

The Catholic Lawyer

Volume 14
Number 1 *Volume 14, Winter 1968, Number 1*

Article 3

December 2016

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Recommended Citation

Kenneth L. Lasson (1968) "Religious Freedom and the Church-State Relationship in Maryland," *The Catholic Lawyer*. Vol. 14 : No. 1 , Article 3.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol14/iss1/3>

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RELIGIOUS FREEDOM AND THE CHURCH-STATE RELATIONSHIP IN MARYLAND

KENNETH L. LASSON *

MARYLAND HOLDS the unique and admirable distinction of having been the State whose early history most directly ensured, and whose citizenry was most directly affected by, the first amendment's grant of religious liberty. The Supreme Court's docket is still liberally sprinkled with petitions calling for renewed interpretation of the establishment clause, and Marylanders will soon vote upon a proposed new state constitution with a similar provision—hence, the opportuneness for tracing Maryland's contribution to the cause of toleration and to the principle of church-state separation.

The validity of an historical approach has long been acknowledged by both the textwriters and the courts. As early as 1819, the Supreme Court endorsed the wisdom of looking to the views of the Founding Fathers in interpreting the Constitution.¹ In 1872, the Court noted the importance of observing "the history of the times" surrounding the adoption of constitutional amendments.² The special propriety of an historical analysis for the first amendment has likewise been evident. The edict that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has proved to be obscure in meaning; determination of the scope of the first amendment's religion clauses requires a determination of the intent of the first Congress, as well as the intent of the citizens of the states that ratified the amendment.³ In an 1878 decision the Supreme Court observed that the word "religion" was not defined by the Constitution and added: "We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the

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¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

² *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67 (1872).

³ ANTIEAU, DOWNEY & ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* at vii (1963).

history of the times in the midst of which the provision was adopted.”⁴ Again, in a 1947 case involving religion, the Court concerned itself with the “conditions and practices which they [the Founding Fathers] fervently wished to stamp out in order to preserve liberty for themselves and for their posterity.” Mr. Justice Black concluded that, “It is not inappropriate briefly to review the background and environment of the period in which the constitutional language [establishment of religion] was fashioned and adopted.”⁵

Although the first amendment was a reflection on the situation in most of the colonies of early America, Maryland’s role was of paramount significance. Maryland stood out among all the original states as the real champion of tolerance and liberty.⁶ Similarities have been pointed out between the first colonial government of Maryland and the American plan of government under the Con-

stitution, in particular with respect to religious liberty, general suffrage, an elective branch of the legislature and an appointive upper branch, and three independent departments of government.⁷

The scope of this article will not extend beyond a sketch of the important events concerning the theme of toleration and its development in Maryland; from a background setting of religious persecution in the early 1600’s to the recent cases involving church and state. The solution to the underlying question of interpretation—whether the establishment clause requires complete separation of church and state, or whether it permits nondiscriminatory government participation—will not be attempted, although a conclusion will be offered.

The Setting in Europe— George Calvert

The early part of the seventeenth century was an age of religious persecution in both continental Europe and Great Britain. The Spanish Inquisition, aimed chiefly at the Jews, was at the height of its activity. Germany was in the midst of the Thirty Years’ War, a bloody conflict born of theocratic animosities, religious affiliations, public policies and national politics were so intertwined with the governments of state and church that they could not be separated. Austria was bound up in the same struggle. France alone was a haven for toleration, the only country in Europe where Protestants and Catholics alike enjoyed their own form of religion. But

⁴ Reynolds v. United States, 98 U.S. 145, 162 (1878).

⁵ Everson v. Board of Educ., 330 U.S. 1, 8 (1947); Horace Mann League v. Board of Pub. Works, 242 Md. 645, 220 A.2d 51, 55-60, cert. denied, 385 U.S. 97 (1966).

⁶ Truman, *Maryland and Tolerance*, 40 MD. HIST. MAG. 85, 86 (1945). Mr. Truman, in an address before the Maryland Historical Society, noted that “Truly all history is but an introduction into the future. The greatest tragedies in history have been made by people who did not read and analyze history.”

Of the two original havens for the religiously persecuted, Rhode Island and Maryland, the latter seems to have stood for a truer concept of toleration. See RILEY, MARYLAND—THE PIONEER OF RELIGIOUS LIBERTY 34 (1917); IVES, THE ARK AND THE DOVE 242 (1936); and, particularly, RUSSELL, MARYLAND: THE LAND OF SANCTUARY 279-87 (1907).

⁷ LONG, GENESIS OF THE CONSTITUTION 96.

France, too, was the scene of more than one theological skirmish, especially those involving Papal acknowledgment of the French king's selection of Church officers.⁸

Catholics in Ireland were made to suffer under the established Church of England; they were taxed for the support of the Church, and they were fined for not attending Sunday morning services of the Church. When the Irish rebelled, they were massacred—3,000 in one day on the Island Magee. Scottish Presbyterians were forced by James I, King of England, to accept his five articles of religion, and Scotland, too, was aroused to rebellion. Wales was hopelessly caught in between.⁹

And in England itself, the established Church was becoming more and more dictatorial. Roman Catholics could neither vote nor hold office. Conformity of worship was enforced by fines and imprisonment. Priests were tortured, prisons were crowded with "Papists," and people were burned at the stake for denying the Trinity.¹⁰

This was the age in which George Calvert lived, first Lord Baltimore, founder of Maryland.

Calvert has been uniformly hailed as a man of great political insight, patient understanding and moral fibre. Distinguished historians of the United States

have reserved their highest praise for the self-made statesman-philosopher. One ranked him among the wisest and most benevolent statesmen of all ages, saying that Calvert

was the first in the history of the Christian world to seek for religious security and peace by the practise of justice and not by the exercise of power; to plan the establishment of popular institutions with the environment of liberty and conscience. . . . The asylum of Papists was the spot where in a remote corner of the world, on the banks of rivers which as yet had hardly been explored, the mild forbearance of a proprietary, adopted religious freedom as the basis of the state.¹¹

Calvert was chosen Secretary of State of England by King James I, who knew of his tolerant views on religion and recognized him as "a man of great sense, but not obstinate in his sentiments, taking as great pleasure in hearing others' opinions as in delivering his own."¹²

Shortly after the death of his first wife, George Calvert converted to Catholicism, and, true to character, publicly announced his change of religion.¹³ When British persecution of Catholics became severe, the first Lord Baltimore bowed out of office. Again he affirmed his faith and claimed that the duties of office were no longer compatible with his religion. Historians frequently praise Calvert's loyalty to his faith, but seldom note the significance which his conversion to Ca-

⁸ For a discussion of Spain, France and Austria during this period, see RILEY, *supra* note 6, at 13-25.

⁹ *Id.* at 10-13.

¹⁰ For a more detailed background, see *id.* at 7-9; IVES, *supra* note 6, at 13-20; and RUSSELL, MARYLAND: THE LAND OF SANCTUARY chs. 1-2 (1907).

¹¹ 1 BANCROFT, HISTORY OF THE UNITED STATES 244.

¹² IVES, *supra* note 6, at 31-32.

¹³ *Id.* at 36.

tholicism may have had upon his philosophy of government. Although retired from public office, he was nevertheless still a king's man. He had not changed his political party, yet church and state were still clearly separated in his mind.¹⁴

Calvert's ill-fated attempts to colonize in Newfoundland¹⁵ seemed to do little more than increase his fervent desire to establish a haven for the persecuted. He was liked and respected by the King, and his request for a charter to set up a colony on the shores of the Chesapeake was granted, without too much difficulty, in 1632.¹⁶ But before the charter received its seal, the first Lord Baltimore died, never to set foot upon his promised land.

The Ark and the Dove to the Act of Toleration—1634-1650

Maryland was born as the "Free State" but it did not earn that title, unless it be true that nothing is earned except that which is suffered for. To be sure, incidents of religious friction under the Calverts, during the first fifty years of the colony, were isolated ones; but an

undercurrent of low-key animosity and tension, perhaps engendered by the still rather close control exercised by the mother country or perhaps only carried over by a hard core of the settlers, was ever-present. The flame was not to be lit until the Protestant Revolution of 1688, but the combustible elements were there. And when Establishment did take its place, there was as much intolerance and persecution in Maryland as in any of the other colonies.

But the foundation built by the Calverts, however frayed from the outside, rested on strong underpinnings and remains important and valuable in any meaningful interpretation of the first amendment.

The theory upon which Maryland was founded, that of a state whose government was truly tolerant and whose citizens enjoyed equal rights for all, did not originate with George Calvert. Indeed the idea was prevalent among many political philosophers of the era. Thomas More's *Utopia* spoke of a law made

that every man might be of what religion he pleased, and might endeavor to draw others to it by the force of argument and by amicable and modest ways, but without bitterness against those of other opinions; but that he ought to use no other force than that of persuasion, and was neither to mix it with reproaches nor violence.¹⁷

It remained for Cecil Calvert, upon the death of his father, to forge the ideal into a reality. Fortunately, the second

¹⁴ JOHNSON, THE MARYLAND ACT OF RELIGIOUS TOLERATION 5 (1949).

¹⁵ IVES, *supra* note 6, at 45-46.

¹⁶ Some writers have suggested that Calvert's first consideration in asking for the new charter was to offset the financial loss occasioned by the failure of colonization in Newfoundland, and that the wish to establish a refuge for Catholics was but secondary. See SKIRVEN, THE FIRST PARISHES OF THE PROVINCE OF MARYLAND 3 (1923); ALLEN, MARYLAND TOLERATION 18 (1855). But this theory has not been popular among other historians.

¹⁷ Quoted in ANDREWS, SEPARATION OF CHURCH AND STATE IN MARYLAND at 170 (1934).

Lord Baltimore was of much the same mold as the first. He too was determined to "provide a refuge for English Catholics, and . . . create a fair domain for himself and his posterity. . . . [He] realized that in the age of suspicion and distrust in which his venture had its inception the Catholics alone would never be permitted . . . to build a successful colony."¹⁸ Accordingly, he recognized the necessity for Protestants working hand in hand with Catholics, and to prevent discord between the factions, he sought to do away with all factions through a strict policy of religious liberty.¹⁹

Most of the early settlers of Maryland were Protestant,²⁰ and Cecil Calvert realized that only the fairest treatment of the colonists upon their arrival in the new land would keep the province in his hands.²¹ Religious tolerance was maintained vigorously,²² both Cecil and his brother Leonard (who was to become the colony's first governor while the Proprietor remained in England) went far beyond what they had to do to save their charter or preserve their rights, in order to protect the religiously oppressed.²³ This is clearly evidenced by

the oath required of the governor and other high officers.²⁴

At a considerable expense of time, effort and money, Cecil Calvert outfitted two ships, the *Ark* and the *Dove*, to carry the first settlers of Maryland to their new home. Of primary interest in discerning the motives of the Calverts is the carefully drafted letter of instructions from Cecil to Leonard, "the first declaration of religious liberty to come to America."²⁵ The first instruction reads:

His Lord required his said governor and commissioners that in their voyage to Maryland that they be very careful to preserve unity and peace amongst all the passengers on shipboard and that they suffer no scandal nor any offense to be given to any of the Protestants whereby any just complaint may hereafter be made by them in Virginia or in England and that for that end they cause all acts of the Roman Catholic religion to be done privately as may be and they instruct all the Roman Catholics to be silent upon all occasions of discourse concerning matters of religion and that the said Governor and Commissioners treat

¹⁸ Wroth, *The First Sixty Years of the Church of England in Maryland, 1632-1692*, 11 MD. HIST. MAG. 6-7.

¹⁹ INVENTORY OF THE CHURCH ARCHIVES OF MARYLAND—PROTESTANT EPISCOPAL: DIOCESE OF MARYLAND 7 (1940). See also PETRIE, CHURCH AND STATE IN EARLY MARYLAND 12 (1892); BROWNE, GEORGE AND CECILIUS CALVERT 98 (1890).

²⁰ ALLEN, *supra* note 16, at 18-19.

²¹ SKIRVEN, *supra* note 16, at 7.

²² PETRIE, *supra* note 19, at 15. See also 1 SCHARF, HISTORY OF MARYLAND 151-82 (1879).

²³ IVES, *supra* note 6, at 146.

²⁴ The oath reads:

I will not by myself or any other, directly or indirectly trouble, molest or discountenance any person professing to believe in Jesus Christ for or in respect to religion. I will make no difference of persons in conferring offices, favors or rewards for or in respect of religion, but merely as they shall be found faithful and well deserving and endowed with moral virtues and abilities; my aim shall be public unity and if any person or officer shall molest any person professing to believe in Jesus Christ, on account of his religion, I will protect the person and punish the offender. *Id.*

²⁵ *Id.* at 106. See also BROWNE, *supra* note 19, at 46; RILEY, *supra* note 6, at 45.

the Protestants with as much mildness and favor as justice will permit. And this to be observed at land as well as sea.²⁶

Although the religious tone of the early province was Roman Catholic ("Protestants were a minority in terms of influence, if not in numbers"),²⁷ nevertheless each sect tended to mind its own affairs and there was a minimum of overt ill-will. From the founding of the province in 1634 until establishment of the Anglican Church in 1692, all churches and ministers were supported by voluntary contributions.²⁸ The principle of religious toleration had not only been implied by charter²⁹ but had been also vigorously enforced by the courts. Enforcement was by edict of the Lord Proprietary, and the people showed their approval by active cooperation. "While they had enjoyed the blessing of toleration, of their own free will they had neither debated it nor voted upon it in the Assembly."³⁰ Church and state were

viewed not so much in terms of union and separation, but as two sovereignties;³¹ the instructions for self-government aboard the *Ark* and the *Dove* and in the new land itself were enforced in a spirit of complete fairness from 1634 to 1649.³²

Several religious disputes of a relatively minor nature occurred during the early years of the settlement. In 1638 William Lewis, a Catholic, was found guilty of proselytizing by force of his authority over his Protestant servants. In 1641 Thomas Gerard, also a Catholic, was charged and convicted of interfering with Protestant church services. Both Lewis and Gerard were fined 500 pounds of tobacco. And there was a prolonged dispute during the late 1630's and after between Lord Baltimore II and the Jesuit Order.³³ Thomas Copley, a Jesuit, instituted in 1637 a deliberate attempt to rid the colony of numerous "heretics" with which it was "infested," and backed a rigid program to exclude Anglicans from political office.³⁴

A few historians have pointed to an obscure ordinance enacted in 1639 as the first piece of religious tolerance legislation in Maryland and possibly in the United States. Known variously as the "Ordinance of 1639" or the "Act for Church Liberties,"³⁵ it was passed by the

²⁶ IVES, *supra* note 6, at 106. Instruction #15 required that "settlers be very careful to do justice to every man without partiality." BROWNE, *supra* note 19, at 56. The original manuscript is in the possession of the Maryland Historical Society.

²⁷ JOHNSON, *supra* note 14, at 84. One author reasons that, although the numerical majority of those who came over on the *Ark* and *Dove* were Anglicans, the principal *adventurers* were Roman Catholics. SKIRVEN, *supra* note 16, at 6.

²⁸ BROWNE, *supra* note 19, at 124.

²⁹ However, the charter *probably* requires that if churches be erected it must be according to the ecclesiastical laws of England. The Church of England was not to be prejudiced. PETRIE, *supra* note 19, at 11.

³⁰ JOHNSON, *supra* note 14, at 7.

³¹ HANLEY, *THEIR RIGHTS AND LIBERTIES* 121 (1959).

³² JOHNSON, *supra* note 14, at 6. For a decidedly anti-Catholic view of Roman Catholic enforcement, see BROWN, *EARLY RELIGIOUS HISTORY OF MARYLAND* (1876).

³³ JOHNSON, *supra* note 14, at 2.

³⁴ SMITH, *RELIGION UNDER THE BARONS OF BALTIMORE* 204-12 (1899). Mr. Smith calls Mr. Copley "Maryland's evil genius."

³⁵ ALLEN, *supra* note 16, at 42.

annual assembly to distinguish church from state. Both the church and the colonists were to have religious "rights and privileges."³⁶ There is ample evidence that the tradition which underlay the 1639 ordinance persisted, at least among Maryland Catholics, up to the time of the constitutional conventions of the 1780's.³⁷

Much has been written and a great deal said about the famous "Toleration Act of 1649," more correctly entitled "An Act Concerning Religion." It has been alternately labeled as "one of the proudest memorials of our colonial history"³⁸ and "really a most disgraceful piece of intolerance."³⁹ The divergence of opinion may be readily understood when one examines the construction and content of the Act. It contained five sections. The first provided for punishment by death and confiscation of property of any person who should deny the divine nature of the Trinity or utter reproachful words concerning it. Under the second and third sections those who blasphemed Catholics were subject to fine, whipping and imprisonment. The same punishment was decreed by the fourth clause against profaners of the Sabbath Day. But the fifth section was of an entirely different tone, providing in part:

Whereas, the enforcing of the conscience in matters of religion hath frequently

³⁶ 1 ARCHIVES OF MARYLAND 82-83 [hereinafter cited as ARCHIVES].

³⁷ HANLEY, *supra* note 31, at 123. See also HALL, THE LORDS BALTIMORE AND THE MARYLAND PALATINATE 67 (1902).

³⁸ HALL, *supra* note 37, at 66.

³⁹ SMITH, *supra* note 34, at 319.

fallen out to be of dangerous consequence in those commonwealths where it hath been practised, and for the more quiet and peaceable government of this Province and the better to preserve mutual love and amity amongst the Inhabitants thereof; Be it therefore also by the Lord Proprietary, with the advice and consent of the Assembly, ordered and enacted (except as in this present act is before declared and set forth) that no person or persons whatsoever within this Province, or the islands, ports, harbors, creeks, or havens thereunto belonging, professing to believe in Jesus Christ shall from henceforth be anyways troubled, molested, or discountenanced for, or in respect to, his or her religion nor in the free exercise thereof within this province, or the islands thereunto belonging, nor in any way compelled to the belief or exercise any other religion against his or her consent, so as they be not unfaithful to the Lord Proprietary or molest or conspire against the civil government.⁴⁰

The intolerations of the Toleration Act, with its heavy penalties for blasphemy and its requirement that one's Christianity, indeed one's religion, had to be Trinitarian, are said to have been tempered by the character of the above-quoted paragraph and the actual situation in the colonies. The necessity for a belief in Christianity discriminated against the Jews, and the order for submission to a civil government, against the Quakers; but there were few Jews in Maryland at that time and the Quakers' chief difficulty seems to have been in the oath requirements, which were relaxed in 1688

⁴⁰ 1 ARCHIVES 244.

and abolished in 1702.⁴¹ Still the law was narrow and strict, the freedom it granted more negative than positive.

The historical significance of the "Act Concerning Religion" has probably been overemphasized—it was far less liberal than the policy advocated by the Lords Baltimore ever since the *Ark* and the *Dove*.⁴² Religious freedom had been the common law of Maryland from its foundation in 1634,⁴³ as is clearly evidenced by the instructions given Leonard Calvert, the oath required of the governor, the ordinance of 1639 and the record in the courts of a strong enforcement of the principle of toleration. But the changing character and growth of Puritanism in England and the existence of a Protestant majority in the legislative assembly by 1648⁴⁴ had its effect on the young Maryland settlement. It seems safe to say that the "Act Concerning Religion" was in reality a compromise between the liberal practices of the colonists and founders prior to its passage and the intolerance of the element about to seize control during the impending interregnum of Oliver Cromwell.⁴⁵

⁴¹ PETRIE, *supra* note 19, at 37.

⁴² For a concurring view, see IVES, *supra* note 6, at 228.

⁴³ RILEY, *supra* note 6, at 49.

⁴⁴ INVENTORY OF THE CHURCH ARCHIVES OF MARYLAND, *supra* note 19, at 11. "As the political complexion of the mother country changed, the complexion of Maryland changed with it." MARNELL, *THE FIRST AMENDMENT* 139 (1964).

⁴⁵ ANDREWS, *SEPARATION OF CHURCH AND STATE IN MARYLAND* 167 (1934); BROWNE, *supra* note 19, at 137. It has been suggested that one purpose of the Act was to attract more Catholics to the colony. See GAMBRALL, *EARLY MARYLAND: CIVIL, SOCIAL, ECCLESIASTICAL* 109ff. (1893).

Cromwell and the Puritans 1651-1658

After several decades of persecution in Virginia, the Puritans were invited by Lord Baltimore II to come to Maryland, under a promise of absolute freedom of worship. At first only a small number accepted the opportunity, but when in 1649 the Virginia assembly declared that the beheading of the King was an indefensible act of treason, under penalty of death, the number of Puritans in Maryland increased to more than one thousand.

Apparently the Puritans were neither satisfied with the tolerant society into which they fled, nor content to live peacefully with those of different theological views. Reports filtered to England that the Puritans were not being fairly treated by the Maryland government. They persuaded the Crown to send over Parliamentary commissioners. Governor Stone of Maryland immediately acknowledged the new Commonwealth of England but refused to issue warrants and writs in the name of the "Keepers of the Liberty of England" instead of under Lord Baltimore. On this basis, Stone was removed from office and a provisional government established.

A unanimously Protestant assembly was installed and in 1654, the "Act Concerning Religion" was repealed and "popery" outlawed. Cromwell himself was by no means satisfied when he heard of these developments. He ruled that Cecil Calvert's charter was valid and intact, and ordered Stone to resume leadership of the colony. Stone evidently felt that he had to retake the reigns of government by force, and the Puritans were not

averse to an open conflict. The battle of the Severn was fought in March of 1655, and Stone was soundly defeated. Cromwell, too busy with affairs at home to recognize the victors' insubordination, merely ordered them to cease all persecution of Catholics and fully restore Baltimore's province to him.⁴⁶

Once again under the second Lord Baltimore, policies of toleration were re-established. At once Cecil Calvert granted immunity to all offenders in the Puritan rebellion, and permitted them to either keep their lands or leave the colony, whichever course they wished to follow. Even the right to hold office was not denied. Calvert displayed a characteristic magnanimity as a reaction to the Puritan uprising, termed by one writer "the basest act of ingratitude and intolerance in the annals of American history."⁴⁷

A Peaceful Reign 1659-1688

"History has little to record of the daily life of the colonists in times of peace and quiet."⁴⁸ When Lord Baltimore was able to administer the affairs of Maryland without hindrance, Protestants and Catholics lived together in admirable harmony, unique among the several colonies. An indentured Maryland servant, writing home to London in 1666, had this to say about his adopted colony:

Here the Roman Catholic and the Protestant Episcopal, whom the world would

⁴⁶ See RILEY, *supra* note 6, at 51-55; BROWNE, *supra* note 19, at 147-55.

⁴⁷ IVES, *supra* note 6, at 234. See generally *id.* at 233-39.

⁴⁸ *Id.* at 240.

persuade, have proclaimed open wars irrevocably against each other, contrary-wise concur in an unanimous parallel of friendship and inseparable love unto one another; all inquisition, martyrdom and banishments are not so much as named but unexpressibly abhorred by each other. . . . And I really believe this land or government of Maryland may boast that she enjoys as much quietness from the disturbance of rebellious opinions as most states or kingdoms do in the world, for here every man lives quietly and follows his labor and employment desiredly.⁴⁹

The Toleration Act was published in England, and it had its due effect on migration to the Province. Maryland now attracted men of character and wealth.⁵⁰ The colony flourished.

In 1666 and 1671, motions were put before the assembly which, respectively, would settle ministers in every county of the province and would establish a sectarian school. Neither motion passed.⁵¹

Cecil Calvert died in 1675. Like his father, he had never had the pleasure of seeing his American colony. "The administration of Maryland was marked by conciliation and humanity. To foster union, to cherish religious peace, these were the honest purposes of Lord Baltimore during his long supremacy."⁵² The outstanding achievement of Calvert's career was "the fact that he was the first man in history to establish a form of government where all religious sects were absolutely equal before the law. For this

⁴⁹ Reprinted by the Maryland Historical Society. Quoted *id.* at 240-41.

⁵⁰ SKIRVEN, *supra* note 16, at 11.

⁵¹ WERLINE, PROBLEMS OF CHURCH AND STATE IN MARYLAND 14-15 (1948).

⁵² 1 BANCROFT, *supra* note 11, at 437 (1882).

alone he is entitled to immortal fame."⁵³

Despite the noble policies espoused by the Calverts and their subordinate governors, and the glowing pictures painted by optimistic poets of the age, an undercurrent of hostility persisted. *Protection* rather than toleration was the keynote of the Maryland refuge. Catholics, Puritans and Anglicans were three parties living side by side and with equal privileges; but while they respected one another's rights, they did not admire one another's faith.⁵⁴ The seeds of Protestant dissent were evidenced by a 1676 plea for "a maintenance of a Protestant ministry."⁵⁵ Charles Calvert, the third Lord Baltimore, answered by way of a "Paper setting forth the Present State of Religion in Maryland."⁵⁶ This document firmly stated that the colonists would not want to be made to support the ministers of another religion. But there was further demand for a Protestant establishment in a "Complaint from Heaven with a Hue and crye and a petition out of Virginia and Maryland."⁵⁷ By 1676, there were three Protestants for every Catholic in the colony; the Catholics, for whom some say the colony was established, never formed the majority of its inhabitants.⁵⁸ In 1685, the wife of the sheriff of Calvert County petitioned English churchmen for help in establishing Protestantism

in Maryland,⁵⁹ and received considerable support.

King James II was forced to abdicate in 1687 and William of Orange ascended to his throne. This signalled the beginning of the Protestant Revolution.

The Protestant Revolution and its Aftermath—1689-1700

Several reasons have been advanced as to the causes of the revolution of 1689, beyond the obvious one that a growing unrest had to, sooner or later, come into the open. Because of the death of a messenger sent to proclaim the new heads of state of England, Maryland remained silent while the other colonies were pledging their allegiance to William and Mary.⁶⁰ This, combined with the absence of the Proprietor from his province and the false rumor of an impending joint uprising of Catholics and Indians, nurtured an air of disquiet which facilitated the rebellion. John Coode, who was once Catholic, once Protestant, once a clergyman and then, as an atheist, authored the rumor of conspiracy and became leader of the Protestant malcontents, forming an "Association in Arms for the Defense of the Protestant Religion and assisting the rights of King William and Queen Mary."

Catholics and any others refusing to support Coode were jailed. An assembly was called from which Catholics were excluded. Coode and his followers summarily seized power, and held it until King William appointed Sir Lionel Copley as governor in 1691. The next year the

⁵³ IVES, *supra* note 6, at 247.

⁵⁴ ALLEN, *supra* note 16, at 64.

⁵⁵ 5 ARCHIVES 130-32.

⁵⁶ 5 ARCHIVES 133-34.

⁵⁷ 5 ARCHIVES 134-49. See also PETRIE, *supra* note 19, at 37.

⁵⁸ GAMBRALL, *supra* note 45, at 108-09. See *supra* note 45.

⁵⁹ Wroth, *supra* note 18, at 23-24.

⁶⁰ IVES, *THE ARK AND THE DOVE* 253 (1936).

Assembly thanked the King and Queen "for redeeming us from the arbitrary will and pleasure of a tyranical popish government under which we have so long groaned."⁶¹ (The "groaners" but eight years earlier had passed an "Act of Appreciation" to Lord Baltimore as an acknowledgment of "his great love and affection" for them.)⁶² In 1693 the King instructed Governor Nicholson "to permit liberty of conscience to all"⁶³ but apparently this did not mean the freedom to worship as one pleased.

Establishment had taken a firm hold.⁶⁴

The Struggle to Regain Religious Liberty—1701-1775

From the moment of Establishment until the Declaration of Independence, Marylanders suffered as much if not more religious persecution and intolerance than any of the American colonists. Discrimination was not selective, but was levied against any faith other than the Church of England. However, because of the colony's early and continuing relationships with Catholics and because Catholics were probably the largest minority group in Maryland, they seemed to bear the brunt of harsh legislation. In 1699 a test oath requirement had excluded Catholics from all official government positions.⁶⁵ In 1701 and 1702 other laws of discrimination were passed in the Assembly,⁶⁶ but failed to win royal

approval and therefore became ineffective. The Act of 1702⁶⁷ finally made official the establishment of the Church of England as the Church of Maryland, a status that was to continue until the Revolution.

The period 1704 to 1709, under the administration of Governor Seymour, was especially notable for its spirit of intolerance. Catholics were no longer permitted to practice their religion, and an open bid for children to rebel against Catholic parents was made in the Act of 1704,⁶⁸ yet another statute "to prevent the growth of popery within this province." In that same year a determined legislative effort was made to discourage Catholic immigrants to Maryland by use of a system of heavy duties.⁶⁹ Thus the feeling arises that "in the land which Catholics had opened to Protestants, the Catholic inhabitant was the sole victim of Anglican intolerance."⁷⁰

Maryland was returned to the Baltimores in 1715 in the person of 16-year-old Charles Calvert, the fifth Lord Baltimore. But his father had publicly converted to the Anglican Church two years earlier and Charles, proclaiming himself Protestant, was not to follow the noble traditions of his lineage. The Assembly adopted a resolution expressive of its "deep . . . gratitude that the administra-

⁶¹ 8 ARCHIVES 315.

⁶² 7 ARCHIVES 505.

⁶³ 23 ARCHIVES 542.

⁶⁴ See generally IVES, *supra* note 60, at 248-58; 1 SCHARF, *supra* note 22, at 302-41.

⁶⁵ 25 ARCHIVES 68.

⁶⁶ 24 ARCHIVES 91ff.

⁶⁷ *Id.* at 255. See generally GAMBRALL, *supra* note 45, at 23ff; INVENTORY OF THE CHURCH ARCHIVES OF MARYLAND, *supra* note 19, at 16ff.

⁶⁸ 26 ARCHIVES 340-41.

⁶⁹ *Id.* at 289ff.

⁷⁰ 3 BANCROFT, HISTORY OF THE UNITED STATES at 32. See generally RUSSELL, MARYLAND: THE LAND OF SANCTUARY 370-88 (1907).

tion of the province had been finally put upon a wholly Protestant establishment, and expressing the hope that further toleration might not be granted to Catholics."⁷¹ And indeed it was not. Unworthy Protestant clergymen insulted Catholics regularly and subjected them to base indignities. A law was passed which deprived a Protestant widow marrying a Catholic from the custody of her children,⁷² and another act declared that any Protestant officeholder who joined the Catholic Church would forfeit his office.⁷³ In 1718, another act to prevent popery was passed, this one depriving Catholics of their franchise.⁷⁴

It must be pointed out that with the exception of those laws noted above [which were enacted under the governorship of John Hart (1715-1720)], none expressly intolerant of Catholicism was passed *after* the proprietorship was restored to the Calverts, who were too preoccupied with political quarrels to deal with religion.⁷⁵ But neither were any repealed, although the Calverts remained in control until the Revolution.

Maryland now had a state church which compelled orthodoxy under penalty of fine and imprisonment. The Blasphemy Act of 1723, as its counterpart in 1692, provided that offenders be bored through their tongues, fined 20 pounds, or imprisoned six months for a first offense; a second conviction of the same

crime resulted in being branded on the forehead with a "B" or fined 40 pounds, or imprisoned for 12 months; and a third instance was punishable by death without benefit of clergy.⁷⁶

Maryland now had a state church whose members alone were eligible to vote, hold office and practice a profession. The test oaths accomplished their purpose; to possess what we consider today basic rights of every citizen, in the eighteenth century one had to be Protestant.⁷⁷

Maryland now had a state church willing to force dissenters from the commonwealth. A law was on the books which forbade Catholics to bear arms—"a circumstance likely to discourage life on the frontier."⁷⁸ In 1729 another statute penalizing intermarriage was enacted.⁷⁹

And Maryland now had a state church which alone could hold public worship and evangelize, and which alone could perform valid marriages and burials. By 1749 Catholic worship was placed strictly on a sufferance basis, and to celebrate the Mass publicly was forbidden.⁸⁰

⁷⁶ Laws of Maryland, ch. 1, §§ 13, 16 (1623). See ANTIEAU, DOWNEY & ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 17 (1963); GAMBRALL, *supra* note 45, at 112-13.

⁷⁷ However, by 1724 Maryland Quakers were permitted to make an affirmation. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 397 (1902).

⁷⁸ ANTIEAU, DOWNEY & ROBERTS, *supra* note 76, at 18.

⁷⁹ Bacon's Laws, ch. 24, § XII (1729).

⁸⁰ COBB, *supra* note 77, at 36-77. In 1700, the Book of Common Prayers had been made standard in the English Church, and the Act of 1704 had permitted Mass to be held only within a private family setting. *Id.* at 388-89, 397.

⁷¹ RUSSELL, *supra* note 70, at 396. Charles Calvert (fifth Lord Baltimore) then became the first of his family to live in Maryland.

⁷² Bacon's Laws, ch. 39, § X (1715).

⁷³ Bacon's Laws, ch. 39, § X (1716).

⁷⁴ RUSSELL, *supra* note 70, at 400-02.

⁷⁵ *Id.* at 410; MARNELL, *supra* note 44, at 69.

The Assembly repeatedly denied incorporation rights to dissenting churches, despite the well-known difficulties of the trustee system.⁸¹

In 1746 Governor Bladin ordered a proclamation imprisoning any priest found converting Catholics.⁸² So keen was the persecution in Maryland that, six years later, the Catholic community authorized Charles Carroll, father of the signer of the Declaration of Independence, to apply for a tract of land in Louisiana.⁸³ In 1756 a double tax was levied upon Catholics for the support of the colony's militia.⁸⁴

Said the Reverend Thomas Bacon, "Religion among us seems to wear the face of the country; part moderately cultivated, the greater part wild and savage."⁸⁵

Independence to the First Amendment in Maryland—1776-1791

A leading historian of Maryland suggests that one of the major causes behind this State's participation in the American Revolution was the proprietary's intolerance toward Catholics and other dissenters.⁸⁶ This theory is undoubtedly valid. Maryland led her sister

colonies in the struggle to be free from taxes for the support of a particular religion to which the taxpayer did not belong; the struggle to be free from laws compelling dissenters to attend services of the Established Church; and the struggle for equal economic opportunities for dissenters and an end to all preferences held by members of the dominant faith.

By its Declaration of Rights (1776) Maryland became the first of the original 13 colonies to extend legal toleration to all Christian sects.⁸⁷ In short, no person was to be compelled to frequent any particular place of worship.⁸⁸ This was but a step; after almost a century of Protestant domination, change could not be overly abrupt.⁸⁹ The first constitution still empowered the legislature to "lay a general and equal tax, for the support of the Christian religion."⁹⁰ It still gave freedom only to "those professing the Christian belief"⁹¹ and all public officials had to be Christian.

Catholics were unanimously appreciative. One priest wrote, "The toleration here granted by the Bill of Rights has

of Carrollton, who spearheaded Maryland's fight for religious freedom and entry into the united Revolution. 2 SCHARF, HISTORY OF MARYLAND 125ff. (1879).

⁸⁷ WERLINE, *supra* note 51, at 196.

⁸⁸ Article XXXIII of first Maryland Constitution.

⁸⁹ See NILES, MARYLAND CONSTITUTIONAL LAW 54-56 (1915). (Articles XXXVI, XXXVII, XXXVIII).

⁹⁰ Article XXXIII.

⁹¹ *Id.* Of the first thirteen state constitutions, only two (Virginia and Rhode Island) granted full religious freedom. Maryland was one of two (the other, Delaware) to insist on Christianity and one of three (the others, New York and South Carolina) to exclude ministers from public office. COBB, *supra* note 77, at 501.

⁸¹ DIGNAN, HISTORY OF THE LEGAL INCORPORATION OF CATHOLIC CHURCH PROPERTY IN THE UNITED STATES 1784-1932, at 27-28 and 38-39 (1935).

⁸² Maryland Gazette, July 22, 1746.

⁸³ RUSSELL, *supra* note 70, at 414.

⁸⁴ 1 ARCHIVES 419 (1883).

⁸⁵ Quoted in RUSSELL, *supra* note 70, at 458.

⁸⁶ When in 1763 a tax for the support of the Established Church was revived, "a war of essays, as fierce as the war of words that preceded it," began in the press. It ultimately sparked the debate between Daniel Dulaney, the provincial secretary, and Charles Carroll

put all on the same footing and has been a great service to us." Bishop John Carroll said, "If we have the wisdom and temper to preserve [freedom of religion], America may come to exhibit a proof to the world, that general and equal toleration, by giving a free circulation to fair argument, is the most effectual method to bring all denomination of Christians to a unity of faith."⁹²

But Quakers, Dunkers and Mennonites were denied the right to appear as witnesses in capital criminal cases,⁹³ and not until 1826 would Jews be permitted to hold public office.⁹⁴ Certain influential clergymen of the day viewed requests to the legislature to enact laws aiding Christian teachers as the first steps to a return of Establishment.⁹⁵ The danger of de facto establishment was expressed strongly by Reverend Patrick Allison, the first pastor of the First Presbyterian Church in Baltimore, who stated, "All possible descriptions of Christians are equally entitled to the countenance and favour of government." The legislature could not confer on one church "the smallest preference or distinction, which was withheld from, or denied to, any of the rest."⁹⁶

But Reverend Allison was an outspoken opponent of legislation for public support-of-religion laws, which he viewed

as intended to finance the Episcopal Church alone. Although there was no general aid to religion in Maryland during the immediate post-Revolutionary period, the State did finance isolated churches and church-related schools.⁹⁷ (During the 1776-1789 period many states thought it proper to aid the cause of religion and religious education by authorizing churches to conduct lotteries; since this practice was not available to citizens, such legislative favor also constituted a form of government aid to religion and church-related education.)⁹⁸

Even Charles Carroll of Carrollton, one of the signers of the Declaration of Independence, voted in favor of a general tax to support religion.⁹⁹ At this point something should be said about the family Carroll, which in large measure took over the traditions left by the early Calverts. The Carrolls were Catholics, and as such

⁹² Quoted in ANTIEAU, DOWNEY & ROBERTS, *supra* note 76, at 58-59.

⁹³ WERLINE, *supra* note 51, at 157.

⁹⁴ ANDREWS, *HISTORY OF MARYLAND* 450 (1926).

⁹⁵ ANTIEAU, DOWNEY & ROBERTS, *supra* note 76, at 173. See MARNELL, *THE FIRST AMENDMENT* 139-41 (1964).

⁹⁶ ANTIEAU, DOWNEY & ROBERTS, *supra* note 76, at 36.

⁹⁷ *Id.* at 67-68. Thus in 1784 the State gave Washington College—an Episcopal institution—£1250 and other financial aid, and in 1788 the Legislature appropriated £742 for the building of a church in Annapolis. There is further evidence of grants to other institutions of learning which had strongly religious orientations, if not denominationally controlled. *Id.* at 68. And in 1791 the Legislature advanced £200 for a church building in St. Anne's Parish in Annapolis. *JOURNAL OF THE HOUSE*, Dec. 27, 1791. See also MARNELL, *supra* note 95, at 110. For the most recent case dealing with the church-state problem and summarizing the differing views, see *Horace Mann League v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966), in which the Court of Appeals of Maryland held that state grants to three of four local colleges were unconstitutional.

⁹⁸ MARNELL, *supra* note 95, at 74.

⁹⁹ *Id.* at 67; WERLINE, *supra* note 51, at 151.

were persecuted in England; it could well have been the family motto, "Wherever with liberty," which prompted them to come to Maryland. The first Charles Carroll arrived in the midst of Coode's rebellion (1688 ff.) and quickly became the champion of oppressed Catholics and non-conforming Protestants. His son, Charles Carroll of Doughoregan, was educated among Jesuits and spent much of his career campaigning against laws "to prevent popery." He was influential in the legislative defeat of a drastic anti-Catholic statute and violently—though unsuccessfully—opposed a bill which levied double taxation on Catholics. The passage of this bill so discouraged him that he hesitated to encourage his son—Charles Carroll of Carrollton, then being educated in France—to come home to Maryland. But the son was as high spirited as the father used to be. He chose for himself, and returned to Maryland at the dawn of the American Revolution.¹⁰⁰

At first, the intention of Carroll of Carrollton was to avoid politics, but events of the day quickly forced him into the arena. Less than six weeks after his arrival at Annapolis, the Stamp Act was passed by Parliament. Carroll recommended and spearheaded a boycott of British goods and when Daniel Dulaney, a Tory sympathizer, attacked him on the basis of his religion, the young statesman emerged with an overwhelmingly popular victory. His magnanimous reply to Dulaney, "we [Catholics] remember yet

¹⁰⁰ For short but relevant biographies, see IVES, *supra* note 60, at 260-96.

we forgive" won public sentiment for religious as well as civil liberty. Under Carroll's leadership, the Provincial Convention of 1775 extended the franchise to all free men having an estate of 40 pounds, without any regard to religious affiliation. This marked the first time since the Catholic Lords Baltimore that both Protestant and Catholic could go to the polls together. Some believe Carroll to be the first American patriot to have expressed himself in favor of independence, and to have had absolute faith in the ultimate freedom of the colonies.¹⁰¹

On the eve of the Revolution, Charles Carroll of Carrollton had stated, "I am as averse to having religion crammed down my throat as to a proclamation."¹⁰² In a mission to win over French Canadians to the American cause, he promised:

that we hold sacred the rights of conscience and may promise to the whole people . . . the free and undisturbed exercise of their religion; . . . that all . . . Christians be equally entitled to hold offices and enjoy civil privileges and . . . be totally exempt from the payment of any tithes or taxes for the support of any religion.¹⁰³

As much if not more a champion of tolerance and liberty was Carroll of Carrollton's close friend and cousin, Archbishop John Carroll, together with whom he had studied in Europe and won over Canada.¹⁰⁴ It was John Carroll who laid

¹⁰¹ *Id.* at 300-16.

¹⁰² NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789*, at 430 (1924).

¹⁰³ IVES, *supra* note 60, at 324-25.

¹⁰⁴ 3 SHEA, *HISTORY OF THE CATHOLIC CHURCH IN AMERICA* 421 (1886).

the foundations of religious freedom and equality in the principles that gave birth to the new republic, who wrote "the strongest appeal for recognition of the spirit of religious liberty that was made in his day."¹⁰⁵ He frequently stressed that there should be no preference to any one sect and that all religions should be equal before the law.¹⁰⁶ Americans during the Revolution, wrote John Carroll, had "associated into one great national Union, under the express condition of not being shackled by religious tests."¹⁰⁷

Daniel Carroll, elder brother of John, was elected to the Constitutional Convention in 1787, fought for ratification of the first Constitution, and made the strongest recorded plea for the adoption of the first amendment.¹⁰⁸ The combined efforts of Charles Carroll of Carrollton, Bishop John Carroll, and Daniel Carroll, unquestionably in the spirit and under the influence of their antecedents, contributed more than any other single factor to the provisions for religious liberty in the United States Constitution. "Largely through their efforts the spirit of Old Maryland became the spirit of New America."¹⁰⁹

During the course of debate on the present Bill of Rights, the First Congress attempted to satisfy the demands of the

state ratifying conventions for alteration of the Constitution they had accepted. The senators and representatives were undoubtedly responsive to opinions prevailing in their states, and the delegates from Maryland of course were no exceptions. Some of the opposition to Maryland's becoming the seventh to ratify the Constitution emanated from the failure to adopt a bill of rights. The amendments submitted by William Paca to the ratifying convention contained one guaranteeing religious liberty to all and opposing national establishment, but the majority was satisfied to leave such protection to the individual states.¹¹⁰ Although the convention adjourned without agreeing to the proposed amendment, a large number of delegates endorsed the policy "that there be no National Religion established by law; but that all persons be equally entitled to protection in their religious liberty."¹¹¹

When the proposed measure was finally introduced before the First Congress, Daniel Carroll, supported by James Madison, led the plea for its adoption.¹¹² Bishop John Carroll was also an eloquent and respected advocate. He wrote:

The constitutions of some of our states continue still to entrench on the sacred

¹⁰⁵ IVES, *supra* note 60, at 389. See *Gazette of the United States*, June 10, 1789.

¹⁰⁶ BRENT, *BIOGRAPHICAL SKETCH OF THE MOST REVEREND JOHN CARROLL* 142 (1843).

¹⁰⁷ ANTIEAU, DOWNEY & ROBERTS, *supra* note 76, at 45.

¹⁰⁸ IVES, *supra* note 60, at 372, 381, 394.

¹⁰⁹ *Id.* at 403; see also HANLEY, *THEIR RIGHTS AND LIBERTIES* 117ff. (1959).

¹¹⁰ WERLINE, *PROBLEMS OF CHURCH AND STATE IN MARYLAND* 203 (1948).

¹¹¹ 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 553 (Elliot ed. 1859). See also ANTIEAU, DOWNEY & ROBERTS, *supra* note 76, at 132.

¹¹² The original phraseology was: "No religion shall be established by law nor shall the equal rights of conscience be infringed." IVES, *THE ARK AND THE DOVE* 393 (1936).

rights of conscience and men who have bled and opened their purses as freely in the cause of liberty and independence as any other citizens are most unjustly excluded from the advantages which they contributed to establish. But if bigotry and narrow prejudices have hitherto prevented the cure of these evils be it the duty of every lover of peace and justice to extend no further.¹¹³

On September 25, 1789, the First Amendment to the United States Constitution was accepted by Congress, and on December 15, 1791, it went into effect. To be sure, this was but a partial step on the path to full equality. The tenth amendment reserved non-delegated powers to the states and the people; the states had some distance to travel. In Maryland, it would not be until 1798 that Quakers, Mennonites and other conscientious objectors to taking oaths be constitutionally permitted to make an affirmation instead;¹¹⁴ until 1810 that the legislature be forbidden to lay a tax for the support of religion;¹¹⁵ until 1819 that harsh blasphemy laws, carrying penalties of death and confiscation of property, be repealed;¹¹⁶ until 1826 that Unitarians and Jews receive full political rights;¹¹⁷ nor until the mid-nineteenth century that non-Christian sects could claim full religious liberty under the State constitution.¹¹⁸ But the enduring foundation had

been laid. At last, after more than a century and a half of struggle for a principle, did the policy so vigorously espoused by the Calverts, the Carrolls and their constituencies become firmly embedded in the law of the land—that

Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.

Subsequent Maryland Constitutions 1851/1864/1867

There were four articles in the first (1776) Maryland Constitution that pertained to the freedom of religion and these four provisions, though modified through the years, are still present in Maryland law. They are the current Articles 36, 37, 38 and 39 of the Declaration of Rights.

[Although the preamble to the constitution contains a reference to God, this has no legal force “except so far as it recognizes the existence of God and thereby implies that the government is a Christian, or at least a deistic government.”¹¹⁹ The Supreme Court has constitutionalized that implication.¹²⁰ See APPENDICES — I, VI (note 15)].

[Also, the present section 11 of article III, in the constitution proper, which prevents clergymen of any denomination from being senators or delegates, would not seem to offend the First Amendment to the United States Constitution and

¹¹³ *Id.* at 391, 400. See also *supra* note 105.

¹¹⁴ 3 THORPE, THE FEDERAL AND STATE CONSTITUTIONS 1702 (1909).

¹¹⁵ ANTIEAU, DOWNEY & ROBERTS, *supra* note 76, at 147.

¹¹⁶ *Id.* at 78-79, 185.

¹¹⁷ MARNELL, *supra* note 95, at 67.

¹¹⁸ WERLINE, *supra* note 110, at 208.

¹¹⁹ NILES, *supra* note 89 at 12.

¹²⁰ See, e.g., *Zorach v. Clauson*, 343 U.S. 306 (1952), and note 157 and accompanying text, *infra*.

hence will not be dealt with at length here. For the arguments pro and con, see P. PEARLMAN, *DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867*, 258-63 (1923). The provision (which in 1776 was article XXXVII of the constitution proper; 1851, article III, section 11; 1864, non-existent; 1867, article III, section 11) has never been tested in a Maryland court.]

Article 36

Article 36 of the present Declaration of Rights has undergone an interesting evolution. In 1776 it provided for a guarantee of religious liberty to "all persons, professing the Christian religion." Not until 1851, when Maryland's second constitution was drafted, were the words "professing the Christian religion" deleted.

The original article 36 (then XXXIII) also enabled the legislature to "lay a general and equal tax, for the support of the Christian religion . . ." (*cf.* the pre-1776 enforced contribution to the Church of England). In 1810 any taxation "for the support of any religion" was made unlawful by the General Assembly,¹²¹ and the taxation provisions disappeared in the 1851 Constitution.

But the 1851 version did add the requirement that witnesses and jurors believe "in the existence of God" or otherwise be disqualified, and this clause has remained in existence to the present day. That the test for jurors, at least, violates the Federal Constitution, has

been recently decided.¹²² [*See generally* APPENDICES — II, VI (notes 3, 4, 10, 14)].

Article 37

Article 37 (in 1776, XXXV) originally provided that public office holders could be subjected to no oath other than that prescribed by the legislature, besides a declaration of belief in Christianity. This clearly discriminated against members of the Jewish faith—but it was a Scotch Presbyterian who led the dramatic, half-century fight to gain full equality for all non-Christians seeking state office.

Thomas Kennedy was a staunch advocate of religious liberty and equality. In 1817 he was elected a delegate to the General Assembly and headed a committee (created as the result of a resolution made by him) to place Jewish citizens on a footing equal to Christians. In two weeks Kennedy's committee submitted a proposal for an act that "no religious test, declaration or subscription of opinion as to religion, shall be required from any person of the sect called Jews, as a qualification to hold or exercise any office or employment of profit or trust in this state." The bill was twice defeated by a more than 2-1 majority. Kennedy was attacked as "an enemy of Christianity," and called "one half Jew and the other half not a Christian." When he came up for re-election, his bill was the major issue to the opposition's campaign. Benjamin Galloway, running on a so-called

¹²¹ Act of 1809, ch. 167. NILES, *supra* note 89, at 379. Only one serious effort to enforce a tax was made—and defeated—in 1785. NEVINS, *supra* note 102, at 430-31.

¹²² *Schowgurow v. Maryland*, 240 Md. 121, 213 A.2d 475 (1965). The opening clause to article 36 is apparently no longer tenable under *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Levitsky v. Levitsky*, 231 Md. 388, 397, 190 A.2d 621, 625 (1963).

"Christian ticket" and openly disclaiming the support of "Jews, Deists, Mohammedans, or Unitarians," won the election. But Kennedy persisted, ran as an independent candidate in the next year's election (1824), and won. His proposal for Jewish equality became something of a national issue, with the press strongly aligned behind Kennedy. A bill similar to the original proposal was finally enacted in 1825.¹²³

In 1851 the present article 37 (then, article 34) added the clause:

[A]nd if the party shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments.

The 1864 Constitution deleted the language, "if the party shall profess to be a Jew," and the 1867 Constitution erased any distinction between Christian and Jew, the requirement now being only a "belief in the existence of God." The 1867 Constitution also was the first in Maryland to deny the legislature the power to prescribe other tests; it was the "Reconstruction Convention" of 1867 which voiced solid opposition to the so-called "loyalty oaths."¹²⁴

Article 37, however, was still not fully

in line with the third clause of Article VI of the Federal Constitution (prohibiting any religious tests for government officers). Thus, in 1961, in *Torcaso v. Watkins*,¹²⁵ the Supreme Court found Maryland's article 37 to be unconstitutional. [See APPENDICES — III, VI (notes 9, 12)].

Article 38

Once called the second most important provision of the Declaration of Rights,¹²⁶ article 38 has engendered a great deal of litigation. The article is analogous to the old British mortmain statutes, designed to prevent the Church from accumulating property in perpetuity.¹²⁷ Every transfer of property to a clergyman or religious institution was voided unless expressly sanctioned by the General Assembly. With the exception of several minor changes in language, article 38 (in 1776, article XXXIV; in 1851, article 35) remained intact until 1948, when it was virtually repealed. After having been twice rejected by the voters (in 1942¹²⁸ and 1944¹²⁹), a proviso clause was inserted in 1948 to negate the requirement of legislative sanction, thereby making

¹²³ STOKES & PFEFFER, CHURCH AND STATE IN THE UNITED STATES 245-48 (1964); E. ALTFELD, THE JEWS' STRUGGLE FOR RELIGIOUS AND CIVIL LIBERTY IN MARYLAND (1924); NILES, *supra* note 89, at 383.

¹²⁴ NILES, *supra* note 89, at 55. See also *Brice v. Davidson*, 91 Md. 681, 48 A. 52 (1900). The legislature has prescribed as a form of oath: "In the presence of Almighty God, I do solemnly promise or declare. . . ." CODE OF MD., art. 1, § 10.

¹²⁵ 367 U.S. 488 (1961).

¹²⁶ NILES, *supra* note 89, at 56-57. Only one other state, Mississippi, has a similar constitutional provision. (MISS. CONST. art. XIV, § 9).

¹²⁷ *Vansant v. Roberts*, 3 Md. 119, 128 (1852). Foreign religious corporations are not included within the scope of this article. A gift to a minister as an individual (and not as a cleric) does not violate the article. *Church Extension v. Smith*, 56 Md. 362, 391 (1881). Any deed of under five acres does not need the legislature's sanction. *Zion Church v. Hilken*, 84 Md. 170, 35 A. 9 (1896).

¹²⁸ Laws of 1941, ch. 716.

¹²⁹ Laws of 1943, ch. 320.

gifts to the church valid. [See APPENDICES — IV, VI (note 7)].

Article 39

Article 39 prescribes the manner in which oaths are to be administered. Its language in the present (1867) constitution is identical to the two immediate predecessors, the constitutions of 1864 and 1851 (articles 36). The only difference between these and the corresponding provision of the 1776 Declaration of Rights (article XXXVI) is that the latter contained additional clauses which, first, allowed certain denominations such as the Quakers to make a "solemn affirmation" in place of the oath and, second, excluded the same sects from acting as witnesses in cases involving capital offenses. Various acts of 1795 and 1798 amended the constitution to remove these disabilities.¹³⁰ [See APPENDICES — V, VI (note 13)].

While the validity of article 39 under the Federal Constitution has never been specifically tested, the recent Supreme Court cases (*infra*) yield a strong implication of that provision's unconstitutionality.

The Recent Maryland Cases

A series of cases originating in Maryland and involving the interpretation of the religious liberty clauses in both the Federal and State Constitutions have been decided in recent years by the Court of Appeals of Maryland and by the Supreme Court of the United States. A brief catalogue of the more important holdings is presented here. No attempt will be made at a comprehensive treatment of the school prayer and bussing cases.

¹³⁰ NILES, *supra* note 89, at 375.

In *McGowan v. Maryland*,¹³¹ the State's Sunday closing laws,¹³² which generally prohibit the sale on Sunday of all merchandise other than food, medicine, gasoline and other necessities, were attacked as violations of the prohibition against establishment of religion, as infringements upon religious liberty, and as denials of equal protection of the laws. The Supreme Court affirmed the Maryland Court of Appeals in overruling all three of the above-noted contentions. The Sunday laws were held to be, not religious, but social welfare legislation, designed to set aside a day for rest, relaxation, and family togetherness—although the original purpose of the statutes was admittedly in preference of one religion, said the Court, such is no longer the case. Moreover, the Court would not concern itself with questioning the wisdom of the legislature in enacting seemingly arbitrary laws, so long as their primary purpose was social welfare. (On the other hand, if the object was to use the state's coercive power to aid religion, the establishment clause would be violated.)

Torcaso involved a notary public, duly appointed by the governor, who was denied his commission because he refused to declare a "belief in the existence of God," as required by Article 37 of the Maryland Declaration of Rights, *supra*. The Court of Appeals upheld the requirement:

[W]e find it difficult to believe that the Supreme Court will hold that a declara-

¹³¹ 366 U.S. 420 (1961); see also STOKES & PFEFFER, *supra* note 123, at 137-41.

¹³² MD. ANN. CODE art. 27, § 521.

tion of belief in the existence of God, required by Article 37 . . . is discriminatory and invalid. . . . As Mr. Justice Douglas, speaking for a majority of the Court in *Zorach v. Clauson*, 343 U.S. 306, 313, said: 'We are a religious people whose institutions presuppose a Supreme Being.'¹³³

However great the disbelief of the Court of Appeals, the Supreme Court did find the test to be an unconstitutional violation of the first and fourteenth amendments, and reversed.¹³⁴ Said the high Court:

Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept.¹³⁵

Torcaso's denial of the constitutionality of the requirement that an office-seeker declare his belief in a deity would likewise seem to invalidate article 39's use of the language, "attestation of the Divine Being."

The issue before the courts in *Murray v. Curlett*¹³⁶ was whether daily bible reading pursuant to a rule of Baltimore City's Board of School Commissioners

violated the establishment and free exercise clauses of the first amendment. The suit was brought by an avowed atheist. Maryland's Court of Appeals, in reversing the trial court, found that bible reading did not violate the Constitution, in view of the fact that the amount of time and public funds expended was negligible, and that any student who did not wish to participate could be excused upon presentation of a written note from his parents.

The Supreme Court again disagreed, and reversed:

The conclusion follows that . . . the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the . . . petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. . . . Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'¹³⁷

At the same time, however, the Court said that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who

¹³³ *Torcaso v. Watkins*, 223 Md. 49, 58, 162 A.2d 438, 443 (1960).

¹³⁴ *Torcaso v. Watkins*, 367 U.S. 488 (1961).

¹³⁵ *Id.* at 494. See also KURLAND, RELIGION AND THE LAW 107-08 (1961).

¹³⁶ 228 Md. 239, 179 A.2d 698 (1962).

¹³⁷ *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (decided together with *Murray v. Curlett*).

believe in no religion over those who do believe.'"¹³⁸

In 1964 the General Assembly passed a law allowing for a period of silent meditation in the opening exercises on each morning of a school day.¹³⁹ The statute was immediately challenged, but before the case could be decided the complainant (Mrs. Murray) left the state. The cause remains on the docket of the United States District Court in Baltimore. An independent survey has indicated that more than one Maryland county has ignored the *Murray v. Curlett* decision, and permitted school prayer.¹⁴⁰

In *Schowgurow v. Maryland*,¹⁴¹ a Buddhist convicted of homicide attacked the requirement in Article 36 of the Declaration of Rights that jurors profess a belief in the existence of God. Largely on the basis of *Torcaso*, the Court of Appeals reversed:

If, as was held by the Supreme Court in *Torcaso*, a notary public cannot constitutionally be required to demonstrate his belief in God as a condition to taking office, it follows inevitably that the requirement is invalid as to grand and petit jurors, whose responsibilities to the public and to the persons with whom they deal are far greater.¹⁴²

Thus, the court held unconstitutional the article 36 exclusion from jury duty of atheists, agnostics and such religious groups (e.g., Buddhists) whose members do not believe in a Supreme Being.

Mrs. Murray again challenged Maryland's law when she brought suit to attack state tax exemptions for religious organizations.¹⁴³ It was urged that the exemption violated, among other provisions, Article 36 of the Declaration of Rights and the first amendment. The Court of Appeals upheld the validity of the exemption, pointing out that such a policy toward property dedicated to religious uses has long been regarded as reasonable and for a public purpose (and hence valid). The exemption was uniform and nondiscriminatory (property of atheistic organizations is also immune from the tax, the court said) and there were sufficient secular justifications for its constitutionality. Certiorari was denied by the Supreme Court,¹⁴⁴ but the exemption continues to be challenged by several cases pending in the Supreme Court.

The most recent case to struggle with the church-state relationship problem was that of *Horace Mann League v. Board of Public Works of Maryland*.¹⁴⁵ The State enacted statutes providing outright matching grants for the construction of build-

¹³⁸ *Id.* A constitutional amendment to permit school prayer would take the policy determination from the purview of the Supreme Court. Such an amendment has been proposed. See Morning Sun, August 10, 1966, at 1.

¹³⁹ MD. ANN. CODE art. 77, § 98A (1965).

¹⁴⁰ Survey conducted by Robert Dugan, third-year student at the University of Maryland School of Law, as part of a project for a seminar on Constitutional Law.

¹⁴¹ 240 Md. 121, 213 A.2d 475 (1965). See Note, 17 S.C. L. REV. 778 (1965).

¹⁴² 240 Md. at . . . , 213 A.2d at 479.

¹⁴³ *Murray v. Comptroller*, 241 Md. 383, 216 A.2d 897 (1966).

¹⁴⁴ 385 U.S. 816 (1966). See Kauper, *Tax Exemptions for Religious Activities*, THE WALL BETWEEN CHURCH AND STATE 115 (D. Oaks ed. 1963). See also M. HOWE, THE GARDEN AND THE WILDERNESS 152 (1965).

¹⁴⁵ 245 Md. 645, 220 A.2d 51, cert. denied, 385 U.S. 97 (1966).

ings to four private colleges (Hood, Western Maryland, Notre Dame and St. Joseph). The grants were attacked principally on the grounds that they violated the First Amendment of the Federal Constitution and Article 36 of the Maryland Declaration of Rights.

The lower court dismissed the complaint. The Court of Appeals of Maryland, in a 4-3 decision, found that the grant to Hood College was valid but that those to the remaining three institutions were unconstitutional. Each case, said the Court, must be decided on its own facts. Every religious observance by a college does not sectarianize it; "the question of sectarianization depends upon a consideration of the observances, themselves, and the mode, zeal, and frequency with which they are made."¹⁴⁶ If the institutions are in fact sectarian, "no tax, in any amount, large or small, can be levied to support [the institutions], whatever they may be called or whatever form they may adopt to teach or practice religions."¹⁴⁷ The Court found that, although Hood College was affiliated with a Protestant sect, that sect contributed only 2.2 percent of the school's operating budget, and there were no sectarian requirements for teachers or students; upon these facts the college was not sectarian in the legal sense under the first amendment. The other schools, however, were denominationally oriented; their governing boards were controlled by religious orders, and their faculties were either committed to a Christian philosophy or were predominantly of one sect. Grants

to these colleges were held unconstitutional.

On the other hand, the Court found that none of the grants violated Article 36 of the Maryland Declaration of Rights. ("[N]or ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry. . ."). Cited were a large number of cases to the effect that "grants to educational institutions at a level where the state has not attempted to provide universal educational facilities for its citizens have never, in Maryland, been held to be impermissible under article 36, even though the institutions may be under the control of a religious order."¹⁴⁸

In a vigorous dissent, Judge Hammond and two other members of the Court of Appeals argued that the grants of state aid served a sufficiently secular purpose to withdraw them from first amendment prohibition. Both sides appealed the majority decision to the Supreme Court, which denied certiorari.¹⁴⁹

A Conclusion, *Gratis*

The question most directly involved in interpreting the establishment clause of the first amendment is whether the Founding Fathers intended a complete separation of church and state or would, rather, permit government participation if

¹⁴⁶ *Id.* at 65.

¹⁴⁷ *Id.* at 64.

¹⁴⁸ *Id.* at 76.

¹⁴⁹ *Horace Mann League v. Board of Pub. Works*, 385 U.S. 97 (1966). For other recent Maryland cases touching upon the freedom of religion, see *Levitsky v. Levitsky*, 231 Md. 388, 190 A.2d 621 (1963); *Craig v. State*, 220 Md. 590, 155 A.2d 684 (1959).

such were non-discriminatory. A comprehensive analysis will not be attempted here but, on the basis of the historical sketch offered above, some arguments will be suggested.¹⁵⁰

"It is revealing to note that in every state constitution in force between 1776 and 1789 where 'establishment' was mentioned, it was equated or used in conjunction with 'preference'."¹⁵¹ A logical inference might be drawn that Congress did not intend to forbid non-preferential treatment of religion. Or perhaps the major concern revolved around the protection of "free exercise" rather than complete denial of government aid.¹⁵² Undoubtedly, some of the Founders, in particular Madison and Thomas Jefferson, favored full severance of church and state.¹⁵³ But that feeling was hardly unanimous. Charles Carrollton had voted in favor of a state tax to support religion.¹⁵⁴ Daniel Carroll had endorsed a

1784 act of the Maryland General Assembly, "earnestly desiring to promote every pious and charitable design for the relief and assistance of the widowless and fatherless, and especially those of the respectable and useful body of clergy of all denominations."¹⁵⁵ An 1811 issue of the *Baltimore Gazette* asked:

What was the meaning of the Constitution in providing against a religious establishment? Does any man but Mr. Madison imagine it was to prevent the District of Columbia from engaging legal church regulations, and from exercising corporate rights in their congregations? Does the Legislature of Maryland believe it is creating a religious establishment when it is occupied in granting charters to the churches of the different sects of Christians as often as they apply? Where all are equally protected and accommodated, where each sect . . . has its own establishment . . . the best security exists against 'a religious establishment' that is to say, one preeminent establishment which is preferred and set up over the rest against which alone the constitutional safeguard was created.¹⁵⁶

Recent courts seem to have taken similar views. Said Mr. Justice Douglas, in an often quoted passage from *Zorach v. Clauson*:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and lets

¹⁵⁰ For more complete treatments, see KEMPNER, *THE SUPREME COURT AND THE ESTABLISHMENT AND FREE EXERCISE OF RELIGION* 87-99 (1958), and STOKES & PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* (1964).

¹⁵¹ ANTIEAU, DOWNEY & ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* 132 (1963).

¹⁵² *Id.* at 137-38.

¹⁵³ See TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 13ff. (1948), and De Marr, *The Regulation of Religious Corporations in the State of Maryland* 72 (Md. Hist. Soc.).

Madison himself indicated that whenever it was necessary to go beyond the words of the Constitution to ascertain its meaning, the Congress and courts should look for it in the State Conventions, which accepted and ratified the Constitution. ANTIEAU, DOWNEY & ROBERTS, *supra* note 151, at ix.

¹⁵⁴ WERLINE, *supra* note 110, at 151.

¹⁵⁵ GEIGER, DANIEL CARROLL, *FRAMER OF THE CONSTITUTION* 83 (1943).

¹⁵⁶ *Baltimore Federal Republican & Commercial Gazette*, February 26, 1811 (editorial).

each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instructions or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service of our spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.¹⁵⁷

A 1956 Tennessee case pointed out that the doctrine of separation of church and state "should not be tortured into a meaning that was never intended by the Founders of this Republic."¹⁵⁸ And the highest court of Maryland recently took an expressly favorable view of bible reading in the public schools, claiming that "neither the 1st nor the 14th amendment was intended to stifle all rapport between religion and government."¹⁵⁹ The Mary-

¹⁵⁷ 343 U.S. 306, 313 (1952). See *supra* note 133.

¹⁵⁸ *Carden v. Bland*, 288 S.W.2d 718, 724 (Tenn. 1956).

¹⁵⁹ *Murray v. Curlett*, 228 Md. 239, 179 A.2d 698, 701 (1962), *rev'd sub nom*, *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). See BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* 99ff. (1965). Even the dissenters in the *Murray* case did so because they felt that the required saying of the Lord's Prayer and Bible reading plainly favored "one religion and did so against other religions and against non-believers in any religion." 179 A.2d 698, 708. They still do not deny that the first amendment could involve nondiscriminatory laws without being a violation of the freedom of religion; they still do not insist upon strict separation of church and state.

land Court was reversed by the Supreme Court,¹⁶⁰ but Justice Clark, speaking for the majority, was careful to warn against a "religion of secularism."¹⁶¹ The state may not advance religion, but neither may it inhibit it.

Mr. Justice Brennan, concurring in *Murray v. Curlett*, tried to show that certain practices are to be considered constitutional: among them, churches and chaplains at military bases; "In God We Trust" on currency; tax exemptions for churches; draft exemptions for seminary students; and "one nation, under God" in the pledge of allegiance.¹⁶² (But, again, other members of the Court have voiced opposing statements.¹⁶³) That nothing more than a firmly bipartisan relationship of state to church was intended by the Founding Fathers, when viewed in the light of history, seems a well-grounded conclusion. As one commentator has pointed out:

The separation of government from religion represents a definite departure from the intent of the Founding Fathers, who never intended to purge public life in America entirely of religion. They never intended to establish irreligion, nor was that the purpose of the First Amendment. Those who founded our nation did not hesitate to declare their dependence upon God, to mention Him in public utterance,

See also *Horace Mann League v. Tawes* (Daily Record, April 8, 1965), appellate court decision cited *supra* note 97.

¹⁶⁰ *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

¹⁶¹ See *supra* note 138 and accompanying text.

¹⁶² 374 U.S. 203, 295-304 (1963). See also Kauper, *supra* note 144, at 115.

¹⁶³ See Note, 17 S.C.L. REV. 778, 780 (1965).

to open Congress with prayer, to set up chaplaincies, and to ask the President to call a day of prayer and thanksgiving to God. They did not feel that this was inconsistent with the principle of 'a free Church in a free State.' As a matter of fact, they knew that the very concept of religious and civil liberty was founded upon Christian principles and teachings.¹⁶⁴

On the other hand, the argument that the Framers intended that an inviolable wall of separation be erected between church and state is not without merit.¹⁶⁵ Of course, since the Constitution is a living instrument and must be interpreted in the light of contemporary standards and policies, it may be (and has been) validly argued that the intent of the Framers is not necessarily relevant. Under this view advocates of strict separation voice strong arguments and convincing logic.¹⁶⁶

The only real conclusion reached here is that, as of now, the questions have not been conclusively decided; and the

only real argument offered here is that, when the time comes for decision, government's nondiscriminatory participation in matters of religion is an entirely defensible policy.

Maryland's Proposed New Constitution

The church-state problem is a difficult one, and there are no easy solutions to the continuing questions such as whether the federal government can give financial aid, directly or indirectly, to parochial education. "Anyone suggesting that the answer, as a matter of constitutional law, is clear one way or the other is either deluding or deluded."¹⁶⁷

However, the path to follow in re-considering the pertinent provisions of Maryland's century-old constitution is more clear-cut, if not patently obvious.

Article 36 of the Declaration of Rights has in large measure been declared unconstitutional by *Torcaso* and *Schowgurov*. *Torcaso* has expressly voided article 37. Article 38 is self-cancelling, in that every post-1948 transfer of property to a religious organization or representative is valid. Article 39, while never specifically challenged in the courts, is not likely to withstand the wind of *Torcaso* as long as it refers to a Divine Being.

Thus, the only four provisions in the Maryland Declaration of Rights which directly relate to church and state are either inoperable (article 38) or violative

¹⁶⁴ J. KIK, CHURCH & STATE 130 (1963).

[A] regard for the separation principle should not obscure the fundamental consideration that there is a necessary interdependence of religion and government, that religion and the churches have a role to play with respect to the public order and the common life, that government has a role to perform in the protection and advancement of religious liberty, and that government and the churches share some overlapping concerns and functions. KAUPER, RELIGION AND THE CONSTITUTION 118 (1964). See also KATZ, RELIGION AND AMERICAN CONSTITUTIONS 30 (1963).

¹⁶⁵ See *supra* note 163 and accompanying text.

¹⁶⁶ See, e.g., W. DOUGLAS, THE BIBLE AND THE SCHOOLS (1966), and ANTIEAU, DOWNEY & ROBERTS, *supra* note 151, at 132-42.

¹⁶⁷ P. KURLAND, RELIGION AND THE LAW 111 (1961).

of the Federal Constitution. Since problems surrounding freedom of religion are handled by the Supreme Court's interpretations of the first amendment, which in turn are applicable to the states by way of the fourteenth amendment, a new Maryland constitution cannot attempt to limit the scope of the establishment or free exercise clauses. To do so would be only to anticipate the Supreme Court, and success in that venture, especially in view of the still developing clarification of policy by the Court, is highly improbable.

On the other end of the spectrum, a broadening or more absolute statement of religious liberty would not offend the first amendment. It is difficult, however, to formulate a more concise and unfettered declaration than that found in the United States Constitution. The National Municipal League, after exhaustive scholarly research and dialogue, emerged with identical language—"no law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁶⁸ Although all states guarantee the freedom of religion, with forty-seven providing against the establishment of religion,¹⁶⁹ few constitutions protect citizens with such simplicity.¹⁷⁰ The added advantage of using the first amendment language, of course, is that the inter-

pretive policy rules handed down by the Supreme Court will automatically apply to the state—no further analysis of variant state constitutional provisions on religious liberty would be necessary.

In the end, adoption of first amendment language would be an appropriate reflection of the valuable contributions Maryland has made to the law of the land, and the effect her past struggles have had upon the declaration of religious freedom. Because, for that basic liberty America must remain largely indebted to Maryland, where "at no time in her history did the 'temperament which persecutes' . . . find an abiding place."¹⁷¹

* * *

APPENDIX — I
MARYLAND CONSTITUTIONS —
The Preamble

The Present Constitution

We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare:

1867 Constitution

Basically the same as the present, with minor differences in capitalization.

1864 Constitution

Basically the same as the present, with minor differences in capitalization.

¹⁶⁸ MODEL STATE CONSTITUTION, NATIONAL MUNICIPAL LEAGUE § 1.01 (1963).

¹⁶⁹ *Id.* at 29.

¹⁷⁰ SALIENT ISSUES OF CONSTITUTIONAL REVISION, NATIONAL MUNICIPAL LEAGUE PUBLICATION 12 (J. Wheeler ed. 1961). See generally Paulsen, *State Constitutions, State Courts, and First Amendment Freedoms*, 4 VAND. L. REV. 620, 635-42 (1951).

¹⁷¹ HALL, THE LORDS BALTIMORE AND THE MARYLAND PALATINATE 98 (1902).

1851 Constitution

Basically the same as the present, with minor differences in capitalization.

1776 Constitution

The parliament of Great Britain, by a declaratory act, having assumed a right to make laws to bind the Colonies in all cases whatsoever, and, in pursuance of such claim, endeavoured by force of arms, to subjugate the United Colonies to an unconditional submission to their will and power, and having at length constrained them to declare themselves independent States, and to assume government under the authority of the people;—Therefore, We, the Delegates of Maryland, in free and full Convention assembled, taking into our most serious consideration the best means of establishing a good Constitution in this State, for the sure foundation and more permanent security thereof, Declare.

SOURCE: NILES, MARYLAND CONSTITUTIONAL LAW.

SEE APPENDIX — VI, NOTE 15

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APPENDIX — II

MARYLAND CONSTITUTIONS —

Declaration of Freedom of Religion;

Proviso of Belief in a Deity

(Article 36 in present, 1867 and 1864 Constitutions; Article 33 in 1851 and 1776 Constitutions)

The Present Constitution

Art. 36. That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on ac-

count of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

1867 Constitution

Basically the same as the present, with minor changes in punctuation (comma after “ought” in line 6; no comma after “persuasion” in line 8; no comma after “maintain” in line 16; no comma after “worship” in line 17).

1864 Constitution

Basically the same as the present, with the same minor changes noted above (except that, as in the present Constitution, there is no comma after “ought” in line 6).

1851 Constitution

(Article 33); basically the same as the present, with the same minor changes noted above (except that there is a comma after “ought” in line 6).

1776 Constitution

XXXIII. That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him,

all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights; 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, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county; but the churches, chapels, glebes, and all other property now belonging to the church of England, ought to remain to the Church of England forever. And all acts of Assembly, lately passed, for collecting monies for building or repairing particular churches or chapels of ease, shall continue in force, and be executed, unless the Legislature shall, by act, supersede or repeal the same; but no county court shall assess any quantity of tobacco, or sum of money, hereafter, on the application of any vestrymen or church wardens; and every encumbent of the church of England, who hath remained in his parish, and performed his duty, shall be entitled

to receive the provision and support established by the act, entitled, 'An act for the support of the clergy of the church of England, in this Province,' till the November court of this present year, to be held for the county in which his parish shall lie, or partly lie, or for such time as he hath remained in his parish, and performed his duty.

SOURCE: NILES, MARYLAND CONSTITUTIONAL LAW.

SEE APPENDIX — VI, NOTES 3, 4, 10, 16

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APPENDIX — III

MARYLAND CONSTITUTIONS—

Religious Tests

(Article 37 in present, 1867 and 1864 Constitutions; Article 34 in 1851 Constitution; Article 35 in 1776 Constitution)

The Present Constitution

Art. 37. That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.

1867 Constitution

Same as present.

1864 Constitution

Art. 37. That no other test or qualification ought to be required on admission to any office of trust or profit, than such oath of allegiance and fidelity to this State and the United States as may be prescribed by this constitution, and such oath of office and qualification as may be prescribed by this constitution, or by the laws of the State, and a declaration of belief in the Christian religion, or in the existence of God and in

a future state of rewards and punishments.

1851 Constitution

Art. 34. That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of office as may be prescribed by this constitution, or by the laws of the State, and a declaration of belief in the Christian religion; and if the party shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments.

1776 Constitution

XXXV. That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion.

SOURCE: NILES, MARYLAND CONSTITUTIONAL LAW.

SEE APPENDIX — VI, NOTES, 9, 12

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APPENDIX — IV

MARYLAND CONSTITUTIONS—

Avoidance of Property Transfer to
Church or Church Representative

(Article 38 in present, 1867 and 1864 Constitutions; Article 35 in 1851 Constitution; Article 34 in 1776 Constitution)

The Present Constitution

Art. 38. That every gift, sale or devise of land to any Minister, Public Teacher, or Preacher of the Gospel, as such, or to any Religious Sect, Order or Denomination, or to, or for the support, use or benefit of, or in trust for, any Minister, Public Teacher, or Preacher of the Gospel, as such, or any Religious

Sect, Order or Denomination; and every gift or sale of goods, or chattels to go in succession, or to take place after the death of the Seller or Donor, to or for such support, use or benefit; and also every devise of goods or chattels to or for the support, use or benefit of any Minister, Public Teacher, or Preacher of the Gospel, as such, or any Religious Sect, Order or Denomination, without the prior or subsequent sanction of the Legislature, shall be void; except always, any sale, gift, lease or devise of any quantity of land, not exceeding five acres, for a church, meeting-house, or other house of worship, or parsonage, or for a burying ground, which shall be improved, enjoyed or used only for such purpose; or such sale, gift, lease or devise shall be void. Provided, however, that except in so far as the General Assembly shall hereafter by law otherwise enact, the consent of the Legislature shall not be required to any gift, grant, deed, or conveyance executed after the 2nd day of November, 1948, or to any devise or bequest contained in the will of any person dying after said 2nd day of November, 1948, for any of the purposes hereinabove in this Article mentioned.

[Thus amended by Chapter 623, Acts of 1947, ratified November 2, 1948.]

1867 Constitution

Art. 38. That every gift, sale or devise of land to any Minister, Public Teacher or Preacher of the Gospel, as such, or to any Religious Sect, Order or Denomination, or to, or for the support, use or benefit of, or in trust for, any Minister, Public Teacher or Preacher of the Gospel, as such, or any Religious

Sect, Order or Denomination; and every gift or sale of goods, or chattels, to go in succession, or to take place after the death of the Seller or Donor, to or for such support, use or benefit; and also every devise of goods or chattels to or for the support, use or benefit of any Minister, Public Teacher or Preacher of the Gospel, as such, or any Religious Sect, Order or Denomination, without the prior or subsequent sanction of the Legislature, shall be void; except always, any sale, gift, lease or devise of any quantity of land, not exceeding five acres, for a church, meeting-house, or other house of worship, or parsonage, or for a burying-ground, which shall be improved, enjoyed or used only for such purpose; or such sale, gift, lease or devise shall be void.

1864 Constitution

Basically the same as 1867 Constitution, with minor changes in capitalization (there is no capitalization within the body of the Article).

1851 Constitution

(Article 34); basically the same as the 1867 Constitution, (with the same absence of capitalization noted above).

1776 Constitution

(Article XXXIV); basically the same as the 1867 Constitution, with the same absence of capitalization noted above and with language changes consisting of "leave" instead of "prior or subsequent sanction" in line 14; "two acres" instead of "five acres" in line 22; and the deletion of "or parsonage," in line 24.

SOURCE: NILES, MARYLAND CONSTITUTIONAL LAW.

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APPENDIX — V

MARYLAND CONSTITUTIONS—

Manner of Administering Oath
(Article 39 in present, 1867 and 1864 Constitutions; Article 36 in 1851 and 1776 Constitutions)

The Present Constitution

Art. 39. That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being.

1867 Constitution

Same as present.

1864 Constitution

Same as present.

1851 Constitution

(Article 36); same as present.

1776 Constitution

XXXVI. That the manner of administering an oath to any person, ought to be such, as those of the religious persuasion, profession, or denomination, of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being. And that the people called Quakers, those called Dunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation, in the manner that Quakers have been heretofore allowed to affirm; and to be of the same avail as an oath, in all such cases as the affirmation of Quakers hath been allowed and accepted within this State, instead of an oath. And further, on such affirmation, warrants to search for stolen goods, or the apprehension or

commitment of offenders, ought to be granted, or security for the peace awarded, and Quakers, Dunkers or Menonists ought also, on their solemn affirmation as aforesaid, to be admitted as witnesses, in all criminal cases not capital.

SOURCE: NILES, MARYLAND CONSTITUTIONAL LAW.

SEE APPENDIX — VI, NOTE 13

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APPENDIX — VI

COMPARATIVE STUDY OF OTHER STATE CONSTITUTIONS

[References are to article and section numbers; DR. = Declaration of Rights, BR. = Bill of Rights, Am. = Amendment]

Source: Index Digest of State Constitutions (notes 1 to 10, pp. 904-08; notes 11 and 12, p. 837; note 13, p. 767; note 14, p. 583; note 15, pp. 777-81).

1. Twenty-five state constitutions expressly forbid appropriations for religious or sectarian purposes.

Miss. IV 66; Ind. I 6; Ore. I 5; Tex. I 7; Fla. DR. 6; S.D. VI 3; Mich. II 3; Pa. III 18; La. IV 8; Mo. I 7; Wyo. I 19, III 36; Wash. I 11, Am. 4; Ariz. IX 10, II 12; Minn. I 16; Wis. I 18; Mont. V 35; Colo. V 34; Ga. I Sec. I 14; Mont. XI 8; Va. IV 67; Cal. IV 30; Okla. II 5; Utah I 4; Nev. XI 10; Mass. Am. XLVI 2; H. I 3.

[But all of the states except Maryland and Vermont have explicit, if non-constitutional, statutory provisions against such appropriations. See *Horace Mann League v. Board of Public Works*, 242

Md. 645, 220 A.2d 51, 76, *cert. denied*, 385 U.S. 97 (1966).]

2. Three state constitutions specifically prohibit discrimination against one's religion.

H. I 4; La. I 4; N.Y. I 11.

3. Besides Maryland, many states constitutionally guarantee freedom of opinion and of conscience, and prevent denial of civil rights because of one's religious persuasion. Cf. Md. DR. 36.

R.I. I 3; W. Va. III 15; Del. I 1; Wash. I 11; Ark. II 24; Ga. I Sec. I 12; Ind. I 3; Kan. BR. 7; Ky. 5; Minn. I 16; Mo. I 5; N.C. I 26; Ohio I 7; Ore. I 3; Pa. I 3; S.D. VI 3; Tenn. I 3; Tex. I 6; Wis. I 18; Utah I 4; N.H. I 4; Okla. I 2; Vt. I 3; Iowa I 4; Ala. I 3; Mont. III 4; N.M. II 11; Colo. II 4; Ida. I 4; Ill. II 3; Mich. II 3; Mass. DR. 2; N.H. I 5; Me. I 3; Ariz. XX 1; Ida. XXI 19; N.M. XXI 1; N.D. XVI 203; S.D. XXVI; Utah III 1; Wash. XXVI; Wyo. XXI 2; Tenn. XI 15; N.J. I 5; H. I 4, 7.

4. Many constitutions, besides Maryland's, preclude interference with the free exercise of religious worship. Cf. Md. DR. 36.

Ala. I 3; Colo. II 4; Del. I 1; Fla. DR. 5; Ida. I 4; Ill. II 3; Ind. I 2, 4; Iowa I 3; Kan. BR. 7; Ky. 1, 5; Minn. I 16; Mo. I 5, 6; Mont. III 4; Nebr. I 4; N.J. I 3; N.M. II 11; Ohio I 7; Pa. I 3; R.I. I 3; S.D. VI 3; Tenn. I 3; Tex. I 6; Vt. I 3; W. Va. III 15; Wis. I 18; Okla. I 2; Mass. DR. 2; N.H. I 5; Cal. I 4; Conn. I 3; Me. I 3; N.Y. I 3; N.D. I 4; Ore. I 2, 3; S.C. I 4; Va. I 16; Wyo. I 18; Ark. II 24;

Ga. I Sec. I 12; La. I 4; Mich. II 3; Miss. III 18; Nev. I 4 ord. 2; N.H. I 5; N.C. I 26; Utah I 1; Del. (Preamble).

See also Ala. Am. XLVI 4; Mass. Am. XLVI 1, 4; Alas. I 4.

5. Two states do not accept property to be used for sectarian purposes.

Nebr. VII 11; S.D. VIII 16.

6. Three states constitutionally require the practice of religious ethics [Mass. DR. 2; Del. I 1; Va. I 16] while various others set forth limitations on religious liberty (such as restrictions on polygamy, criminal conduct, etc.).

Miss. III 18; Ida. I 4; Mont. III 4; Ark. II 26; Colo. II 4; Ill. II 3; Nebr. I 4; Ohio I 7; Tex. I 5; Ariz. II 12; Cal. I 4; Conn. I 3; Fla. DR. 5; Ga. I Sec. I 13; Me. I 3; Minn. I 16; Miss. III 18; Mo. I 5; Nev. I 4; N.Y. I 3; N.D. I 4; S.D. VI 3; Wash. I 11; Wyo. I 18.

7. The only state constitution besides that of Maryland to limit the sale or gift of land, etc., to a religious body is that of Mississippi [Miss. XIV 270]. Cf. Md. DR. 38.

8. Twenty-nine state constitutions declare equality among religions.

Ala. I 3; Ark. II 4; Colo. II 4; Conn. I 4; Del. I 1; Fla. DR. 6; Ida. I 4; Ill. II 3; Ind. I 4; Kan. BR. 7; Ky. 5; La. IV 8; Me. I 3; Minn. I 16; Miss. III 18; Mo. I 7; Mont. III 4; N.J. I 4; N.M. II 11; Ohio I 7; S.D. VI 3; Tenn. I 3; Tex. I 6; Wis. I 18; N.H. I 6; Mass. Am. XI; Pa. I 3; W. Va. III 15; La. I 4.

9. No religious tests whatsoever, for various purposes, are permitted in nine states. Cf. Md. DR. 37.

Okla. I 2; Ariz. XI 7, XX 7; Colo. IX 8; Ida. IX 6; Mont. XI 9; N. M. XII 9; Utah X 12; Wyo. VII 12; W. Va. III 11, 15.

10. Thirty-two states, besides Maryland, constitutionally prohibit the establishment of a religion. Cf. Md. DR. 36.

Ala. I 3; Alas. I 4; H. I 3; Iowa I 3; La. I 4; N.J. I 3, 4; S.C. I 4; Utah I 4; Ohio I 7; Ark. II 24; Kan. BR. 7; Mich. II 3; N.M. II 11; Mont. III 4; Colo. II 4; Del. I 1; Ida. I 4; Ill. II 3; Ind. I 4; Ky. 5; Minn. I 16; Mo. I 6; Nebr. I 4; Pa. I 3; R.I. I 3; S.D. VI 3; Tenn. I 3; Tex. I 6; Vt. I 3; W. Va. III 15; Wis. I 18; N.H. I 16.

11. In several states *no* religious test may be required for holding public office.

Ala. I 3; Del. I 2; Ariz. II 12; Wash. I 11; Ga. I Sec. I 13; Ind. I 5; Ore. I 4; Iowa I 4; Kan. BR. 7; Me. I 3; Minn. I 17; Wis. I 19; Mo. I 5; Nebr. I 4; Ohio I 7; N.J. I 4; N.M. VII 3; R.I. I 3; Va. IV 58; W. Va. III 15; Wyo. I 18; Alas. I 3; H. I 4.

12. In several other states, including Maryland, the only test that may be given for holding public office is the determination of the acknowledgment of a Supreme Being. Cf. Md. DR. 37.

Ark. II 26, XIX 1; Mass. DR. 18; Miss. III 18, XIV 265; N.C. VI 8; Pa. I 4; S.C. XVII 4; Tenn. I 4, IX 2; Tex. I 4.

13. Several states, besides Maryland, require that the administration of an oath be consistent with the taker's religious persuasion. Cf. Md. DR. 39.

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in concert they make significant strides in the application and clarification of the sixth amendment to the armed forces. As a result of these cases, at the very least, the accused in the military has the right to counsel, either retained or appointed, at both the investigatory and trial stage. The

remaining questions posed are whether this right is also applicable to special courts-martial, and, if so, is counsel in the sense of a lawyer, as distinguished from an officer familiar with the UCMJ and the Manual for Courts - Martial, required.

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(Continued)

Ariz. II 7; Ind. I 8; Ore. I 7; Wash. I 6; Ky. 232.

14. Unlike Maryland, eleven states provide in their constitutions that religious tests for jurors are forbidden. *Cf.* Md. DR. 36.

Ariz. II 12; Cal. I 4; Mo. I 5; N.D. I 4; Ore. I 6; Tenn. I 6; Utah I 4; Wash. I 11; W. Va. III 11; Wyo. I 18; N.M. VII 3.

15. The constitutions of forty-six (46) of the remaining states in the Union have reference to a Supreme Being in the preamble:

Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, [Maryland], Massachusetts, Michigan, Min-

nesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

Tennessee has no express reference in the preamble to its constitution, but submits various dates in the language, "the year of our Lord."

No references whatsoever may be found in the New Hampshire or Oregon constitutions.

Vermont's constitution has no preamble.

[It is important to note that many of the prohibitions and guarantees mentioned above, which may not appear in the constitutions of the several states, are included among subsequent legislative enactments. *See, e.g.,* bracketed notation to note 1].
