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Free Exercise in the Free State: Maryland's Role in Religious Liberty and the First Amendment

KENNETH LASSON

Perhaps it is both inevitable and appropriate that the bicentennial of the Bill of Rights has generated a new and lively debate over the scope and meaning of the First Amendment to the United States Constitution. Parameters of free speech, press, and assembly are frequently drawn, challenged, and recast. Few issues are argued more keenly than those involving religion: the constitutionality of creches on Christmas, school prayer, Sunday closing laws—even the propriety of having a preacher for president. The Supreme Court's docket is liberally sprinkled with petitions calling for renewed interpretation of the religion clauses. Does the rule against establishment prohibit any relationship between state and church, however non-preferential it may be? Does the guarantee of free exercise demand accommodation?

While the notion of "original intent" is still very much in vogue and continues to provoke controversy, the importance of an historical approach has long been acknowledged by both textwriters and courts. As early as 1819, the Supreme Court endorsed the wisdom of looking to the views of the Founding Fathers in construing the Constitution,¹ and it has seldom shied away from an inclination to examine "the history of the times" surrounding the adoption of constitutional amendments.²

Nevertheless, the origin of the edict that "Congress shall

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

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

make no law respecting an establishment of religion, or prohibiting the free exercise thereof" is obscure. Swirls of revisionist history have sometimes clouded determination of what the First Congress wanted in the way of religious liberty, and what the ratifying states sought to protect.³

In an 1878 decision the Supreme Court observed that the word "religion" was not defined by the Constitution, asserting that "we must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."⁴ In the 1947 *Everson* case, the Court again 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." Justice Hugo Black concluded: "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 Most recently Chief Justice William H. Rehnquist insisted that "the true meaning of the Establishment Clause can only be seen in its history."⁶

Maryland, arguably, holds the distinction of having been the state whose early history most directly ensured—and whose citizenry was most directly affected by—the First Amendment's guarantee of religious freedom. Because of its relatively diverse religious population, for much of its colonial experience Maryland stood out as both a champion of tolerance and a hotbed of discrimination.⁷ Similarities have been pointed out between the first provincial government of Maryland and the American plan

3. Chester James Antieu, Arthur T. Downey, and Edward C. Roberts, *Freedom from Federal Establishment* (Milwaukee: Bruce Pub. Co., 1964), vii.

4. *Reynolds v. United States*, 8 U.S. 145, 162 (1878).

5. *Everson v. Board of Education*, 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. *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985).

7. Harry S. Truman, "Maryland and Tolerance," *Maryland Historical Magazine* 40 (1945): 85, 86. A number of historians have noted that, 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, e.g., Elihu S. Riley, *Maryland The Pioneer of Religious Liberty* (Annapolis, Md.: Theodore Arnold, 1917), 34; Joseph Moss Ives, *The Ark and The Dove: The Beginning of Civil and Religious Liberties in America* (New York: Longmans, Green and Co., 1936), 242; and, particularly, William Thomas Russell, *Maryland, The Land of Sanctuary* (Baltimore: J.H. Furst Company, 1907), 279-87.

under the Constitution,⁸ particularly with respect to religious liberty.

This article focuses on the important events concerning toleration and its development in Maryland, from a background of religious persecution in the early 1600s to the adoption of the Bill of Rights. Such historical approaches have been tried before, to be sure, in hopes of resolving the fundamental constitutional question—whether the Establishment Clause requires complete separation of church and state, or whether it permits nondiscriminatory government participation—with remarkably differing results.⁹ As with the other efforts, it is likewise hoped that this analysis will shed more light than heat.

THE SETTING IN EUROPE

The early part of the seventeenth century was an age of religious persecution in both continental Europe and Great Britain. The Spanish Inquisition, though aimed chiefly at Jews, was at its height. Germany was in the midst of the Thirty Years' War, a bloody conflict born of theocratic animosities, religious affiliations, public policies, and national politics so intertwined with the elements of state and church that they could not be separated. Austria was bound up in the same struggle. France alone was a haven, the only country in Europe where Protestants and Catholics alike enjoyed their own form of religion—but here too there was more than one theological skirmish, especially those involving papal acknowledgment of the French king's selection of church officers.¹⁰

Catholics in Ireland were taxed to support the established Church of England, and they were fined for not attending Sunday morning services of the Church. When the Irish rebelled, they were massacred—three thousand in one day on the Island Midge. Scottish Presbyterians, forced by James I, King of England, to accept his five articles of religion, were aroused to rebel-

8. Breckinridge Long, *Genesis of the Constitution of the United States of America* (New York: Longmans, Green and Co., 1936), 242; and, particularly, William Thomas Russell, *Maryland The Land of Sanctuary* (Baltimore: J.H. Furst Company, 1907), 279-87.

9. Compare, e.g., Gerard V. Bradley, *Church-State Relationships in America* (New York: Greenwood Press, 1987), 95-7, with Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: The MacMillan Company, 1986), xvi.

10. For a discussion of Spain, France, and Austria during this period, see Riley, *Maryland the Pioneer*, 13-25.

lion. Wales was hopelessly caught in between.¹¹

In England itself the established Anglican 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.¹²

This was the age in which George Calvert, first Lord Baltimore, lived, prospered, and was himself persecuted. Calvert has been uniformly characterized as a man of great political insight, patient understanding, and moral fibre—a self-made statesman—philosopher. Historians are unusually lavish in their praise of Calvert, one ranking him "among the wisest and most benevolent statesmen of all ages."

[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.¹³

Calvert was chosen secretary of state of England by King James I, who knew of his tolerant views on religion and recognised him as "a man of great sense, but not obstinate in his sentiments, taking as much pleasure in hearing others' opinions as in delivering his own."¹⁴

George Calvert was converted to Catholicism shortly after the death of his first wife. True to character, he publicly announced his change of religion. When British persecution of Catholics became severe, the first Lord Baltimore bowed out of office. Once 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 Catholicism 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

11. Ibid., 10-13.

12. Ibid., 7-9. See also Ives, *Ark and Dove*, 13-20 and Russell, *Maryland: The Land of Sanctuary*, chapters 1 and 2.

13. George Bancroft, *The History of the United States of America from the Discovery of the Continent* (Chicago: University of Chicago Press, 1969), 244.

14. Ives, *Ark and Dove*, 31-32.

and state were still clearly separated in his mind.¹⁵

Calvert was liked and respected by the king, who granted his request for a charter to settle a new territory. His ill-fated attempts to colonize in Newfoundland¹⁶ seemed to do little more than increase his fervent desire to establish a haven for the religiously persecuted. In 1632 he requested and was granted another charter, this time to set up a colony on the shores of the Chesapeake.¹⁷ But the first Lord Baltimore died before his charter received its seal, never to set foot upon his promised land.

THE ARK AND THE DOVE TO THE ACT OF TOLERATION (1634-1649)

That Maryland's early history would be cause for its birth as the "Free State" is a graphic illustration that liberty is relative. To be sure, incidents of religious friction under the Calverts during the first fifty years of the colony were isolated—but an undercurrent of animosity and tension, perhaps engendered by the mother country's close control of its apronstrings 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 buffeted from the outside, rested on strong underpinnings and remains important to any meaningful interpretation of the First Amendment.

The theory upon which Maryland was founded, that of a place 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 For every man to follow the religion of his choice, that each might strive

15. Gerald White Johnson, *The Maryland Act of Religious Toleration* (Baltimore: published for the State of Maryland by the Committee for the 30th Anniversary of the Maryland Act of Religious Toleration, 1949), 5.

16. Ives, *Ark and Dove*, 45-46.

17. 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. Percy Granger Skirven, *The First Parishes of the Province of Maryland* (Baltimore: The Norman, Remington Company, 1923), 3; Ethan Allen, *Sketches of the Early History of Maryland, to the Year 1650* (Baltimore: J. S. Waters, 1855), 18. But this theory has not been popular among other historians.

to bring others over to his own, provided that he quietly and modestly supported his own by reasons nor bitterly demolished all others if his persuasions were not successful nor used any violence and refrained from abuse.¹⁸

It remained for Cecil Calvert, upon the death of his father in the spring of 1632, to forge the ideal into a reality. Fortunately, the second Lord Baltimore was of much the same mold as the first—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.”¹⁹ Accordingly, he recognized the necessity for Protestants working hand in hand with Catholics, and to prevent discord between the factions through a strict policy of religious liberty.²⁰

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.

Drawing on Captain John Smith’s published account of early Virginia, Lord Baltimore warned his new settlers about the dangers of the wilderness (three hundred Virginians had been killed by Indians barely a decade earlier). He also advised them to build their houses “in as decent and uniform a manner” as they could, adjoining one another, and (in the English custom) with enough land behind them for gardens. To be sure the settlers of Maryland sought to pursue earthly gains as much as did the Virginians, but in an atmosphere of religious forbearance somewhat more discreet than what they had heard prevailed in the New England colonies.²¹

Of primary interest in discerning the motives of the Calverts is the carefully drafted letter of instructions from Cecil to his brother Leonard, “the first declaration of religious liberty to come to America.”²² The initial instruction reads:

18. St. Thomas More, *Utopia*, ed. Edward Surtz (New Haven, Conn.: Yale University Press, 1964), 133.

19. Lawrence Wroth, “The First Sixty Years of the Church of England in Maryland, 1632-1692,” *Maryland Historical Magazine* (1916): 6-7.

20. *Inventory of the Church Archives of Maryland—Protestant Episcopal Diocese of Maryland* 7 (1940). See also George Petrie, *Church and State in Early Maryland* (Baltimore: John Hopkins Press, 1892); William Hand Browne, *George and Cecilius Calvert: Barons of Baltimore* (New York: Dodd, Mead, 1890), 98.

21. Robert J. Brugger, *Maryland A Middle Temperament* (Baltimore: Johns Hopkins University Press, 1988), 7.

22. Ives, *Ark and Dove*, 106. See also Browne, *George and Cecilius Calvert*, 46, and Riley, *Maryland the Pioneer*, 45.

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 the Protestants with as much mildness and favor as justice will permit. And this to be observed at land as well as sea.²³

Indeed the carefully devised layout of Maryland's first township, St. Mary's City, placed the first statehouse as far away as possible from the first church—which itself was shared by both Protestants and Catholics.²⁴

Most of the early settlers of Maryland were Protestant,²⁵ 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.²⁶ Although some historians have argued that the tolerant policies of the early Lords Baltimore were dictated more by prudence than beneficence, religious equality appeared to be vigorously maintained.²⁷ Both Cecil and his brother Leonard (who was to become the colony's first governor while the proprietor remained in England), in order to protect against religious oppression, went far beyond what they had to do to save their charter or preserve their rights.²⁸ This is clearly evidenced by the oath required of the governor and other high officers.²⁹

23. Ives, *Ark and Dove*, 106. Instruction /15 required that "settlers be careful to do justice to every man without partiality." Browne, *George and Cecilius Calvert*, 56. The original manuscript is in the possession of the Maryland Historical Society.

24. "St Mary's Legacy to Maryland," *Baltimore Evening Sun*, A23, December 1988.

25. Allen, *Maryland Toleration*, 18-9. See also Benjamin F. Brown, *Early Religious History of Maryland* (Baltimore: Innes & Company, 1876), 10.

26. Skirven, *The First Parishes*, 7.

27. Petrie, *Church and State in Early Maryland*, 15. See also John Thomas Scharf, *History of Maryland from the Earliest Period to the Present Day* (Baltimore; 3. B. Piet, 1879), vol. 1, 151-82. For a dissenting view, see Brown, *Early Religious History of Maryland*, 24, 33 (arguing that Lord Baltimore was openly hostile to Protestants).

28. Ives, *Ark and Dove*, 146.

29. *Ibid.* 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 abili-

Nevertheless, Protestants were a minority in terms of influence, if not in numbers; the religious tone of the early province was clearly Roman Catholic.³⁰ Still, each sect tended to mind its own affairs and to keep whatever ill-will there was well beneath the surface. From the founding of Maryland in 1634, until 1692, when the Church of England was established as the colony's official religion, all churches and ministers were supported by voluntary contributions.³¹ The principle of religious toleration had not only been implied by charter³² but had been also vigorously enforced by the courts, by edict of the lord proprietary, and by the people, who 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."³³ Church and state were viewed not so much in terms of union and separation, but as two sovereignties.³⁴

Although the instructions for self-government aboard the *Ark* and the *Dove* and in the new land itself were enforced in a spirit of fairness,³⁵ several religious disputes occurred during the early years of the settlement. They were relatively minor in nature, but serve to illustrate the desire for tolerance. 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 argument beginning in the late 1630s between Lord Baltimore II and the Jesuit Order,³⁶ which in 1637 instituted a program to rid the colony of numerous "heretics" with which it

ties; 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.

30. Johnson, *Act of Toleration*, 84. One author reasons that, although the numerical majority of those who came over on the *Ark* and the *Dove* were Anglicans, the principal adventurers were Roman Catholics. Skirven, *The First Parishes*, 6.

31. Browne, *George and Cecilius Calvert*, 124.

32. 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, *Church and State in Early Maryland*, 11.

33. Johnson, *Maryland Act of Toleration*, 7.

34. Thomas O'Brien Hanley, *Their Rights and Liberties: The Beginnings of Religious and Political Freedom in Maryland* (Westminster, Md.: Newman Press, 1959), 121.

35. Johnson, *Maryland Act of Toleration*, 6. For a decidedly anti-Catholic view of Roman Catholic enforcement, see Brown, *Early Religious History of Maryland*.

36. Johnson, *Maryland Act of Toleration*, 2.

was "infested," and supported the idea that Anglicans should be excluded from political office.³⁷

The first piece of legislation dealing with religious tolerance in Maryland—and possibly in the United States—was an obscure ordinance passed by the annual assembly in 1639. Known as the "Act for Church Liberties,"³⁸ it attempted to distinguish church from state by granting both clergy and lay colonists various religious "rights and privileges."³⁹ 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 1780s.⁴⁰

The Calverts of course were not alone in seeking a separation of church and state in the new world. To the Puritans in Massachusetts both religious and civil governments had divine—but distinctly separate—authority. When Roger Williams vehemently accused colonial magistrates of mixing the two (in 1631, for example, an act was passed confining the rights to vote and hold office to church members alone), he was banished from the colony.⁴¹ Williams remained undaunted. In 1639 he was instrumental in revising the political compact drawn up by the settlers of Providence, Rhode Island, to the effect that the town's government would be restricted solely to "civil things"—itself perhaps the first practical application in America of the principle of separation of church and state.⁴² Such views made their way back to Massachusetts. In 1641 the general court declared that "no church censure shall degrade or depose any man from any Civil dignitie, office, or Authoritie he shall have in the Commonwealth."⁴³

Rhode Island was somewhat isolated in its tolerance of Jews and Quakers (it was considered a "disgrace to the more godly citizens of the Bay and Connecticut"),⁴⁴ but Williams continued

37. Charles Ernest Smith, *Religion under the Barons of Baltimore* (Baltimore: E. Allen Lycett, 1899), 204-12. Smith calls Copley "Maryland's evil genius."

38. Allen, *Sketches of Early Maryland*, 42.

39. 1 Archives of Maryland 82-83 [hereinafter cited as Archives].

40. Hanley, *Their Rights and Liberties*, 123. See also Clayton Colman Hall, *The Lords of Baltimore and the Maryland Palatinate* (Baltimore: J. Murphy Co., 1902), 67, and "St. Mary's Legacy to Maryland," *Baltimore Evening Sun*, A23, 2 December 1988.

41. Edmund Sears Morgan, *Roger Williams: The Church and the State* (New York: Harcourt, Brace and World, 1967), 63-76; Henry Chupack, *Roger Williams* (New York: Twayne Publishers, 1969), 49.

42. Chupack, note 41, at 52.

43. Morgan, *William, Church and State*, 70.

44. Chupack, note 41, at 55.

to argue that absolute religious freedom was a fundamental human right. His *The Bloody Tenent of Persecution* (1644) pressed two principles: that all men had the right to freedom of conscience, and that civil government had no authority to mandate a national church.⁴⁵ Once such an imposition was made, he said, religious conviction declines.⁴⁶ "No man shall be molested for his conscience," read the Providence proclamation.⁴⁷ A magistrate's authority could be delegated only by the people, urged Williams; harassment of dissenters was morally wrong, as was taxing them for the benefit of a church they did not believe in. "If the Lord Jesus were himself in person in Old or New England," he asked, "what Church, what Ministry, what Worship, what Government he would set up, and what persecution he would practice toward them that would not receive Him?"⁴⁸

Perhaps Williams' most famous articulation of his separatist view appeared in a letter published ten years after *The Bloody Tenent*. In it he compared the roles of government and citizenry to a ship and its passengers: whether "papists, protestants, Jews and Turks," passengers could not "be forced to come to the ships' prayers of worship, nor compelled from their own particular prayers or worship, if they practice any"—but the ship's commander could enforce participation in its common defense and punish violations of its civil regulations.⁴⁹

THE ACT OF TOLERATION TO THE PURITAN UPRISING (1649-1658)

THE ACT IN CONTEXT

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"⁵⁰ and "really a most disgraceful piece of intolerance."⁵¹

The divergence of opinion may be readily understood when one examines the law's content in context. It contained five sections. The first four can hardly be said to reflect tolerance—at least not by today's standards. They provided for punishment

45. Ibid., 85.

46. Ibid., 76.

47. Ibid., 41.

48. Ibid., 78.

49. Ibid., 57.

50. Hall, *The Lords of Baltimore*, 66.

51. Smith, *Religion under the Barons*, 319.

by death and confiscation of the property of any person who should deny the divine nature of the Trinity or utter reproachful words concerning it, and fines, whipping, and imprisonment for those who blasphemed Catholics or profaned the Sabbath.

But the fifth section was of an entirely different tone:

Whereas, the enforcing of the conscience in matters of religion hath frequently 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 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 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.⁵²

That clause, when read against the demographic backdrop in the colonies, serves to temper the act's harsh penalties for blasphemy and its requirement that one's Christianity—indeed one's religion—had to be Trinitarian. The Act of Toleration certainly discriminated against Jews and Quakers. But there were but a handful of Jews in Maryland at this time; Maryland was the last of the original thirteen colonies to have any substantial Jewish community, primarily because Lord Baltimore's first settlers all came from England—from which Jews had been expelled and banned in 1290. The Quakers' chief difficulty seems to have been in the oath requirements (which were relaxed in 1688 and abolished in 1702).⁵³ Still, the law was narrow and strict, and the rights it sought to guarantee deceptively limited.

In contrast, Rhode Island's first code—no doubt reflecting Roger Williams' views—declared that "all men may walk as their consciences persuade them, everyone in the name of God."⁵⁴ Pennsylvania guaranteed freedom of worship to all who

52. 1 Archives 244 (quoted in pertinent part).

53. Petrie, *Church and State in Early Maryland*, 37.

54. Charter of Rhode Island and Providence Plantations (1663), as found in Francis N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the States, Territories and Colonies*, 8 vols. (Washington, D.C.: Government Printing Office, 1908), 6:321.

“acknowledged one Almighty and Eternal God to be the Creator, Upholder and Ruler of the World.”⁵⁵

In fact Maryland's long heralded “Act Concerning Religion” was far less liberal than the policy advocated by the Lords Baltimore ever since the landing of the *Ark* and the *Dove*.⁵⁶ Religious freedom had been the common law of Maryland from its foundation in 1634,⁵⁷ 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,⁵⁸ had their effect on the young Maryland settlement.

By 1648, it can now most easily be seen, the “Act Concerning Religion” was in reality a compromise between the liberal practices of the Calverts and the colonists prior to its passage and the intolerance of the Puritan element about to seize control during the impending interregnum of Oliver Cromwell.⁵⁹

CROMWELL AND THE PURITANS

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.

Alas, the Puritans were dissatisfied with the manner in which they were tolerated in Maryland—nor were they themselves content to live peacefully with those of different theological views. They let it be known among the powers in England that the Puritans were not being fairly treated by the colonial gov-

55. John D. Cushing, ed., *The Earliest Printed Laws of Pennsylvania, 1681-1713* (Wilmington, Del.: Michael Gelazier, 1978), 205.

56. Ives, *Ark and Dove*, 228.

57. Riley, *Maryland the Pioneer*, 49.

58. Inventory of the church archives of Maryland, Protestant Episcopal Diocese of Maryland (1940), 11. “As the political complexion of the mother country changed, the complexion of Maryland changed with it.” William H. Marnell, *The First Amendment* (Garden City, N.Y.: Doubleday, 1964), 139.

59. Andrews, *Separation of Church and State in Maryland*, 167; Browne, *George and Cecilius Calvert*, 20-1. It has also been suggested that one purpose of the Act was to attract more Catholics to the colony. See Theodore Charles Gambrell, *Studies in the Civil, Social, and Ecclesiastical History of Early Maryland* (New York: T. Whitaker, 1893), 109.

ernment, and persuaded the crown to send over parliamentary commissioners. Governor (Captain) William 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, which in 1654 sought to repeal the "Act Concerning Religion" and outlaw "popery." Cromwell himself was by no means satisfied when he heard of these developments. Ruling that Cecil Calvert's charter remained valid and intact, he ordered Stone to resume leadership of the colony. But the Puritans of Maryland, not averse to open conflict, resisted. In March of 1655, in what one historian called "the basest act of ingratitude and intolerance in the annals of American history,"⁶⁰ they soundly defeated Stone at the Battle of the Severn. Cromwell, though, was too busy with affairs at home to fully countenance the victors' insubordination, and merely ordered them to cease all persecution of Catholics and to restore Lord Baltimore's province to him.⁶¹

THE LUMBROZO AFFAIR

In February of 1658, at the provincial court of St. Mary's, came one of the first major convictions under the "Act Concerning Religion." Two witnesses claimed that Jacob Lumbrozo—the first known Jew in Maryland as well as the first Jewish doctor in any of the colonies—had questioned the divinity of Jesus. More particularly Lumbrozo had argued that Christ's resurrection "might be done by necromancy or sorcery." Although the accused declared that he had "sayd not any thing scoffingly, or in derogation by him when Christians acknowledge for their Messiah," he was found guilty and held over for sentencing.⁶²

Ten days later came word of Cromwell's accession to the throne of England, and of his declaration of a general amnesty. Lumbrozo—almost a victim of the "Toleration Act"—was freed.

Once again Cecil Calvert's policies of toleration were reestablished. He quickly granted immunity to all offenders in the

60. Ives, *Ark and Dove*, 234.

61. Riley, *Maryland the Pioneer*, 51-55.

62. XLI Archives 203, 258, and 259. See also Raphael Semmes, *Crime and Punishment in Early Maryland* (Baltimore: Johns Hopkins Press, 1938), 166-67; and Peter J. Kumpa, "In Colonial Maryland, Jewish Settlers Found No Welcome Sign," *Baltimore Evening Sun*, A6, 23 November 1987.

Puritan rebellion, and with characteristic magnanimity permitted them to either keep their lands or leave the colony, whichever course they wished to follow. Even their right to hold office was not denied.

Religious liberty may not have been absolute, but considering the tenor of the times it could be said to have returned.

PEACE AND PROSPERITY (1659-1688)

When Lord Baltimore was able to administer the affairs of Maryland without hindrance, Protestants and Catholics apparently lived together in harmony. "History has little to record of the daily life of the colonists in times of peace and quiet."⁶³ An indentured Maryland servant, writing home to London in 1666, had this to say about the adopted colony:

Here the Roman Catholic and the Protestant Episcopal, whom the world would persuade, have proclaimed open wars irrevocably against each other, contrariwise 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.⁶⁴

Maryland now attracted men of character and wealth, perhaps in part due to publication of the Toleration Act in England.⁶⁵ The province flourished amid sporadic attempts to bridge the gap between church and state. In 1666, for example, a motion was put before the assembly which would settle ministers in every county, and in 1671 there was a proposal to establish a sectarian school. Neither bill passed.⁶⁶

Though the Quakers under Puritan rule (particularly in 1658-59) were on various occasions fined, whipped, and jailed, by 1672 their founder himself, George Fox, was preaching in Maryland to meetings described as "wonderful glorious."⁶⁷ Between 1661 and 1675 some thirteen Quakers had won election as burgesses, and in time Friends were exempted from both military service and the requirement to doff their hats before civil

63. XLI Archives, 240.

64. Reprinted by the Maryland Historical Society. Quoted in XLI Archives, 240-41.

65. Skirven, *The First Parishes*, 11.

66. Albert Warwick Werline, *Problems of Church and State in Maryland* (South Lancaster, Mass.: College Press, 1948), 14-5.

67. Brugger, *Maryland: A Middle Temperament*, 29.

magistrates.⁶⁸

Cecil Calvert died in 1675. Like his father, he had never had the pleasure of seeing his American colony.

Others also saw that the administration of Maryland was characterized by "conciliation and humanity. To foster union, to cherish religious peace, these were the honest purposes of Lord Baltimore during his long supremacy."⁶⁹ The outstanding achievement of Calvert's career was said to be "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 alone he is entitled to immortal fame."⁷⁰

Nevertheless, despite the noble policies openly 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 reason for refuge in Maryland. Catholics, Puritans, and Anglicans may have lived side by side and with equal rights and privileges, but they did not take kindly to one another's faith.⁷¹ The seeds of dissent were evident in a 1676 plea for "maintenance of a Protestant ministry."⁷² Charles Calvert, the third Lord Baltimore, responded with a "Paper setting forth the Present State of Religion in Maryland,"⁷³ which firmly pointed out 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."⁷⁴ By that time there were three Protestants for every Catholic in the colony. (Indeed Catholics, for whom some say the colony was established, never formed the majority of its inhabitants.)⁷⁵ In 1685, the wife of the sheriff of Calvert County received considerable support when she petitioned English churchmen for help in establishing Protestantism in Maryland.⁷⁶ By the time King James II was forced to abdicate in 1687 and William of Orange ascended to his throne, the Protestant Revolution was well under way.

68. *Ibid.*, 30.

69. Bancroft, *History of United States*, 327.

70. Ives, *Ark and Dove*, 247.

71. Allen, *Sketches of Early Maryland*, 64.

72. V Archives, 130-32.

73. V Archives, 133-34.

74. V Archives, 134-49. *See also* Petrie, *Church and State in Early Maryland*, 37.

75. Gambrall, *Early Maryland*, 109.

76. Wroth, "The First 60 Years of the Church in Maryland," 23-4.

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 sooner or later, a growing unrest had to come into the open. Perhaps because of the death of a messenger sent to proclaim the new heads of state of England, Maryland happened to remain silent while the other colonies were pledging their allegiance to William and Mary.⁷⁷ This may have served to facilitate the rebellion, but no more so than did the absence of the proprietor from his province—and the false rumor of an impending joint uprising of Catholics and Indians, nurture an air of disquiet. The rumor was authored by John Coode, who at various times was a Catholic and an atheist, before becoming leader of the Protestant malcontents.

Coode formed an "Association in Arms for the Defense of the Protestant Religion and assisting the rights of King William and Queen Mary," and with his followers summarily seized power. An assembly was called from which Catholics were excluded. Anyone who refused to support the association was jailed. Finally, in 1691, King William appointed Sir Lionel Copley as governor of the province. The next year the assembly thanked the king and queen "for redeeming us from the arbitrary will and pleasure of a tyrannical popish government under which we have so long groaned,"⁷⁸ although eight years earlier it had passed an "Act of Appreciation" to Lord Baltimore acknowledging "his great love and affection" for them.⁷⁹ In 1693 the king instructed Governor Francis Nicholson "to permit liberty of conscience to all,"⁸⁰—but apparently this did not mean the freedom to worship as one pleased. By this time, the movement toward establishment was taking a firm hold.⁸¹

THE STRUGGLE TO REGAIN RELIGIOUS LIBERTY (1701-1774)

From the moment of establishment until the Declaration of Independence, Marylanders suffered as much if not more reli-

77. Ives, *Ark and Dove*, 253.

78. VII Archives, 505. See also, John M. Swomley, *Religious Liberty and the Secular State: The Constitutional Context* (Buffalo, N.Y.: Prometheus Books, 1987), 33-4.

79. VII Archives, 505.

80. XXIII Archives, 542.

81. See generally Ives, *Ark and Dove*, 248-58, and Scharf, *History of Maryland*, 302-41.

gious persecution and intolerance than any of the other 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.⁸²

In 1700 the king rejected a law requiring "That the Book of Common Prayer and other Administration of the Sacraments, with the rites and services of the Church, according to the Church of England, the Psalter and Psalms of David, and morning and evening prayer, therein contained, be solemnly read by all and every minister in every Church, or other place of public worship, within this province." But the colonial government did pass laws depriving Catholics of their full civil rights and prohibiting priests from holding public services, though such laws were rarely enforced.⁸³

In 1701 and 1702 other discriminatory laws were passed in the assembly,⁸⁴ though for various reasons they failed to win royal approval and therefore became ineffective. Finally, the Act of 1702⁸⁵ officially established the Church of England as the Church of Maryland—a state of affairs that was to continue until the Revolution.

Little pretense was offered of tolerance. The period beginning in 1704, under the administration of Governor (Colonel) John Seymour, was especially notable for its restrictive spirit. Catholics were no longer permitted even to practice their religion. The Act of 1704 bade children to rebel against Catholic parents; it was yet another statute "to prevent the growth of popery within this province."⁸⁶ Likewise a system of heavy duties was imposed to discourage Catholic immigrants to Maryland.⁸⁷ Thus "in the land which Catholics had opened to Protestants, the Catholic inhabitant was the sole victim of Anglican intolerance."⁸⁸

82. XXV Archives, 68.

83. Sanford M. Cobb, *The Rise of Religious Liberty in America* (New York: The MacMillan Company, 1902), 397-98.

84. XXIV Archives, 91.

85. *Ibid.*, 255. See generally Gambrall, *Early Maryland*, 23.

86. XXVI Archives, 340-41.

87. *Ibid.*, 289.

88. Bancroft, *History of the United States*, 32. See generally Russell, *Maryland: The Land of Sanctuary*, 370-88.

In 1715 Maryland was returned to the Baltimores in the person of sixteen-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 administration 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.”⁸⁹

And indeed it was not. Protestant clergymen regularly insulted Catholics and subjected them to legal indignities. In 1716 a law was passed which deprived a Protestant widow of custody of her children if she married a Catholic;⁹⁰ another act (1716) declared that a Protestant officeholder who joined the Catholic Church would forfeit his office;⁹¹ and in 1718 the governor asked for, and the assembly passed, an act depriving all unsworn Catholics of their right to vote—still another piece of legislation designed to prevent popery.⁹²

It should be pointed out, however, that the particular laws noted above were enacted under the governorship of John Hart (1715-1720). Few expressly intolerant of Catholicism were passed *after* the proprietorship was restored. But neither were any repealed, although the Calverts remained in control until the Revolution. It could well have been that they were too preoccupied with political quarrels to deal with religion.⁹³

Or it could have been that they were well satisfied with Anglican establishment. Maryland now had a state church which compelled orthodoxy under penalty of fine and imprisonment. As did its 1692 counterpart, the Blasphemy Act of 1723 provided that offenders be bored through their tongues, fined twenty 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 forty pounds, or imprisoned for twelve months; a third instance was punishable by death

89. Russell, *Maryland: The Land of Sanctuary*, 396. Charles Calvert (fifth Lord Baltimore) then became the first of his family to live in Maryland.

90. *Bacon's Laws*, ch. 39 § X (1715).

91. *Bacon's Laws*, ch. 39 § X (1716).

92. Russell, *Maryland: The Land of Sanctuary*, 400-42. See also Brugger, *Maryland: A Middle Temperament*, 56.

93. Russell, *Maryland: The Land of Sanctuary*, 410; Marnell, *The First Amendment*, 69.

without benefit of clergy.⁹⁴

In addition, only members of the church were eligible to vote, hold office, and practice a profession. The test oaths accomplished their purpose; in the eighteenth century one had to be Protestant in order to possess what would be considered today the basic rights of every citizen.⁹⁵ In 1729 another statute penalizing intermarriage was passed.⁹⁶ Catholics had already long been forbidden to bear arms, a discouraging restriction for life on the frontier.⁹⁷

In Maryland, only ministers of the established church could hold public worship and evangelize; they alone perform officially valid marriages and burials. In 1746 Governor Thomas Blade ordered the imprisonment of any priest found converting Catholics.⁹⁸ By 1749 Catholic worship had been placed strictly on a sufferance basis; to celebrate the Mass publicly was forbidden.⁹⁹ The Assembly repeatedly denied incorporation rights to dissenting churches, despite the well-known difficulties of the trustee system.¹⁰⁰

So keen was the persecution in Maryland that, in 1752, the Catholic community authorized Charles Carroll (father of the signer of the Declaration of Independence) to apply for a tract of land in Louisiana.¹⁰¹ In 1756 a double tax was levied upon Catholics for the support of the colony's militia.¹⁰² When in 1763 a tax for the support of the established church was re-

94. *Law of Maryland*, ch. 1, secs. 13, 16 (1623). See also Antieu, Downey, and Roberts, *Freedom from Federal Establishment*, 17, and Gambrall, *Early Maryland*, 112-13.

95. However, by 1724 Maryland Quakers were permitted to make an affirmation. Cobb, *The Rise of Religious Liberty in America*, 397.

96. *Bacon's Laws*, ch. 34, § XII (1729).

97. Antieu, Downey, and Roberts, *Freedom from Federal Establishment*, 18.

98. *Maryland Gazette*, 22 July 1746.

99. Cobb, *The Rise of Religious Liberty in America*, 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 338-39, 397.

100. Patrick Joseph Dignan, *History of the Legal Incorporation of Catholic Church Property in the United States, 1784-1932* (New York: P.J. Kennedy & Sons, 1935), 27-8.

101. Russell, *Maryland: The Land of Sanctuary*, 414.

102. *I* Archives, 419.

vived,¹⁰³ it sparked a war of words in the press and elsewhere.¹⁰⁴ "Religion among us," concluded Rev. Thomas Bacon, "seems to wear the face of the country; part moderately cultivated, the greater part wild and savage."¹⁰⁵

The noble ideal of toleration espoused a full century earlier lay in ruins.

INDEPENDENCE TO THE BILL OF RIGHTS (1776-1791)

In the context of such a backdrop it is easy to understand the degree to which Maryland's early insistence on peaceful coexistence among different religious sects, and its subsequent gross intolerance toward Catholics and other dissenters, influenced its participation in the American Revolution.¹⁰⁶

From bitter experience did Maryland lead the other colonies in the struggle to be free from taxes supporting a religion to which the taxpayer did not belong from laws compelling dissenters to attend services of the established church, for equal economic opportunities for dissenters, and indeed, for an end to *all* preferences held by members of the dominant faith.

On the eve of the Revolution, Baptists lay in Virginia jails for publishing their religious views; priests were still being threatened with death. James Madison had just met his countryman and soon-to-be mentor Thomas Jefferson, and the two of them began to articulate their classic views on civil liberties, particularly on the religious persecution they saw in their own and neighboring colonies. "Compulsion stinks in G-d's nostrils," said Jefferson.¹⁰⁷ "Religious bondage shackles and debilitates the mind and unfits it for every noble enterprize, every expanded prospect," wrote Madison.¹⁰⁸ He also felt strongly

103. *Laws of Maryland*, ch. 27 (1763): "An Act Empowering the Justices of Prince-George's and Charles counties to levy on the taxable persons of Saint-Johns (Commonly called King George's) parish, in the said counties, the sum of fifty-six thousand pounds of tobacco for the necessary enlargement of their parish church."

104. Scharf, *History of Maryland*, 2:125.

105. Quoted in Russell, *Maryland: The Land of Sanctuary*, 458.

106. When in 1763 a tax for the support of the Established Church was revived, "a way 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 of Carrollton, who spearheaded Maryland's fight for religious freedom and entry into the United Revolution. Scharf, *History of Maryland*, 125.

107. Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge: Belknap Press of Harvard University Press, 1963), 4.

108. Irving Brant, *The Fourth President: A Life of James Madison* (Indianapolis: Bobbs-Merrill, 1970), 17.

that without freedom of conscience there could be no freedom of speech, press, assembly, or association,¹⁰⁹ and that moral decay was not the result of the absence of an established church but of wars and bad laws.¹¹⁰

THE CARROLL FAMILY

At this point something should be said about the Carroll family, which in large measure took over the traditions left by the early Calvert. The Carrolls were Catholics, and as such were persecuted in England; it could 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, but unsuccessful in opposing the bill which levied double taxation on Catholics. The passage of this tax so discouraged him that he was tempted to keep his son—Charles Carroll of Carrollton—in France, where he was being educated. 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.¹¹¹

At first, the intention of the young Carroll was to avoid politics. But events of the day quickly forced him into the arena. Less than six weeks after his arrival at Annapolis, Parliament passed the Stamp Act. Carroll of Carrollton quickly spearheaded a boycott of British goods. When Daniel Dulaney, a Tory sympathizer, attacked him on the basis of his religion, the young statesman fought back. "I am as averse to having religion crammed down my throat as to a proclamation."¹¹² He emerged with an overwhelmingly popular victory, in the process of winning wide public sentiment for general civil liberties. Under Carroll's leadership, the Provincial Convention of 1775 extended the franchise to all free men having an estate of forty pounds, without any regard to religious affiliation. This marked

109. *Ibid.*, 35.

110. *Ibid.*, 126.

111. For short but relevant biographies, see Ives, *Ark and Dove*, 260-96.

112. Allan Nevins, *The American States During and After the Revolution, 1775-1789* (New York: The MacMillan Company, 1924), 430.

the first time since the Catholic Lords Baltimore that both Protestant and Catholic could go to the polls together.

Carroll of Carrollton had absolute faith in the ultimate freedom of the colonies, and some regard him to be the first American patriot to have expressed himself in favor of independence.¹¹³ 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."¹¹⁴

As much if not more a champion of tolerance and liberty was Archbishop John Carroll, Charles' close friend and cousin with whom he had studied in Europe.¹¹⁵ He frequently stressed that there should be no preference to any one sect, that all religions should be equal before the law.¹¹⁶ Americans during the Revolution had "associated into one great national Union, under the express condition of not being shackled by religious tests."¹¹⁷

Daniel Carroll, John's elder brother, likewise spent a good portion of his career fighting for religious equality. In 1784 he endorsed an act of the Maryland General Assembly "earnestly desiring to promote every pious and charitable design for the relief and assistance of widows and the fatherless, and especially those of the respectable and useful body of *clergy of all denominations*."¹¹⁸ He was elected to the Constitutional Convention in 1787, advocated ratification, and made perhaps the strongest recorded plea for adoption of the First Amendment.¹¹⁹

By its own Declaration of Rights in 1776, Maryland became the first of the original thirteen colonies to extend legal toleration to all Christian sects—thus, its designation as the "Free State."¹²⁰ In short, no person was to be compelled to frequent

113. Ives, *Ark and Dove*, 300-16.

114. *Ibid.*, 324-25. Nevertheless, Carroll of Carrollton did vote in favor of a state tax to support religion. See notes 123 and accompanying text.

115. Henri de Courcy and John Gilmary Shea, *History of the Catholic Church of the America* (New York: P.J. Kennedy, 1879), 421.

116. Daniel Brent, *Biographical Sketch of the Most Reverend John Carroll* (Baltimore: John Murphy, 1843), 142.

117. Antieu, Downey, and Roberts, *Freedom from Federal Establishment*, 45.

118. Mary Virginia Geiger and David Carroll, *A Framer of the Constitution* (Washington, D.C.: The Catholic University of America, 1943), 83 (emphasis added).

119. Ives, *Ark and Dove*, 372, 381, and 394.

120. Werline, *Church and State in Maryland*, 196.

any particular place of worship.¹²¹

After almost a century of Protestant domination, however, the new tolerance was not abrupt.¹²² The first constitution still empowered the legislature to “lay a general and equal tax, for the support of the Christian religion.”¹²³ As did the “Act of Toleration” over a century earlier, it still gave freedom only to “those professing the Christian belief.”¹²⁴ And in the newborn state, all public officials had to be Christian.

Nevertheless, Catholics appeared to be unanimously appreciative. “The toleration here granted by the Bill of Rights,” one priest wrote, “has put all on the same footing and has been a great service to us.”¹²⁵ Bishop John Carroll agreed. “If we have the wisdom and temper to preserve [freedom of religion],” he said, “America may come to exhibit a proof to the world, that general and equal circulation to fair argument, is the most effectual method to bring all denominations of Christians to a unity of faith.”¹²⁶ It is hard to discern how either of them felt about Quakers, Dunkers, and Mennonites, all of whom were denied

121. Article XXXIII of the first Maryland Constitution.

Article 36 of the present Declaration of Rights (then, XXXIII) 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 version of 36 also enabled the legislature to “lay a general and equal tax, for the support of the Christian religion . . .” In 1810 any taxation “for the support of any religion” was made unlawful by the General Assembly, and the taxation provisions disappeared in the 1851 Constitution. Act of 1809, ch. 167. Alfred Salem Niles, *Maryland Constitutional Law* (Baltimore: Hepbron and Hayden, 1915), 379. Only one serious effort to enforce a tax was made—and defeated—in 1785. Nevins, *The American States 1775-1789*, 430–31.

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 was not declared unconstitutional until 1965, in *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); The Supreme Court has constitutionalized that implication. See e.g., *Zorach v. Clauson*, 343 U.S. 306 (1952), and accompanying text.

122. See Niles, *Maryland Constitutional Law*, 54-66.

123. Article XXXIII.

124. *Ibid.* 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, *The Rise of Religious Liberty in America*, 501.

125. Quoted in Antieu, Downey, and Roberts, *Freedom from Federal Establishment*, 58-9.

126. *Ibid.*

the right to appear as witnesses in capital criminal cases,¹²⁷ or about Jews, none of whom were permitted to hold public office.¹²⁸ They were primarily concerned with protecting their own.

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.¹²⁹ The danger of *de facto* establishment was expressed strongly by Rev. Patrick Allison, the first pastor of the First Presbyterian Church in Baltimore: "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."¹³⁰ But Rev. 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 indirectly support various churches and church-related schools.¹³¹ Many states, in fact, thought it proper to aid the cause of religion and religious education by authorizing churches to conduct lotteries.¹³²

Non-preferential support was the primary form of establishment. Protestant Christianity became South Carolina's state church in 1778;¹³³ in Massachusetts a tax to support Christian religions was passed in 1780;¹³⁴ New York reserved certain parcels of land for Gospel schools in 1781;¹³⁵ Connecticut passed a

127. Werline, *Church and State in Maryland*, 157.

128. Matthew Page Andrews, *History of Maryland: Province and State* (Garden City, N.Y.: Doubleday, Doran, 1929), 450.

129. Antieu, Downey, and Roberts, *Freedom from Federal Establishment*, 173. See also Marnell, *The First Amendment*, 139-141.

130. Antieu, Downey, and Roberts, *Freedom from Federal Establishment*, 36.

131. *Ibid.* 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*, 27 December 1791. See also Marnell, *The First Amendment*, 110.

132. Marnell, *The First Amendment*, 74.

133. Cobb, *The Rise of Religious Liberty in America*, 505.

134. Henry Steele Commager, ed., *Documents of American History* (New York: Appleton-Century-Crofts, 1949), 108.

135. John Webb Pratt, *Religion, Politics, and Diversity: The Church-State Theme in New York History* (Ithaca, N.Y.: Cornell University Press, 1967), 114-15.

church-aid bill in 1784,¹³⁶ Georgia one in 1785.¹³⁷

Indeed, non-preferential aid received the active backing of some of the new nation's most influential statesmen: in 1779 Patrick Henry introduced a bill in the Virginia legislature for a general taxation to support all religions, and his efforts won the endorsement of none other than George Washington himself.¹³⁸

Madison and Jefferson led the fight in opposition to Henry's proposal. It was a battle Jefferson would later regard as the severest he had ever undertaken.¹³⁹ In 1784 Madison delivered his famous "Memorial and Remonstrance Against Religious Assessments"—to many historians the most powerful defense of religious liberty ever written in America.¹⁴⁰ It claimed the right of every man to exercise religion according to the dictates of his own conscience. Such a right, argued Madison, was unalienable by nature, "a duty towards the Creator" that was much older and deeper than the claims of civil society and "wholly exempt from its cognizance." The preservation of freedom, he declared, requires that governments not transgress the rights of the people: "The rulers who are guilty of such an encroachment . . . are tyrants. The people who submit to it . . . are slaves."¹⁴¹

The effect of Madison's Remonstrance—together with his strategic support of Patrick Henry for governor of Virginia, (from which position he could not as effectively push for his general assessment to support churches)—was so great that Henry's bill lost without even a vote.

For his part Jefferson opposed both the plural establishments that existed in most of the states as well as non-preferential aid to all religions. To him the concept of toleration was not that much less an evil than an exclusive established church, because it implied that the state recognized only one "true" faith and that the others were merely granted a (revocable) license to exist. Matters of conscience he felt, should be entirely free and private.¹⁴² Thus did he introduce his "Bill for Establishing Religious Freedom," which, in diametric opposition to Henry's proposal, provided that "no man should be compelled to frequent or support any religious worship, place, or ministry whatso-

136. Cobb, *The Rise of Religious Liberty in America*, 501.

137. Reba Carolyn Strickland, *Religion and the State in Georgia in the Eighteenth Century* (New York: Columbia University Press, 1939), 163-64.

138. Levy, *Jefferson and Civil Liberties*, 5.

139. *Ibid.*, 3-4.

140. Brant, *The Fourth President*, 128.

141. *Ibid.*

142. Levy, *Jefferson and Civil Liberties*, 4.

ever," nor be restrained in any way on account of his religious opinions.¹⁴³ In 1785 Jefferson's bill was enacted by the Virginia legislature. "I flatter myself," Madison wrote to him, that the act has "extinguished forever the ambitious hope of making laws for human mind."¹⁴⁴ Jefferson's pride of authorship was so great that he felt the measure as important as the Declaration of Independence, at least insofar as it was a contribution for which he most wanted to be remembered.¹⁴⁵

In the matter of non-preferential aid to religions both Madison and Jefferson differed as well with their Maryland counterparts. Even Charles Carroll of Carrollton, one of the signers of the Declaration of Independence, had voted in favor of a general tax to support religion in Maryland, as did Governor William Paca and future Supreme Court Justice Samuel Chase.¹⁴⁶

THE FIRST AMENDMENT: SEPARATION OR ACCOMMODATION?

Thus it may be seen that good historical arguments can be mounted to support *either* argument—that the Founding Fathers favored strict separation, or that they favored non-preferential encouragement. In truth there were eloquent spokesmen for each position, and the language ultimately adopted in the First Amendment allows for both interpretations.

Prior to adoption of the Bill of Rights, in every state constitution where "establishment" of religion was mentioned, it was equated or used in conjunction with "preference."¹⁴⁷ From such evidence it could be inferred that Congress intended the First Amendment more to protect free exercise than to forbid all government aid, however non-preferential.

Indeed part of the opposition to Maryland's becoming the seventh state to ratify the Constitution emanated from the Convention's failure to adopt a bill of rights that would limit federal (but not state) control over religion. Among the amendments submitted by William Paca to the state's ratifying convention was one guaranteeing religious liberty to all and opposing na-

143. *Ibid.*, 6-9. See also Bradley, *Church-State in America*, 37-8.

144. Marnell, *The First Amendment*, 67. See also Werline, *Church and State in Maryland*, 151.

145. Brant, *The Fourth President*, 354.

146. Levy, *Jefferson and Civil Liberties*, 9.

147. Bradley, *Church-State in America*, 76-7.

tional establishment.¹⁴⁸ Although the convention adjourned without agreeing to the proposed amendment, a large number of dissenting delegates had 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."¹⁴⁹ The majority in Maryland was satisfied to leave such protection to the sovereign states,¹⁵⁰ even the minority members, such as Carroll, Paca, and Chase, were for the most part just multi-establishmentarians who favored non-preferential church aid.¹⁵¹

During the course of debate on the federal Bill of Rights, the First Congress undoubtedly was responding not only to the religious concerns urged by Madison and Jefferson of Virginia, but to those espoused by Daniel and John Carroll of Maryland as well. Bishop (John) Carroll was likewise an especially eloquent and respected advocate of an amendment. He wrote:

The constitutions of some of our states continue still to entrench on the sacred 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.¹⁵²

There was considerable debate over the original language proposed for the First Amendment: "No religion shall be established by law nor shall the equal rights of conscience be infringed."¹⁵³ Much of it was about how to avoid giving the impression that religion should be abolished altogether.¹⁵⁴ Ultimately came the present Establishment and Equal Protection Clauses, that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." On 25 September 1789, the First Amendment to the United States Constitution was accepted by Congress.

But the question of complete separation versus accommoda-

148. See also 83 *Maryland Historical Magazine* 1 (Spring 1988), a special issue devoted to Maryland's role in development of the federal Bill of Rights.

149. Werline, *Church and State in Maryland*, 203.

150. Jonathan Elliott, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia: J. B. Lippincott and Company, 1859), volume 2, 553. See also Antieu, Downey, and Roberts, *Freedom from Federal Establishment*, 132.

151. Werline, *Church and State in Maryland*, 203.

152. Bradley, *Church-State in America*, 76.

153. Ives, *Ark and Dove*, 391 and 400.

154. See generally, Levy, *Jefferson and Civil Liberties*, 5, and Brant, *The Fourth President*, 234-35.

tion persisted—and indeed has never been put to rest. There can be little doubt that Madison, the principal architect of the Bill of Rights, favored strict separation of church and state. He had long opposed non-preferential aid to churches. In the First Amendment his clear intention was to prohibit states as well as the federal government from establishing any religion. Later as president he vetoed a federal grant of land to a Baptist church with a strict-separation explanation.¹⁵⁵

Madison's views, however, were hardly accepted in whole cloth by Congress. The Senate threw out his proposal to subject the states to a similar but separate restriction regarding establishment—one which Madison called the most valuable on his entire list.¹⁵⁶ As noted above, there was much sentiment expressed about avoiding anti-religious references.

A full ten years after passage of the Bill of Rights the Baltimore *Gazette* asked editorially:

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.¹⁵⁷

155. Brant, *The Fourth President*, 269.

156. *Ibid.*, 264-75.

157. Editorial, *Baltimore Federal Republican and Commercial Gazette*, 26 February 1811.

Recent courts have taken similar views. Said Mr. Justice Douglas in an oft-quoted passage from *Zorach v. Clauson*, 343 U.S. 306 at 313 (1952):

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 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 callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. 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." *Carden v. Bland*, 288 S.W.2d 718, 49, 58, 162 A.2d 438, 443 (1960).

Indeed the guarantee of religious freedom did not become binding on the states until after passage of the Fourteenth Amendment (1868) and its subsequent interpretation by the Supreme Court almost eighty years later (in 1947).¹⁵⁸

When viewed from *that* historical perspective, it seems a well-grounded conclusion that nothing more than a firmly bipartisan relationship of state to church was intended by the Founding Fathers. Thus we have arguments like this:

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, 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 civil liberty was founded upon Christian principles and teachings.¹⁵⁹

(More recently the Court of Appeals of Maryland 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." *Murray v. Curlett*, 228 Md. 239, 179 A.2d 698, 701 Schempp, 374 U.S. 203 (1963). See Donald E. Boles, *The Bible, Religion, and the Public Schools* (Ames, Iowa: Iowa State University Press, 1965), 99. 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. Though the decision was reversed by the Supreme court, *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), Justice Clark (speaking for the majority) was careful to warn against a "religion of secularism." *Id.* at 225.

(Mr. Justice Brennan, concurring in the same case, said 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.) 374 U.S. 203, 295-304 (1963).

See also article entitled "Tax Exemptions for Religious Activities" in Dallin H. Oaks, ed., *The Wall Between Church and State* (Chicago: University of Chicago Press, 1963), 115. But other justices have voiced opposing views. See Note, 17 S.C.L. Rev. 778, 780 (1965).

158. *Everson v. Board of Education*, 330 U.S. 1 (1947).

159. Jacob Marcellus Kik, *Church and State* (New York: Nelson, 1963), 130. [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. Paul Kauper, *Religion and the Constitution*

But other readers of history can make just the opposite point, and just as cogently. If Madison were the primary author of the First Amendment, should not *his* intentions be given the most credence? In Maryland itself, in 1785, a non-preferential church-aid bill (exempting non-Christians) was voted down by a resounding two-to-one majority of the legislature.¹⁶⁰ The pre-Bill-of-Rights revolution against an established religion in the nine states with multiple establishments took the form of a fight against taxation to support any churches: Must not one conclude from this that the Founding Father's original intention was to prohibit even non-preferential accommodation, to carve in stone the principle of strict separation?¹⁶¹

The answer is not clear, except through selective historical references. The question once again must be resolved, independently, by the Supreme Court.

THE ROAD TO FULL EQUALITY

By the time the Bill of Rights was enacted, local prosperity had engendered such community spirit that various denominations of Middleton, Maryland happily shared one church building—as their ancestors had a century-and-a-half earlier in St. Mary's City. A French tourist was moved to observe that “nearly all the sects tolerate each other and the sectarians respect each other.”¹⁶²

To be sure, enactment of the First Amendment was but a partial step on the road to full equality; the Tenth Amendment reserved non-delegated powers to the states, and the people and 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 were constitutionally permitted to make an affirmation instead;¹⁶³ until 1810 that the legislature was forbidden to enact multiple establishments or lay a tax for the support of religion;¹⁶⁴ until 1819 that harsh blasphemy laws, carrying penalties of death and confiscation of

(Baton Rouge, La.: Louisiana State University Press, 1964), 118. See also Wilber Griffith Katz, *Religion and American Constitutions* (Evanston, Ill.: Northwestern University Press, 1964), 30.

160. Levy, *The Establishment Clause*, 48.

161. Swornley, *Religious Liberty*, passim.

162. Brugger, *Maryland: A Middle Temperament*, 155.

163. Thorpe, ed., *The Federal and State Constitutions*, 1702.

164. Antieu, Downey, and Roberts, *Freedom from Federal Establishment*, 147. See also Levy, *The Establishment Clause*, 48.

property, were repealed,¹⁶⁵ until 1826 that Unitarians and Jews received full political rights;¹⁶⁶ until the mid-nineteenth century that non-Christian sects were able to claim full religious liberty under the state constitution; nor until the mid-twentieth century, well after the religion clauses of the First Amendment were held to be binding on the states,¹⁶⁷ that clergymen would be permitted to hold public office under the state constitution.¹⁶⁸

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.

165. Antieu, Downey, and Roberts, *Freedom from Federal Establishment*, 185.

166. Marnell, *The First Amendment*, 67.

167. *Everson v. Board of Education*, 330 U.S. 1 (1947).

168. *Kirkley v. State*, 381 F.Supp 327 (D. Md. 1974).