹ What typically was discussed in terms of liberty could also be addressed in terms of interests: "In vain would it be for individuals to have distinct interests, were they not preserved in the enjoyment of them, by the combined power of the whole."³²

Of course, not all types of natural liberty could be sacrificed to obtain protection; Americans often denied that there could be any restraints upon the natural right of free exercise of religion. Drawing on Locke, eighteenth-century Americans said that each individual possessed, as part of his equal freedom in the state of nature, an inalienable liberty to worship or to exercise his religion as he pleased. Dissenters and even, increasingly, members of establishments opined that a person's relationship to his Maker was so "personal" and important that it could not be surrendered to the control of society. It was a matter of which an individual had an inalienable right "to judge for himself."³³ This argument that the natural right

³¹ Zephaniah Swift—later Chief Justice of Connecticut—wrote that "the natural rights which we sacrifice are of but very little value, when compared with the civil rights we acquire in a free and well regulated government." Zephaniah Swift, 1 *A System of the Laws of the State of Connecticut* 16 (1795). According to a Massachusetts minister, "it is indeed much for the People's Good that they are put in Subjection to the Power of the Magistrate; that they are certainly more effectually secured of their Lives, Liberties & Estates, under the Direction & Restraint of Laws and Government, than they possibly could be without. For if there were not king in Israel, every Man might do what was right in his own Eyes." William Welsted, *The Dignity and Duty of the Civil Magistrate* 22 (Mass election sermon 1751) (Evans 6793). A Connecticut minister preached: "Men . . . are by no means, to remain in a State of Nature; each one to possess by himself, and use for himself his natural Rights & Liberties, without any borrowed Strength and Advantage from others by Compact: . . ." Benjamin Lord, *Religion and Government Subsisting Together in Society, Necessary to their Compleat Happiness and Safety* 2 (Conn election sermon for 1751, printed 1752) (Evans 6868). Also: "Every Member may have the Strength of the whole employed for the Security of his own Life and Property. And also rejoyce in his Neighbours having the same Protection and Advantage with himself: So that, the Privileges of Society must be vastly greater than all the Rights of Nature separately Consider'd and Used. . . ." *Id.* at 3. The Rev. Hemmingway said: "It is true, the interests of society require subordination: but this deprives none of liberty, but helps all to enjoy it better." Moses Hemmingway, *A Sermon* 27 (Mass election sermon 1784) (Evans 18526). See also *id.* at 16.

³² Zabdiel Adams, *A Sermon* 35 (Mass election sermon [1782]) (Evans 17450). On the same page, he added a Hobbesian flourish: "Althou' a state of nature may have some attendant advantages; yet the inconveniences of it are a thousand times greater.—It is a state of war." *Id.*

³³ For example, in Massachusetts dissenters petitioned that "God hath given to every Man an Unalienable Right in Matters of His Worship to Judge for himself as his Conscience reserves ye Rule from God." 1749 Petition to the Mass Assembly from the Separate congregations in 17 towns in Anson Phelps Stokes, 1 *Church and State in the United States* 422 (Harper, 1950). The Baptist leader Isaac Backus wrote: "In civil states particular men are

of religious judgment and worship was inalienable was reinforced by another argument, based on assumptions about the secular purpose of government. The principle of self-preservation—the assumed goal of humans to preserve themselves—suggested that men formed government to secure their “secular Welfare.” Thus, an establishment minister preached: “The Nature of civil Society or Government, is a temporal worldly Constitution, formed upon worldly Motives, to answer valuable worldly Purposes.”³⁴ So common was the assumption that men formed civil government by consent “to promote their *temporal interests*” that a leading Baptist minister could mimic his own use of the state-of-nature analysis by saying of heaven that “[t]hey who enter into this kingdom do it voluntarily, with a design of promoting their spiritual interests.”³⁵ Having been established for secular purposes, civil government

invested with authority to judge for the whole; but in Christ's kingdom each one has an equal right to judge for himself.” Isaac Backus, *A Fish Caught in His Own Net* (1768), in William G. McLoughlin, ed, *Isaac Backus on Church, State, and Calvinism* 198 (Belknap, 1968) (“*Backus on Church, State, and Calvinism*”). See also *id.* at 332, 335. Another Baptist leader, Samuel Stillman, also asserted that religion was a “right of private judgment.” It was a matter “in which every man is *personally* interested; and concerning which every man ought to be fully persuaded in his own mind.” Samuel Stillman, *A Sermon* 25 (Mass election sermon 1779) (Evans 16537). In Virginia, Presbyterians petitioned: “The thoughts, the intentions, the faith, and the consciences of men, with their modes of worship, lie beyond their reach, and are ever to be referred to a higher and more penetrating tribunal. These internal and spiritual matters cannot be measured by human rules, nor be amenable to human laws.” Memorial of the Presbytery of Hanover to the General Assembly of Virginia (Oct 1784), in William A. Blakely, ed, *American State Papers* 109 (Religious Liberty Assoc., 1911) (“*American State Papers*”). Later, Presbyterians said: “Religion is altogether personal, and the right of exercising it unalienable; and it is not, cannot, and ought not to be, resigned to the will of the society at large; and much less to the legislature, which derives its authority wholly from the consent of the people, and is limited by the original intention of civil associations.” Memorial of the Presbyterians of Virginia to the General Assembly (Aug 13, 1785), in *American State Papers* 113–14. See also Witherspoon, *Lectures*, Lect XIV, at 160. Madison wrote that this right “is unalienable, because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men.” James Madison, Memorial and Remonstrance (1785), *American State Papers* 120–21. An establishment minister in New Hampshire preached: “As the conscience of man is the image and representative of God in the human soul; so to him alone it is responsible.” Israel Evans, *A Sermon* 6 (NH election sermon 1791) (Evans 23358). Another preached that, “as piety and our mode of faith are matters only between GOD and our own souls, we ought to be amenable to no human tribunal; but only answerable to GOD and our consciences.” Samuel Shuttlesworth, *A Discourse* 14 (Vt election discourse 1791, printed 1792) (Evans 24788). For additional evidence of both dissenting and establishment opinion, see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo Wash L Rev 933–38 (1992).

³⁴ Abraham Williams, *A Sermon* 8 (Mass election sermon 1762) (Evans 9310).

³⁵ Samuel Stillman, *A Sermon* 33 & 26 (Mass election sermon 1779) (Evans 16537). See quotation of the Rev. Booth in note 149.

arguably lacked authority to deny an individual's free exercise of religion. On the basis of these arguments, dissenters and their allies could insist that the natural right of religious freedom was "exactly the same" in civil society as in the state of nature.³⁶ Although some establishment writers argued that government had a right to deny religious liberty to persons whose religious opinions might pose a threat to civil government, this point of view increasingly was questioned.³⁷ In the decades following 1776, the natural right of the free exercise of religion was, to large numbers of dissenters and even many members of establishments, a right simply beyond the reach of civil government.

In contrast, Americans did not typically consider most other natural rights—even "inalienable" natural rights—immune from government restraints. Life, liberty, property, and the pursuit of happiness were inalienable natural rights but were to be protected under the regulations of civil government. So too, freedom of speech was governed by the laws concerning, among other things, defamation, blasphemy, and fraud.³⁸ Taking up the cause of South Carolina's dissenters, the Rev. William Tennent—a Presbyterian—acknowledged that individuals could give government the power to regulate the rights often described as inalienable—the only exception being in matters of religion: "I can communicate to my representative, a power to dispose of part of my property, for the security of the remaining part: I may give him a right to resign a part of my personal liberty to the obligation of good laws, as a means of preserving the rest,—but, cannot,—I say it is out of my power, to communicate to any man on earth, a right to dispose of my conscience, and to lay down for me what I shall believe and

³⁶ Stillman wrote of the "Rights of Conscience" that "in a state of nature, and of civil society [they] are exactly the same. They can neither be parted with nor controled, by any human authority whatever." Samuel Stillman, *A Sermon* 11 (Mass election sermon 1779) (Evans 16537). See also the opinion of the Connecticut Separate, Israel Holly, *A Word in Zion's Behalf* 18 ([1765]) (Evans 10005). Madison wrote "that in matters of religion no man's right is abridged by the institution of civil society, and that religion is wholly exempt from its cognizance." James Madison, Memorial and Remonstrance, *American State Papers* 121. See also quotations in note 39 and accompanying text.

³⁷ Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo Wash L Rev 915, 918–26 (1992).

³⁸ The right of contract also was subject to variation by civil laws. Zephaniah Swift, 1 *A System of the Laws of the State of Connecticut* 16 (1795). For a later example, see the dissent of Marshall in *Ogden v Saunders*, 12 Wheat 213, 345 (1827).

practice in religious matters.”³⁹ Whereas the free exercise of religion might be “exactly the same” under government as in nature, other inalienable natural rights were different under government and therefore were inalienable in a rather qualified way. In order to obtain protection for their natural rights, individuals could submit even “inalienable” natural rights to particular legal forms or restraints.⁴⁰

Not surprisingly, Americans frequently associated protection with obedience and allegiance. According to an establishment clergyman in Massachusetts, “[a]s every Subject has a Right or Claim to be protected by the Magistrate, so the Magistrate has an equal

³⁹ William Tennent, *Mr. Tennent's Speech on the Dissenting Petition, Delivered In the House of Assembly, Charles-Town, South-Carolina, Jan. 11, 1777* 6 (1777) (Evans 15612). He also said: “The rights of conscience are unalienable [sic], and therefore, all laws to bind it, are, *ipso facto*, null and void.” *Id.* at 6–7. After defining property to include “everything to which a man . . . may have a right,” Madison wrote that “[c]onscience is the most sacred of all property; other property depending, in part, on positive law, the exercise of that [conscience] being a natural and unalienable right.” James Madison, “On Property” (1792), in *American State Papers* 159. According to Jefferson, “our rulers can have authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.” Thomas Jefferson, *Notes on the State of Virginia*, P. L. Ford, ed., 197 (1894). In presenting their draft to the public, the 1782 New Hampshire Constitutional Convention explained of the Bill of Rights: “We have endeavor’d therein to ascertain and define the most important and essential natural rights of men. We have distinguished betwixt the alienable and unalienable rights: For the former of which, men may receive an equivalent; for the latter, or the RIGHTS of CONSCIENCE, they can receive none.” *An Address of the Convention for Framing a New Constitution or Form of Government for the State of New Hampshire* 15 (1782) (Evans 17616). Nathaniel Chipman quoted Paine: “The natural rights, which he [i.e., an individual] retains, are all those, in which the power to execute is as perfect in the individual as the right itself: Among this class are . . . all intellectual rights, or rights of the mind; consequently Religion is one of those rights. The natural rights, which are not retained, are all those, which, though they are perfect in the individual, the power to execute them is defective.” Nathaniel Chipman, *Sketches of the Principles of Government* 107 (1793). Later, Alexander Addison wrote: “The right of conscience is a natural right of a superior order for the exercise of which we are answerable to God. The right of publication is more within the control of civil authority, and was thought a more proper subject of general law.” Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly* (1800), in *American Political Writing* 1090. See also Zephaniah Swift, 1 *A System of the Laws of the State of Connecticut* 16 (1795); McLoughlin, 1 *New England Dissent* 610.

⁴⁰ This summary of how Americans analyzed restraints on inalienable natural rights has, for the sake of simplicity, described only the physical natural freedom or power of individuals in the state of nature to do as they pleased. When discussing the moral liberty of individuals, Americans said that this moral freedom did not include a liberty to infringe the equal rights of others or otherwise to violate natural law. With respect to an individual’s moral freedom in the state of nature, Americans could say that no natural rights—alienable or inalienable—were sacrificed to society.

Claim and Right to be obeyed by every Subject."⁴¹ Another preached:

as by the social compact, the whole is engaged for the protection and defence of the life, liberty and property of each individual; so each individual owes all that he hath, even life itself, to the support, protection and defence of the whole, when the exigencies of state require it. And no man, whether in authority or subordination, can justly excuse himself from any duty, service or exertions, in peace or war, that may be necessary for the publick peace, liberty, safety or defence, when lawfully and constitutionally called thereto.⁴²

Protection required submission to law.⁴³

By the same token, however, a constitution's or government's failure to provide satisfactory protection justified disobedience. "Nothing is more true," wrote Theophilus Parsons, "than that ALLEGIANCE AND PROTECTION ARE RECIPROCAL."⁴⁴ With this double-edged maxim, Americans explained not only obedience to the restraints that provided protection for natural liberty but also the repudiation of constitutions that did not adequately supply protection. For example, the North Carolina Constitution began by declaring that "[w]hereas allegiance and protection are, in their nature, reciprocal, and the one should of right be refused when the other is withdrawn, . . ."⁴⁵ Similarly, the Massachusetts Constitution described the protection or safety of individuals in the enjoyment of their natural rights as at least one of the purposes of government, and said that "whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happi-

⁴¹ William Welsted, *The Dignity and Duty of the Civil Magistrate* 40 (Mass election sermon 1751) (Evans 6793).

⁴² Jonas Clark, *A Sermon* 29 (Mass election sermon [1781]) (Evans 17114). He also said, "every member is engaged for the peace, safety and defence of the state; and the whole for the peace, safety and protection of every member" *Id.* at 21.

⁴³ It was a common sentiment. Among others, Swift wrote: "Every citizen owes obedience to the laws of the state, and is entitled to protection and security in his life, liberty, and property. The duties of protection and allegiance, are reciprocal." Zephaniah Swift, 1 *A System of the Laws of the State of Connecticut* 13 (1795). See also Calvin's Case, 7 Coke 1 (1608), cited by Earl M. Maltz, "The Concept of Equal Protection of the Laws—An Historical Inquiry," 22 *San Diego L Rev* 499, 507 (1985); Thomas Hobbes, *Leviathan*, ch ii, § 21, at 153, and Review & Conclusion, 491, Richard Tuck, ed (Cambridge U, 1991).

⁴⁴ *The Essex Result* (1778), in Theophilus Parsons, *Memoirs of Theophilus Parsons* 367 (1861).

⁴⁵ NC Const of 1776.

ness.”⁴⁶ The people had subjected some of their natural liberty to civil government through a constitution, and if, by so doing, they did not obtain protection for the rest of their natural liberty, they could alter their mode of government—by constitutional amendment or even revolution. The protection of natural liberty, far from being a legal right with a remedy at law, was a purpose of government the people achieved by establishing and, if necessary, changing the system of law.

The balance between restraint and liberty that constituted the desired protection was not always entirely clear. Protection required a sacrifice of liberty to legal obligations, but an excess of these obligations could endanger the very liberty they were de-

⁴⁶ Mass Const of 1780, preamble. This quotation was preceded by the following: “The end of the institution, maintenance and administration of government, is to secure the existence of the body-politic; to protect it; and to furnish the individuals who compose it, with the power of enjoying, in safety and tranquility, their natural rights, and the blessings of life:”. Id. The New Jersey Constitution declared that “allegiance and protection are, in the nature of things, reciprocal ties, each equally depending upon the other, and liable to be dissolved by the others being refused or withdrawn.” NJ Const of 1776, preamble. The Virginia Declaration of Rights proclaimed “[t]hat Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath a indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.” Va Decl of Rights of 1776, § 3.

The Apostle Paul, according to the Rev. Goodrich, “well knew the rights of human nature,” and, after quoting the Apostle on the subject of submission to civil authority, Goodrich said: “When a constitutional government is converted into tyranny, and the laws, rights and properties of a free people are openly invaded, there ought not to be the least doubt but that a remedy consistent with this doctrine of the apostle, is provided . . . for their preservation; nor ought resistance in such case to be called rebellion. . . . Civil society can exist no longer, than while connected by its laws and constitution: These are of no force, otherwise than as they are maintained and defended by the members of the commonwealth. This regular support of authority is the only security, a people can have against violence and injustice, feuds and animosities, in the unmolested enjoyment of their honest acquisitions: Hence the very end of civil society demands, that the orders of government be enforced.” Elizur Goodrich, *The Principles of Civil Union* 25 (Conn election sermon 1787) (Evans 20393). In other words, the principle of self-preservation required revolution if government so abandoned its obligations as to invade rather than secure liberty, but, in normal circumstances, security or protection was achieved through enforcement of the laws of civil society. According to Moses Hemmingway, “no man has ever any rightful liberty to consent to any constitution or compact inconsistent with his own safety and welfare, and that of his fellow men: for instance, to authorize any to govern unrighteously and oppressively. . . . and if any people have been so imprudent and blameable as to consent to, and put themselves under a tyrannical government, they are so far from being bound in honor or conscience to support it, that it is their duty to overthrow and abolish it as soon as they can.” Moses Hemmingway, *A Sermon* 14–15 (Mass election sermon 1784) (Evans 18526).

signed to protect. On the ground that individuals established government to protect natural liberty, Americans frequently said they did not want more legal restraints on natural liberty than were necessary.⁴⁷ Yet even the Americans who said this recognized that substantial legal obligations were necessary to the degree required for self-preservation—for the protection of individual liberty and interests.⁴⁸ The challenge was to create constitutions and laws that restrained natural liberty as little as possible but that, nonetheless, imposed restraints adequate for the preservation of such liberty.⁴⁹

Thus, protection—in the sense of protection for natural liberty—was the protection individuals obtained by sacrificing part of their natural liberty for the creation of civil government and its

⁴⁷ See note 225. James Madison's cousin, the Rev. James Madison, wrote to him that one of the "Principles common to Am[erican]ns" was "ye Desire of enjoying all the Advantages of Gov[ernment] at ye least possible Expense to Natural Liberty." Rev. James Madison, Letter to James Madison (Feb 9, 1788), in 8 *Documentary History* 358. See also "Publicola" [Archibald Maclaine], *An Address to the Freemen of North Carolina* (State Gaz of NC, March 20, 1788), 16 *Documentary History* 437.

⁴⁸ E.g., Noah Hobart, *Civil Government the Foundation of Social Happiness* 7–8 (Conn election sermon 1750, printed 1751) (Evans 6692); Israel Evans, *A Sermon* 10 (NH election sermon 1791) (Evans 23358); "Brutus," 2 *Complete Anti-Federalist* 373; "Impartial Examiner," 5 *id* at 176; Zephaniah Swift, 1 *A System of the Laws of the State of Connecticut* 13 (1795). See also William Blackstone, 1 *Commentaries* 125–26 (1765).

⁴⁹ In the words of an Anti-Federalist: "To yield up so much, as is necessary for the purposes of government; and to retain all beyond what is necessary, is the great point, which ought, if possible, to be attained in the formation of a constitution." "An Old Whig," 3 *Complete Anti-Federalist* 33. Similarly, "Brutus" wrote: "[I]t was necessary that a certain portion of natural liberty should be surrendered, in order, that what remained should be preserved: how great a proportion of natural freedom is necessary to be yielded by individuals, when they submit to government, I shall not now enquire. So much, however, must be given up, as will be sufficient to enable those, to which the administration of government is committed, to establish laws for the promoting the happiness of the community, and to carry those laws into effect." "Brutus," 2 *Complete Anti-Federalist* 373. A supporter of a Congressional ticket that included Anti-Federalists wrote that "we ought to preserve our liberties, if possible, so far as they may consist with our essential protection." "A Friend to Liberty and Union," "To the Freemen of Pennsylvania," *Federal Gazette* (Phila.) (Nov 7, 1788, No. 33). Justice James Iredell told a grand jury: "True liberty certainly consists in such restraints, and no greater, on the actions of each particular individual as the common good of the whole requires. The exact medium it may be difficult to find, . . ." James Iredell, Charge to the Grand Jury of the Circuit Court for the District of Massachusetts (Oct 12, 1792), in 2 *Documentary History of the Supreme Court* 310. In this sense, Paine had written that "[t]he science of the politician consists in fixing the true point of happiness and freedom." Paine, *Common Sense* 97–98. James Witherspoon said that "The end of union should be the protection of liberty, as far as it is a blessing." Witherspoon, *Lectures*, Lect X, at 124. In its instructions to its delegates to the Connecticut ratifying convention, the town of Preston ungrammatically observed that "We are willing to give up such share of our rights as to enable government to support, defend, and preserve the rest. It is difficult to draw the line." Instructions of the Town of Preston, Nov. 26, 1787, in 3 *Documentary History* 439. See also notes 27–28.

laws. In order to protect natural liberty, government and its laws had to restrain a portion of it, and the balance between the liberty protected and the restraints on liberty varied from one society to another, according to their different constitutions and laws. Rather than a legally enforceable right to a particular degree of protection or natural liberty, protection was a purpose of government and, in this sense, was a moral claim on government enforced by the power of the people to alter their constitutions by amendment or even revolution. This specialized idea of protection—protection for natural liberty—was distinct from ordinary notions of protection, and it was this specialized idea of protection that came to be of such importance for American debates about equality. If individuals obtained protection for their natural liberty by submitting to legal restraints on a portion of that freedom, then equal protection may have been an equality of these restraints or civil obligations—and, concomitantly, an equality of the natural liberty protected.

II. EQUAL PROTECTION

The idea of equal protection was the position of establishments, which increasingly conceded an equal protection of the laws for natural rights but did not want to give up the possibility of unequal “privileges.” Whereas dissenters typically demanded equal civil rights—not only equal protection but also equal privileges—establishments frequently asserted that the only equality government was obliged to provide was equal protection.

Put more concretely, equal protection appealed to establishment writers who sought to justify a combination of privilege and toleration—who wanted to retain the “privileges” of their religion but were willing to allow dissenters an equality of natural rights and obligations under civil law. Proponents of equal protection typically said that government should provide their established religion with financial support or other privileges not available to dissenters. These advocates of equal protection, however, tended to criticize the intolerant governments that not only distributed privileges unequally among religions but also imposed unequal legal restraints on the natural liberty of dissenters.⁵⁰ Such governments, according to increasing numbers of establishment writers, did not equally

⁵⁰ E.g., if dissenters had to pay penalties or if dissenters could not enforce contracts.

protect the natural rights of individuals with respect to their religious differences. These tolerant establishment writers condemned unequal legal restraints as violations of equal protection and justified their unequal privileges as compatible with that standard.

Although the alternative standard of equality—equal civil rights—will not be discussed until later, it must be mentioned at this point, because equal protection was an idea that was contrasted to equal civil rights. In both England and America, dissenters of varying sects sought equal civil rights—an equality of rights under civil law. They thereby were requesting not only an equality of the natural liberty permitted and protected under civil law but also an equality of legal privileges. It was as an alternative to equal civil rights that establishment authors, in England and then America, proposed equal protection—a standard with which they could advocate toleration without sacrificing their unequal privileges.

American establishment writers who borrowed the idea of equal protection ordinarily did not alter it, but they put that idea to varying uses, according to the circumstances in which they found themselves. In the middle of the eighteenth century, supporters of American establishments advocated equal protection in a context in which it was a relatively tolerant standard: they used equal protection as a basis for condemning unequal legal restraints on dissenters. Later, particularly by the time of the Revolution, when dissenters had obtained equal legal obligations and sought, in addition, equal privileges, supporters of establishments employed the idea of equal protection to defend their unequal privileges against the claims of dissenters. With the idea of equal protection, an establishment could provide dissenters an egalitarian reassurance that no one would be subjected to greater legal obligations or “restraints” than anyone else on account of his or her religion, but an establishment did not thereby promise to share equally or to forgo its privileges, such as state financial support. In short, equal protection required equal obligations and permitted unequal privileges; it was a greater degree of equality than many American dissenters had in the middle of the eighteenth century but less than they increasingly demanded; it was a tolerant establishment position that establishments could employ both against establishment penalties on dissent and against dissenting demands for equal privileges.

The typical eighteenth-century understanding of equal protection appears to have been drawn in most instances from the auda-

cious Anglican apologist, William Warburton.⁵¹ Equal restraints on natural liberty and even "equal protection" had been discussed by English political theorists of the previous century, sometimes in connection with religious liberty and sometimes as a more generally applicable standard, but it was Warburton's analysis of religious liberty that eighteenth-century Americans most clearly drew upon in their debates about equal protection.⁵² In the 1730s, Warburton

⁵¹ Warburton eventually became Bishop of Gloucester. For the English controversies concerning Warburton, see Arthur W. Evans, *Warburton and the Warburtonians* (Oxford U, 1932). It is not possible to measure the use of Warburton's ideas in America simply by counting citations. In addition to the usual difficulties with this approach, it should be noted that the strongest American establishments were Congregationalist and that the Anglican establishments were politically weak. For these reasons, Americans often did not cite the controversial Bishop even when directly borrowing his arguments. Nonetheless, it seems clear that many American writers drew upon Warburton's ideas.

⁵² For an early discussion of equal protection, see *Englands Safety in the Laws Supremacy* 5 (1659). The anonymous pamphleteer urged "such a settlement where every man may be as to Law and publick Countenance, in a equal capacity (except by past actions for a time disabled) and alike protected in the enjoyment of propriety and exercise of honest Industry." *Id.* This sort of language was related to earlier complaints about monopolies and, as will be seen, was employed in the eighteenth and especially the nineteenth century both to criticize monopolies and to describe a generally applicable standard of equal protection.

In connection with religion, Richard Hooker had written: "As for such abatements of civil state as take away only some privilege, dignity, or other benefit which a man enjoyeth in the commonwealth, they reach only unto our dealing with public affairs, from which what should let but that men may be excluded and thereunto restored again, without diminishing or augmenting the number of persons in whom either church or commonwealth consisteth? He that by way of punishment loseth his voice in a public election of magistrates, ceaseth not thereby to be a citizen. A man disenfranchised may notwithstanding enjoy as a subject the common benefit of protection under laws and magistrates." Richard Hooker, *Hooker's Ecclesiastical Polity Book VIII*, Raymond A. Houk, ed, ch 1, at 164–65 (Columbia Univ, 1931).

More generally, European theorists—including Hobbes and Pufendorf—argued that an equality of taxes, of punishments, and, more generally, of civil constraints was an important means of avoiding dangerous resentments and disturbances. E.g., Pufendorf said that "an equality is to be observed in punishments, namely, that those who are equally guilty should suffer equally, and the misdeed which in the case of one is punished, should not in the case of the other be condoned, without a very weighty cause; since, forsooth, an inequality of that kind frequently furnishes matter for dangerous disturbances to commonwealths" Samuel Pufendorf, 2 *Elementorum Jurisprudentialis Universalis Libri Duo* bk I, ch xxi, § 11, at 205 (Oxford U, 1931). See also: Samuel Pufendorf, *Of the Laws of Nature and Nations* bk VIII, ch v, §§ 5–6, at 828–29 (1710) (re taxes); Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society*, in William Molesworth, ed 2 *Works Of Dominion*, ch xiii, § 10, at 173 (1841) (re public burdens). Others discussed the necessity of equal restraints on natural liberty without mentioning the danger of disturbances. In a very late assertion of leveller ideas, an anonymous pamphleteer wrote that "the Laws ought to be the Protectors and Preservers, under God, of all our Persons and Estates." *The Leveller* (1659), in 4 *Harleian Miscellany* 515–16 (1808). He sought "equal justice and safety." *Id.* at 518. Sydney said that "the equality in which men are born is so perfect, that no man will suffer his natural liberty to be abridged, except others do the like: I cannot reasonably expect to be defended from wrong, unless I oblige myself to do none; or to suffer the punishment prescribed by the law, if I perform not my engagement." Algernon Sidney, *Discourses Concerning Government*

laid the foundation for his controversial reputation by publishing two tracts, *Alliance Between Church and State* (1736) and *The Divine Legation of Moses Demonstrated* (1737), in which he prominently used the idea of equal protection to argue both for a "free toleration" of religious worship and for an established church supported by a test.⁵³ At the heart of Warburton's arguments was the distinction between "*the sanctions of reward and punishment*."⁵⁴ Reasoning that temporal punishments were in many instances inappropriate and that the civil government could not efficaciously alter the behavior of individuals by distributing temporal rewards, Warburton proved, he thought, the necessity of an alliance between church and state. The church supplied the sanction of future rewards necessary for the success of the state, and the state attended to the interests of the church.

Warburton discussed equal protection when arguing for the proposition that "by the *original constitution* of civil government, the sanction of rewards *was not enforced*."⁵⁵ In accord with the state-of-nature analysis, Warburton assumed that individuals formed government to obtain protection and that this protection was "*security to our temporal liberty and property*."⁵⁶ "In entering into society," he wrote, "it was stipulated, between the magistrate and people, that *protection* and *obedience* should be reciprocal conditions."⁵⁷ Consequently, punishment could include a denial of protection. Yet a withdrawal of protection was not an appropriate punishment for all types of disobedience: "for though all obedience

548, Thomas G. West, ed (Liberty Classics, 1990). It is not altogether clear, however, whether he assumed each individual would have the same protection.

For somewhat ambiguous suggestions of a greater degree of equality—equal legal rights—see John Locke, *A Letter Concerning Toleration* 24 & 55 (Bobs Merrill, 1955); Benjamin Hoadly, *The Original and Institution of Civil Government Discuss'd* 162 (1710) (re an equality with respect to civil government but particularly legal restraints).

⁵³ William Warburton, 1 *Works*, ed Richard Hurd, 13 (1811) (Warburton, "*Works*"). Note, however, that he qualified his support for toleration. Like Locke, Warburton excepted from complete toleration any "sects" that threatened the state in certain ways; unlike Locke, he had a detailed list of such undesirable groups and varied the restraints upon them: "The ATHEIST, the ENGLISH PAPIST, the GERMAN ANABAPTIST, and the QUAKER, all hold opinions pernicious to civil society. But these having different degrees of malignity, must have different degrees of restraint." 7 *id.* at 255.

⁵⁴ *Alliance Between Church and State*, in *id.* at 32.

⁵⁵ *Id.*

⁵⁶ *Id.* at 36.

⁵⁷ *Id.* at 32–33.

be the same; and so, *uniform protection* a proper return for it; yet disobedience being various both in kind and degree, the withdrawing protection would be too great a punishment for some crimes, and too small for others."⁵⁸ Thus, Warburton assumed that individuals deserved "uniform protection" for their obedience. Moreover, he propounded this uniformity as part of an argument for both a toleration and a government alliance with an established church.

Incidentally, in contrast to this uniform protection for individuals of varied religions was the state's rather different protection of the established religion, "which was under the more *immediate* protection of the civil Magistrate, in contradistinction to those which were only TOLERATED."⁵⁹ Thus, the uniform protection, which amounted to a toleration, concerned the specialized idea of protection drawn from the state-of-nature analysis, but the magistrate's protection of the establishment was a "more *immediate* protection" of the sort expected from a monarch traditionally known as "the defender of the faith." Of course, this more immediate protection of the establishment consisted not only of "uniform protection" or toleration but also of various unequal "rewards," including a test (to assure that government would be in the hands of the established church) and the provision of "a settled maintenance for its ministers."⁶⁰

In response to dissenters who were clamoring for equal civil rights—for equal rewards as well as uniform protection—Warburton offered only the uniform protection he had derived from the state-of-nature analysis:

[T]his pretended *right of every qualified subject to a share of the honours and profits in the disposal of the supreme magistrate* is altogether groundless and visionary.

Let it be remembered, that, . . . it hath been proved at large, that REWARD IS NOT ONE OF THE SANCTIONS OF CIVIL SOCIETY: the only claim which subjects have on the magistrate, for *obedience*, being protection.

Now the consequence of this is, that all places of honour and profit, in the magistrate's disposal, are not there in the nature of a TRUST; to be claimed, and equally shared by the subject: but of the nature of a PREROGATIVE; which he may dispose

⁵⁸ Id at 33.

⁵⁹ *The Divine Legation of Moses Demonstrated*, in 2 id at 264.

⁶⁰ Id at 278.

of at pleasure, without being further accountable, than for having such places *ably* supplied.⁶¹

On account of the obedience of its subjects, the state was obliged to provide protection—"uniform protection"—but it was not obliged to distribute rewards equally. Therefore, although it had to offer uniform protection, it could use unequal "rewards" to secure its alliance with the established church.⁶²

To Warburton, this combination of equal protection and unequal rewards—of toleration and establishment—held out the promise of religious harmony. Religious disturbances, argued Warburton, had tended to arise when sects were denied toleration or when all were tolerated but they quarrelled to achieve supremacy in a state. Therefore, he reasoned, a state could end such disturbances only by tolerating different religions and establishing one in a way that precluded the political ambitions of the others:

What persecutions, rebellions, revolutions, loss of civil and religious liberty, these intestine struggles between sects have occasioned, is well known even to such as are least acquainted with the history of mankind.

To prevent these mischiefs was . . . one great motive for the state's seeking *alliance* with the church. For the obvious remedy was to *establish* one church, and give a *free toleration* to the rest.⁶³

In the course of advocating a tolerant establishment as a solution to religious discord, Warburton adumbrated the role equal protection would have for decades to come. Yet—notwithstanding the abstract quality of his argument—we may wonder whether he foresaw that his ideas would be adopted by establishments so distant and different from that which he defended.

Relying upon the conventional understanding of protection—that government was established to protect natural liberty—Warburton used the idea of a uniform protection to justify establishments; in contrast, however, a small number of Protestant anti-establishment writers attempted to resist that conventional un-

⁶¹ *Alliance Between Church and State*, in 7 *id* at 252.

⁶² For one of the more detailed American arguments based on Warburton's analysis, see Thomas Reese, *An Essay on the Influence of Religion in Civil Society* (1788) (Evans 21418). Among other things, the Rev. Reese speculated that "[i]t may perhaps be said that protection is the reward conferred on every individual for his observance of the laws." *Id* at 7, note. He then explained that this was a "mistake" or misnomer. *Id*.

⁶³ *Alliance Between Church and State*, in Warburton, 7 *Works* 250.

derstanding. Between 1735 and 1738, in England, *The Old Whig*—a series of radically anti-establishment essays—argued that individuals should be equally protected in their rights, whether natural or acquired under civil government. That individuals should have equal civil rights—neither extra restraints nor extra privileges on account of their religion—was a radical but not unusual position. *The Old Whig*, however, associated this with the words “equal protection.” According to one of the essays, men entered into society

with a view to their *better security* in the possession of [their most valuable and sacred rights], whether natural or acquired; and think that the great end of all *just law* and government is the full and *intire protection* of all those who contribute by a peaceable and useful behaviour to the common welfare, and do not by any wilful violation of the public peace forfeit those privileges, which they have otherwise an *equal claim* to with the rest of mankind.⁶⁴

This was an explicit attempt to redefine protection to include privileges. Later, *The Old Whig* urged its readers “to deliver our constitution from every foreign or domestic insult . . . and secure it to our children’s children by such laws as may give equal liberty and equal protection to all its friends, however differing from us in trifling opinions, or in useless ceremonies.”⁶⁵ Apparently, *The Old Whig* came close to associating the phrase “equal protection” with equal civil rights—with an equality both of natural rights and of privileges. As will be seen, this approach was occasionally repeated in subsequent decades but remained a minority view. Far more often, dissenters plainly demanded equal civil rights, and establishments preserved their unequal privileges by offering only equal protection.

The idea of equal protection that Warburton used to defend England’s establishment permitted unequal privileges but generally forbade unequal restraints on natural liberty, and therefore it could be used by tolerant supporters of establishments not only to defend

⁶⁴ 1 *The Old Whig* 15 (1739). The first essay is dated March 13, 1735; the final essay is dated March 13, 1738. 2 *id* at 440.

⁶⁵ 2 *The Old Whig* 431. Incidentally, the periodical appears to have been concerned with “common” rights: “And ’tis equally ridiculous to imagine, that a man can forfeit any of the common rights of the subjects, because he scruples a bit, a gesture, or particular form of words, that others may think fit to make use of . . .” 1 *id* at 16. For the significance of this, see note 239.

their unequal privileges but also to condemn the unequal restraints of excessively severe establishments. In his 1758 treatise, Vattel, like Warburton, discussed two types of protection. Vattel argued that a prince should encourage devotion to the established religion⁶⁶ and, indeed, that it was a condition of his wearing the crown that he “protect and maintain the religion of the state.”⁶⁷ This was the protection that could not be equal. Vattel, however, also urged toleration, and, in this regard, he talked about the other sort of protection—the protection that was to be equal.⁶⁸ He preceded his discussion of equal protection by noting that the prince should not force compliance with the established religion, for “by constraint” the prince could only “produce uneasiness or hypocrisy.”⁶⁹ He then explained:

[I]n general . . . the most safe and equitable means of preventing the disorders that may be occasioned by difference of religion, is an universal toleration of all the religions that have nothing dangerous in them, either with respect to manners, or the state. . . . Holland and the states of the king of Prussia furnish a proof of this: Calvinists, Lutherans, Socinians, Jews, Catholics, Pietists, all live in peace, because they are equally protected by the sovereign; and none are punished, but the disturbers of the tranquility of others.⁷⁰

To prevent religious disputes, individuals of these different religions were to be “equally protected”; they were to be punished for disturbing others but not on account of their religion.

Americans similarly could use the idea of equal protection to argue against unequal restraints on dissenters without questioning establishment privileges. Eighteenth-century Connecticut had one

⁶⁶ Emmerich de Vattel, *The Law of Nations*, bk I, ch xii, §§ 133–34, at 116–17 (1820).

⁶⁷ *Id.*, bk I, ch xii, § 138, at 118.

⁶⁸ Of course, the equal protection provided to individuals of varied religions was quite different from the prince’s protection of the state religion. Equal protection was an equality of constraint—“protection” being a term of art in the state-of-nature analysis that referred to protection of natural liberty. In contrast, the prince’s protection of the “true” religion was protection in an ordinary and broader sense. It concerned the prince’s role as defender of the faith and obviously required more of him than that he merely avoid imposing greater legal restraints on that favored religion than on others.

⁶⁹ *Id.*, bk I, ch xii, § 134, at 117.

⁷⁰ *Id.*, bk I, ch xii, § 135, at 117–18. For a continental discussion of equal protection in connection with taxation, including an attempt to reconcile equal protection with a graduated tax, see Jean Jacques Burlamaqui, 2 *Principles of Natural and Political Law* pt III, ch 5, §§ 14–16, at 148 (1807).

of America's most intransigent establishments.⁷¹ Not only did the government provide financial assistance and other privileges to Congregationalists but also, particularly in reaction to the Great Awakening, it restricted and penalized the increasing numbers who wished to separate from establishment churches. In 1742, the Connecticut legislature prohibited individuals from going into a parish and preaching, unless they had permission from the minister and a majority of the church of the parish.⁷² In 1743, the legislature enacted that dissenting congregations had to obtain its permission to hold meetings, and it further indicated, what hardly required saying, that new light and other Congregational requests for such permission would not be considered favorably.⁷³

By far the most eloquent attack on this intolerance came in an anonymous 1744 pamphlet, *The Essential Rights and Liberties of Protestants*, possibly by Elisha Williams—a member of the Connecticut General Assembly and eventually a judge of the Colony's Superior Court. Like Warburton and Vattel, Williams had no quarrel with an establishment that consisted of government support for a particular religion. What Williams objected to was the imposition of a religion upon individuals:

. . . if by the word *establish* be meant only an approbation of certain articles of faith and modes of worship, of government, or recommendation of them to their subjects; I am not arguing against it. But to carry the notion of a religious establishment so far as to make it a rule binding to the subjects, or on any penalties whatsoever, seems to me to be oppressive of Christianity, to break in upon the sacred rights of conscience, and the common rights and privileges of all good subjects.⁷⁴

⁷¹ It provoked Ebenezer Frothingham to inveigh: "The Most High hath condescended to speak heavy things to Connecticut." Ebenezer Frothingham, *A Key to Unlock the Door* 194 (1767) (Evans 10621).

⁷² An Act for Regulating Abuses and Correcting Disorders in Ecclesiastical Affairs, §§ 2, 4, & 5 (May 1742), in 8 *Public Records of the Colony of Connecticut* 456 (1874). Violators who were not ordained ministers could (merely upon complaint to a J.P.) be bound over to their peaceable and good behavior in an amount of 100 pounds, and a noninhabitant or person not ordained who violated the law could be "sent (as a vagrant person) . . . out of the bounds of this Colony." *Id.* at §§ 4 & 5.

⁷³ "An Act Providing Relief Against the Evil and Dangerous Designs of Foreigners and Suspected Persons" (May 1743), in 8 *Public Records of the Colony of Connecticut* 522 (1874), discussed by McLoughlin, *New England Dissent* 362.

⁷⁴ [Elisha Williams?], *The Essential Rights and Liberties of Protestants* (Boston, 1744), in Ellis Sandoz, ed., *Political Sermons of the American Founding Era 1730–1805* 73 (Liberty, 1991) ("Political Sermons"). Like so many of the American clergy who wrote after the 1730s,

Opposed to penalties on dissenters, Williams, like Vattel, used the idea of equal protection to encourage the establishment to be tolerant:

That the civil authority ought to *protect all their subjects* in the enjoyment of *this right of private judgement in matters of religion*, and the liberty of worshipping GOD according to their consciences. That being the end of civil government (as we have seen) *viz.* the greater security of enjoyment of what belongs to every one, and *this right of private judgment*, and worshipping GOD according to their consciences, being the *natural and unalienable right of every man*, what men by entering into civil society neither did, nor could give up into the hands of the community; it is but a just consequence, that they are to be protected in the enjoyment of this right as well as any other. A worshipping assembly of Christians have surely as much right to be protected from molestation in their worship, as the inhabitants of a town assembled to consult their civil interests from disturbance &c.⁷⁵

Because individuals had not sacrificed to government their natural right of worship and judgment in matters of religion, they were to be equally protected by government in this right as in any other, secular freedom. Of course, the molestation that concerned Williams here was that which occurred under the laws restricting separatist and new light preaching.⁷⁶ Drawing on an historical example, Williams added that

the right of private judgment in matters of religion being unalienable, and what the civil magistrate is rather oblig'd to protect his subjects equally in, both Wickliff, and they who desired to hear him, had a just right to remain where they were, in the enjoyment of that right, free from all molestation from any persons whatsoever . . .⁷⁷

Williams appears to have been familiar with Warburton's arguments in favor of establishment.

⁷⁵ Id at 97.

⁷⁶ Williams talked about molestation by individuals, but he clearly understood such individuals to be acting through the legal system. He was complaining about the inequality of legal restraints or obligations rather than a failure to enforce those restraints. Incidentally, the description of religious intolerance as "molestation" was quite common. For an example in an equal protection clause, see article 33 of the 1776 Maryland Constitution, reproduced in the text below at note 88.

⁷⁷ Id at 115.

Individuals did not submit their natural right of judgment in religious matters to civil government, and individuals were to be equally protected by civil government in that right. Consequently, according to Williams, individuals had a right to enjoy their natural right of judgment, without molestation from anyone. Whereas Warburton had said that individuals should be equally protected in their natural liberty, regardless of their religious differences, Williams talked about equal protection for the natural liberty of worship and judgment, and, in this respect, he slightly recast and narrowed the idea of equal protection to focus it on Connecticut's prohibition of certain religious meetings.⁷⁸ In other regards, however, Williams employed an understanding of equal protection consistent with that of Warburton.

As one might expect, many dissenters were not satisfied to claim a mere equal protection of their natural liberty but demanded, in addition, equal privileges, which, together with equal protection, would have given them a full equality of civil rights. In 1750, a prominent Connecticut dissenter, Ebenezer Frothingham, employed the idea of equal protection, not to ask for equal protection only of natural rights, but to insist upon an "equal protection" of the privileges of government and thereby a full equality of civil rights:

The moral Rule, and civil Power, is to protect every one; that supposing there is in one Society, some of the Church of *England*, and them that profess the *Seabrook* Regulation, and them that are Congregationals, and Baptists, and Quakers: Now all these ought equally to be protected by this moral Rule, or civil Power, in their proper Rights and Privileges, and each one be left to support their own Worship . . .⁷⁹

Like *The Old Whig*, Frothingham argued for equal "protection" of civil rights. Yet the end of government was typically understood to be the protection of natural rights, and therefore Frothingham's

⁷⁸ Of course, the laws of Connecticut did protect the natural liberty of individuals unequally, but, because they did so by directly prohibiting certain religious meetings, Williams was able to focus his argument on the unequal protection of a particularly valuable portion of natural liberty, the freedom of worship.

⁷⁹ Ebenezer Frothingham, *The Articles of Faith and Practice* 296 (1750) (Evans 6504). The "Seabrook regulation" is, of course, the "Saybrook Platform"—representing the position in 1708 of Connecticut's Congregational establishment. He also said he favored "the Protecting and Defending every Man . . . in their moral and civil Rights and Privileges." *Id.*

argument was vulnerable to being turned against him. Indeed, the response did not take long.

In the 1751 Connecticut election sermon, the Rev. Benjamin Lord used the idea of equal protection to defend the religious role of Connecticut's civil government. Whereas Williams had discussed equal protection in order to urge intolerant establishments to abandon their unequal restraints on dissenters, now, when dissenters prominently demanded equal privileges, Lord could employ the idea of equal protection to defend the establishment against these claims for greater equality. Like Frothingham, Lord defined the purpose of government in terms of protection, but, unlike Frothingham, Lord conformed to the conventional view that government was created to protect the life, liberty, and property of the members of the community—their natural liberty rather than their privileges.⁸⁰ Moreover, according to Lord, "[e]very Member may have the Strength of the whole employed for the Security of his own Life and Property. And also rejoyce in his Neighbours having the same Protection and Advantage with himself"⁸¹ Apparently in reaction to Frothingham's demand that Connecticut provide equal civil rights on grounds of "equal protection," Lord handily pointed out that the Colony already provided equal protection—equal protection of natural liberty—which was a sufficient basis for ending dissensions. As it happens, Lord's position was not as convincing as it might have been, for Connecticut, in fact, still penalized Congregational dissenters, and consequently Lord had to devote much of his sermon to an explanation that separation was a threat to the state—indeed, a danger akin to "anarchy"—and so, perhaps, was to be prohibited rather than protected.⁸² Nonetheless,

⁸⁰ "[A]ll civil Government of the right Stamp, must be agreeable to Scripture and Reason, and so to the Nature and Ends of a civil Community, the Preservation of the Lives, Liberties & Estates of all the Members thereof, against the force of Rapine, Injustice & all manner of destructive Violence." Benjamin Lord, *Religion and Government Subsisting Together in Society, Necessary to their Compleat Happiness and Safety* 28 (Conn election sermon for 1751, printed 1752) (Evans 6868).

⁸¹ *Id.* at 3. The word "advantage" does not necessarily relate to anything other than natural rights: The immediate context, a discussion of rights in the state of nature and their preservation under government, suggests this limited meaning. At the very least, Lord did not want equal privileges for dissenters.

⁸² Lord passionately asserted that the separations of dissenters were an anarchical threat to civil government, see note 150, and he seems to have understood this threat to be grounds for denying toleration, though he said so only indirectly. *Id.* at 23, 34–35, 40–41. Lord's ambiguity or, perhaps, ambivalence may have been connected to his difficult position in his

Lord clearly had an advantage over Frothingham, for Lord argued on the basis of the widely-held assumptions that government was formed to protect natural rights and that natural rights were distinct from privileges. Thus, just as tolerant supporters of establishments used the idea of equal protection against penalties on dissenters, so too establishment writers could use the idea to defend a supposedly tolerant establishment against dissenters' demands for equal privileges and equal civil rights.

Even so, it was only after mid-century that American establishments used the idea of equal protection as an important part of their position in a broad political debate rather than merely as an occasional argument. Whereas, in England, already in the late seventeenth century, a substantial number of Anglicans urged tolerance for dissenters, in America, before the 1760s and '70s, relatively few establishment writers were inclined to advocate toleration. It was one thing to be willing to concede an equality of restraints, but it was another actively to seek such an equality. Consequently, although the argument that government had to treat individuals equally only with respect to protection was a useful establishment response to demands for equal privileges, it was not likely to be an identifying position of America's mid-century establishments.

In the 1770s, however, many dissenters intensified their claims for equal civil rights. The Great Awakening and the migrations of people to and through America had left many colonies with large numbers of dissenters of various denominations, some of whom formed majorities in their localities. In the turbulence of the 1770s, emboldened by the freedom and equality claimed for America as a whole, some dissenting sects began to feel their strength and importuned colonial and then state legislatures for equal rights.⁸³ Throughout America, the justice of their claims, their strength, and the sympathy they elicited from members of establishment

parish. In 1748, Separates in Lord's parish "obtained a majority and were able to block a vote to levy the annual taxes for Lord's salary and for the . . . new meeting house." McLoughlin, 1 *New England Dissent* 373. It is difficult to resist speculating that Lord's unusual difficulties in his parish may have affected the peculiar tone of his sermon and even other aspects of his life. For Lord's years of controversy and his eventual poverty, insanity and death, see *id.* at 373–76.

⁸³ H. J. Eckenrode, *Separation of Church and State in Virginia* 41–73 (Da Capo, 1971 reprint of 1910 edition) (Eckenrode, "Separation of Church and State in Virginia"); Buckley, *Church and State in Revolutionary Virginia* 177 & *passim*.

religions created a climate of opinion in which establishment ministers often sought, rather defensively, to show that they too were against "persecution." A constitutional guarantee of the natural right of free exercise was rapidly becoming the minimal degree of religious liberty one could respectably acknowledge.

In these new circumstances, in which restraints on natural liberty on account of religious differences were no longer possible and establishment privileges were at risk, some establishments defended their privileges by asserting their support for religious freedom and equality—but only the free exercise of religion and equal protection. What, for Lord, had been a useful argument against equal civil rights now became a central principle for several American establishments. By acknowledging the natural right of free exercise and offering an equal protection, establishments could take an attractively egalitarian position and thereby could resist demands for equal civil rights; establishments could be for equality and yet could retain their unequal privileges. Thus, in several states, the Revolution was accompanied by a struggle in which anti-establishment forces demanded equal civil rights, and establishments offered, instead, equal protection.

The importance of equal protection to the position of establishments is apparent from three state constitutions. In 1776, the Maryland Constitution guaranteed that "all persons, professing the Christian religion, are equally entitled to protection in their religious liberty."⁸⁴ In 1780, the Massachusetts Constitution promised equal protection to Christian sects, and New Hampshire in 1784 copied this provision and others from its neighbor's constitution.⁸⁵

The Anglican church in Maryland was the first establishment to use an equal protection clause to help fend off claims for equal rights. Having long received government support, Maryland's Anglicans in 1776 attracted considerable resentment. Indeed, with George III as head of their church, Anglicans had particular difficulty resisting egalitarian and anti-establishment demands.⁸⁶ At the November 1776 convention, however, Anglicans constituted a ma-

⁸⁴ Md Const of 1776, Art 33.

⁸⁵ See note 92 and accompanying text.

⁸⁶ Arthur Pierce Middleton, *From Daughter Church to Sister Church: The Disestablishment of the Church of England and the Organization of the Diocese of Maryland*, in 79 Md Hist Mag 189, 191 (1984).

jority, and, of the committee responsible for drafting the Declaration of Rights, all members but one were Anglican.⁸⁷ Therefore, although Anglicans apparently felt obliged to sacrifice their old tax privileges, they at least had an opportunity, in drafting the Maryland Declaration of Rights, to preserve some opportunities for a future establishment. Article 33 said:

. . . all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; . . . nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry; yet the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him.⁸⁸

In other words, Anglicans abandoned exclusive claims on tax support. The best they could retain for themselves with respect to financial assistance was to leave open the prospect of a tax to support all Christian denominations. As for other privileges, however, the possibility of an inequality even among Christians was left intact. Indeed, in the first half of the 1780s, Anglicans sought tax support for Christians and incorporation for themselves. Yet these attempts encountered substantial and ultimately successful opposition. That the Anglicans of Maryland failed after 1776 to obtain much from government was a consequence of political resistance rather than the provisions of their state's Constitution.⁸⁹

Of the two northern constitutions that contained equal protection clauses, that of Massachusetts may be taken as an example, for extensive information about that constitution is available.⁹⁰ After guaranteeing the right of individuals to worship according to conscience, the Massachusetts Bill of Rights, in article three, required

⁸⁷ *Id.* at 190.

⁸⁸ Md Const of 1776, Art 33.

⁸⁹ 79 Md Hist Mag 193–94; Norman K. Risjord, *Chesapeake Politics 1781–1800* 211–13 (Columbia U, 1978). For the documents produced by the Anglicans in 1783 and 1784, see William Smith, 2 *The Works of William Smith* 509–23 (1803).

⁹⁰ Unfortunately, there is little evidence concerning contemporary interpretation of New Hampshire's religion clauses. See McLoughlin, 2 *New England Dissent* 846. See, however, quotation of McClintock in note 24.

legislation ensuring that towns would tax individuals for the support of Protestantism—an arrangement that was advantageous for the most numerous sect in each town, typically the Congregationalists.⁹¹ According to article three and the scheme created under it, individuals who did not wish to support the dominant sect in their locality could direct their tax payments to their own religious society, but, in order to do this, they had to take the initiative to have themselves recognized as members of dissenting denominations. Consequently, the taxes paid by dissenters unwilling or unable to get such official recognition ended up in the pockets of Congregationalists, who thereby received what was considered an unequal government privilege. A subsequent clause of article three of the Massachusetts Bill of Rights—the Christian-denominations clause—provided that “every denomination of christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law.” A second half of this clause added: “And no subordination of any one sect or denomination to another shall ever be established by law.”⁹²

The authors of the Massachusetts Constitution apparently understood the first, equal-protection half of the Christian-denominations clause to require equal protection for rights existing in the state of nature. The natural rights context of equal protection is apparent in article ten of the Massachusetts Bill of Rights, which explained that “[e]ach individual of the society has a right to be protected by it [i.e., the society] in the enjoyment of his life, liberty and property, according to standing laws.”⁹³ Individuals sacrificed some of the liberty they enjoyed in the state of nature—some of their “life, liberty and property”—and, by means of this sacrifice,

⁹¹ The legislation was to apply “in all cases where such provision shall not be made voluntarily.” Mass Const of 1780, Bill of Rights, Art 3. In practical terms, this meant that Boston was exempted.

⁹² Mass Const of 1780, Bill of Rights, Art 3. When addressing the establishment of religion, the New Hampshire Constitution approximately followed the Massachusetts provisions, including the Christian-denomination passage already quoted: “And every denomination of christians, demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another, shall ever be established by law.” NH Const of 1784, Bill of Rights, Art 6.

Whereas the religion provisions in Maryland used the idea of equal protection in connection with individuals, the provisions in Massachusetts and New Hampshire used the notion of equal protection in connection with denominations.

⁹³ Mass Const of 1780, Bill of Rights, Art 10.

they obtained the protection of society or government “according to standing laws.” As the similar New Hampshire Constitution said, “[w]hen men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others.”⁹⁴ An equality of natural freedom in society and a concomitant equality of legal obligations or “restraints” is also suggested by the communication of the largely Congregationalist town of Gorham to the Massachusetts drafting convention: “That no Restriction be laide on any Profession of Christianity or denomination of Christians, but all Equally intiteld to protection of the Laws.”⁹⁵

The second half of the Massachusetts Christian-denominations clause (which said that “no subordination of one sect or denomination to another shall ever be established by law”) looked, at first glance, as if it provided an equality of at least privileges or benefits,

⁹⁴ NH Const of 1784, Bill of Rights, Art 3.

⁹⁵ Oscar & Mary Handlin, eds, *Popular Sources of Political Authority—Documents on the Massachusetts Constitution of 1780*, at 430 (Belknap, 1966) (“*Popular Sources of Political Authority*”). Since 1820, Gorham has been part of the state of Maine. For the power of Congregationalists in Gorham, see Hugh D. McLellan, *History of Gorham, Me.* ch 9–10, at 169–221 (1903). In addition to the general information found in this volume, note the following. In 1781, at least 66 men sought certification as Baptists so as to be free of paying taxes in support of the Congregational ministry. Id at 206–7. To these Baptists must be added an indeterminate number of new lights. Id at 204. However, Gorham’s tax records for 1780 indicate an adult (over 16) male population of approximately 380. Id at 336.

The constitutional guarantee of equal protection for all Christian denominations posed some difficulties with regard to Catholicism. In a meeting to consider ratification of the Massachusetts Constitution, the town of Dunstable recognized that the guarantee extended to Catholicism and was uncomfortable with this: “[T]hese Sentences are so general as to Engage full Protection to the Idolatrous worshippers of the Church of Rome [and] therefore they wore not Clear in their judgment to give so much Incoragement to Idol worship as to Engage any full protection in their Idolatry[,] for if the government should not Disturbe such in their pretended worship it would be as much as they might Expect without our being under special obligation to protect them there in by the laws of the land.” *Popular Sources of Political Authority* 641. In contrast, George Washington was not reluctant to grant Catholics equal protection. He wrote to American Catholics that “[a]s mankind becomes more liberal they will be more apt to allow that all those who conduct themselves as worthy members of the community are equally entitled to the protection of civil government.” George Washington, letter to the Roman Catholics in the U.S., March 15, 1790, in William B. Allen, ed, *George Washington: A Collection* 546 (Liberty Classics, 1988). Like so many other late eighteenth-century supporters of establishments, Washington approved of government financial benefits for Protestantism and gladly conceded equal protection. (For Washington’s position on establishments, note his letter to Mason, in which he refused to sign Madison’s 1785 *Remonstrance*: “Although no man’s sentiments are more opposed to any kind of restraint upon religious principles than mine are, yet I must confess, that I am not amongst . . . those, who are so much alarmed at the thoughts of making people pay towards the support of that which they profess.” Quoted by Eckenrode, *Separation of Church and State in Virginia* 105.)

and thus, if taken together with the first half of the clause—which concerned equal protection—it seemed to concede equal civil rights. Yet the no-subordination language only proscribed the subordination of one sect to another; it did not forbid a scheme that established in each town whichever sect formed a majority there. Indeed, as has been seen, earlier paragraphs of article three of the Bill of Rights authorized tax support for Protestantism through a system that gave privileges to persons whose religion constituted a majority in a locality. Of course, it was no coincidence that such persons tended to be Congregationalists. Thus, an establishment minister could quote the equal-protection and no-subordination language of the Constitution and claim with satisfaction that it prohibited the establishment of any one church over others: “Any denomination of Christians, who would endeavor to bring the Civil Authority of the State to grant any peculiar privileges to their church, and to give it a pre-eminence over others, ought to be watched over and guarded against. . . . While this frame of Government continues, no one church or denomination of Christians can oppress another with constitutional law on their side.”⁹⁶ Although he was correct that no church had been given peculiar privileges—that no particular sect had been established—he omitted to mention that privileges had been granted to local majority churches. In other words, the no-subordination requirement had been carefully drafted to permit the establishment of majority sects. As the town of Middleborough observed, “in saying that no Subordination etc. Shall ever be Established by Law: and in another part of the same article: in Saying, that all monies paid by the Subject etc; where it must be understood: if any thing can be Learnt by it: that individuals may at some Times and under Some Circumstances be obliged to pay money as aforesaid, Contrary to the Dictates of their Consciences for the Support of Teachers as aforesaid.”⁹⁷ To meet egalitarian pressures while retaining some unequal privileges, Maryland

⁹⁶ Joseph Willard, *Persecution Opposite to the Genius of the Gospel*, sermon preached at Harvard on Sept. 7, 1785, Widener Library Archives, Harvard Univ, as quoted by James H. Smylie, *Protestant Clergy, the First Amendment and Beginnings of a Constitutional Debate, 1781–91*, in Elwyn A. Smith, ed, *The Religion of the Republic* 116, 130 (Fortress, 1971).

⁹⁷ *Popular Sources of Political Authority* 693. Isaac Backus had a parish that included part of Middleborough or Middleboro, and eventually the town had additional Baptist churches. Although Congregationalists remained dominant, the complaint quoted above appears to reflect some deference to the views of the Baptists. The rest of the town's return, however, was less accommodating. McLoughlin, 1 *New England Dissent* 629.

had used the idea of equal protection, and now, for similar purposes, Massachusetts used both equal protection and a very narrow guarantee against the subordination of “any one sect . . . to another.”

Thus, the men who drafted the constitutions of Massachusetts, New Hampshire and Maryland used the idea of equal protection to preserve establishments. Whereas a constitutional right to the free exercise of religion was a right to a particular degree of freedom, a constitutional right of equal protection was, apparently, not a legal right to enjoy natural liberty or any portion of it to any particular degree, but simply the right to enjoy the same natural liberty in civil society and to be subjected to the same legal obligations as other persons. Therefore, to a constitution that already guaranteed the natural right of free exercise of religion, an equal protection clause added a clarification or reassurance that the document prohibited discriminatory restraints on natural liberty; an equal protection clause made clear that the document not only forbade direct denials of free exercise but also forbade unequal restraints, on account of religion, of other natural liberty. An equal protection provision did this, moreover, with a phrase that gave the constitution an egalitarian luster—that secured the political advantages of discussing religious liberty in terms of equality. But equal protection did not give the equality of benefits or privileges so many dissenters desired. The constitutions of Maryland, Massachusetts, and New Hampshire employed egalitarian language but did not preclude unequal privileges.⁹⁸

Dissenters and other opponents of establishment understood that they had not achieved full equal civil rights with respect to religion. They knew they had obtained guarantees of their natural right of free exercise and clarifying prohibitions against unequal protection of natural liberty but not a provision for equal privileges. Recollecting his work in drafting most of the Massachusetts Constitution, John Adams observed that “[t]he Article respecting Religion . . .

⁹⁸ In Massachusetts and New Hampshire, tax support could vary according to religious differences among Christian sects. In Maryland, only benefits other than tax support could vary among such denominations. The idea of equal protection was also used to describe Connecticut’s religious liberty. Zephaniah Swift, 1 *A System of the Laws of the State of Connecticut* 144 (1795). For the limited character of such equality, see *id.* at 146 & 144 n. As observed above, relatively little information survives concerning the contemporary interpretation of New Hampshire’s religion clauses.

was the only Article which I omitted to draw."⁹⁹ Later he explained that he "could not sketch [it], consistent with my own sentiments of perfect religious freedom, with any hope of its being adopted by the Convention, so I left it to be battled out in the whole body."¹⁰⁰ Although in a minority, John Adams was not alone. During ratification of the Massachusetts Constitution, the mostly Baptist town of Swansea complained that "[t]he Legislature cannot act agreeable to such a Power as is Vested in them by the third article [which included the equal protection clause] without Rendering individuals unhappy who have an Equal Right to the Blessings of government."¹⁰¹ The town of Bellingham—which also had a Baptist majority—suggested replacing the third article with several brief statements, including: "Nor can any man who acknowledges the being of a God Be justly abridged or Deprived of any Civil Right as a citizen on account of his Religious Sentiment or Peculiar mode of Religious Worship."¹⁰² Dissenters sought equal civil rights and were fobbed off with equal protection.

III. EQUAL CIVIL RIGHTS

In the 1770s, when many Americans claimed equal rights from Britain, increasing numbers of dissenters demanded equal rights with respect to religion from their American governments.¹⁰³ As already observed, the requests of these dissenters for equal civil rights prompted some establishments to obtain equal protection clauses in state constitutions. Rather than accept mere equal protection, however, dissenters continued to press for equal civil rights.

⁹⁹ John Adams, letter to William D. Williamson, Feb 28, 1812, quoted in Gregg L. Lint et al, eds, 8 *Papers of John Adams* 262, n 12 (Harvard U, 1989) ("*Papers of John Adams*"). He continued: "I could not satisfy my own Judgment with any Article that I thought would be accepted: and farther that Some of the Clergy, or older and graver Persons than myself would be more likely to hit the Taste of the Public." Id. Later, there were unconfirmed suggestions that Parsons had drafted Article 3. E.g., *Independent Chronicle* (Boston), June 13, 1811 (XLIII, No 3147). These may have been based merely on Parson's committee assignment in the drafting convention.

¹⁰⁰ Josiah Quincy's diary (entry for May 31, 1820), as quoted by Edmund Quincy, *Life of Josiah Quincy* 379 (1867), in 8 *Papers of John Adams* 262, n 12.

¹⁰¹ *Popular Sources of Political Authority* 530. For the Baptist majority, see McLoughlin, 1 *New England Dissent* 675; see also id at 628.

¹⁰² *Popular Sources of Political Authority* 740. For the Baptist majority, see McLoughlin, 1 *New England Dissent* 675; see also id at 628.

¹⁰³ A useful collection of Massachusetts discussions of equality and suffrage may be found in *Popular Sources of Political Authority*.

Dissenters did not repudiate the idea of equal protection, because an equal protection for natural liberty was something they wanted and, indeed, had already largely achieved in practice, if not in name; yet they also, in addition to equal protection, desired an equality of privileges. Among other things, dissenters tended to resent state systems of tax support that in one way or another favored other denominations over their own. Even plans that allowed dissenters to direct their payments to their own sects were often understood to establish unequal benefits.¹⁰⁴ By requiring dissenters to inform the civil government that they were not of the majority sect, such plans signified government approbation of the established religion and, moreover, transferred the tax payments of noncomplying dissenters to the establishment. In opposition to these unequal privileges, many dissenters demanded equal privileges, which, together with the equal protection they already had, would have given them equal civil rights. They insisted that all civil laws rather than merely those protecting natural freedom avoid inequalities on account of religion.

Demands for what amounted to equal civil rights with respect to religion took several forms, each of which used different language to refer to the desired type of equality. Often, dissenters treated these different forms or modes of analysis as equivalents and employed them interchangeably. A brief survey of the most common of these approaches for discussing equal civil rights can, perhaps, illustrate the extent of anti-establishment demands.

Some analysis was explicitly in terms of an equality of civil rights. For example, the Pennsylvania Constitution of 1776 declared: "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship."¹⁰⁵ Similarly, at least with respect to a narrower class of individuals, the New Jersey Constitution said "[t]hat there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this

¹⁰⁴ Incidentally, Americans may have distinguished between general taxes and taxes raised to support specific government benefits. An unequal distribution of the benefits supported by general revenues was an inequality of privileges and was not considered contrary to notions to equal protection. In contrast, a tax system for support of religion may have been considered a form of special assessment. If so, then a mechanism permitting an individual at least to direct his payment to his own religious society may have been necessary to avoid a constraint of natural liberty that discriminated among religions.

¹⁰⁵ Pa Const of 1776, Art 2.

Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect . . . shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects."¹⁰⁶

Another, far more common approach was to distinguish natural rights from the privileges, advantages, benefits, or emoluments of civil government—that is, from rights not existing in the state of nature. There were numerous variations in the language with which this approach was described. For example, although many Americans used the words “right” and “privilege” interchangeably to denote either a natural right or a right existing only under civil government, they often employed these words to distinguish between the two types of rights and demanded not only the right to the free exercise of religion but also equal privileges. For purposes of this bifurcated analysis, they also used the words “discrimination” and “preference.” Thus, in New York, where anti-establishment sentiment found strength in the state’s religious diversity, the 1777 Constitution prohibited an establishment by requiring that “the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed”¹⁰⁷ Not only would the natural right of free exercise be shielded from discriminatory restraints—in the document’s words, “without discrimination”—but also preferences on account of religious differences would be prohibited. Anti-establishment Americans frequently attempted to use versions of this bifurcated analysis of equal civil rights in order to guarantee the free exercise of religion and then prohibit an establishment.¹⁰⁸

¹⁰⁶ NJ Const of 1776, Art 19. For other examples, note the following. The 1778 South Carolina Constitution provided that Protestants “shall enjoy equal religious and civil privileges.” SC Const of 1778, Art 38. In this context, the word “privileges” appears to have been interchangeable with “rights.” Among other things, the presbytery of Hanover, Virginia, wanted government “to restrain the vicious and to encourage the virtuous, by wholesome laws equally extending to every individual.” Memorial of the Presbytery of Hanover to the General Assembly of Virginia (Oct 24, 1776), in *American State Papers* 94; see also the same language in the Memorial of April 25, 1777 in id at 97.

¹⁰⁷ NY Const of 1777, Art 38.

¹⁰⁸ E.g., in 1790, South Carolina employed the same language as New York to prohibit an establishment. SC Const of 1790, Art 8, § 1. As suggested in the text, the bifurcated analysis had many variants. In 1788, New York’s ratification convention proposed as an amendment to the U.S. Constitution: “That the people have an equal, natural, and unalien-

A third analysis was that civil government had no authority to legislate with respect to religion—a claim commonly assumed to preclude unequal civil rights on account of religion. It will be recalled that large numbers of Americans, following Locke, said that individuals could not relinquish their natural right of free exercise and that civil government was erected for exclusively secular purposes.¹⁰⁹ On the basis of such arguments, some Americans, in addition, insisted that all religious matters were beyond the jurisdiction of civil government.¹¹⁰ According to these Americans, civil government had no authority to legislate with respect to religion—whether to restrain free exercise and other natural rights or even to give privileges to one or more religions. For example, Madison

able right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others." Elliot, 1 *Debates* 328. Virginia's proposal concluded with a similar guarantee: "[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others." 3 *id.* at 659. In Delaware, section 2 of the Declaration of Rights said that Christians "ought . . . to enjoy equal Rights and Privileges in this State, unless, under Colour of Religion, any man disturb the Peace, Happiness or Safety of Society." Del Const of 1776, Bill of Rights, § 3. See also: NJ Const of 1776, Art 19, quoted in text at note 106; proposal of 1788 NC ratification convention, Elliot, 4 *Debates* 244. Israel Holly wanted "civil rulers to tolerate and protect all conscientious professors of religion, and establish none." Israel Holly, *An Appeal to the Impartial* (1778), as quoted in Ezra H. Gillett, *Historical Sketch of the Cause of Civil Liberty in Connecticut 1639–1818*, 4 *Historical Magazine* 20 (2nd Ser) (July 1868). Some of Virginia's dissenters petitioned that "That your memorialists have never been on an equal Footing with the other good People of this Colony in respect of religious Priviledges, having been obliged by Law, to contribute to the Support of the Established Church." Memorial and Petition of the Dissenters from the Church of England and others in the Counties of Albermarle, Amherst, and Buckingham (Oct 22, 1776), Va State Library, Mfm of Misc Ms 425. Other dissenters in Virginia petitioned that, being "[f]ully Persuaded . . . That the Religion of JESUS CHRIST may and ought to be Committed to the Protection Guidance and Blessing of its Divine Author, & needs not the Interposition of any Human Power for its Establishment & Support[.] We most earnestly desire and Pray that not only an Universal Toleration may take Place, but that all the Subjects of this Free State may be put upon the same footing and enjoy equal Liberties and Privileges." Petition of Divers of the Freeholders and other Free Inhabitants of Amherst County (Nov 1, 1779), Va State Library, Mfm of Misc Ms 425.

¹⁰⁹ See text accompanying notes 33–35.

¹¹⁰ These Americans were expanding upon the ideas of earlier, European writers. Pufendorf had argued that civil law has no need to inquire as to things merely of the mind or as to things that do not disturb the peace. Samuel Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo*, ed W. A. Oldfather, bk I, ch xiii, § 19, at 162 (Oxford U, 1931). Locke wrote: "The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests. [New ¶] Civil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like." Locke, *Letter Concerning Toleration* 17. Locke argued, however, that government could prohibit some religions, and he did not explicitly preclude the possibility of some government recognition of an established church.

wrote "that in matters of religion no man's right is abridged by the institution of civil society, and that religion is wholly exempt from its cognizance."¹¹¹ This position, that religion was free from civil control and even civil recognition, was a powerful argument against unequal privileges on the basis of religious differences. Indeed, a prohibition of any legislation with respect to religion could have a still broader effect: It could bar even equal privileges.

Any of these three approaches could be generically described by eighteenth-century Americans as freedom of conscience or religious liberty. For a long time, Englishmen and Americans had sometimes called the free exercise of religion "freedom of conscience" or "religious liberty." They also, however, could use these phrases to refer to a right against establishments.¹¹² For example, some assumed

¹¹¹ James Madison, Memorial and Remonstrance (1785), in *American State Papers* 121. The Presbytery of Hanover petitioned: "In the fixed belief of this principle, that the kingdom of Christ, and the concerns of religion, are beyond the limits of civil control, we should act a dishonest, inconsistent part, were we to receive any emoluments from any human establishments for the support of the gospel." Memorial of the Presbytery of Hanover to the General Assembly of Virginia (April 25, 1777), in *American State Papers* 98; see also Memorial of Presbytery of Hanover (Oct 24, 1776) in id at 94. Some attributed this position to Locke: ". . . any Majestrait or Legislative Body that takes upon themselves the power of Governing Religion by human Laws Assumes a power that never was committed to them by God nor can be by Man for the Confirmation of which Opinion we shall Cite no less Authority than the Great Mr. Lock who says 'that the whole Jurisdiction of the Majestrait reaches only to civil Concernments and that all civil power Right and Dominion is bounded and confined to the only care of promoting these things' which is so Pertinent that we need not Expatriate on it Onely say that if you can do any thing in Religion by human laws you can do every thing if you can this Year take five Dollars from me and give it to A Minister of any Denomination you may next year by the same Rule take Fifty or what not and give it to one of another or to them of all other Denominations." Petition of Sundry of the Inhabitants of Rockingham County (Nov 18, 1784), Va State Library, Mfm of Misc Ms 425. (Note, however, that the petitioners admired South Carolina's equal establishment of Protestant sects. In other words, the no-legislation-respecting language may sometimes have been interpreted simply to require equality among Protestants.) A petition from Rockbridge, Virginia, said: "Let the Ministers of the Gospel of all denominations enjoy the Privileges common to every good Citizen protect them in their religious exercises in the Person and Property and Contracts and that we humbly conceive is all they are entitled to and all a Legislature has power to grant." Petition from Rockbridge County, Virginia in Eckenrode, *Separation of Church and State in Virginia* 97. The Baptist leader John Leland wrote that "[t]o indulge [ministers] with an exemption from taxes and bearing arms is a tempting emolument. The law should be silent about them; protect them as citizens, not as sacred officers, for the civil law knows no sacred religious officers." John Leland, *The Rights of Conscience Inalienable, and, Therefore, Religious Opinions Not Cognizable By Law* (1791), in *Writings of Leland* 188. See also notes 119–22 and accompanying text.

¹¹² Americans frequently spoke of "free exercise" or "free exercise, according to conscience." "Free exercise," however, tended to be understood to suggest the natural right. Therefore, the broader degree of liberty—not only the natural right but also equal civil rights or freedom from government legislation with respect to religion—often was said to be freedom of conscience or freedom of religion.

that these phrases referred to equal civil rights among Christians or, at least, among Protestants. On this basis, in the South Carolina Assembly, the Rev. William Tennent said: "My first, and most capital reason, against all religious establishments is, that *they are an infringement of Religious Liberty*."¹¹³ For yet other Americans, "freedom of conscience" and "freedom of religion" could refer to an absence of laws respecting religion or to an unspecific absence of establishments. These phrases could be used as convenient catch-alls.¹¹⁴

With a somewhat more descriptive label, dissenters, particularly Baptists, generically claimed equal liberty or equality of religious liberty. For example, Samuel Stillman—a prominent Baptist—preached in a Massachusetts election sermon that the governor should secure to all peaceable Christians "the uninterrupted enjoyment of equal religious liberty." Such language (like the phrase "freedom of conscience" or "religious liberty") could be ambiguous,

¹¹³ William Tennent, *Mr. Tennent's Speech on the Dissenting Petition, Delivered in the House of Assembly, Charles-Town, South-Carolina, Jan. 11, 1777* 5 (1777) (Evans 15612). Tennent made it clear that he understood religious liberty in terms of equality. See John Wesley Brinsfield, *Religion and Politics in Colonial South Carolina* 107–8, 116, 120–22 (Southern Historical Press, 1983). Recalling how he had collected signatures for the petition supported by Tennent, Colonel William Hill later wrote of himself that, "in order to get as many names as possible—and not believing in the doctrine of the turks that women have no souls) he got the women to sign their names with the men." *Id.* at 111.

¹¹⁴ For some uses of these phrases against establishments, see the following. According to a minority of the Pennsylvania ratification convention, "[t]he right of conscience shall be held inviolable." "The Address and Reasons of Dissent of the Minority," 2 *Documentary History* 623. In 1779, Isaac Backus prepared a draft Bill of Rights for the Massachusetts Constitution. Among other things, it said that "every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby." *Backus on Church, State, and Calvinism* 487. In 1780, Backus wrote: "Our Convention at Cambridge passed an act last Wednesday to establish an article in our bill of rights which evidently infringes upon the rights of conscience." McLoughlin, 1 *New England Dissent* 604. Also in Massachusetts, Joseph Hawley wrote: "Pray give over the impossible (task) of endeavoring to make a religious establishment, (consistent) with the unalienable Rights of Conscience." Joseph Hawley, *Protest to the Constitutional Convention of 1780*, in Mary C. Clune, ed., *Joseph Hawley's Criticism of the Constitution of Massachusetts*, in 3 *Smith College Studies in Hist* 50 (1917). According to Leland, "[t]he question is, 'Are the rights of conscience alienable, or inalienable?'" John Leland, *The Rights of Conscience Inalienable* (1791), in *Writings of Leland* 180. Although he discussed this as an inalienable natural right, he had a broad view of it, apparently considering it a freedom from all legislation concerning religion, including taxes in support of religion. See also J. Leland, *The Yankee Spy* (1794), in *id.* at 239; *Popular Sources of Political Authority* 693. For a much narrower understanding of "religious rights," see Noah Hobart, *Civil Government the Foundation of Social Happiness* 30 (Conn election sermon 1750, published 1751) (Evans 6692). In many of these writings, the precise definition of the "right of conscience" or the "right of religion" was not altogether clear.

for it could refer either to the equal natural right of free exercise or to a religious liberty involving equal civil rights. Stillman, however, clarified that, for him, "equal religious liberty" was an equality of civil rights with respect to religion:

The authority by which he [i.e., the "magistrate"] acts he derives alike from *all the people*, [and] consequently he should exercise that authority *equally* for the benefit of *all*, without any respect to their different religious principles. . . .

Stillman wanted "*equal treatment of all the citizens*."¹¹⁵

Of course, these various modes of analysis were often used together, as may be illustrated by the First Amendment to the Constitution of the United States. Like some earlier constitutional provisions concerning religion, the First Amendment drew upon the bifurcated approach that distinguished between natural rights and government privileges. As indicated above, the bifurcated analysis took various forms. Some state constitutions, for example, protected the natural right of free exercise in one clause and proscribed unequal privileges in a second. Other constitutional provisions—including New Hampshire's 1787 proposal to amend the United

¹¹⁵ Samuel Stillman, *A Sermon* 29 (Mass election sermon 1779) (Evans 16537). Stillman also said that "as all men are equal by nature, so when they enter into a state of civil government, they are entitled *precisely* to the same rights and privileges; or to an *equal degree* of political happiness." *Id.* at 11. For other uses of the phrase "equal liberty" or "equal religious liberty" to refer to an equality of civil rights, see the following. In Virginia, Baptists petitioned that "the full equal and impartial Liberty of all Denominations, may be indubitably secured." Petition of the Ministers and Messengers of the Baptist Denomination assembled at Noel's Meeting House in Essex County on May 3, 1783 (May 30, 1783), Va State Library, Mfm of Misc Ms 425. Baptists also told the legislature: "Your Memorialists have hoped for a removal of their Complaints, and the enjoyment of equal Liberty; . . . And that in every Act, the bright beams of equal Liberty, and Impartial Justice may shine, . . ." Memorial of the Committee of Several Baptist Associations, Assembled at Dover Meeting House, Oct 9, 1784 (Nov 11, 1784), Va State Library, Mfm of Misc Ms 425. The Presbyterians of Hanover, Virginia, tendentiously interpreted the 1776 Declaration of Rights as "declaring that equal liberty, as well religious as civil, shall be universally extended to the good people of this country." Memorial of the Presbytery of Hanover to the General Assembly of Virginia (April 25, 1777), in *American State Papers* 96. An anti-establishment Virginian said: "When every society of Christians is allowed full, equal, and impartial liberty, what can they desire more?" *The Freeman's Remonstrance Against an Ecclesiastical Establishment* . . . By a Freeman of Virginia 5 (1777) (Evans 43750).

In contrast, the July 1789 House Committee Report on the Bill of Rights may have equated equal rights of conscience merely with the natural right of free exercise: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." House Committee Rep of July 28, 1789, in *Creating the Bill of Rights* 30. The phrase concerning establishment may have made unnecessary any further anti-establishment clause, and therefore, perhaps, the "equal rights of conscience" here may have referred only to equal rights of free exercise.

States Constitution, and, later, the First Amendment—took a similar bifurcated approach, yet, in place of the clause prohibiting unequal privileges, these provisions more broadly forbade legislation with respect to religion.¹¹⁶

Incidentally, a prohibition of all legislation with respect to religion may have been considered too broad. In particular, it might have precluded legislation protecting the free exercise of religion. Americans of many persuasions, both dissenters and members of establishments, had argued that government should protect their right freely to exercise their religion,¹¹⁷ and, in effect, they thereby added a caveat to their claim that government was created only to protect civil or temporal interests. In the words of some of Virginia's more prominent Presbyterians, "The end of civil government is security to the temporal liberty and property of mankind,

¹¹⁶ The New Hampshire ratification convention proposed that "Congress shall make no Laws touching Religion, or to infringe the rights of Conscience." *Creating the Bill of Rights* 17. Typically, as has been seen, it was dissenters who sought a prohibition of legislation with respect to religion, but, for purposes of the federal government, this position of dissenters may have also appealed to state establishments. See note 122.

¹¹⁷ For example, Witherspoon, who thought that "[t]he magistrates . . . have a right to instruct, but not to constrain," argued that "[t]he magistrate ought to defend the rights of conscience, and tolerate all in their religious sentiments that are not injurious to their neighbors." Witherspoon, *Lectures*, Lect XIV, at 160–61. He added that, "At present, as things are situated, one of the most important duties of the magistracy is to protect the rights of conscience." *Id.* The Presbyterian Synod of New York and Philadelphia declared that, "It having been represented to Synod, that the Prebyterian Church suffers greatly in the opinion of other denominations from an apprehension that they hold intolerant principles, the Synod do . . . declare, that they ever have, and still do renounce and abhor the principles of intolerance; and we do believe that every member of society ought to be protected in the full and free exercise of their religion." *Records of the Presbyterian Church in the United States of America* 499 (1904), as quoted in James H. Smylie, *Protestant Clergy, the First Amendment and Beginnings of a Constitutional Debate, 1781–91* in Elwyn A. Smith, ed., *The Religion of the Republic* 116, 141–42 (Fortress, 1971). See also David Parsons, *A Sermon* 13 (Mass election sermon 1788) (Evans 21360).

In related language, Americans could request that government equally protect individuals in their religious liberty. For example, an Anti-Federalist minority in the Maryland ratification convention proposed as an amendment to the Constitution: "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty" (April 21, 1788), Elliot, 2 *Debates* 553. Of course, Federalists argued that, even without a bill of rights, the Constitution provided equal protection: "Partiality to any sect, or ill treatment of any, is neither in the least warranted by the constitution, nor compatible with the general spirit of toleration; an equal security of civil and religious rights, is therefore given to all denominations, without any formal stipulations; which, indeed, might suggest an idea, that such an equality was doubtful. If the constitution must at all have any amendment on this subject, it should be to guarantee to every state in the union perfect liberty of conscience; because it is much more probable that superstition, mingled with political faction, might corrupt a single state, than that bigotry should infect a majority of the states in Congress." [Nicholas Collin], *Remarks on the Amendments to the Federal Constitution* (No 9), in *Federal Gazette* (Phila) (Nov 18, 1788, No 42).

and to protect them in the free exercise of religion.”¹¹⁸ Therefore, when dissenters came to argue against establishments that government should not legislate concerning religion, some of these dissenters—at least, many Presbyterians in Virginia—hastened to add as a caveat that government should, of course, be able to provide protection for the inalienable natural right of free exercise.¹¹⁹ For example, in 1777, a petition from the Presbytery of Hanover asked that “the civil magistrates no otherwise interfere [in religion], than to protect them all [i.e., “every individual”] in the full and free exercise of their several modes of worship.”¹²⁰ Similarly, in 1785, the Presbyterians of Virginia petitioned that “it would be an unwarrantable stretch of prerogative in the legislature to make laws concerning it [i.e., religion], except for protection.”¹²¹ Perhaps, to permit legislation protecting the free exercise of religion, the First Amendment merely forbade legislation “respecting an establishment of religion.”¹²²

¹¹⁸ Memorial of the Presbyterians of Virginia (Aug 13, 1785), in *American State Papers* 113.

¹¹⁹ This was not exclusively a Presbyterian position. Thomas Paine wrote that “[a]s to religion, I hold it to be the indispensable duty of all government, to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith.” Paine, *Common Sense* 108–9.

In contrast, however, many dissenters wanted government to promote and, in this sense, protect religion rather than just the free exercise of religion, provided the government did not discriminate among Christian or, at least, Protestant sects. Buckley, *Church and State in Revolutionary Virginia* 177 (re Presbyterians); McLoughlin, 1 *New England Dissent* 610. For example, the New York and Philadelphia Synod of the Presbyterian Church said, in 1792, that “Civil Magistrates may not assume to themselves the administration of the word and sacraments . . . or, in the least, interfere in matters of faith. 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.” *The Constitution of the Presbyterian Church in the United States of America* 35 (1792) (Evans 24711). Incidentally, in their introduction to their 1787 draft, the Synod had revealed some sympathy for the more liberal position: “They do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and, at the same time, may be equal and common to all others.” *A Draught of the Form of the Government and Discipline of the Presbyterian Church in the United State of America* iii (1787) (Evans 20658).

¹²⁰ Memorial of the Presbyterians of Hanover to the the General Assembly of Virginia (April 25, 1777), in *American State Papers* 97.

¹²¹ Memorial of the Presbyterians of Virginia to the General Assembly (Aug 13, 1785), in *American State Papers* 114. Immediately preceding the passage quoted in the text was the following: “We never resigned to the control of government our right of determining for ourselves in this important article [i.e., religion], and acting agreeably to the convictions of reason and conscience in discharging our duty to our Creator. And therefore . . .” According to Eckenrode, this Memorial was drafted by William Graham. Eckenrode, *Separation of Church and State in Virginia* 107.

¹²² Indeed, already in 1784 Madison had attributed to anti-establishment forces in Virginia the position that there should be no legislation concerning an establishment of religion. In

With numerous minor variations, the types of analysis reviewed above were used to claim at least equal civil rights. Of course, some dissenters demanded, not merely equal civil rights, but, more generally, an absence of legislation respecting religion. Many other dissenters ungenerously insisted upon equal civil rights only for Christians—or, alternatively, only for Protestants—rather than for all persons.¹²³ Large numbers of dissenters even were willing to be content with a lesser right than that which they might request in general terms. Subject to these caveats, however, dissenters employed some common modes of analysis and described their hopes for at least an equality of civil rights—an equality both of restraints on natural liberty and of privileges.

a letter to Richard Henry Lee, Madison summarized the opposition to an assessment bill as being based, among other grounds, "on the general principle that no Religious Estabts. was within the purview of Civil authority." J. Madison, letter to Robert Henry Lee (Nov 14, 1784), in Robert S. Alley, ed, *James Madison on Religious Liberty* 53 (Prometheus, 1985). He continued by pointing out that the Presbyterians "do not deny but rather betray a desire that an Assessment may be estabtd. but protest agst. any which does not embrace all Religions" Id at 54. When attributing to opponents of assessment the principle that "religious establishments" were not within the "purview" of civil authority, Madison may have been summarizing the views of Baptists and western and other Presbyterians who were reluctant to compromise on the question of establishment. Certainly, some such Presbyterians in the 1780s held that government should not interfere with religion, except to protect the free exercise of it. For such a position, taken about nine months after Madison wrote his letter, see text at note 121.

Madison's subsequent writings seem to confirm that he considered his own position to be different from the principle that "religious establishments" were not within the "purview of civil authority." Madison's notes for the debates on the 1784 assessment bill state: "*Rel*: not within purview of Civil Authority." R. A. Rutland et al, eds, 8 *Papers of James Madison* 198 (U of Chi, 1973). Similarly, a year later, an ameliorated assessment bill provoked Madison in his famous Memorial and Remonstrance to say that "religion is wholly exempt from [government's] cognizance." Memorial and Remonstrance, in *American State Papers* 121. Madison may have been emphasizing the unqualified character of his claim.

Of course, the radical anti-establishment position adopted by Madison coincided with the Federalist view that the federal government, being a government of delegated powers, had no power with respect to religion. In the Virginia ratification convention, Madison said: "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation." J. Madison in Va Rat Convention (June 12, 1788), in Elliot, 3 *Debates* 330. Some historians have claimed that the "no law respecting" language merely reflected the federal character of the government of the United States. E.g., Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, Wash U L Q 371 (1954). This is belied by the extensive evidence that such language had been used for some time at the state level to describe one of the most radical of the anti-establishment positions. See text at notes 109–11 & 117–22.

¹²³ Thus, they could consistently assume that civil government should inculcate the principles of Christianity. Even those who sought equal rights for persons of all religions could explain that government was able to promote the principles of Christianity to the extent such principles were in accord with natural religion. On this basis, many claimed that government could enforce observance of the Sabbath.

Among the most intriguing discussions about equal civil rights were the arguments of dissenters and their supporters in states in which establishments and establishment constitutions had conceded only the right of free exercise or free exercise and equal protection. Disappointed with these guarantees, dissenters and their confederates attempted to couch their demands for equal civil rights in terms of the meager language available to them. In Virginia, where the 1776 Declaration of Rights merely guaranteed free exercise and did not prohibit an establishment, it is possible to trace in considerable detail how dissenters and their supporters adapted their arguments to make the best of what little had been yielded to them.

For example, many dissenters in Virginia claimed equality by denouncing "separate privileges." During the Revolution, various state bills of rights, including Virginia's, prohibited separate privileges, emoluments, or honors, unless in exchange for services—these prohibitions being addressed to the fear that aristocratic or economic interests separate from the common interest of society would seek to enrich themselves through legislation.¹²⁴ Not having a better constitutional foundation for their claims to equal privileges, many Virginia dissenters rested their case on the separate privileges clause of the Declaration of Rights.¹²⁵ For various rea-

¹²⁴ According to the Virginia clause, "no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary." Va Decl of Rights of 1776, § 4. See text at notes 216–17.

¹²⁵ For example, Presbyterians petitioned: "[W]e ask no ecclesiastical establishment for ourselves, neither can we approve of them and grant it to others: this, indeed, would be giving exclusive or separate emoluments or privileges to one set (or sect) of men, without any special public services, to the common reproach or injury of every other denomination." Memorial of the Presbytery of Hanover to the General Assembly of Virginia (Oct 24, 1776), in *American State Papers* 94; see also *id.* at 100 & 118. With an unusual touch of dry humor, Baptists petitioned "That your Memorialists firmly believe as they are taught in the Declaration of Rights 'that no Man or set of Men are entituled to exclusive or separte Emoluments or Privileges from the Community, but in Consideration of publick Services' [and] That they cannot see that for a Person to call himself a Church-Man and to conform to the Rites and Ceremonies of the Church of England, is doing the State any publick Service." Memorial of the Baptist Association (June 3, 1782), Va State Library, Mfm of Misc Ms 425. See also the following petitions from Va State Library, Mfm of Ms 425: Memorial of the Committee of Several Baptist Associations, Assembled at Dover Meeting-House, Oct 9, 1784 (Nov 11, 1784); Petition of the Inhabitants of Cumberland County (Oct 26, 1785); Petition of the Inhabitants of the County of Buckingham (Oct 27, 1785); Petition of the Inhabitants of the County of Henry (Oct 27, 1785); Petition of the Inhabitants of the County of Surry (Oct 26, 1785); Memorial & Remonstrance of the Inhabitants of the County of Charlotte (Oct 27, 1785); Petition of the Inhabitants of the County of Isle of Wight (Oct 28, 1785). Note that the petitions of October 26 and 27 listed here employed versions of a

sons, however, such arguments were of limited appeal or usefulness. Among other things, although "separate interests" and "unequal laws" were ideas applicable to religious interests, they were traditionally associated with social and economic interests. Even with respect to economic interests, moreover, at least some Americans were becoming cautious about prohibiting unequal laws or special privileges for separate interests; many Americans accepted the inevitability of separate interests and sought political as much as merely legal obstacles to unequal laws.¹²⁶ Last but not least, dissenters wanted a greater equality than mere "equal laws." To provide equal civil rights, laws had to avoid making any distinction among different religions; the laws had to treat individuals the same, regardless of religion. In contrast, equal laws were laws that did not unjustly benefit or penalize any separate interest, and this was not the strict equality needed by dissenters.¹²⁷

Even more interesting than the anti-establishment use of the separate-interests language was the anti-establishment attempt to claim equal civil rights in terms of the free exercise of religion. George Mason's draft religion clause for the 1776 Virginia Declaration of Rights adverted to toleration rather than a right of free exercise and did not preclude an establishment. In response, Madison drafted an alternative clause, similar to that which would appear in most state constitutions, asserting the free exercise of religion as a right rather than something merely to be tolerated. He also, however, sought to make an equality of privileges seem a necessary consequence of the far more acceptable right of free exercise. Madison wrote that:

all men are equally entitled to the full and free exercise of it [i.e., religion], accord[ing] to the dictates of Conscience: and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges: nor subjected to any penalties or disabilities¹²⁸

single text. For evidence that Jefferson may have had a hand in some of these petitions, see Declaration of the Va Association Baptists (Dec 25, 1776), in Thomas Jefferson, 1 *Papers*, 660, Julian P. Boyd, ed (Princeton U, 1950).

¹²⁶ See, of course, *Federalist* No 10.

¹²⁷ Thus, much later, Emerson wrote about "the Spartan principle 'of calling that which is just, equal; not that which is equal, just.'" Ralph W. Emerson, *Politics*, in his *Essays: Second Series* 193, 197 (1854).

¹²⁸ He indicated that it should continue: "unless, under colour of religion, any man disturb the peace, the happiness, or safety of society." Robert Scribner & Brent Tarter, eds, 7

Madison described equal emoluments and an absence of penalties as a necessary result of the equal right to the free exercise of religion.

Madison's proposal failed. Supporters of Virginia's Anglican establishment recognized the implications of the phrase concerning "peculiar emoluments or privileges"—that it was "a prelude to an attack on the Established Church."¹²⁹ They therefore insisted on dropping the second half of Madison's language. As a result, the Declaration protected only the natural right: "all men are equally entitled to the free exercise of religion, according to the dictates of conscience"¹³⁰

In the next session of the Virginia legislature, dissenters petitioned for equal civil rights. For example, on October 16, 1776, a petition was presented in which some dissenters described their desire for "every religious denomination being on a level" and their hope that the legislature would interfere "only to support them in their just rights and equal privileges."¹³¹ On October 22, two petitions were presented—from Albermarle, Amherst, and Buckingham counties—praying that "every religious denomination may be put upon an equal footing."¹³² Another, on November 9, from the Committee of Augusta County, complained of "unequal treatment."¹³³

Some of the 1776 Virginia petitions acknowledged that the Declaration of Rights, in speaking of "free exercise . . . according to . . . conscience," had not abolished the establishment, and these petitions asked the legislature to finish the task. In what may have been the first petition of the session on behalf of dissenters, the legislature was requested "to complete what is so nobly begun."¹³⁴

Revolutionary Virginia: Independence & the Fifth Convention, 1776, A Documentary History 457 (U Press of Va, 1983) ("Revolutionary Virginia").

¹²⁹ 7 *Revolutionary Virginia* 457.

¹³⁰ Va Const of 1776, Decl of Rights, § 16.

¹³¹ Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* 69 (Da Capo, 1971 reprint of 1900 edition) (James, "Struggle for Religious Liberty in Virginia").

¹³² *Id* at 70.

¹³³ *Id* at 74.

¹³⁴ *Id* at 68–69. Such acknowledgements continued long after 1776. In 1780, Baptists seeking legislative reforms said that "the Completion of Religious Liberty is what as a Religious Community your Memorialists are particularly interested in." Memorial of the Baptist Association Met at Sandy Creek in Charlotte, Oct 16, 1780 (Nov 8, 1780), Va State Library, Mfm of Misc Ms 425. In 1784, the Presbytery of Hanover petitioned: "The security

Before the end of the month, however, some petitions exhibited a rather lawyerly tendency to demand in terms of what was granted that which had been denied. Some, as noted above, argued that the "separate privileges" clause had prohibited an establishment of religion. Others, however, made arguments more similar to Madison's that the free exercise of religion required equal privileges.¹³⁵ As the historian H. J. Eckenrode noted, these petitions "advanced the theory that the Bill of Rights had put an end to the establishment."¹³⁶

of our religious rights upon equal and impartial ground, *instead of being made a fundamental part of our constitution as it ought to have been*, is left to the precarious fate of common law. A matter of general and essential concern to the people is committed to the hazard of the prevailing opinion of a majority of the assembly at its different sessions." Memorial of the Presbytery of Hanover to the General Assembly of Virginia (May 1784), in *American State Papers* 101. In 1785, the Presbyterians of Virginia petitioned: "We regret that full equality in all things, and ample protection and security to religious liberty were not incontestably fixed in the Constitution of the government." Memorial of the Presbyterians of Virginia to the General Assembly (Aug 13, 1785), in *id* at 118.

¹³⁵ Some dissenters argued against an establishment that their hopes had "been raised & confirmed by the Declaration of your Hon[or]able House in the last Article of rights which we beg leave to recite, viz. 'That Religion or the Duty we Owe to our Creator . . . ' It will hence unavoidably follow that No Laws which are indefensible & incompatible with the Rights of Conscience should be suffered to remain unrepealed." They believed that "religious liberty in its fullest extent" was one of the "rights of human Nature." Petition of the Dissenters from the Ecclesiastical Establishment, Berkeley County (Oct 25, 1776), Va State Library, Mfm of Misc Ms 425. Others petitioned that "it would be a violation of the rights of the Good People of this state[.] our Bill or Rights Particularly Points out that religion is the duty we owe to our Creator and the manner of dischargeing it can only be directed by reason and Conviction not by Force or violence, therefore as all men are Equally Intitled to the free Exercise of Religion according to the dictates of Conscience &c &c We your Petitioners beg leave to represent . . . that we think . . . that even to force a man to support this or that teacher of his own religious Persuasion, [sic] is a depriving him of that liberty of giving his Contributions to the Particular Pastor whose Morals he would make his Patron [sic?], whose Powers he feels most Persuasive to Rightousness would be wrong, Cruel, and Oppressive." Petition of Sundry Freeholders and other Inhabitants of the County of Bedford (Oct 27, 1785), Va State Library, Mfm of Misc Ms 425.

¹³⁶ Eckenrode, *Separation of Church and State in Virginia* 47; Buckley, *Church and State in Revolutionary Virginia* 24. Already on October 11, 1776, "a letter from Augusta County quoted the free exercise clause . . . and asked that it be carried into effect immediately by placing all religious groups on the same basis 'without preference or preeminence' given to any one church." Va Gaz (Purdie, Oct 11, 1776), as quoted in *id* at 24. Presbyterians of Hanover, Virginia, based their complaints against the establishment on the Declaration of Rights and, in the following paragraph, noted that they "annually pay large taxes to support an establishment from which their consciences and their principles oblige them to dissent,—all which are confessedly violations of their natural rights, and in their consequences a restraint upon freedom of enquiry and private judgment." Memorial of the Presbytery of Hanover to the General Assembly of Virginia (Oct 24, 1776), in *American State Papers* 92. In 1785, Presbyterians claimed of a proposed statute: "The bill is also a direct violation of the Declaration of Rights, which ought to be the standard of all laws. The sixteenth article is clearly infringed . . ." Memorial of the Presbyterians of Virginia to the General Assembly (Aug 13, 1785), in *id* at 116.

What was tendentious in ordinary petitions was an opportunity for ingenuity in the writing of Madison and Jefferson.¹³⁷ Already in 1776, as has been seen, Madison proposed unsuccessfully that the free exercise of religion required that there be no "peculiar emoluments or privileges." In 1779, in his Virginia Act for Establishing Religious Freedom, Jefferson took a similar approach, and, because Jefferson provided a lengthier explanation than had Madison, his proposal can be examined in greater detail. Eventually enacted in 1785, Jefferson's statute declared, among other things, that the profession of religious opinions by men "shall in no wise diminish, enlarge, or affect their civil capacities."¹³⁸ The prefatory clauses explained

that our civil rights have no dependence on our religious opinions, more than our opinions in physics or geometry; that, therefore, the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to the offices of trust and emolument, unless he profess or renounce this or that religious opinion is depriving him injuriously of *those privileges and advantages to which in common with his fellow-citizens he has a natural right*; . . .¹³⁹ [italics added].

If civil government had been established for exclusively secular ends, and if religion was, moreover, not susceptible to civil control, then, indeed, it could be argued that civil government had no power to deny a man office because he would not swear, for example, to the 39 Articles. Yet it was a paradox—a clever and arresting solecism—to assert that the refusal of office was a denial of "privileges and advantages" to which a man had a natural right. According to the state-of-nature theory discussed in part I and that was so popular in America, a denial of a right that did not exist in the state of nature would not normally be a denial of a natural right. Nonetheless, the prefatory clauses of Jefferson's statute suggested that a denial of such a right on grounds of religion could be viewed as an infringement of natural right, because the exercise of religion was a natural right. This suggestion of the preface was

¹³⁷ Many petitions may have drawn upon the ingenuity of these two Virginians but without their sophistication.

¹³⁸ Jefferson's language about civil capacities probably reflected his familiarity with English debates about religious liberty.

¹³⁹ 12 William Waller Hening, ed, *Collection of the Laws of Virginia* 85 (U Press of Va, 1969 reprint of 1823 edition).

repeated in the body of the Act, and, indeed, this second pronouncement reveals why, even when successfully achieving equal civil rights, Jefferson went out of his way to stretch traditional notions of natural right:

And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with the powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law, yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.¹⁴⁰

To restrain future Assemblies, Jefferson declared that a denial of civil rights on grounds of religion—including a denial of some rights existing only under civil government—would be a violation of natural right. Jefferson was appropriating for equal civil rights the inviolability associated with an aspect of natural liberty, particularly the inalienable natural right of free exercise of religion.

In 1785, Madison came close to repeating the sophisticated solecism that he and Jefferson each had made in, respectively, 1776 and 1779, but Madison appears to have been quite careful in 1785 to avoid saying that a denial of equal civil rights was a violation of natural right. In his *Memorial* of 1785, Madison argued against legislation that he described as contrary to, among other things, the natural right of free exercise of religion guaranteed by the Virginia Declaration of Rights. Conceivably, therefore, Madison's *Memorial* may be understood to suggest that he thought the bill's unequal privileges violated the natural right of free exercise. Yet, in the *Memorial*, Madison did not directly say this, and, indeed, at one point he seems to have gone out of his way to avoid such a statement. Immediately after denouncing the bill's violations of the equal natural right of free exercise, he warned against the special exemptions and other privileges the bill created:

As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others, peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their Religions unnec-

¹⁴⁰ Id at 86.

essary and unwarrantable? . . . Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others?¹⁴¹

Note that Madison did not say that peculiar exemptions or privileges would violate the natural right of free exercise; rather, they would violate the "principle" of "equality." By cleverly shifting the foundation of his argument from the equality of the natural right of free exercise of religion to the principle of equality, he avoided the somewhat strained position he and Jefferson had earlier espoused.¹⁴²

It has been seen that opponents of establishments frequently stretched the conventional understanding of separate privileges or of free exercise in order to justify their claims for equal civil rights. Strikingly, however, they attempted to use the idea of equal protection for this purpose much less frequently. Only very occasionally did they claim equal civil rights in terms of equal protection. It will be recalled that Ebenezer Frothingham wrote about equal protection in order to justify equal civil rights. According to Frothingham, persons of different sects "ought equally to be protected by . . . civil Power, in their proper Rights and Privileges, and each one be left to support their own Worship . . ." Civil power, he added, "knows nothing about the different Professions there is [sic] among Mankind."¹⁴³ Later, other opponents of establishments sometimes demanded equal civil rights on grounds of equal protection. For example, during ratification of the Massachusetts Constitution, the town of Leicester described that Constitution's compulsory support for religion as a violation of conscience and a "Persecuting or Compeling" of individuals. This, they said, "is inconsistent with the Last Paragraph [according to which] Every Denomination of religious Societys Demeaning themselves Peace-

¹⁴¹ James Madison, Memorial and Remonstrance, in 8 *Papers* 300, Robert A. Rutland, ed (U of Chi, 1977). On the political maneuvers of Madison in 1784 and 1785, see Norman K. Risjord, *Chesapeake Politics 1781-1800* 205-10 (1978).

¹⁴² Later, however, when not writing to garner political support for legislation, Madison continued to assert that an establishment was a violation of natural right. For example, in 1792, Madison used a very broadly defined notion of property to argue that a tax in support of religion was a taking of property. James Madison, "Of Property," *American State Papers* 158. His argument was as follows: property embraces everything to which a man may attach a value and have a right; a person has a property of particular value in his religious opinions; government is instituted to protect property, including the rights of individuals; if government imposes a test or taxes individuals to support religion, it violates the property rights individuals have in their opinions.

¹⁴³ Ebenezer Frothingham, *The Articles of Faith and Practice* 296 (1750) (Evans 6504).

ably and as Good Subjects Should be Equally under the Protection of Law."¹⁴⁴ Relatively few Americans, however, demanded equal civil rights in terms of equal protection with as much clarity as did the men of Leicester.¹⁴⁵

In sum, the exigencies faced by dissenters sometimes prompted them and their supporters to base their claims for equal civil rights on unconventional and, in this sense, strained interpretations of less generous but more widely accepted standards. They sometimes argued that establishment privileges were separate privileges or a denial of a natural right. They also occasionally said that equal protection included equal privileges; yet they made this assertion relatively infrequently and rarely in an unambiguous fashion.

Dissenters understood that they needed guarantees of equal civil rights rather than only equal protection. In Massachusetts, in the decades following the adoption of the 1780 Constitution, dissenters repeatedly went to court to challenge the constitutionality of religious assessments, but they did so on the basis of language other than that relating to equal protection—and even so they ultimately failed.¹⁴⁶ Where they had the power—in Delaware, Pennsylvania,

¹⁴⁴ *Popular Sources of Political Authority* 836. McLoughlin describes Leicester as one of the Massachusetts towns in which Baptists, although a minority, were on relatively "good terms" with their neighbors. McLoughlin, 1 *New England Dissent* 516 & 628.

¹⁴⁵ For what may be another Massachusetts example, see *Popular Sources of Political Authority* 694. In Virginia, dissenters and their supporters appear occasionally to have used this argument but not clearly or systematically. E.g., the Presbytery of Hanover said: the legislature should be "the common guardian and equal protector of every class of citizens in their religious as well as civil rights." Memorial of the Presbytery of Hanover to the General Assembly (May 1784), in *American State Papers* 103. Yet, in the same Memorial, the Presbytery also said that "an equal share of the protection and favour of government to all denominations of Christians, were particular objects of our expectations and irrefragable claim." *Id.* at 100. This bifurcated analysis was in accord with the conventional understanding of equal protection. In his Memorial, Madison may have treated equal protection as an equality of civil rights: "Such a government will be best supported by protecting every citizen in the enjoyment of his religion with the same equal hand which protects his person and property; by neither invading the equal rights of any sect, nor suffering any sect to invade those of another." J. Madison, Memorial and Remonstrance, in *id.* at 126. Whether this passage employs the conventional understanding of equal protection is not altogether clear.

The argument that equal protection was an equality of legal rights—of both natural rights and privileges enjoyed under government—was revived, as one might expect, shortly after the adoption of the Fourteenth Amendment to the U.S. Constitution. E.g., in 1872, Senator Oliver Morton of Indiana argued that "the word 'protection,' as there used, . . . is substantially in the sense of the equal benefit of the law" See Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 *San Diego L. Rev.* 499, 528 (1985).

¹⁴⁶ McLoughlin, 1 *New England Dissent* 636–59, especially 637, 639; Isaac Backus, *A Door Opened for Equal Christian Liberty* 4–5 [1783]; *Kendall v. Kingston*, 5 *Mass.* 524, 529 (1809); *Barnes v. Inhabitants of 1st Parish of Falmouth*, 6 *Mass.* 401, 416–17 (1810) (the whole of the Christian denominations clause quoted but the equal protection language apparently not relied upon). Many of the challenges in Massachusetts are described in Nathan Dane, 2 *A General Abridgment of American Law* 329–48 (ch 48) (1823).

North Carolina, South Carolina, New Jersey, and New York—opponents of establishments sought and obtained constitutional guarantees of equal privileges or equal civil rights. In contrast to establishments, which used equal protection clauses to preserve unequal privileges, opponents of establishments insisted that privileges also should be equal—that there should be an equality of civil rights.

Dissenters and other opponents of establishments tended to proclaim their egalitarian aspirations in relatively perspicuous language, and this account of how they sought equal civil rights rather than merely free exercise and equal protection can best be concluded in their own words. For example, in 1790, in New Hampshire, where the Constitution of 1784 promised equal protection rather than equal civil rights with respect to religion, a dissenting Anglican minister, John Cosens Ogden, was asked to preach the election sermon. He praised the tolerance of American governments and noted that “all religions are most justly tolerated, and ought and are promised to be protected.” But he gently suggested that there should be a still greater equality:

[A]ll are to enjoy every advantage, which law can afford to preserve, and whose professors are each determined to defend and maintain their own privileges. Upon this head, the conduct of our civil rulers in every part of this continent, for many years, has been founded upon the purest justice, and most perfect policy, in not only protecting and guarding all from spoil and incursions, but striving to remove all cause of heartburnings, and jealousies, by preferring one before another, either by an open or implied partiality¹⁴⁷

After declaring his hope for “a more equal practice in Newengland,” he went on to complain of unequal state support for ministers: “If God . . . extends his care to all, let us not be inattentive to his will, nor appear to limit his mercies or our favours by any unnecessary partialities; or debar them an equal opportunity to inculcate the great duties we owe each other.”¹⁴⁸ In a 1791 Fourth

¹⁴⁷ John C. Ogden, *A Sermon* 17–18 (NH election sermon 1790) (Evans 22747). He then praised the legislature for encouraging the principle of “protecting all denominations of professors” and attributed “the honour done me in calling me to lead the devotions of this day” to the “beginning [of] a more equal practice in Newengland, according to the opinion and wish of so large a part of our country, . . .” *Id.* at 19.

¹⁴⁸ *Id.* at 20.

of July sermon, the sometime congressional chaplain, William Linn of New York City, voiced a similar appreciation of equality when discussing the United States Constitution. He praised the new Constitution and then proceeded to exclaim about the extent of religious liberty: "Here no particular modes of faith, or worship are established. . . . Every one stands upon equal footing, and can prove successful, only by the piety, virtue, learning, and liberality of its professors."¹⁴⁹

IV. EQUALITY AND DIVERSITY

The eighteenth-century Americans who struggled over standards of religious equality understood that their debate concerned not only their legal rights but also the character of their society, and, in defense of their different positions, each side argued that its own standard of equality would allow Americans to overcome the discord so often associated with religious diversity. Americans were attempting to delineate the civil consequences of

¹⁴⁹ William Linn, *The Blessings of America* 18–19 (Fourth of July sermon given at request of Tammany Society 1791) (Evans 23504). In the ellipses, he said: "No undue preference is given to one denomination of religion above another." In fact, it may be doubted whether Linn expected any religious preferences under the U.S. Constitution. Incidentally, note that, in a July 4 sermon in 1794, David Ramsay—President of the South Carolina Senate—preached: "While the government, without partiality to any denomination, leaves all to stand on equal footing, none can prove successful, but by the learning, virtue, and piety of its professors." David Ramsay, *An Oration Delivered on the Anniversary of American Independence . . . in St. Michael's Church in Charleston, South Carolina* 9 (London, Daniel Isaac ["swinish multitude"] Eaton 1795). Earlier, a petition to the Virginia General Assembly, presented on October 11, 1776, asked that "all church establishments be pulled down . . . and each individual [be] left to rise or sink by his own merit and the general laws of the land." James, *Struggle for Religious Liberty in Virginia* 69. The Dutch Reformed Church concluded the preface to the publication of its Constitution by observing that "Whether the Church of Christ will not be more effectually patronized in a civil government where full freedom of conscience and worship is equally protected and insured to all men, and where truth is left to vindicate her own sovereign authority and influence, than where men in power promote their favorite denominations by temporal amendments and partial discriminations, will now, in America, have a fair trial." *The Constitution of the Reformed Dutch Church, in the United States* vii–viii (1793) (Evans 26065). Even before ratification of the Bill of Rights, the Rev. Shuttlesworth—an establishment minister—preached to the Vermont legislature: "[T]hat which most of all distinguishes this excellent constitution, and adds a glory to the whole, is that religious liberty, candour, and catholicism therein exhibited. . . . The legislature of our nation, . . . are setting us the example; [they] have put all denominations of christians on a level." Samuel Shuttlesworth, *A Discourse* 14 (Vt election discourse 1791, printed 1792) (Evans 24788). The Rev. Abraham Booth mimicked this sort of analysis in his description of the "privileges and honors enjoyed by the subjects of th[e heavenly] kingdom," which, he said, would not be unequal: "Nor are they confined to a few distinguished favorites of our celestial Sovereign; for they are common to all his real subjects." Abraham Booth, *An Essay on the Kingdom of Christ* 99 (1791) (Evans 23213).

religious disagreement, including the relationship of contentious religious groups to the larger polity, and therefore, not surprisingly, their views on diversity and equality were connected to their perceptions of social unity. Having been challenged to explain how a harmonious, unified political society was to be achieved if it were to contain diverse and discordant religious sects, dissenters insisted that an equality of civil rights would remove the sources of controversy. In contrast, some establishment ministers, once they had accepted as inevitable and even attractive a degree of legal equality, suggested that legal equality—even an equality of all civil rights—could not, by itself, produce unity. On this ground, they urged Americans to recognize the Christian sentiments and morals they had in common and, at least by implication, justified government support for religion as a means of encouraging shared opinions. Thus, dissenters who claimed equal civil rights and establishments that defended a lesser equality understood and sometimes justified their positions in terms of their somewhat different conceptions of unity in a diverse society.

Establishment writers had long argued that separation from the established church undermined the unity and harmoniousness of society. Particularly during the Great Awakening, they pointed to the dangers of separation. In Connecticut, for example, Benjamin Lord went to the extreme of associating the colony's religious divisions with a selfish, anarchical individualism: "In the Exercise of *Anarchy*, Men seem to be dissolving Community it self, and going back to the state of Nature: to do every one what is Right in his own Eyes; which a greatly privileg'd People are often, but too prone unto. As if a Government form'd for *Liberty*, to the Subjects, gave them a *License*, to act for themselves abstracted from Relation to Society and without concern for the common Good."¹⁵⁰

¹⁵⁰ Benjamin Lord, *Religion and Government Subsisting Together in Society, Necessary to their Compleat Happiness and Safety* 27 (Conn election sermon for 1751, printed 1752) (Evans 6868). He continued: "Verily, 'tis a Principle near akin to Anarchy, that prompts men in a Community, to act, as Individuals with levelling Designs; forgetting how sacred are the bonds of civil Society, which the have taken upon them, and objecting against any settled form of Government at all." Id at 27–28. According to Lord, separation was an assertion of private interest against the interest of society: "If Persons are Ignorant of the Distinction there is between the State of Men; as *Individuals*, and as *Members* of Community: If they are Insensible of the Bonds of Society, and the sacred Obligations arising thence, to act with unselfish, stedly Views of the common Good: But are ready to separate their own private Interest from that, and so practically Renounce their Relation to the Body Politic; this hurts it greatly. If they Imagine, they may seek their own private Good, abstracted from any Regard

Religious divisions were, for Lord, a threat to social and political unity.

In contrast, dissenters frequently defended their ambitions for equal civil rights on the ground that legal equality would produce social harmony. Establishment writers occasionally employed this argument to justify equal protection or, sometimes, an equal establishment of Christianity,¹⁵¹ but, on behalf of their greater degree of equality, dissenters could take the approach more frequently and more effectively. Frothingham wrote:

I think it will not weaken the hands of civil rulers, that rule for God, to have different professions [of religious belief] in a town

to the whole Community; or, as if their own particular Interest must be the Standard by which, to measure the public Good; and hence, frame their Schemes of Conduct to suit them, only, this is Mischievous to Society. For now, when they come to act as Members of Society, the *great Question* with them is, What is good for *me*? and what will suit *my Interest*? Not what is good for the *Community*, or proper for *them*? And this governs their Vote and Conduct; which is a Violation of the duty of Members, a betraying their Trust, and breaking their solemn bonds. . . . And this, I suppose upon a just Examination, will be found one great spring of the hurtful Divisions in Church and State." Id at 48–49. Although Lord's language was extreme, even for Connecticut, it sounded a widely known theme. In Connecticut, the Rev. Bartlett preached that "there is nothing, tends more directly and effectually, to cast a Blemish upon Christianity, than the following seducing Teachers, and receiving such Errors from them, as tend to break the Bands of christian Charity, and to crumble christian Societies and Communities into Sects and Parties; and to lay a Foundation for unchristian Strifes, Divisions, Separations, and Schisms . . ." Moses Barlett, *False and Seducing Teachers* 46 (1757) (Evans 7842).

¹⁵¹ E.g., in Massachusetts, Zabdiel Adams defended the supposedly equal support for Protestant denominations as a means of ending dissension: "Nothing gives life and spirit to any corporate body; nothing induces them ['constituents'] to submit to burdens with greater alacrity than to find they are necessary and levied in equal proportions." Zabdiel Adams, *A Sermon* 29 (Mass election sermon [1782]) (Evans 17450). In Virginia, petitioners for an equal establishment of Christians argued "That a System of Worship Simple Pure & Tolerant Formed On the Broad Basis of Gospel Liberty & Christian Charity—Divested of past Prejudices & Bigotry—And Dictated by a true Catholick Spirit would meet with a General Acceptance and Approbation. . . . No Proud or lordly Prelate, No bigoted Presbytery can Awe your Deliberations: . . . That you may Form such a System as may Reconcile all those Petty Jars & truifling Differences which . . . have hitherto so unhappily Divided the Protestants Amongst us. . . . promote an Happy Union by Comprehending All the Sincere & pious Christians of every Denomination at present Among us . . . lay a Foundation for the Exercise of Christian Love . . . and exhibit such a Spectacle to the Wondering World as hath not appear[e]d since the first Ages of Christianity." Petition of Sundry Inhabitants of the County of Amherst (Nov 27, 1783), Va State Library, Mfm of Misc Ms 425. In Connecticut, Benjamin Lord used such arguments on behalf of equal protection. See text at note 81. More generally, Governor Wolcott of Connecticut wrote that "the late Bishop of London was of Opinion, that the Religious State of this Country is founded upon an equal Liberty of all Protestants; none can claim a national Establishment, nor any Superiority over the rest. . . . as far as I can know anything about it, this Government is of the Same opinion & that this is the best Foundation of Love & Peace. [Y]et it is certain the Charter grants us a Power to govern the People religiously," which he thought meant "a Power to Set up the Gospel & Support it & to oblige the people to attend the Publick ordinance of it . . ." Roger Wolcott to E. Punderson (Jan 30, 1752), *The Wolcott Papers* 145 (1916).

or colony. For consider persons in different professions, finding themselves favoured with an equal share of liberty, with the rest of their neighbors, and fellow subjects, it will in my opinion have a natural tendency to knit their affections, and dutiful regard to their rulers, stronger, if it can be, than if they was all of one opinion in religion. . . .¹⁵²

Indeed,

instead of the colony's being ruined by enacting full and free liberty of conscience, it is the most likely, if not the only remedy to save it from confusion, and final ruin: for such a liberty has a natural tendency to unite all parties in good neighborhood, to strive together in all civil things for the good of the whole civil body, and the contrary for its ruin.¹⁵³

According to Frothingham and many other dissenters, only "an equal share of liberty" could unify a diverse society.¹⁵⁴

¹⁵² Ebenezer Frothingham, *A Key to Unlock the Door* 155–56 (1767) (Evans 10621). "[N]ow for civil rulers to set up and establish the sect that pleases them, and deprive all the rest of their equal share of liberty, and force their neighbours to go against the light of their consciences, . . . Sure I am, that nothing is more likely to alienate good subjects from due affection, and dutiful regard to their civil rulers, than such a practice; . . ." *Id.* at 156.

¹⁵³ *Id.* at 159.

¹⁵⁴ E.g.: "Upon Trial it hath been found that where Ministers have been settled by the Power of the established Constitution, in many Instances it hath occasioned warm Debates, Divisions, and Separations unavoidably. . . ." Strict Congregational Churches in Connecticut, *An Historical Narrative* 15 (1781) (Evans 17115). "It is inequality that excites jealousy and dissatisfaction." William Tennent, *Mr. William Tennent's Speech on the Dissenting Petition* 19 (1777) (Evans 15612). In Virginia, some Presbyterians petitioned that by removing unequal civil rights with respect to religion, the legislature "will remove every real ground of contention, and allay every jealous commotion on the score of religion." Memorial of the Presbytery of Hanover to the General Assembly (May 1784), in *American State Papers* 105. Baptists urged "the Expediency of removing the Ground of Animosity, which will remain while Preference is given, or particular Favours are granted in our Laws to any particular Religious Demoninations." Memorial of the Baptist Association (June 3, 1782), Va State Library, Mfm of Misc Ms 425. Baptists expressed their "hope . . . that no Species of religious Oppression may remain to . . . alienate the Affections of the different Denominations from each other." Address of the Ministers and Messengers of the Churches of the Baptist Denomination Associated in Amelia County, May 12, 1783 (May 31, 1783), Va State Library, Mfm of Misc Ms 425. Dissenters argued that if "every Religious Denomination" were "on a Level," then "animosities may cease." Petition of Dissenters (Oct 16, 1776) (the so-called "Ten-Thousand Name" Petition), Va State Library, Mfm of Misc Ms 425. Charles Carroll—a Catholic—wrote that "were an unlimited toleration allowed and men of all sects were to converse freely with each other, their aversion from difference of religious principles would soon wear away." Charles Carroll, letter to Edmund Jennings, Aug 13, 1767, in *Unpublished Letters of Charles Carroll of Carrollton* 143, Thomas M. Field, ed (U.S. Catholic Historical Soc, 1902). A sympathetic establishment minister preached: "With respect to articles of faith or modes of worship, civil authority have no right to establish religion. The people ought to choose their own ministers, and their own denomination, as

A prominent Baptist minister, Samuel Stillman, not only argued that legal equality was the means to achieve unity amid diversity but also that unequal law was the cause of a diversity of interests. Like other dissenters who attacked establishments by demanding greater equality, Samuel Stillman accepted the common eighteenth-century assumption that "[u]nion in the state is of absolute necessity to its happiness" and that this unity was something "the magistrate will study to promote." Like other dissenters, he argued that unity would exist only under a plan of "*a just and equal treatment of all of the citizens*":

For though christians may contend amongst themselves about their religious differences, they will all unite to promote the good of the community, because it is their interest, so long as

our laws now permit them; but as far as religion is connected with the morals of the people, and their improvement in knowledge, it becomes of great importance to the state; and legislators may well consider it as part of their concern for the public welfare, to make provision that all the towns may be furnished with good teachers Perhaps a little addition to the law already in force in this state might sufficiently secure the continuance of religious instruction, enlarge rather than diminish liberty of conscience, and prevent envyings, contentions, and crumbling into parties." Samuel Langdon, *A Sermon* 47–48 (NH election sermon 1788) (Evans 21192). See also Nathaniel Ward, *The Simple Cobar of Aggawam in America*, in Clarence L. Ver Steeg & Richard Hofstadter, eds, *Great Issues in American History* 207 (1969).

Sometimes such views about equality were associated with arguments that diversity would create a competition for virtue among sects. Concerned that other sects feared Presbyterians, the Synod of New York and Philadelphia declared in a Pastoral Letter: "No denomination of Christians among us have any reason to fear oppression or restraint, or any power to oppress others. We therefore recommend charity, forbearance, and mutual service. Let the great and only strife be who shall love the Redeemer most, and who shall serve him with greatest zeal." *A Pastoral Letter from the Synod of New York and Philadelphia . . . May 24, 1783* ([1783]) (Evans 44445). Jefferson wrote: "Difference of opinion is advantageous in religion. The several sects perform the office of a Censor morum over each other." Thomas Jefferson, *Notes on the State of Virginia* Query XVII, at 198–99, Paul L. Ford, ed (1894). According to a New Hampshire Anglican, ". . . let us beware of infidelity and Laodicean indifference; and show our gratitude to God and our country, and prove our love to religion and its professors, by each living up to the rules and professions of his own order; and the emulation be, who shall best know, defend, and practice the truth." John C. Ogden, *A Sermon* 18 (NH election sermon 1790) (Evans 22747). See also note 158.

In response to dissenters' demand for an equality of privileges, Warburton had argued that a complete equality was a danger to the state, because sects would struggle for supremacy. William Warburton, *Alliance Between Church and State*, in Warburton, 7 *Works* 99–100. Similarly, after arguing that the established church "has shewn no Disposition to restrain [dissenters] in the Exercise of their Religion," some of the established clergy in Virginia argued that "[t]hey cannot suppose, should all Denominations of Christians be placed upon a Level, that this Equality will continue, or that no Attempt will be made by any Sect for the Superiority; & they foresee that much Confusion, probably civil Commotions, will attend the Contest." Memorial of a Considerable Number of the Clergy of the Established Church in Virginia (Nov 8, 1776), Va State Library, Mfm of Misc Ms 425.

they all enjoy the blessings of a free, and equal administration of government.¹⁵⁵

Extending this analysis, that equal treatment could produce a unity of interests, Stillman drew the even more dramatic conclusion that unequal rights were what created a division of interests:

[I]f the magistrate destroys the equality of the subjects of the state on account of religion, he violates a fundamental principle of a free government, establishes separate interests in it, and lays a foundation for disaffection to rulers, and endless quarrels among the people.¹⁵⁶

According to Stillman, legal inequalities created “separate interests.”¹⁵⁷

¹⁵⁵ Samuel Stillman, *A Sermon* 30 (Mass election sermon 1779) (Evans 16537). In the election sermon of the previous year, Phillips Payson had argued that “[t]he variety and freedom of opinion is apt to check the union of a free state.” Phillips Payson, *A Sermon* 22 (Mass election sermon 1778) (Evans 15956).

¹⁵⁶ *Id.* He continued: “Happy are the inhabitants of that commonwealth, in which every man sits under his vine and fig-tree, having none to make him afraid.—In which all are protected, but none established.” *Id.* at 30.

¹⁵⁷ Stillman made explicit what was at least suggested by the writings of many others. E.g., in Virginia, Baptists said that, by neglecting to remove injustices, the legislature “does but increase suspicion and disaffection.” Memorial of the Baptist Association met at Noels Meeting House, May 8, 1784 (May 26, 1784), Va State Library, Mfm of Misc Ms 425. It also was argued that “when one is by law exalted to dominion above the rest, this lays the foundation of envy, and debate, and emulation, and wrath, and discord, and confusion; if not of war, bloodshed, and slaughter, in the end:—Being all indulged alike, as children of the same family (though differing in size, feature, complexion, &c.) what cause can they have to quarrel with one another?” *The Freeman’s Remonstrance Against an Ecclesiastical Establishment . . . By a Freeman of Virginia* 5 (1777) (Evans 43750).

Incidentally, the “Freeman” was not the only dissenter to make the argument about differences of size or complexion. See, e.g., William Tennent, *Mr. Tennent’s Speech, on the Dissenting Petition* 7–8 (1777) (Evans 15612). In New England it was written that: “It is great pity, . . . as charity is our distinguishing mark as christians, that we exercise it much less in religion, than in the common affairs of life. Agreeable to which, says an author, I do not believe that there are two men upon earth who think exactly alike upon every subject; and yet our different tastes in meat, drink, building and dress make not the least difference in humans society; nor is it likely that they ever will, unless we establish by law, and tack preferments to one particular mode of eating, drinking, building and dressing” *Some Remarks upon Mr. President Clap’s History* 56–57 (1757) (Evans 7881), as quoted by Isaac Foster, *A Defence of Religious Liberty* 184 (1780) (Evans 16775). See also Isaac Watts, *A New Essay on Civil Power in Things Sacred*, in *6 Works of . . . Isaac Watts* 42 (1811); Jefferson as quoted in note 158.

Nor was the warning about potential bloodshed unique. E.g., in 1794, in response to a statute that used the proceeds from the sale of western lands to support Christian sects, Connecticut’s Baptists met in Hartford during the meeting of the next General Assembly and declared that they were prepared “to shed their blood” on behalf of their liberty. Ezra H. Gillett, *Historical Sketch of the Cause of Civil Liberty in Connecticut, 1639–1818*, 4 *Historical Magazine* 28 (2nd Ser, July 1868) (citing interview with participant in 1794 meeting).

Just as dissenters viewed diversity and equal civil rights as compatible with the unity of society, so establishment clergymen perceived the unity of society in a way that reflected their distress about religious differences and their conviction that establishment was a means of producing rather than destroying harmony. Establishment clergymen emphasized, among other things, the need for Christian charity. In conjunction with their arguments for equal civil rights, various dissenters had urged a tolerance of religious differences,¹⁵⁸ but members of establishments turned this theme against them. Particularly after conceding what they thought a generous degree of equality,¹⁵⁹ many establishment clergymen felt that the strident self-righteousness and contentiousness of dissenters was unseemly at best. They exhorted dissenters to be more humble, charitable, tolerant, and, in these senses, more Christian.¹⁶⁰

¹⁵⁸ Stillman urged establishments to accept the inevitability of diversity: "In fine. Seeing the body of christians, however divided into sects and parties, 'are entitled precisely to the same rights,' it becomes them to rest contented with that equal condition, nor to wish for pre-eminence. Rather they should rejoice to see all men as free, and as happy as themselves. [new ¶] They should study to imbibe more of the spirit of their divine Master, to love as brethren, and to preserve the unity of the spirit in the bonds of peace. In the present state of ignorance and prejudice, they cannot expect to see eye to eye. There will be a variety of opinions and modes of worship among the disciples of the same Lord; men equally honest, pious, and sensible, while they remain in this world of imperfection. Let them therefore be faithful to their respective principles, and kind, and forbearing towards one another." Samuel Stillman, *A Sermon* 37–38 (Mass election sermon 1779) (Evans 16537). From a rather different perspective, Thomas Paine described the diversity of sects as a test of Christian kindness: "it is the will of the Almighty, that there should be diversity of religious opinions among us: It affords a larger field for our christian kindness. Were we all of one way of thinking, our religious dispositions would want matter for probation; and on this liberal principle, I look on the various denominations among us, to be like children of the same family, differing only, in what is called their Christian names." Paine, *Common Sense* 109. Jefferson asked: "But is uniformity of opinion desirable? Nor more than of face and stature." T. Jefferson, *Notes on the State of Virginia* 198, ed Paul L. Ford (1894).

Incidentally, note that, at Harvard, in 1784, Isaias-Lewis Green argued affirmatively on the question: "An diversitas opinionum, inter homines, ad felicitatem eorum [copy defective]." Harvard University, *Quaestiones Sub Reverendo Josepho Willard* (1784). Nathan Read argued affirmatively on the question: "An tolerantia cujusque religionis ad veram religionem promovendam tendat." Id.

¹⁵⁹ Although an attempt to preserve unequal privileges, the establishment of Christianity or, at least, Protestantism in various states was also a tangible manifestation of establishment latitudinarianism.

¹⁶⁰ E.g.: "It is however greatly to be lamented that there is not a more catholick and comprehensive spirit among different denominations of christians. Bigotry and censoriousness sour the temper and interrupt the happiness of society. . . . among people of knowledge, though of different communions, a harmonious intercourse commonly takes place. With madmen and enthusiasts there can be no agreement, except among people as distracted as themselves." Zabdiel Adams, *A Sermon* 42 (Mass election sermon [1782]) (Evans 17450).

Some of the establishment clergy who pleaded for charity and moderation in disputes among Christians suggested that legal equality—whether equal protection or equal civil rights—could not, by itself, harmonize the conflicting interests and passions of diverse sects. Whereas Stillman and other dissenters tended to emphasize that individuals “cannot expect to see eye to eye” and that they therefore should “be faithful to their respective principles, and kind, and forbearing toward one another,”¹⁶¹ some establishment clergy declared their hopes for an amelioration of differences among Christians.¹⁶² They urged their fellow Christians to accept

According to Ezra Stiles, religious denominations, having “no superiority as to secular powers and civil immunities, they will cohabit together in harmony, and I hope, with a most generous catholicism and benevolence. The example of a friendly cohabitation of all sects in america, proving that men may be good members of civil society, and yet differ in religion.” Ezra Stiles, *The United States Elevated to Glory and Honor* 55 (Conn election sermon 1783) (Evans 18198). Speaking of religious disputes among “people who before lived in harmony,” Jonathan Boucher—a loyalist and a relatively tolerant Anglican—preached that, “though religious disputes ought, of all others, to be carried on with good temper and mildness, they seem, as conducted by these persons, apt to excite bitterness and rancour.” Jonathan Boucher, “On Schisms and Sects” (1769), in *A View of the Causes and Consequences of the American Revolution* 81 (1797). He also noted that, “[a]gainst the ministers of the established Church their censures are particularly sharp and severe.” *Id.* at 82. (This was preached in various places, including “once (not in any church, but *sub dio*) in the Back Woods, near the Blue Ridge.” *Id.* at 46, n.)

¹⁶¹ See note 158.

¹⁶² Of course, they assumed that sects other than their own required moderation. Zabdiel Adams hoped the diversity of sects would ameliorate fanaticism: “If coercion would bring mankind to a uniformity of sentiment, no advantage would result therefrom. It is on the contrary best to have different sects and denominations live in the same societies. They are a mutual *check* and *spy* upon each other, and become more attentive to their principles and practice. Hence it has been observed that where *Papists* and *Protestants* live intermingled together, it serves to meliorate them both. The same may be observed of any other sects.” Zabdiel Adams, *A Sermon* 41–42 (Mass election sermon [1782]) (Evans 17450). Nathan Strong preached: “If we look thro the christian sectaries, who differ in ceremonies and words, candor will perceive that the greatest number of them unite, in the weighty matters of faith, piety, religion and justice, towards GOD and towards men. A diffusion of knowledge is now advancing a liberal spirit. May the Great Head of the Church hasten the period, when those who think alike, concerning a divine love, justice, faith and truth, may join their hands and hail a future meeting in Heaven, where ceremonies and modes of expression will not separate brethren. Experience hath taught, that tolerancy in these things is the most powerful means of union” Nathan Strong, *A Sermon* 21 (Conn election sermon 1790) (Evans 22913). For earlier discussions in Massachusetts about Christian unity, see, *inter alia*, McLoughlin, 1 *New England Dissent* 278–300.

Of course, such sentiments were not confined to establishment writers or New England. Nonetheless, these opinions appear to have had particular appeal to writers who—whether because of their religious traditions or their political circumstances—either did not fear an acknowledgment of unity or, at least, felt the resentment of dissenters. For a Catholic example from Maryland, see John Carroll, Letter to Joseph Berington (July 10, 1784), 1 *John Carroll Papers* 148 (Notre Dame, 1976). For an Anglican example from Virginia, see Petition from Amherst County quoted in note 151.

the unity of their faith—an old theme with which increasing numbers of dissenters did not disagree.

Even without a reconciliation of sectarian differences, some of the establishment clergy urged at least a recognition of America's common Christianity or, even less ambitiously, its common religiosity and morals. They emphasized shared religious values not merely as a means of overcoming sectarian differences but also as a solution to the broader problem of separate or private interests in American society. In Connecticut, for example, the Rev. Nathan Strong eloquently described the varieties of private interests and then preached:

It is the business of government to hold the balance between them, to check the overbearing and point them to a common good, and for this it needs the assistance of some pervading social bond, and this bond can be no other than religion. . .

In all rational society there needs some cementing principle of the heart, by which the minds who compose it may be united, have one interest, one common good, and one happiness. . . .

Christian love in its comprehension of virtues, is the supreme tie of social connexion.¹⁶³

Strong was not alone. After noting that "a community like ours" was "spread out over such an immense continent, divided by so many local governments, prejudices and interests," the Rev. David Tappan of Massachusetts observed: "A people so circumstanced, can never be firmly and durably united, under one free and popular government, without the strong bands of religious and moral principle, of intelligent and enlarged patriotism."¹⁶⁴ By acknowledging

¹⁶³ Nathan Strong, *A Sermon* 11–12 (Conn election sermon 1790) (Evans 22913). The preceding passage was as follows: "The great end of political associations is best answered where there is the most perfect union, and those principles are most essential to government, which have the greatest tendency to produce union. The interests of individuals, are by the emergencies of time thrown into many situations. We live with many others whose passions are complicated, various and pointed to their own personal ends. Every lesser district, every family, and individual in the family, hath interests of its own. If these private interests have a supreme influence the utmost evils will ensue." Id at 11.

¹⁶⁴ David Tappan, *A Sermon* 37 (Mass election sermon 1792) (Evans 24481). He disclaimed a desire for establishment. He quoted: "Take away the law-establishment, and religion re-assumes its original benignity. In America a Catholic Priest is a good citizen, a good character, and a good neighbor; an Episcopalian Minister is of the same description; and this proceeds from there being no law-establishment in America." Id at 20. Nonetheless, he thought there was "in many respects, a natural alliance between intelligent, virtuous Magistrates and Ministers, in a free and christian State." Id. For sentiments concerning

the Christianity, religiosity and morals they had in common, these Americans attempted to bind together a vast and variegated nation, and they thereby contributed to the establishment—the voluntary or moral establishment—of a virtuous, religious, and Christian nation.¹⁶⁵ Although developed in New England, “[t]he enormous practical success of the voluntary social establishment reached the farthest corners of the expanding nation; it dominates the Protestant mind in large sections of the nation to this day.”¹⁶⁶

Yet what may have been platitudinous in discussions of the diversity of interests in general was still somewhat controversial with respect to religious divisions. Establishment writers often emphasized the importance of shared values, and they thereby disparaged the necessity of shared rights. By implication, unequal rights were the necessary means of establishing shared values and unity. In

republican unity and the role of the people in the Christian polity, see Alan Heimert, *Religion and the American Mind* 540–49 (1966).

¹⁶⁵ Elwyn A. Smith, *The Voluntary Establishment of Religion*, in Elwyn A. Smith, ed, *The Religion of the Republic* 154, 155 (1971); Sydney E. Ahlstrom, 1 *A Religious History of the American People* 463–65 (1975); see also Carol Weisbrod, *Charles Guiteau and the Christian Nation*, 7 *J L & Relig* 187 (1989). It may be suspected that the idea of a Christian nation was merely a nationalist and Protestant rejection of Catholicism. It appears, however, to have developed, at least in part, as a response to sectarian diversity chiefly among Protestants. Even when discussing a somewhat later period than that considered here, Perry Miller wrote of the attempt by some Americans to make “the voluntary principle . . . a mechanism not of fragmentation but of national cohesion.” Perry Miller, *The Life of the Mind in America* 44 (Harcourt Brace 1965). See also *id* at 70–72.

The clergy who addressed the problems of diverse interests and sects occasionally spoke in terms of common religiosity and morals rather than in terms of a common Christianity. An emphasis on virtue rather than Christianity was more typical of the very frequent assertions in election sermons that nations, Christian or infidel, would be blessed or punished in this world according to their virtue or, in some accounts, according to their conformity to natural religion. This idea could be expressed in terms of a national religion: “Let no man take an alarm as if by a national religion, I would recommend the establishment of any modes or forms in preference to others. . . . By a national religion I would be understood to mean, an acknowledgement of the being, perfections and providence of one supreme GOD; a sense of his moral government both in this and a future State; and a careful observance of the eternal laws of justice, truth and mercy in all our public conduct.” Jeremy Belknap, *An Election Sermon* 34 (NH election sermon 1785) (Evans 18927). Of course, non-establishment clergy could still be worried about the possibility of a national establishment. For example, Abraham Booth of New York said: “If all the subjects of Christ be real saints, it may justly be queried whether any *National religious establishment* can be a part of his kingdom. . . . is it not plain, that a National church is inimical to the spirit of our Lord’s declaration. *My kingdom is not of this world?* Does not that . . . saying compel us to view the church and the world in a *contrasted* point of light.” Abraham Booth, *An Essay on the Kingdom of Christ* 38–39 (1791).

¹⁶⁶ Elwyn A. Smith, *The Voluntary Establishment of Religion*, in Elwyn A. Smith, ed, *The Religion of the Republic* 154, 156 (1971).

contrast, dissenters frequently argued that equal civil rights would produce harmony among individuals of different religions. Although hardly adverse to a recognition of America's common Christianity, dissenters wanted to preserve their distinctiveness—they wanted to be “faithful to their respective principles”—and therefore they stressed common rights rather than a common Christianity as the means of achieving unity.

Thus, Americans pursued their dispute about religious diversity and different standards of equality within the context of a wider disagreement about harmoniousness and unity in American society. Dissenters and establishments not only formulated standards of equality that preserved their interests and reflected their perspectives on religious diversity but they also sometimes justified their positions concerning equality in terms of the social unity that they said would result from their distinct approaches to diversity. Whereas those who lacked legal equality said unequal civil rights were a source of discord, those who benefited from unequal privileges saw these as the means of establishing the shared religious values that would produce harmony in American society. By making such arguments, which contrasted shared rights to shared values, these Americans seem to have developed—at least for purposes of this dispute—rather different assumptions about what constituted unity and harmony among persons of varied denominations.

In Congregationalist New Hampshire, an Anglican, John Cosens Ogden, optimistically combined the positions of dissenting and establishment writers.¹⁶⁷ He had an interest in equality typical of dissenters, and yet he adhered to the establishment position that an equality of rights alone could not produce harmony. After noting that “[w]e have one common country and kindred to provide for,” and, after explaining the political usefulness of piety and moral behavior, he spoke about the significance of a common religion:

¹⁶⁷ Similarly, when arguing in the *Federalist* that the states “should never be split into a number of unsocial, jealous, and alien sovereignties,” John Jay had found evidence of American unity in sentiments and in rights: “Similar sentiments have hitherto prevailed among all orders and denominations of men among us. To all general purposes, we have uniformly been one people. Each individual citizen everywhere enjoying the same national rights, privileges, and protection.” John Jay, *The Federalist* 9 (No 2) (Everyman, 1937). For Jay, the unity of Americans was manifest in their similar sentiments and similar rights.

A similarity of religion, language, and laws, have ever availed much to spread peace and prosperity: and unless the first binds our hearts in love, and restrains our unruly passions, we shall ever be exposed to confusion and tumult.¹⁶⁸

What all Christians had in common—Christian sentiment and virtue—were particularly important in a nation in which diverse sects were to be treated equally:

The preservation of a religious, pure heart, is not less important; but becomes much more so in a country where all religions are most justly tolerated, and ought and are promised to be protected¹⁶⁹

He then demanded, as seen in part III, a greater equality of rights for dissenters and reminded his audience that dissenters were “determined to defend and maintain their own privileges.”¹⁷⁰ Nonetheless, Ogden also emphasized the importance of a “similarity of religion.” He appears to have thought a harmonizing similarity—in particular, “a religious and pure heart”—was possible and even necessary amid the sectarian diversity he defended.

As dissenters sensed their victories, they came to acknowledge the possibility that the nation could be unified by its religious sentiments. Until the New England establishments abandoned their special privileges, their claims that they sought a moral rather than a legal establishment remained suspect, at least within their own states. In the 1790s, however, and especially in the early nineteenth century, as Americans abolished their remaining establishments, they recognized with gratification their voluntary or moral establishment of a Christian nation.¹⁷¹ They considered themselves blessed by a unity of Protestant sentiment and by an equality of rights—a unity that, although now based on mere sentiment rather than doctrine, was enough to bind Americans together,

¹⁶⁸ John C. Ogden, *A Sermon* 17 (NH election sermon 1790) (Evans 22747).

¹⁶⁹ *Id.* Of course, it is no coincidence that Ogden was an Anglican.

¹⁷⁰ *Id.* at 18. See text at note 147.

¹⁷¹ Until the influx of large numbers of Catholics in the nineteenth century, many Americans felt little need to emphasize the Protestant character of their Christian nation. Of course, the growing religious diversity of nineteenth-century America prompted numerous challenges to the establishment of Protestant Christianity—not least to its remaining legal privileges—but this article focuses on the earlier debate that occurred largely among Protestant sects.

and an equality of rights that, by removing the grounds for dis-sension, allowed Americans to acknowledge their religious unity.

V. AN EPILOGUE CONCERNING EQUAL PROTECTION

Thus far, I have examined the ideas of equal protection and equal civil rights as standards developed by eighteenth-century Americans to address their religious diversity. In the nineteenth century, however, Americans employed the idea of equal protection in connection with racial differences and eventually even adopted that standard in the United States Constitution. They thereby gave that idea a prominence and legal significance that remains with us and that makes any information about equal protection in the nineteenth century seem unusually interesting.

An epilogue to this history of equal protection in the eighteenth century is especially warranted because other histories of equal protection commence their accounts in the 1830s. Equal protection has its origins, we are sometimes told, in Andrew Jackson's 1832 Bank veto.¹⁷² Howard Jay Graham, Jacobus Ten Broek, and others have added that the ideas of protection and equal protection were developed in the antislavery debates of the mid-1830s.¹⁷³ In light of the mid-nineteenth-century focus of this older scholarship, two basic questions need to be examined: First, how did nineteenth-century Americans define equal protection? In particular, did they employ an idea of equal protection similar to that used by their predecessors? Second, if nineteenth-century Americans did draw upon the earlier notion of equal protection, how did they come to do so? How did an idea used in eighteenth-century discussions of religious diversity come to play a role in nineteenth-century debates about slavery and eventually in the U.S. Constitution?

¹⁷² E.g., J. R. Pole, *The Pursuit of Equality in American History* 146 (U of Calif, 1979).

¹⁷³ Howard J. Graham, *The Early Anti-Slavery Background of the Fourteenth Amendment*, in *Everyman's Constitution*; Ten Broek, *Equal Under Law*; William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* 155 (1977). Professors Earl A. Maltz and Steven J. Heyman have pointed out that the notion of protection was discussed in prior centuries, but they seem to be unaware of the eighteenth-century debates concerning equal protection. Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 San Diego L Rev 501 (1985); Steven J. Heyman, *The First Duty of Government* 41 Duke L J 507 (1991). Raoul Berger was aware of the the equal protection clause in the 1780 Massachusetts Constitution but did not pursue it. Raoul Berger, *Government by Judiciary* 168 (Harvard, 1977) (Berger, "Government by Judiciary").

What, then, was the nineteenth-century definition of equal protection? Although the evidence bearing on this question is extensive and requires further study, the materials I have examined suggest the possibility that Americans in the nineteenth century typically defined the idea of equal protection very much as they had in the eighteenth. Of course, historians unaware of the eighteenth-century history of equal protection have not even purported to discuss the relationship between the eighteenth- and the nineteenth-century understandings of that idea, but they have taken positions on various aspects of the meaning of equal protection in the nineteenth century and their views must now be considered.

Howard J. Graham, Jacobus Ten Broek and Steven J. Heyman have argued that the protection involved in the idea of equal protection was a right of individuals to have government protect rights not only by passing laws but also by taking otherwise discretionary actions.¹⁷⁴ In support of their position, these historians point to instances in which Americans argued that they needed police or other executive intervention to “protect” their rights.¹⁷⁵ For example, when abolitionists were beset by mobs, they complained about the failure of the states to apply the laws against murder, arson, and other injurious behavior; they pointed out that, when the victims of popular violence were abolitionists, the law was not enforced, and, therefore, they asked that government provide equal protection of, for example, their right of free speech and press.¹⁷⁶ Some of these instances involved a failure of judicial process—an issue that, as will be discussed below, came to be addressed in terms of equal protection.¹⁷⁷ In other instances, however, abolitionists complained, not about unequal legal restraints, not about a failure of judicial process, but about unequal government intervention to prevent violence or otherwise to enforce legal restraints.¹⁷⁸ So too,

¹⁷⁴ Howard J. Graham, *The Early Anti-Slavery Background of the Fourteenth Amendment*, in *Everyman's Constitution* 153; Ten Broek, *Equal Under Law* 21, 51–52; Steven J. Heyman, *The First Duty of Government*, 41 *Duke L J* 507, 545 (1991).

¹⁷⁵ See, e.g., notes 178 & 180.

¹⁷⁶ E.g., Ten Broek, *Equal Under Law* 37–38. See note 181 & accompanying text.

¹⁷⁷ See text at notes 207–10.

¹⁷⁸ Ten Broek, for example, quotes James G. Birney, who complained of mob violence against abolitionists: “Law has lost its honor; it is in the dust; none do it reverence; its authority to restrain, to punish, to protect, is mocked at.” James G. Birney, Letter to Joshua Leavitt and Others (Jan 10, 1842), in Dwight L. Dummond, ed., *2 Letters of James Gillespie Birney 1831–1857* 653 (Peter Smith, 1966 reprint of 1938 edition), quoted in Ten Broek, *Equal Under Law* 37.

Chancellor Kent identified the “preventive” arm of the government as a “further” form of protection: “While the personal security of every citizen is protected from lawless violence by the arm of government and the terrors of the penal code, and while it is equally guarded from unjust and tyrannical proceedings on the part of the government itself, by the provisions [of constitutions], every person is also entitled to the preventive arm of the magistrate, as a further protection from threatening or impending danger.”¹⁷⁹ Tracing a similar usage, Heyman has drawn attention to the 1858 Congressional debates about police forces in the District of Columbia, during which some Congressmen discussed the necessity of police “protection” for life, liberty, and property.¹⁸⁰ Clearly, nineteenth-century Americans sometimes used the term “protection” to refer to their need for executive-branch intervention.

Nonetheless, it should be noted that the abolitionists and others who complained about unequal executive enforcement of the law tended to talk about the necessity of protection or equal protection from government but did not typically demand for themselves equal protection *of the laws* or equal *legal* protection. As noted in Part I, eighteenth-century Americans frequently said that individuals obtained protection for their natural liberty from government. Although they typically focused on protection of the laws for natural rights, their language was not entirely free from ambiguity. On the one hand, many of their discussions indicate that they understood protection for natural liberty to be provided by laws that restrained a portion of it; on the other hand, they often spoke in generalities that permitted protection to be understood more broadly to include government enforcement of such laws. This broader usage of the word “protection” as a term of art in the state-of-nature theory certainly was in accord with the unspecialized or ordinary usage of the word “protection,” and, consequently, nineteenth-century writers could easily talk about unequal government enforcement of laws in terms of the obligation of government to provide protection or equal protection. They tended,

¹⁷⁹ James Kent, 2 *Commentaries* Pt IV, Lect xxiv, at *15.

¹⁸⁰ Steven J. Heyman, *The First Duty of Government*, 41 *Duke L.J.* 507, 544–45 (1991). For example, Heyman quotes Senator Crittenden, who said that Congress had an obligation “to provide for an adequate and efficient police in this city, so as to preserve the peace and secure the lives and property of individuals.” *Id.*, quoting *Congressional Globe*, 35th Cong. 1st Sess. 1465 (1858).

however, not to address this problem in terms of equal protection *of the laws*.¹⁸¹

Moreover, Americans who talked about ending slavery by securing "equal protection"—particularly, Americans who sought to end slavery by securing "equal protection of the laws"—were not typically speaking about executive action to enforce laws protecting natural liberty. Although the unequal policing of the laws was the problem of protection that most seriously affected abolitionists in their efforts against slavery, it was hardly the problem of protection that most seriously affected slaves or ex-slaves. Prior to 1868 and (for some purposes) even later, the law itself, not merely the executive enforcement of the law, was what was unequal. As Henry B. Stanton said in 1837, when speaking of domestic relations among slaves, "[t]here is not the shadow of legal protection for the family state among the slaves of the District."¹⁸² In other words, the unequal protection *of the laws* was the more obvious inequality with respect to slavery. Indeed, the equal protection of the laws was one of the things that distinguished free persons from slaves. Northern abolitionists remained free men and women even when deprived of government protection, in the sense of government enforcement of the laws. In contrast, slaves remained slaves even when provided with such protection, for they did not have a more basic type of protection, the equal protection of the laws. It is no coincidence

¹⁸¹ For example, William Goodell sarcastically wrote that "we are generously offered protection on condition that we shall renounce our principles and cease to disseminate them We are to be protected, not in the enjoyment of our civil and religious liberties as free citizens; but if we will relinquish those rights, then we are to be unmolested in our persons and our property [New ¶] The protection we ask is a protection different from all this; and it is a protection we supposed we had a right to claim, as free American citizens the protection most highly appreciated by us, is that which protects the freedom of speech and of the press" Ten Broek, *Equal Under Law* 38, n 6, quoting *The Emancipator* (July 22, 1834). Lovejoy pleaded to a committee of the people of Alton: "I, Mr. Chairman, have not desired, or asked any compromise. I have asked for nothing but to be protected in my rights as a citizen—rights which God has given men, and which are guaranteed to me by the constitution of my country. . . . the question to be decided is, whether I shall be protected in the exercise and enjoyment of those rights—that is the question, sir;—whether my property shall be protected, whether I shall be suffered to go home to my family at night without being assailed, and threatened with tar and feathers, and assassination" Id., quoting Joseph C. and Owen Lovejoy, *Memoir of the Rev. Elijah Lovejoy; Who Was Murdered in Defence of the Liberty of the Press, at Alton, Illinois* 279–80 (1838). In addition to the abolitionists, note Kent's *Commentaries* and the 1858 police debate quoted in text at notes 179–80. For other illustrations see Ten Broek, *Equal Under Law* 38–39 & notes, and Heyman, *The First Duty of Government*, 41 *Duke L J* 507, 537–45. Of course, Ten Broek and Heyman take a rather different view of the evidence than is presented here.

¹⁸² Quoted in Ten Broek, *Equal Under Law* 46.

that Stanton recommended that slaves be given equal *legal* protection:

[T]he slave should be legally protected in life and limb, in his earnings, his family and social relations, and his conscience. To give impartial legal protection in that District, to all its inhabitants would annihilate slavery. Give the slave then, equal legal protection with his master, and at its first approach slavery and the slavery trade flee in panic, as does darkness before the full-orbed moon.¹⁸³

Although abolitionists were often denied equal protection, in the sense of equal government enforcement of the laws protecting their natural rights, slaves were denied the equal protection of the laws, and this was essential to their status as slaves.¹⁸⁴

Graham, Ten Broek and Heyman also suggest that protection was a particular degree of protection.¹⁸⁵ Yet it was the failure of the idea of protection to indicate any particular degree of protection that made the idea of equal protection so much more precise and so much more useful as a legal standard. In political declarations, some Americans demanded, for example, "complete and ample protection."¹⁸⁶ They had to specify that their protection was to be complete and ample because the word "protection" did not, by itself, necessarily refer to an extensive protection.¹⁸⁷ On the basis of a similar understanding of the word, Southerners sometimes justified their peculiar institution by explaining that their laws afforded protection for each individual—not the same protection for

¹⁸³ Quoted in Ten Broek, *Equal Under Law* 46–47.

¹⁸⁴ Thus, Birney asked: "What is our object? Liberty We contend for liberty as she presents herself in the Declaration of American Independence We struggle for her reception, her installation. We long to see the first work of her reign—the abolition of slavery, and the protection of every human being in the land by just and impartial laws." James G. Birney, letter to Joshua Leavitt and Others (Jan 10, 1842), in Dwight L. Dumond, ed., *2 Letters of James Gillespie Birney 1831–1857* 645 (Peter Smith, 1966 reprint of 1938 edition). Incidentally, note that abolition and protection by impartial laws was hardly the sum of Birney's goals, but it would be, he thought, the "first" manifestation of liberty.

¹⁸⁵ Howard J. Graham, *The Early Anti-Slavery Background of the Fourteenth Amendment*, in *Everyman's Constitution* 152; Ten Broek, *Equal Under Law* 21, 51–52; Heyman, *The First Duty of Government*, 41 *Duke L. J.* 545.

¹⁸⁶ E.g., Democratic Platform, § 4 (1840), in Thomas H. McKee, ed., *The National Conventions and Platforms of All Political Parties 1789–1905* 41 (Friedenwald Co, 1906). This was "complete and ample protection from domestic violence, or foreign aggression." *Id.*

¹⁸⁷ Even "complete and ample protection" was so imprecise that it was more often employed as a political slogan rather than as a legal standard.

blacks as for whites, but, nonetheless, protection, varying from one class of persons to another according to what was appropriate.¹⁸⁸ Hence, the significance of “equal” protection.¹⁸⁹

Nineteenth-century Americans tended not even to consider protection, as such, a legally-enforceable right. Many nineteenth-century writers assumed, as was conventional already in the eighteenth century, that civil government and its legal restraints on natural liberty were the means by which individuals obtained protection for their remaining natural liberty and that if government and its laws failed to provide adequate protection, they could be altered by the people. Therefore, when exposed to murder, theft, and other assaults on those portions of their natural liberty that typically were protected by legal restraints, nineteenth-century Americans argued that government should protect them. But this is not to say that nineteenth-century courts enforced this right of protection or that many Americans expected the courts to do so.¹⁹⁰ Graham, Ten Broek, and Heyman have not provided any evidence that Americans typically understood protection to be more than the idea of protection drawn from the state-of-nature analysis—the protection individuals obtained for their natural liberty by sacrificing some of that liberty to government and its laws.

The nineteenth-century idea of equal protection was also similar to that of the eighteenth century in that it concerned an equality of natural liberty protected by civil laws rather than an equality of all legal rights, including privileges. Just as eighteenth-century Americans differentiated between equal protection and equal civil rights, so too, as Professor Maltz has pointed out, nineteenth-century Americans distinguished equal protection from an equality of all legal rights.¹⁹¹ For example, whereas some opponents of slav-

¹⁸⁸ William Sumner Jones, *Pro-Slavery Thought in the Old South* 113–15 (U of NC, 1935); see also Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 Am J Legal Hist 305, 329–31 (1988). Another approach was to say that slaves were not members of civil society. For an early example, see 7 *Revolutionary Virginia* 454, n 16.

¹⁸⁹ Incidentally, both eighteenth- and nineteenth-century sources not infrequently use the phrase “the same protection” as a synonym for “equal protection.” This may illuminate the significance of the word “equal” in the latter phrase.

¹⁹⁰ Heyman suggests that protection was a potentially enforceable right but cites no case in which such a claim succeeded. Heyman, *First Duty of Government*, 41 Duke L J 538–41. Instead, he argues, among other things, that statutes, such as the American versions of the English Riot Act of 1714, were what “reaffirmed the community’s duty of protection and made it the basis of a legal action.” Heyman, 41 Duke L J at 542.

¹⁹¹ Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 Am J Legal Hist 305, 324; Earl M. Maltz, *The Concept of Equal Protection of the Laws—An Historical*

ery were content to argue for equal protection, others also advocated equal privileges.¹⁹² Of course, free blacks tended to demand equal rights or equal privileges rather than mere equal protection.¹⁹³

Consistent with the claims for equal protection were arguments similarly based on assumptions about the equal freedom of humans in the state of nature. Typical of these related arguments was William Thomas's observation that "[w]e declare that 'all men are born free and equal.' . . . [W]e can find no difference between black and white, as respects their natural rights."¹⁹⁴ In language as varied as that of William Channing and Abraham Lincoln, Americans frequently spoke of their common humanity and natural freedom.¹⁹⁵ Although not stated in terms of "equal protection," this

Inquiry, 22 San Diego L Rev 499, 506-7 (1985). In contrast, most historians of the Fourteenth Amendment largely ignore this distinction. E.g., William E. Nelson, *The Fourteenth Amendment from Political Principle to Judicial Doctrine* (Harvard U, 1988) (Nelson, "Fourteenth Amendment").

According to both Graham and Ten Broek, nineteenth-century Americans typically defined equal protection in terms of protection for natural rights, yet both historians apparently attribute to abolitionists a very broad understanding of what constituted natural rights. These historians apparently consider natural rights to have included important privileges in addition to the liberty existing in the state of nature.

Of course, some nineteenth-century Americans adopted definitions of natural liberty that deviated from the conventional version described in the text here. For example, some Americans argued that agency and therefore representation was a natural right, and, subsequently, some opponents of slavery made use of this argument.

¹⁹² See Earl M. Maltz, 22 San Diego L Rev 499, 506 (1985). Of course, defenders of slavery could also use the idea of equal protection. See Ten Broek, *Equal Under Law* 42; Earl M. Maltz, 32 Am J Legal Hist 305, 329-34 (1988). Incidentally, Ten Broek says "slavery and the concomitant discriminations against free Negroes and abolitionists were to be described by abolitionists, as early as 1835, as denials of rights to the equal protection of the laws . . ." Ten Broek, *Equal Under Law* 34. In fact, the analysis of equal protection was not first applied to the question of slavery in the 1830s, let alone by the abolitionists. For example, see a Fourth of July oration published at Gettysburg, David M'Conaughy, *The Nature and Origin of Civil Liberty* 5-6 (1823).

The 1833 *Declaration of Sentiments of the American Anti-Slavery Society* did not clearly require equality, although it may have been so understood: "Every man has a right to his own body—to the products of his own labor—to the protection of law—and to the common advantages of society." Declaration of Sentiments of the American Anti-Slavery Convention (1833), in William L. Garrison, *Selections from the Writings and Speeches of . . .* 68 (Negro Universities, 1968 reprint of 1852 edition). Note the ambiguity of "common advantages," which left room for some unequal rights. Note also that Garrison was familiar with the use of the idea of equal protection in the context of religious freedom. William L. Garrison, *Penal Observance of the Sabbath*, in id at 101.

¹⁹³ See, e.g.: Philip S. Foner & George E. Walker, eds, 1 & 2 *Proceedings of the Black State Conventions, 1840-1865* (Temple U, 1979-80); C. Peter Ripley, ed, 3-5 *The Black Abolitionist Papers* (U of NC, 1991).

¹⁹⁴ Defensor [i.e., William Thomas], *The Enemies of the Constitution Discovered, or An Inquiry into the Origin and Tendency of Popular Violence* 109 (1835).

¹⁹⁵ Charles Edward Merriam observed the contrasting ways in which these and other

type of argument attacked slavery by assuming that all individuals had equal natural rights not only in the state of nature but also under civil government—the same assumption upon which the idea of equal protection was founded. Consequently, the argument about the equal humanity of each individual could easily merge into discussion of equal protection.¹⁹⁶ Thus, William Channing, who gently criticized the extreme measures of abolitionists, wrote of human rights: “The great end of civil society is to secure rights The community is bound to take the rights of each and all under its guardianship. It must substantiate its claim to universal obedience by redeeming its pledge of universal protection.”¹⁹⁷ If all men are equally human, he argued, then the liberty they have as humans—that is, the liberty they have as individuals, independent of government—should be protected by government, regardless of race. Although not an equality of all rights held under civil laws, an equality of natural rights—or, more important for our purposes, an equality of protection for natural rights—would bring slavery to an end.

This very traditional understanding of equal protection as a minimal degree of equality—the equality all persons should have as individuals—is apparent in the debates about the Fourteenth Amendment. In Congress and elsewhere, Americans repeatedly associated equal protection with “life, liberty and property”—these

Americans espoused this position, quoting Lincoln as saying that “[t]he Fathers ‘did not mean to say all were equal in color, size, intelligence, moral development or social capacity.’ What they did mean was that ‘all men are equal in the possession of certain inalienable rights among which are life, liberty, and the pursuit of happiness.’” Charles E. Merriam, *A History of American Political Theories* 222 (Kelly, 1969 reprint of 1903 edition), quoting Abraham Lincoln, 1 *Works* 232 (1894). For Channing, see text at note 197.

¹⁹⁶ This is not to say, however, that these arguments were the same or were considered to be equally efficacious. See John Jay’s views in note 215.

¹⁹⁷ William E. Channing, *Slavery* 48 (1835). See also *id.* at 17–19, 37, & 39. For his views on abolitionists, see *id.*, ch 7. Note that he thought obedience and protection were reciprocal obligations.

Note also that, by Channing’s time, some Americans had altered their vocabulary and spoke of human or personal rights rather than of natural rights. Although not exclusively or even chiefly a historical theory, the state-of-nature analysis was, in the eighteenth century, increasingly questioned for its historical inaccuracy. Some Americans responded to this difficulty by talking about human, individual or personal rights—meaning the rights an individual had as a human or person, independent of civil society and government. Incidentally, they thereby adopted at least one phrase—“personal rights”—already used for other purposes and so managed to avoid an irrelevant historical inaccuracy by employing language likely to cause significant analytic confusion.

being well understood as the components of natural liberty.¹⁹⁸ Although, as one might expect, Congressmen and Senators sometimes spoke about equal protection without defining it and sometimes loosely said, without elaboration, that an equal protection clause would provide for equality,¹⁹⁹ their particular examples tended to be consistent with the standard definition of equal protection—with the idea of equal protection of the laws for natural rights.²⁰⁰ That equal protection concerned natural rights—life, liberty, and property²⁰¹—was the assumption upon which Senator Howard could say: “Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law?”²⁰² Today, we may, perhaps, regret that our predecessors established in our Constitution only a minimal degree of equality. Yet this should no more surprise us than that, to do so, they first had to fight a civil war.

Alexander Bickel, Alfred H. Kelly, William E. Nelson, Louis H. Pollock and William W. Van Alstyne have emphasized that equal protection of the laws was a vague, amorphous and therefore potentially expansive idea.²⁰³ In taking this position, these scholars have suggested that the indeterminacy of the 1866 understanding of equal protection of the laws permitted judicial development of equal protection doctrine—that the text of the Fourteenth Amendment in effect authorized judicial formation of the requirements of the Equal Protection Clause.²⁰⁴ Yet, to support their conclusion,

¹⁹⁸ Berger, *Government by Judiciary* 169–92; Earl M. Maltz, *Civil Rights, the Constitution and Congress, 1863–1869* 93–120 (U of Kansas, 1990).

¹⁹⁹ For another possible explanation, see note 235.

²⁰⁰ See, e.g., speech of Senator Howard at *Congressional Globe* 2766 (1866), discussed by Berger, *Government by Judiciary* 174.

²⁰¹ Berger, *Government by Judiciary* 166–92; Earl M. Maltz, *Civil Rights, the Constitution and Congress, 1863–1869* 93–120. See also the quotations in Herman Belz, *A New Birth of Freedom* 140–41 (Greenwood, 1976). Belz, however, appears to assume that equal protection was an equality of all non-political rights held against government. *Id.* at 142–43.

²⁰² *Congressional Globe* 2766 (1866).

²⁰³ Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv L Rev 1, 60–61 (1955); Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 Mich L Rev 1049, 1084–86 (1954); Nelson, *The Fourteenth Amendment* 8, 9, 21 (1988); Louis H. Pollock, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U Pa L Rev 1 (1959); William W. Van Alstyne, *The Fourteenth Amendment, The ‘Right’ to Vote, and the Understanding of the Thirty-Ninth Congress*, Supreme Court Review 33, 72 (1965).

²⁰⁴ See note 203. For example, Nelson writes that his history “directs judges to cease

these scholars hardly look beyond the post-Civil War Congressional debates. Kelly, for example, writes that "equal protection had virtually no antecedent legal history."²⁰⁵ As has been seen, however, the earlier evidence about equal protection is extensive, and it does not suggest the sort of vagueness Bickel, Pollock, Kelly, and others, following them, have claimed. Although Nelson cites various mid-nineteenth-century discussions of equality, he does not even attempt to distinguish among the various different standards of equality Americans may have been discussing. By now it should be clear that Americans claimed more than one type of equality, and that equal protection of the laws cannot simply be lumped together with other standards of equality. Far from being a vague and therefore flexible commitment to equality in general, equal protection of the laws was a specific type of equality, and it was defined with relative precision.²⁰⁶

In only one respect did the nineteenth-century definition of equal protection differ from the eighteenth-century definition: In the nineteenth century, the words "equal protection" often referred to the idea of equal *judicial* protection of legal rights. Yet even this usage did not greatly alter the idea of equal protection, which remained a contrast to equal civil rights. Englishmen and Americans had often said that courts should treat individuals equally—that is, with the same process. More generally, they assumed that, although established to protect natural rights, government, including its courts, should protect all rights held under law. In the late eighteenth century, being increasingly familiar with the phrase "equal protection," some Americans began to speak of equal protection by the courts for legal rights—that is, all such rights as a person had under law. This notion of equal protection—equal judi-

searching in the amendment's legislative history for specific binding resolutions of the particular issues they face." Nelson, *Fourteenth Amendment* 11. See also text at 242.

²⁰⁵ Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 Mich L Rev 1049, 1052 (1954). Incidentally, Kelly, who contributed to the NAACP brief in *Brown v Bd. of Ed.*, has subsequently written that it "manipulated history in the best tradition of American advocacy, carefully marshalling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the contrary, either by suppressing it when that seemed plausible, or by distorting it when suppression was not possible." Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, Supreme Court Review 119, 144 (1965).

²⁰⁶ Of course, there is an extensive literature on the ways in which the idea of equality and other, similar ideas can be vague. Particularly elegant is Nelson Goodman, *Seven Strictures on Similarity*, in *Experience and Theory* 19 (U of Mass, 1970).

cial protection for such legal rights as one had—amounted to an equality of process or an equality before the courts. As Maltz has shown, this definition of equal protection was not unusual in mid-nineteenth-century America.²⁰⁷

Increasingly, Americans appear to have combined this notion of equal protection by the courts—an equality of process—with the idea of equal protection for natural rights. American advocates of equal protection for natural rights often appear to have assumed an equal protection by the courts. In nineteenth-century America, however, the idea of equal protection by the courts typically concerned an equal protection of all civil rights, whether originally natural or acquired only under government, and Americans sometimes explicitly combined this broad idea of equal judicial protection with the older idea of equal protection for natural rights. Thus, nineteenth-century Americans continued to use the phrase “equal protection” to refer to an equal protection of natural rights,²⁰⁸ but they also, instead, sometimes used those words to refer to an equality of judicial process²⁰⁹ or a combination of these two ideas. Incidentally, the phrase “equal protection” was also occasionally used in its ordinary sense rather than as a label for a specific idea about natural rights or about judicial protection.²¹⁰ In general, there is

²⁰⁷ Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 Am J Legal Hist 305, 324–25.

²⁰⁸ The Federal Circuit Court for the District of New Jersey said of a property owner that “he may devote [his property] to whatever purposes he pleases, in which the law protects him equally with any other proprietor.” *Bonaparte v Camden & A.R. Co.*, 3 F Cas 821 (Cir Ct NJ 1830) (Fed Case 1,617). When a “negro John Brooks” was charged with disturbing and hindering “the congregation of the African meeting-house in Washington county . . . by cursing and swearing, and loud and profane talking and noise,” the Circuit Court for the District of Columbia overruled a motion in arrest of judgment. Among other things, it observed that although it might be said that the Christian religion was not a part of the common law, “[e]very religious sect is equally protected by our laws.” *US v Brooks*, 24 F Cas 1244 (Cir Ct DC 1834) (Fed Case 14,655).

²⁰⁹ For an early example, note that, in *Chisboly v Georgia*, Chief Justice Jay said that “by securing individual citizens as well as States, in their respective rights,” the extension of the judiciary power of the United States in that case “performs the promise which every free Government makes to every free citizen, of equal justice and protection.” *Chisboly v Georgia*, 2 US 419, 479 (1793). This was the equal protection by the courts for such rights as a person had under civil laws. For a much earlier, English example, see John Rogers, *A Vindication of the Civil Establishment of Religion* 83 (1728).

²¹⁰ E.g., in Wisconsin, the Democratic members of the 1846 Constitutional Convention resolved in favor of, inter alia, “[e]qual, just, and humane protection to the social rights alike to debtors and creditors.” Resolutions (Dec 30, 1846), in Milo M. Quaife, ed, *The Struggle Over Ratification 1846–1847*, 206 (1920).

little difficulty distinguishing the different uses of "equal protection."

Equal protection was not, evidently, a very different idea in the nineteenth century than it had been in the eighteenth. It required a type of equality rather than a particular degree of substantive rights, and the equality it required was an equal protection for natural rights, plus, occasionally, an equality of judicial process. Because equal protection did not require an equality of privileges, it often was contrasted to an equality of all rights. One kind of equal protection was the equal protection of the laws, and this type of equal protection did not include a right to executive-branch intervention. Moreover, in the absence of some constitutional or other positive law providing a legal right to equal protection, Americans did not consider the "right" of equal protection legally enforceable. Although there were other, nonspecialized definitions of the phrase "equal protection," and although this term was sometimes used imprecisely, the evidence suggests that, in mid-nineteenth-century America, the phrase "equal protection" could and, typically, was understood as a term of art in the state-of-nature analysis with the standard definition described here. It was this standard definition that Americans appear to have taken for granted in the 1860s.

If nineteenth-century opponents of slavery employed a notion of equal protection similar to that used by eighteenth-century Americans in debates about religious liberty, it may be asked how the idea of equal protection was transmitted to the campaigners against slavery or, for that matter, to other Americans, such as the champions of the South who claimed equal protection for their natural right of property. All of these Americans could use the same idea of equal protection, because they were drawing upon a notion that had long been part of theoretical discussions about politics and law. Having employed the idea of equal protection to address their religious differences, Americans, particularly Federalists, used that idea beginning c. 1790 to justify differences in acquisitions and wealth. In so doing, these Americans adopted the idea of equal protection as part of their general political theory, and they thereby came to use equal protection as a broadly applicable standard of equality not tied to any particular characteristic or type of diversity. Consequently, in the 1820s and '30s, when ever-larger numbers of Americans wrestled with the issue of slavery, they could

apply, among other notions of equality, the idea of equal protection.

Like the establishment clergy in the previous decades, Federalists in the 1790s sought to stave off demands for equal rights, and one of the ways they could do so was by promoting the alternative type of equality, equal protection, which they, among others, had discussed in connection with religious liberty.²¹¹ Unlike the establishment clergy, however, these Federalist advocates of equal protection were less concerned about the preservation of unequal privileges than about the possibility that, under the guise of “equal rights,” government would, in fact, provide inadequate or unequal protection. Federalists particularly feared the notion of equal rights when it was associated with demands for equal political rights or was asserted as the basis for an equalization of property. To be precise, they suspected that “French”-style equal rights would lead to severe and even, perhaps, unequal restraints on property or other natural rights,²¹² and they tended to employ the idea of equal protection as a defense against this leveling egalitarianism. They emphasized that government was designed to protect natural liberty equally and extensively—leaving individuals to pursue their natural liberty according to their various unequal talents and circumstances.²¹³ For example, after descanting on the different re-

²¹¹ In some states, Federalists were closely associated with the religious establishments. Of course, although Federalists in the 1790s found the idea of equal protection particularly useful for some of their arguments, it is not suggested that they were the only persons who found the idea attractive. The idea reflected commonly held assumptions. Incidentally, note that one Anti-Federalist said he favored “the peaceable and equal participation in the rights of nature.” “A Columbian Patriot,” *Observations on the New Constitution and on the Federal and State Conventions* (1788), 4 *Complete Anti-Federalist* 274.

²¹² The alternative possibility, that government would attempt to equalize the condition of individuals by providing either massive or unequal benefits, was not frequently even considered. Warburton wrote that “*society could not reward, though it should discover the objects of its favour*; the reason is, because no society can ever find a fund sufficient for that purpose, without raising it on the people as a tax, to pay it back to them as a reward.” William Warburton, *Alliance Between Church and State*, in Warburton, 7 *Works* 35. In a similar vein, James Witherspoon told his classes at Princeton: “It has been often said, that government is carried on by rewards and punishments; but it ought to be observed, that the only reward that a state can be supposed to bestow upon good subjects in general is protection and defence. Some few, who have distinguished themselves in the public service, may be distinguished by particular rewards; but to reward the whole is impossible, because the reward must be levied from those very persons to whom it is to be given.” Witherspoon, *Lectures*, Lect XII, at 141.

²¹³ This aspect of Federalist thought was not always discussed in terms of “equal protection.” For example, in *Federalist* No 10, Madison discussed protection, but his approach to the factionalism caused by inequality did not rely upon a simple legal requirement, such as

wards men would reap on account of their unequal talents,²¹⁴ Zephaniah Swift—the future Chief Justice of Connecticut—insisted that “[w]hether men possess the greatest, or the smallest talents, they have equal claims to protection, and security in their exertions, and acquisitions.”²¹⁵

By applying the notion of equal protection to differences other than those of religion, Federalists popularized an understanding that the idea of equal protection concerned differences in general. Already in the seventeenth century, it had been argued that “every man” should be “alike protected in the enjoyment of propriety and exercise of honest Industry.”²¹⁶ At least some Federalists appear to have been aware of such generalized discussions of equal protection

equal protection. When speaking of “men in society, previous to civil government,” Wilson discussed “the laws of God and nature” and said that “[b]y these laws, rights, natural or acquired [i.e., acquired before establishment of government—more commonly called ‘adventitious rights’], are confirmed, in the same manner, to all; to the weak and artless, their small acquisitions, as well as to the strong and artful, their large ones. If much labor employed entitles the active to great possessions, the indolent have a right, equally sacred, to the little possessions, which they occupy and improve.” James Wilson, *The Works of James Wilson*, 241, Robert G. McCloskey, ed (Belknap, 1967). (Incidentally, in examining this passage, Professor Jenifer Nedelsky appears to be of the opinion that it concerned the laws of civil government. Jenifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 105.) Although the approach described here was typically employed by Federalists, it was also used by others. See, e.g., “Federal Farmer,” 2 *Complete Anti-Federalist* 261. For an early antecedent, see Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society*, Of Dominion, ch xiii, § 11 in 2 *Works* 174, ed William Molesworth (1841).

²¹⁴ “Men at their birth are all vested with equal rights, but are endowed with unequal powers. There is a great difference between their intellectual, as well as corporeal faculties, which is the origin of the inequality of mankind. . . . The man who possesses uncommon talents for accumulating property, will grow rich, while the opposite character, with equal advantages will remain poor. Those who are blest with the powers of eloquence . . . will acquire a fame that cannot be reached by men of moderate capacity. . . .” Zephaniah Swift, 1 *A System of the Laws of the State of Connecticut* 17 (1795).

²¹⁵ Id. For his discussion of religious liberty, see id at 144. Chief Justice John Jay distinguished equal protection from the protection and equal rights declared in bills of rights. It will be recalled that many state constitutions contained, typically in their bills of rights, statements that all men had equal liberty or rights in the state of nature and that government was established to protect such liberty. In a charge to a grand jury, Jay argued that such declarations were not, by themselves, adequate: “It is not sufficient to tell men by a Bill of Rights, that they are free, that they have equal Rights, and that they are entitled to be protected in them—men will not believe they are really free, while they experience oppression—they will not think their title to equal Rights, realized, until, they enjoy them; nor will they esteem that a good Government, whatever may be its Name, which does not uniformly, impartially and effectually protect them.” John Jay, Charge to the Grand Jury of the Circuit Court for the District of Virginia, May 22, 1793, 2 *Documentary History of the Supreme Court* 390.

²¹⁶ *Englands Safety in the Laws Supremacy* 5 (1659).

and of related early debates about monopolies, and Federalists now used the concept of equal protection in a similarly generalized way.

A particularly lengthy and elegant example of the Federalist approach to equal protection may be taken from an anonymous essay on equality published in 1804 in the *Connecticut Courant*. It is somewhat atypical (though hardly unusual) for its association of equal protection with the idea of equal or equitable laws—that is, laws that were not partial to separate or private interests. Whereas the idea of equal protection (or, for that matter, equal civil rights) was familiar from a controversy in which equality was demanded with respect to a particular characteristic—religion—the notion of equal laws had long been discussed with regard to the full variety of interests in society. In other words, for a long time, Americans had associated equal protection with religious differences and had associated equal laws with the problem of differing interests in general. Thus, the *Courant*'s essayist may have been inclined to draw upon the idea of equal or equitable laws precisely because he was elucidating equal protection as an idea concerning differences in general. Otherwise, however, he was orthodox in his argument that inequality was inevitable and that equal protection left individuals with an equal and very extensive degree of natural freedom.

The essayist began his analysis by noting that republican laws should recognize the rights of human nature without partiality. All men, according to the *Courant*,

have equally a right to the gifts of nature and to all their honest acquirements, whether of learning or property, and to enjoy, or in any wise appropriate the fruits of their industry as they themselves may deem proper. . . . These rights of human nature, which, under arbitrary governments, are either withheld or granted with a partial hand, are recognized expressly or virtually by those republics which acknowledge the people to be the source of power. While such free republics continue pure, they are constantly making a *practical* acknowledgement of the equal rights of human nature by the equity of their laws and the impartiality of their courts of justice; meteing the same measure to the rich and poor, protecting good citizens and punishing evil doers, without any respect of persons.²¹⁷

²¹⁷ *Dissertations on the Deceptive Arts of Demagogues* No 7 (concerning equality), in 40 *Conn Courant*, No 20, p 1 (Sept 19, 1804).

This "equity" or nonpartiality of law with respect to the rights of human nature was compatible with the natural inequality or differences of humans:

In various other respects, men are created *unequal*, and by the improvement, the neglect, and the misimprovement of their talents, as well as by innumerable providential occurrences, the native inequalities between them are further diversified and considerably increased. . . . This order of nature tends to effect a necessary degree of subordination and at the same time, so to diversify the occupations and pursuits of men as to promote the general interests of society. . . . Yet, [even] if all men were equal in the gifts of nature, in their educations, and in their industry and prudence, there still would be great inequalities in their circumstances, effected by causes hidden from their sight and beyond their controul.²¹⁸

Thus, individuals were unavoidably unequal both in their abilities and in their circumstances. By protecting individuals equally or nonpartially in their natural freedom, republican laws left individuals free to pursue their own interests and to make the best of their varied abilities and circumstances:

Now amidst all the diversity of human talents, amid the constantly shifting circumstances of men living under a free government when every one has the power of self-direction as to the improvement of his talents and the pursuits of life, *the true republican equality* consists in the whole body politic guarding with the same care all its members, by enacting equitable [i.e., nonpartial] laws and executing those laws with strict impartiality. This kind of equality is practicable and salutary; . . . it is the great spur to general industry, and is a spring of life to a free commonwealth. In such a state of things, the rich and the poor are equally protected in their persons and reputations, in their honest acquisitions and in all their rights; and they are at liberty to employ for their own benefit the faculties which have been given them by the God of nature.²¹⁹

According to the *Courant's* essayist, equal protection permitted and was the means of attaining a high degree of individual liberty in civil society. With equal protection, Federalists thought they could reconcile equality and individual freedom, and therefore they made

²¹⁸ Id.

²¹⁹ Id.

that idea their egalitarian response to the demands for equality that appeared to portend an equalization of condition.²²⁰

²²⁰ A few other illustrations may be useful. Supreme Court Justice William Cushing charged a grand jury: "The great end of government, you know, is peace and protection; peace with nations, protection against foreign force:—peace and order within; protection of individuals, of all classes of men, whether poor or rich, in the undisturbed enjoyment of their just rights, which are comprehended under a few, but important words—*security of person and property*, or, if you please, *rights of man*." William Cushing, Charge to the Grand Jury of the Circuit Court for the District of Rhode Island (Nov 7, 1794), in 2 *Documentary History of the Supreme Court* 491. He also said that: "Where people are not permitted to enjoy these blessings, *security of person and property*, unmolested, there is tyranny, whether it arises from monoarchy, aristocracy, or a mob. Where all men are equally and promptly protected in the free exercise of these rights, there is liberty and equality;—liberty, to do whatever just laws made by a free representative allow; equality, that is, as to right of protection respecting the great objects of life, liberty and property, when not forfeited to the state by criminal conduct; respecting property, which a man has fairly and honestly obtained—not that which is unrighteously taken or forced from another;—not equality in regard to quantity; for that seldom, if ever, can happen, owing, under providence, to the infinitely various faculties and diligence of different individuals;—not a right for the indolent to rob the laborious—to share equally the fruits of the virtuous industry of others; such ideas being founded in extravagance of enthusiasm and delusion, or in downright dishonesty and depravity of mind—subversive of the first principles of justice, and the great ends of society." Id at 492. In response to the idea of "equality," Jonathan Maxcy wrote: "When the road to acquisition is equally open to all—when the laws equally protect every man's person and property—all men will not make exertions equally great—all will not possess the same spirit of enterprize—all will not obtain accession of wealth, of learning, virtue and honour, equally extensive and important. . . . That men in the social state are equal as to certain rights—that they ought to be protected in their persons and property, while they conduct [themselves] as good citizens, will undoubtedly be admitted. This, however, is a very different kind of equality from that which the promulgers of this pernicious doctrine [of equality] intended to introduce." Jonathan Maxcy, *An Oration* (1799), in 2 *American Political Writing* 1048. According to Noah Webster, "That one man in a state, has as good a right as another to his life, limbs, reputation and property, is a proposition that no man will dispute. Nor will it be denied that each member of society, who has not forfeited his claims by misconduct, has an equal right to protection. But if by *equality*, writers understand an equal right to distinction, and influence; or if they understand an equal share of talents and bodily powers; in these senses all men are *not* equal." Noah Webster, *An Oration on the Anniversary of the Declaration of Independence* (1802), in 2 *American Political Writing* 1229. According to Timothy Ford, "To what then does this term equality relate? I will answer in the words of the French constitution; 'men are born and always continue free, and equal in respect of *their rights*.' Thus, my personal liberty is equal to that of any other man; my life is *equally* sacred and inviolable, my bodily powers are *equally* my own; my power over my own actions is *equally* great and *equally* secured from external restraint; my will is *equally* free; what I acquire, be it greater or less, I have an *equal* right to possess, to use and to enjoy. I have an equal claim upon the protection of the laws; an *equal* right to serve my country, and an *equal* claim to be exempted from service. . . ." "Americanus" [i.e., Timothy Ford], *The Constitutionalist* (1794), in 2 *American Political Writing* 930. For the significance of Ford's use of the phrase "personal liberty," see note 197. Responding to claims for equalization of property and of political rights, Fisher Ames wrote: "The philosophers among the democrats will no doubt insist that they do not mean to equalize property, they contend only for an equality of rights. If they restrict the word equality as carefully as they ought, it will not import that all men have an equal right to all things, but, that to whatever they have a right, it is as much to be protected and provided for as the right of any persons in society. In this sense nobody will contest their claim. . . . [new ¶] As the common law secures equally all the rights of the citizens, and as the jacobin leaders loudly decry this system, it is obvious that

In connection with their argument that equal protection was the sort of equality desirable under a free government, Federalists sometimes modified the standard description of the purpose of government so that it incorporated the notion of equal protection. For example, in a charge to a grand jury, John Jay said that "impartially to give Security & Protection to all" was "among the most important Objects of a *free* Government."²²¹ The end of government, once described simply as the protection of life, liberty, and property for every individual, increasingly could be described as "the equal protection of life, liberty, and property, to every individual."²²² By the middle of the nineteenth century, some state constitutions had declared of the "people" that "Government is instituted for their equal protection and benefit."²²³

Eventually, Americans used the notion of equal protection not only to define the purpose of republican government but also to define "civil liberty." Increasingly, during the eighteenth century, Americans described liberty or civil liberty as the natural liberty enjoyed under civil laws. Americans were educated in the assumption that civil government was instituted to protect natural liberty,

they extend their views still farther. . . . Am I then to have, in the new order of things, an equal right with you? Certainly not, every democrat of any understanding will reply. What then do you propose by your equality? You have earned an estate; I have not; yet I have a right, and as good a right as another man, to earn it. I may save my earnings and deny myself the pleasures and comforts of life till I have laid up a competent sum to provide for my infirmity and old age. All cannot be rich, but all have a right to make the attempt; and when some have fully succeeded, and others partially, and others not at all, the several states in which they then find themselves become their condition in life; and whatever the rights of that condition may be, they are to be faithfully secured by the laws and government. This, however, is not the idea of the men of the new order of things, . . ." Fisher Ames, *Equality II*, in *The Palladium* (Nov 20, 1801), in 1 *Works of Fisher Ames* 240-42, William B. Allen, ed (Liberty Classics, 1983). See also Nathaniel Chipman, *Sketches of the Principles of Government* 177-82 (1793). Of course, some of the individuals who used this analysis were not strictly Federalists.

²²¹ John Jay, Charge to the Grand Jury of the Circuit Court for the District of Virginia, May 22, 1793, 2 *Documentary History of the Supreme Court* 381.

²²² *Constitutional History*, 29 North Am Rev. 265, 280 (1829). A Connecticut minister argued: "The end of government is the general happiness. It is not that a few may riot in affluence at the expense of the rest; but that all may enjoy equal security and liberty." Joseph Lathrop, *The Happiness of a Free Government and the Means of Preserving It* 10 (July 4th sermon 1794) (Evans 27200). In 1828, South Carolina protested against the tariff that its unequal and oppressive operation was "incompatible with the principles of a free government and the great ends of civil society, justice, and equality of rights and protection." SC Protest Against the Tariff, Dec. 19, 1828, in Richard Hofstadter, ed, *Great Issues in American History* 277 (1958).

²²³ Ohio Const of 1851, Art 1, § 2; Kan Const of 1855, Art 1, § 2. The latter was the anti-slavery constitution produced in Topeka.

and therefore they could easily conclude that civil liberty was the natural liberty held under the laws of civil government.²²⁴ Indeed, some of them may have found this narrow definition of civil liberty a convenient response to the growing demands for equal civil rights. In a variant of this definition of civil liberty, Americans described civil liberty as the largest possible degree of natural freedom held under civil laws—not a particular set of civil rights, but rather, more generally, the character of the liberty desirable under civil government and its laws. In the terse phrase of an anonymous pamphleteer, “Civil liberty is the exemption from useless restraint.”²²⁵ Of course, such a notion of civil liberty could be defined in terms of protection. For example, a Federalist wrote that “[w]hen people enter into society, they must, in order to obtain protection, give up some part of their natural liberty, in order to secure the rest—the more we retain in our hands, consistent with that protection, which is necessary for society, will be so much the better, and this is called civil liberty.”²²⁶ Similarly, if the purpose of government was equal protection, civil liberty could be defined in terms of *equal* protection for the greatest possible natural freedom. In 1822, for example, Daniel Chipman wrote:

To establish civil liberty, and render the enjoyment of it certain and uniform with all classes of people, is, or ought to be the

²²⁴ For example, James Iredell told a grand jury: “Let it be remembered that civil Liberty consists not in a Right to every Man to do just what he pleases—but it consists in an equal Right to all the Citizens to have, enjoy, and to do, in peace Security and without Molestation, whatever the equal and constitutional Laws of the Country admit to be consistent with the public Good.” John Jay, Charge to the Grand Jury of the Circuit Court for the District of New York (April 12, 1790), in 2 *Documentary History of the Supreme Court* 30. See also Thomas Rutherford, *Institutes of Natural Law*, bk II, ch vii, at 444 (1832) (first published 1756).

²²⁵ [Zephaniah Swift?], *The Security of the Rights of Citizens of Connecticut* 9 (1792) (Evans 24776) (citing Paley on *Moral and Political Philosophy*). For the tentative attribution to Swift, see Pierce W. Gaines, ed, *Political Works of Concealed Authorship 1789–1810* 32 (Shoe String 1965). Of course, this approach was drawn from the other side of the Atlantic. Blackstone had written that “Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public.” W. Blackstone, 1 *Commentaries* 125 (1765). See also Thomas Rutherford, *Institutes of Natural Law*, bk II, ch vii, at 444–45 (1832) (explaining the necessity of this modified definition). Francis Lieber observed that “when the term Civil Liberty is used, there is now always meant a high degree of mutually guaranteed protection . . .” Francis Lieber, *Civil Liberty and Self-Government* 24 (1859), cited by Heyman, *The First Duty of Government* 41 Duke L.J. 507, 530.

²²⁶ “Publicola” [Archibald Maclaine], “An Address to the Freemen of North Carolina” (Mar 20, 1788), 16 *Documentary History* 437. For a nineteenth-century example, see quotation of Lieber in note 225. See also James Kent, 2 *Commentaries* pt IV, lect xxiv, at *1.

great end of all governments; that is, to secure all classes of society alike in the enjoyment of their rights, without any other restraint upon natural liberty, than that which is imposed upon all by equal and expedient laws for the general safety and welfare of the whole community.²²⁷

Later, Francis Lieber was more succinct: "Liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of"²²⁸

Incidentally, the definition of civil liberty in terms of protection for a large degree of natural liberty was not without its costs. Among other things, it contributed to a redefinition of the phrase "civil rights." In the eighteenth century, the phrase "civil rights" had often been used to refer variously to all rights held under the laws of civil government, to the portion of such rights acquired under the laws of civil government, or to the natural rights held under the laws of civil government. As noted in Part III, the first and broadest definition had been reflected in dissenters' claims of equal civil rights.²²⁹ Already in the eighteenth century, however, and especially in the nineteenth, the phrase "civil rights" increasingly came to be understood to refer only to the natural rights protected by civil laws and, sometimes, certain rights of process.²³⁰ Of course, Americans still occasionally used the phrase "civil rights" to refer to all rights under civil laws or to privileges, but,

²²⁷ Daniel Chipman, *An Essay on the Law of Contracts for the Payment of Specific Articles* iii (1822). In 1791, the Rev. Israel Evans said that "where the rights of man are equally secured in the greatest degree, there is the greatest happiness—AND THAT IS OUR COUNTRY." Israel Evans, *A Sermon* 18 (NH election sermon 1791) (Evans 23358).

²²⁸ Francis Lieber, *Civil Liberty and Self-Government*, as quoted by Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 485 n 2 (1890). Lieber continued: "or in the most efficient protection of his rights, claims, interests, as a man or citizen, or of his humanity manifested as a social being." *Id.*

²²⁹ See text at notes 105–6. See also Samuel Pufendorf, *Of the Relation Between Church and State* § 13, at 27 (1719).

²³⁰ The increasingly dominant natural-rights definition and some of the ambiguities are revealed in this definition by Zephaniah Swift: "Civil rights may therefore be defined to be the exercise and enjoyment of natural rights, in that limited qualified manner which is prescribed by law and is necessary to their security, and the peace and good order of society, and by reason of which he acquires certain other civil rights, resulting from the social state." Zephaniah Swift, 1 *A System of the Laws of the State of Connecticut* 176–77 (1795).

by the nineteenth century, they typically no longer did so.²³¹ As a result, by the 1860s, "equal civil rights" normally denoted only an equality of natural rights and judicial process. On this basis, when, in 1866, Congress enacted guarantees of various natural rights and judicial process, it could say that the bill assured Americans of their "civil rights,"²³² and, shortly afterward, Senators and Representatives could say that the Equal Protection Clause of the Fourteenth Amendment required an equality of civil rights.²³³ Thus, in the middle of the nineteenth century, the phrases "equal civil rights" and "equal protection" both referred to an equality of judicial process and of the natural rights protected under civil government. Unlike for the phrase "equal protection," for the phrase "equal civil rights," this was a truncated definition. Of course, even this diminished meaning has since been lost, and the phrase "civil rights" now refers, not to legal rights, nor even to protected natural rights, but more vaguely to important or fundamental rights.

Just as Federalists and others used the idea of equal protection to define, in powerfully egalitarian terms, republican equality, the

²³¹ This may be why dissenters increasingly did not talk about their demands in terms of "equal civil rights." Apparently to avoid ambiguity, they often asked for "equal rights" or for a combination of free exercise and "equal privileges."

²³² An Act to Protect All Persons in the United States in their Civil Rights, and Furnish Means of Their Vindication (1866), 14 *Statutes at Large* 27 (1866). In explaining the Civil Rights Bill, Representative Wilson asked, "What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as [in the language of James Kent] 'the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.'" *Congressional Globe* 1117 (1866). As has been shown by Berger and Maltz, this was the standard interpretation of the Civil Rights Bill. Berger, *Government by Judiciary* 27–28, 169–71; Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863–69* 67–68.

²³³ Berger, *Government by Judiciary* 172. As Berger points out, Americans also said that the Civil Rights Bill would require equal protection. *Id.* at 169–70.

In connection with suffrage for former slaves, Republican Representative James W. Patterson of New Hampshire spoke of the military heroism of "these despised chattels" and asked: "Have not such deeds redeemed the race from dishonor and distrust, and entitled them, not only to a protection of their civil rights, but to an impartial enjoyment of the privileges of citizenship?" *Id.* at 2695 (1866). Democratic Representative Lewis W. Ross of Illinois said of the Freedmen's Bureau that he was "unwilling to vote a tax on my constituents to support in idleness any class of people, white or black." He was "opposed to any law discriminating against ['the unfortunate colored people'] in the security and protection of life, liberty, person, property and the proceeds of their labor. These civil rights all should enjoy. Beyond this I am not prepared to go." *Id.* at 2699 (1866).

Incidentally, Raoul Berger has concluded that the Fourteenth Amendment's equal protection "was limited to the rights enumerated in the Civil Rights Act of 1866." Berger, *Government by Judiciary* 169. This seems to suggest that a constitutional right was defined in terms of a statutory enumeration of rights. For another interpretation, see my text.

purpose of government, and the extent of civil liberty, so too, some Americans used the idea to describe the limited economic role of government. For example, at South Carolina College, the President and Professor of Political Economy, Thomas Cooper, used the idea against monopolies. Although a privilege for the monopolist, a monopoly was also an unequal restraint on the talents, industry, and, more generally, the natural liberty of other individuals. According to Cooper (who appears to have been familiar with some of the pre-eighteenth-century discussions of equal protection) individuals forming government would "endeavour to provide" for "the equality of protection in the earning and enjoyment of the fruits of their honest industry."²³⁴ In rather stronger language, an anonymous essay of 1841 emphatically disclaimed any role for government, except equal protection. It asserted that "human legislation . . . has conferred neither rights, nor privileges, nor powers—but protected all, and all alike."²³⁵ According to the essay, "The boast of the laws should be . . . that they have neither advanced nor retarded any man; but that they let him alone to work out his happiness in the exercise of his own true nature. . . .

²³⁴ Thomas Cooper, *Lectures on the Elements of Political Economy* 249 (1830). When explaining the benefits of abolishing monopolies, the eighteenth-century English controversialist, Josiah Tucker, noted that "[t]he Government and Administration, which . . . considers itself as the equal Protector of, and equally related to all its Subjects, would soon find the Effects of its Paternal Care in the growing Industry of the People." Josiah Tucker, *The Elements of Commerce and Theory of Taxes*, in Josiah Tucker, *A Selection from His Economic and Political Writings*, ed. Robert Livingston Schuyler, 180 (Columbia U, 1931).

²³⁵ "A Phrenologist," *On Rights and Government*, 9 Democratic Rev 568, 575 (Dec 1841). The author was, apparently, a New Yorker, who combined in his writing the state-of-nature analysis, a severe version of laissez-faire theory, and considerable religious enthusiasm. Most remarkable was a passage in which he said that man "comes into society with the capital which God has given him, and he demands 'free trade.'" Id at 576. He also said: "The most perfect human laws claim no higher merit, than that they have followed nature; not having conferred the rights of humanity, but guaranteed and defended them; not having bestowed any powers upon any man, but having kept him free from obstruction in the exercise of his natural faculties." Id at 575.

Incidentally, by assuming that government should protect individuals in their natural rights and should not confer privileges, this author could quite consistently say that his scheme treated all persons equally. For example, he wrote that "*the laws shall be general in their scope and application, equal and impartial to all.*" Id at 575. Also: "if the laws . . . apply to all men alike, or are general, affecting all men alike, then all men are equally regarded, protected, and punished by those laws, and legal equality is established." Id at 575. In other words, if a government confined itself to equal protection and thus did not give any privileges, such a government could be said to have laws that were "equal and impartial to all." This understanding of the limited role of government may, perhaps, explain some of the occasional statements, during the Congressional debates about the Fourteenth Amendment, to the effect that the Equal Protection Clause would require states to treat individuals alike, regardless of racial differences.

Government has nothing to bestow upon any man; it can only serve to protect him in all he hath."²³⁶ The essay not only argued that government should provide equal protection but also explicitly stated that equal protection was the sole purpose of government.

It was in the context of the Federalist-derived analysis of equal protection that Andrew Jackson demanded equal privileges in his 1832 Bank veto.²³⁷ Using language that could have been borrowed from a Federalist, Jackson acknowledged equal protection:

Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth, cannot be produced by human institutions. In the full enjoyment of the gifts of heaven, and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law.

Only after he had accepted the inequality of individuals and the equality of protection, did Jackson insist on equal privileges:

But when the laws undertake to add to these natural and just advantages, artificial distinctions, to grant titles, gratuities, and exclusive privileges . . . , the humble members of society, . . . who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government. . . . If [government] would confine itself to equal protection, and as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. . . .

. . . Many of our rich men have not been content with equal protection and equal benefits.²³⁸

The equality demanded by Jackson consisted of both equal protection and equal "favors," "benefits," or "privileges." Jackson did not argue against equal protection any more than did religious dissenters of the previous century or abolitionists of the coming decade.

²³⁶ Id at 575–76.

²³⁷ Amos Kendall and others drafted it.

²³⁸ Andrew Jackson, Bank Veto (1832), in *The Addresses and Messages of the Presidents of the United States* 409–10 (1839). A locution similar to Jackson's had been employed by Virginia's Presbyterians in 1785 when complaining about a proposed assessment in support of Christianity. The assessment, they wrote, "exalts to a superior pitch of grandeur, as the church of the State, a society which ought to be contented with receiving the same protection from government which the other societies enjoy, without aspiring to superior notice or regard." Memorial of the Presbyterians of Virginia to the General Assembly (Aug 13, 1785), in *American State Papers* 117.

Like many of them, he simply asked for an additional degree of equality.²³⁹

By insisting upon both equal protection and equal "favours," Jackson drew upon and encouraged popular suspicions about the distribution of economic benefits from an increasingly wealthy and powerful federal government.²⁴⁰ While government was understood to have been created to provide protection, and while government distributed relatively few economic privileges, Americans could still aspire, with respect to economic matters, simply to have equal protection. Indeed, by urging that government should confine itself to equal protection, some Americans signaled the limited role they desired for government.²⁴¹ Nonetheless, Americans perceived that government was increasingly a source of substantial economic favors, and therefore many Americans now demanded that these privileges, like protection, be equal.

Opponents of slavery also frequently discussed equal protection and equal privileges, and, as had Jackson, they thereby employed ideas familiar from earlier debates. After using the notion of equal

²³⁹ For another illustration of the dependence of Jacksonian analysis upon Federalist discussions of equal protection, see William Leggett (Evening Post, Nov 21 & Dec 13, 1834), in *Democratick Editorials*, Lawrence H. White, ed., 3, 7-9 (1984).

Jackson assumed that unequal benefits would involve "artificial distinctions." In the debates about religious liberty, dissenters sought equality with respect to a single characteristic, religion, and therefore they could be relatively clear about the equality they sought. In contrast, Jackson was discussing equality generally rather than with respect to a single characteristic, and therefore he had to speak of an end to "artificial distinctions."

Abolitionists, unlike Jackson, were concerned about inequalities with respect to a single characteristic, yet they often conformed to the Jacksonian approach. That is, they opposed "artificial distinctions" and sought a right to "common advantages." For example, in 1833, the Declaration of Sentiments of the American Anti-Slavery Society proclaimed: "Every man has a right to his own body—to the products of his own labor—to the protection of law—and to the common advantages of society." Declaration of Sentiments of the American Anti-Slavery Convention (1833), in William L. Garrison, *Selections from the Writings and Speeches of . . .* 68 (Negro Universities, 1968 reprint of 1852 edition). These abolitionists said that each individual had a right to common advantages rather than all advantages because they were not seeking to have race treated differently than any other characteristic. Indeed, only because the equal rights standard was considered generally applicable could abolitionists convincingly argue that individuals should have equal rights regardless of race.

²⁴⁰ Of course, the Jacksonian requests for equal government benefits were different from many of the earlier demands for equal rights so abhorred by Federalists. By adopting Federalist language about equal protection, the Jacksonians made clear that they were not attempting to reduce all individuals to an equality of condition.

²⁴¹ Drawing upon Jackson's language, a leading Jacksonian editor, William Leggett, wrote of government that he desired that "its duties shall be strictly confined to its only legitimate ends, the equal protection of the whole community in life, person, and property." William Leggett (Evening Post, April 22, 1834), in *Democratick Editorials* 24.

protection in their disputes about religious differences, Americans had applied the idea to other differences, such as those of skill, character, and wealth, and they thereby had emphasized that it was generally applicable to the varied distinctions among individuals. For this reason, opponents of slavery could convincingly argue that individuals deserved equal protection without regard to race. Thus, by the time Congress proposed the Fourteenth Amendment to the U.S. Constitution, the idea of equal protection had long been part of American legal and political theory and clearly was applicable to the difficulties facing the nation.

In closing, we should remind ourselves that older ideas of equality may have been rather different from those to which we are accustomed. Too often, historians have examined the development of the notion of equality without attempting to distinguish among the different types of equality that earlier Americans discussed. Conflating ideas eighteenth- and nineteenth-century Americans distinguished, some historians have talked about a single notion of equality. For these historians, the different formulations about equality employed by early Americans and the different implications of those formulations are simply evidence that the idea was ill-defined and amorphous. In the words of one commentator, "[e]quality was thus a vague . . . idea in mid-nineteenth-century America. . . . Equality could mean almost anything."²⁴²

Another approach, however, is possible, and it sheds light not only on the Fourteenth Amendment but also on eighteenth-century ideas of equality and religious liberty. By tracing how late eighteenth-century Americans responded to their problems of religious diversity, this account has differentiated at least two contrasting standards of equality. Far from being the same, equal protection and equal civil rights were, in the eighteenth century, the carefully defined standards of competing religious interests.

Just as debate about religious freedom provoked Americans to pursue contrasting ideas of equality, so these notions of equality contributed much to American understandings of religious freedom. In their struggles over the legal implications of their religious differences, eighteenth-century Americans often discussed their religious freedom and their religious discord in terms of equality,

²⁴² Nelson, *Fourteenth Amendment* 21.

some seeking equal civil rights and others, equal protection. Although Americans who participated in these debates frequently disagreed as to which standard of equality could secure their freedom and harmonize their differences, they apparently concurred that the standard of equality they adopted would affect the capacity of their society to overcome and survive its divisions.