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### Law and Religion in Colonial America

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## LAW AND RELIGION IN COLONIAL AMERICA

MARK MCGARVIE AND ELIZABETH MENSCH

English religious conflict influenced law in the early British colonies; so too, however, did commercial ambition and English legal traditionalism. That inherently unstable combination produced significant reconfigurations in the eighteenth century, when religion became less obviously formative and public in relation to law, but no less intermeshed with legal culture and political conflict. Protestants in America reenacted many Old World religious conflicts as they struggled to integrate commercial gain, the coercions of law, and the promise of Christian freedom – or, put differently, as they sought the right relation between the City on Earth and the City of God. Their various solutions to that Augustinian dilemma took widely different forms.

In England Tudor political skill had, for a time, muted religious tension. Church and commonwealth became a single all-enveloping unity. That unity, however, masked both Catholic resentment and mounting Calvinist pressure to distinguish the church from the realm – to “gather out” and purify the true church of the redeemed. Early Stuarts exacerbated these tensions exactly when England was extending commercial ventures into America. Protestants feared the Catholic leanings of the Stuart kings, and Archbishop Laud’s persecution of dissenters coupled the Church of England with Stuart assertion of unlimited prerogative. Puritans, viewing Christ (and the free consent of believers) as the only true source of church authority, denounced a hierarchical Anglican episcopacy rooted in Crown prerogative. Meanwhile, lower ecclesiastical courts, charged with enforcing morality, veered from laxness to corrupt and discretionary intrusiveness. Their disrepute was almost matched by that of English law, with its capriciously enforced multitude of capital crimes.

Religion drove many dissenting Protestants and some Catholics to America. In England, civil war (beginning in 1642) led to Puritan Parliamentary rule, which was followed by the Restoration of Charles II in 1660. Restoration brought renewed imposition of Anglican uniformity and fear

of Catholicism until 1688, when the Glorious Revolution established both Parliamentary supremacy and a Protestant Church of England, with (limited) toleration of non-conformists. The consequent easing of religious tension provided a backdrop for the rationalism of the English Enlightenment – embraced by many Anglican clergy – but also for renewed religious fervor. Both of those developments in England were reinforced by similar developments in the colonies.

English settlers came, however, not just as Protestants but also as colonizers. They arrived under the authority of two written texts: the Bible and the Law. The first charter of the Virginia Company stated, as its primary purpose, to bring the “Christian religion to such people [Indians] as yet live in darkness and miserable ignorance. . . .” Metaphors of darkness and ignorance filled colonial descriptions of the wilderness, juxtaposed to metaphors, common in Europe, of noble savages in a state of Edenic innocence. Linked to metaphors of darkness and ignorance were images of death, idleness, the void, chaos, wild beasts, and Satan. Thus a Virginia tract described Indians as in “the arms of the Devil” and “wrapped up unto death, in almost invincible ignorance.” Into the darkness the settlers brought the Word, and with it, they believed, light, knowledge, order, and industry.

Metaphors of visibility and darkness perhaps come naturally, especially to literate cultures, but they carried special power for Protestants schooled in the primacy of texts (*sola scriptura*), and deeply familiar with such particular texts as the Bible, Augustine, and Calvin, in which images of light and darkness abound. Attitudes shaped and reflected by such metaphors affected legal treatment of Africans as well as Indians, and also of those who practiced in the shadows, so to speak, those (pre-literate) arts of the occult called witchcraft.

Written legal and religious texts embodied authority and reinforced white male dominance over less literate groups – Africans, Indians, and women. Massachusetts Bay had a government printer by 1638 chiefly to print laws and religious works, and New England villages often required a Bible in every household; similarly, the Church of England inundated colonies with books of common prayer. Laws were to be read, Massachusetts magistrates stated, not just in print but in the lives of the people themselves – inscribed in the heart, like scripture. Throughout the colonies laws and public announcements were read in churches. After the 1750s a republicanized, secular print culture emerged, with vigorous debate of public issues; but in the early colonies written texts embodied a unified political and religious authority.

Outsiders to the dominant culture suffered catastrophic ostracism. Indians who survived white diseases often had two options: conversion or death. Massachusetts Puritans, for example, published enough native language

Bibles for one of every 2½ Indians, and set up more than thirty “praying towns” with regular schedules of work and worship; but they also invoked “light” from the Word of God to justify igniting the flames that burned (alive) an entire Indian village. Anglicanism offered an elaborate spiritual defense of brutal race-based Southern slave codes, and execution (by burning, hanging, and the wheel) of rebel New York City slaves underscored the legal violence even of Northern slavery. All colonies founded before 1660 had laws against witchcraft, which were enforced most rigorously in New England: occult practices were implicitly associated with the wilderness and with African and Indian pagan “darkness.” English enforcement of equivalent laws died out well before colonial enforcement.

The colonists’ legal and religious relation to outsiders, of course, was not one of pure conquest. Indians resisted conversion, were shrewd partners in war and trade, and litigated in colonial courts; slaves negotiated rights, became adept at passive resistance, and learned to invoke the implicit egalitarianism of Christian baptism; and legal excesses at Salem were sufficiently embarrassing to end New England witchcraft trials, despite lingering enforcement in the South. Nevertheless, colonial elites undeniably used religion in relation to law to legitimate social control – not just as colonizers but also within their own white communities. “Social control” as an explanatory category, however, is excessively reductionist: it denigrates sincerity of belief and ignores difference. Most early colonists used law to construct Protestant community – to give concrete embodiment to faith. The chief purpose of law was not to protect individual rights (the preoccupation of a later period) but to build a Christian polity. Indeed, for many, liberty itself meant the liberty to form a godly community, which necessarily required, however paradoxically, a high degree of social control.

The first section of the chapter describes some general features of the interaction of law and religion in the colonies and some common historical changes. Subsequent sections, describing six distinct colonies, explore significant differences that those commonalities mask.

## I. COMMON THEMES

Most British colonizers came to America for profit and expected law to serve that purpose. Like other Europeans, however, they assumed the value of a Christianized culture in which self-interest was subordinate to God’s will, as served by hierarchy, order, and Christian communalism. To reinforce Christian values eleven of the original thirteen colonies legally established Protestant churches, requiring tax support and regular attendance. All colony-wide religious establishments were either (Puritan) Congregationalist or Anglican, but some colonies created a “multiple” establishment,

which allowed each locality to establish its own churches. Often, only the established church could promulgate creeds taught in schools or perform weddings or baptisms, and only members could vote or hold office. Notably, the two colonies that rejected establishment (Rhode Island and Pennsylvania) did so on specifically theological grounds. Therefore “establishment” in the colonies is best appreciated not as a particular legal arrangement but as the cultural reflection and promotion of Christian values – values that competed with economic and military influences, as well as English legal traditionalism, to form colonial law. Throughout the colonies, including those with no official establishment, churches played a central role in educating the young, establishing community norms, and shaping law.

The egalitarianism latent in Reformation theology sometimes came to the fore and, especially in New England, cut against hierarchical extremes. Nevertheless, to the early colonists community implied some social hierarchy, with each station performing its sanctioned role. Ministers from Massachusetts to South Carolina preached both deference to social betters and the obligations entailed by privilege: when social position was ordained by God, attendant duties did not seem a violation of “earned” private right. A pervasive model for hierarchy was the household, where the father’s loving governance of family, servants, and economic production ideally eased the Christian tension between enforcement of ethical norms and the requirement of boundless forgiveness – between the demand of law and the promise of grace. Law reinforced household authority by imposing public corporal punishment to control servants and slaves, and to strengthen family-based moral discipline, while also imposing duties on the wealthy to give support to workers, orphans, or the indigent. Early Virginia records document the prosecution of a “runaway master” who “fled from his servants” to evade supporting them and show parish assignment of poor boys to work for wealthy individuals, whether needed or not. Ironically, such laws foreshadowed later Anglican defense of race-based slavery as a paternalistic embodiment of Christian love and charity, yet even in the North charity reflected a pre-modern understanding of hierarchy and deference; it was intended to relieve individual suffering, not transform the social order.

Colonial laws relating to economic activity further reinforced communitarianism. Clergy not only admonished greed and encouraged charity but also specifically endorsed commercial restrictions that were even more rigorous than those endorsed by their Catholic counterparts in Europe. Some historians have recently argued that colonial Massachusetts flourished by linking communitarian ethics with an emerging capitalism. Nevertheless, the Bay government structured its markets to serve community in a manner unfamiliar to modern capitalism: it limited land distribution to “worthy”

recipients, controlled prices and wages, prosecuted merchants for seeking unjust profits, and limited all business activity to prescribed times and places.

Most colonies adopted the Reformed view that government, as an “ordinance of God,” should protect the individual’s moral as well as civil welfare. Criminal law in Virginia and in New England referred to “sin,” implicitly accepting the obligation to construct Christian conscience, not just preserve civil peace. Penal law provided the moral definition of community, and the earliest colonies instituted significant reforms. They eliminated lower ecclesiastical courts (despised by Puritans), virtually abolished execution for property offenses as inconsistent with scripture and level of moral blame, and heightened criminal liability for personal misconduct. Corporal punishment provided public moral instruction, often including sermons at executions.

Even a rough contrast between early New England and Chesapeake penal law, however, shows the difference between Puritan and Anglican influence. New Englanders, shaping their polities on the model of ancient Israel, adopted English legal categories only if consistent with the Bible and used scripture as the direct source for roughly half their criminal law. New England also dropped capricious mitigating pleas, like benefit of clergy, since literacy and wealth implied heightened moral accountability, not privileged excuse. The earliest Puritans trusted magistrates (“Gods upon earthe,” said Winthrop) to apply law with equitable Christian discretion; admonishment was often sufficient punishment. Codification followed later, with its own didactic value.

By contrast, Southern Anglicans often reintroduced a modified ecclesiastical court system by entrusting church officers to report personal misconduct to county courts. Reflecting the public, political nature of Anglican ecclesiology, discretionary legal enforcement aimed more toward preserving outward public peace than building inner righteousness. Particular laws were usually taken from England, not scripture, and defined judicially, in the name of paternal authority, not by codes. Judges, eschewing mere admonishment, allowed traditional English mitigating pleas and relaxed punishment for gentry while operating *in terrorem* in relation to the large servant classes who, before the huge slave purchases began in the late seventeenth century, constituted roughly three-fourths of Chesapeake immigrants. The only two early colonial executions for theft, for example, were of Virginia laborers. Thus, put generally, early Puritans used penal law to serve scripture, whereas Anglicanism used religion to spiritualize English traditionalism; Anglicans sacralized law and a paternalistic social order, Puritans prepared the godly for salvation. Nevertheless, in each case the goal was a version of Christian community.

By the late seventeenth century, communitarianism showed the strains of entrepreneurial efforts to recruit new inhabitants, even as disaffected second and third generations felt the pull of commercial opportunity and unsettled land. Religious diversity also became common, leading to accommodation. Nevertheless, pluralism did not automatically produce a high level of toleration. Throughout the seventeenth century nearly all colonies had laws to deter heterodox religious practice, and prosecutions for blasphemy, heresy, sedition, contempt, passion, breach of the Sabbath, or religious deviance continued into the eighteenth century. In 1703 South Carolina made blasphemy a crime, defining it as “defaming any person of the Trinity, denying the truths of Christianity, or denying the divine authority of the Bible.” New York prosecuted a blasphemy case pursuant to an already existent statute during the same year. Delaware brought a blasphemy suit in 1705, Maryland in 1710, and North Carolina in 1717. Protestants who dissented from established churches could be prosecuted, along with agnostics, Jews, and Catholics; Connecticut passed a new law in 1742 against itinerant preaching to stifle evangelicalism.

While establishment waned between 1660 and 1690, that waning was followed by fresh efforts to establish Anglicanism, vigorously supported by England and by colonial officials. Especially when coupled with the imposition of English law, Anglicanization of other Europeans often meant a significant reduction in women’s legal rights and cultural influence. Meanwhile, Congregationalism remained strong in New England, where most people still lived within six miles of a church. Congregationalism also had the advantage of well-educated, locally ordained ministers. In 1690, 90 percent of all colonial congregations were either Congregational or Anglican.

In the next eighty years that reality changed dramatically as immigrants from Germany, France, Ireland, and Scotland came to the middle colonies. By 1770 only about 20 percent of congregations were Congregational and 15 percent Anglican. Meanwhile, commercialism led to the increased use of law to structure competitive property and exchange relationships, not the godly life. The eighteenth century brought a vast proliferation of printed law forms, which preceded the dramatic expansion of a professional lawyer class in mid-century.

Several historians have seen in these changes a breakdown of the communitarianism once premised on religious homogeneity and the seeds of an individualistic ideology that prompted political revolution. The Great Awakening, starting in the 1730s, can be seen either as consistent with those trends or as a reaction against them. During the Awakening, New Light preachers combined human-centered emotional appeals with invocation of a God-centered communal existence. Preachers became a “means of grace,” exciting listeners to frenzies of repentance that bent their wills

toward conversion. Despite its flirtation with Arminianism – the human capacity to achieve righteousness – New Light doctrine restated human depravity and dependence on divine grace. Yet, Jonathan Edwards argued, people could hasten the coming of the millennium by forming a new, perfected social order, a “union of believers” joined together in regenerate love. Awakening preaching was radically egalitarian while simultaneously evocative of an earlier, legally structured Christian communitarianism. To a degree especially surprising in the South, Awakening congregations broke down barriers based on race, gender, class, and even literacy.

Established churchmen reacted with alarm, even describing New Light emotionalism as Satanic. Governments helped head off the assault. Several New England legislatures, for example, enacted laws in the 1740s to discipline government officials and ministers who endorsed separatism, itinerant evangelicalism, or emotional piety. Similarly, in the South planters feared the Baptist and Methodist challenge to legally structured inequality. Gentry seized control of churches to strengthen the Anglican establishment, but persecution only fortified New Light dissenters: convinced by faith, they calmly accepted martyrdom.

Established churches could not absorb the force of the Awakening’s piety. Dissenters migrated to other churches, such as Baptist, Presbyterian, or Methodist, sapping power from integrated corporate systems of church and state. A crucial development of this post-Awakening period was the vigorous growth of non-established American denominationalism, with its combination of hierarchy and autonomy, cross-colonial ties, and local independence. Denominational associations were at the forefront in adapting legal categories still on the border of an emerging distinction between public and private (such as incorporation, trust, and property) to fashion their identities as private, voluntary institutions protected by law to serve a quasi-public moral role. As their institutional structures became increasingly intermeshed with existing legal and social structures, denominations typically gained respectability but lost New Light perfectionist zeal; old divisions of class, race, and gender reemerged.

Although it united some evangelicals within denominations, the Great Awakening isolated many from the traditional established churches and also from commercialism and rationalism. By mid-century the market economy had outgrown the parameters of providentialism and communalism. New Lights who sought to perpetuate an archaic model of religious community viewed the new economy with disdain, condemning its greed, inequality, and self-indulgence. Equally great was the shift New Lights precipitated within the established churches, in which Congregational and Anglican exponents of rational religion united with traditionalists in opposition to evangelicalism. As in England, Arminianism combined with natural law to



direct established religion toward secular, Enlightenment rationalism. In effect, the social radicals, the evangelicals, became the religiously orthodox, whereas the social conservatives in established churches became the religious liberals. By the middle of the eighteenth century religion had divided American society and positioned itself as a vehicle for social change.

## II. REGIONAL VARIATIONS

Generally drawn comparisons and contrasts do not do justice to the richness and nuance of colonial religious difference. For example, in New England, Puritan theology was a decisive force, in effect subordinating civil government to religious truth; during the colonial period New England struggled against the amoral effects of commerce on its legally structured religious community. Yet internal struggles arising from paradoxes within Reformed theology itself produced Rhode Island's extraordinary Baptist experiment in religious liberty, the unusual but consequential history of which cannot be captured under a general heading, "New England."

Similarly, the Middle Colonies, subject of recent historical attention due to their diversity and rapid commercial development, cannot be described by reference to pluralism and commerce alone. Pennsylvania's legal history, shaped by Quaker, pietist, and other sectarian influence, is different from New York's, with its often-violent struggles between a forced Anglican establishment and Dutch and dissenter resistance.

Finally, in the South, Anglicanism demonstrated its expansive capacity to envelop and spiritualize the legal and social order by sanctifying even the privileged moral license and slave laws of gentry culture. Anglicans refused to convert slaves, despite pressure to do so by clergy in England, and thereby reinforced the white construction of Africans as a heathen "other." Only Awakening evangelicals rekindled Christians' latent, egalitarian longing for a true community of believers, challenging Southern traditionalism. Yet Anglicanism in Maryland was different from Anglicanism in Virginia, being more Calvinist and also shaped by an extraordinary preoccupation with the perceived threat of Catholicism. Maryland's legal conflicts, often carried back to England, were utterly unique but at the same time representative of the extent to which America's Protestant culture still defined itself by opposition to Catholicism – a fact of lasting historical significance.

Despite those differences, regional commonalities are helpful in characterizing general forms of colonial establishment. New England townships attempted to preserve Christian homogeneity and communitarianism until well into the nineteenth century. Congregationalists, Presbyterians, Quakers, and Baptists shared a common Reformation heritage, imbuing New England with cultural similarity despite sectarian differences. Religious

establishment persisted in New England longer than elsewhere, usually into the second or third decade of the nineteenth century; Massachusetts continued public support of churches until 1833.

The mid-Atlantic colonies were the most diverse: Germans, English, Irish, Dutch, and Scots migrated to New York, Pennsylvania, Delaware, and New Jersey. Yet, diversity did not necessarily inhibit religious establishment. Dissenters were often taxed to support an established church and accepted its role in public functions, and the wide variety of sects led to more congregations, relative to population, than in any other region. Nevertheless, residents chafed at laws that restricted individual freedom and economic initiative. By the mid-eighteenth century, New York City and Philadelphia had become major cosmopolitan centers of business, ideas, and entertainment. Economic expansion and religious diversity eroded the authority of religiously inspired law, and most mid-Atlantic states disestablished their churches in revolutionary-era constitutions. In the process, churches were also removed from performing vital public tasks like education, poor relief, and record keeping. The states were slow to assume those responsibilities, leaving them to the (unreliable) beneficence of the wealthy.

By 1703 Anglicanism was established in each of the Southern colonies. Southern Anglicanism reflected both the influence of the English Enlightenment and the deference to gentry domination that characterized the South's paternalistic honor-based society. Anglican devotion to social order served as the glue within a society divided by wealth, race, and culture. Along with frontier Indian wars and race-based slavery, Anglicanism helped define white culture as a unified, inclusive, morally based community, notwithstanding inequalities in wealth and education far more extreme than in other regions. Under the parish structure churches assumed a significant role in governing, but the autonomous moral authority of the church was never strong and declined in the eighteenth century when religious growth occurred almost exclusively among rural Baptists and Methodists. Southern colonies disestablished their churches during the constitutional era, 1785–1800.

#### *New England: Massachusetts*

English Puritans were convinced that a true church of the elect (those redeemed by God's grace) could not survive within a church ruled by the Crown rather than Christ, and they believed that the (predestined) elect, servants of Christ on earth, must be free to shape their churches to conform to the gospel. In America, therefore, self-governing congregations formed the colony's primary social structure. Civil authority, exercising coercive force, gained legitimacy only to the extent that it governed consistently with

church teachings. Puritan ventures to Massachusetts thus sought not only to secure churches conducive to Puritan worship but also to form civil societies that would adhere to scripture; like Calvin in Geneva, Puritans designed their governments to serve the church. While Puritans scrupulously separated realms of church and state authority, their polity suppressed heresy, enforced laws of Christian morality, and acceded to advice of church leaders; conversely, ministers used sermons to reinforce civil authority, preaching strict obedience to civil law.

Puritans believed God provided natural reason so people could comprehend the world, if not its Creator. Yet, as inherently sinful, people must subordinate their ambition to God's will. Piety, the proper human attitude, required devotion of natural talent to furthering God's will as expressed in scripture. While nobody could merit salvation by works, God's covenant required that people serve God in return for the possibility of salvation for some, and held each person responsible for the welfare of the whole. Taking love of neighbor to be a sign of salvation, Puritans put group above individual and used scripture to shape legal definitions of the public good.

Massachusetts began as two separate colonies, which were not united until the late 1600s. Pilgrims, who were radical Puritans seeking complete separation from the Church of England, reached Plymouth in 1620. Since the colony had no specialized police, law enforcement in early Plymouth meant imposition of community norms by group action. Civil law was integrated with church doctrine, and disputes were resolved in three institutions with overlapping jurisdiction: town meetings, church congregations, and law courts. Any dispute could be brought to any forum, but town meetings generally resolved the few cases that set policy for the entire community. In each forum the goal was the same: restoration of community through extirpation of sin, which was, by definition, whatever caused division and antagonism, civil or criminal.

In 1630, less radically separatist Puritans settled a second Bay colony. The newly elected Governor, John Winthrop, arrived with a charter signed by Charles I that created a joint-stock company dedicated to earning profits; it allowed the company to establish any laws not in conflict with English law. Immediately, however, the colonists ignored even this minimal limitation, looking chiefly to the Bible, not England, for direction. The charter authorized the creation of "one greate, generall, and solempe Assemblie" known as "The Great and Generall Courtes," with executive, legislative, and judicial authority. Court members, or magistrates, bound by law to serve God and Gospel, exercised essentially equitable authority. Ministers were regularly summoned to advise magistrates, even on matters of trade and foreign relations. Moreover, the body politic itself was constituted only of (male) church members. While membership rates for early years are uncertain, by

1652 perhaps half of adult males were church members, a percentage that declined during the century.

Colonists brought private disputes to the General Court, which had original, and later appellate, jurisdiction over criminal and civil matters. The use of a consent-based political body to adjudicate personal disputes reflected the communitarian attitude that all matters were public and also the Puritan belief that the soundest “law” was the discerning judgment of the godly people. Church elders served as a final court of appeals, resolving disputes over charter interpretation and General Court authority; possibly, this process was a reflection of the religious origins of appeal rights (to Rome). Growth of the colony required division of the General Court into two houses in 1634. Further growth led to formation of county courts in the 1640s, whose chief function was to maintain “an able and faithful ministry” and remove any “perniciously Heterodox” preacher.

Early laws secured conformity by requiring support of congregational churches and attendance at services; full church membership came only with proof of conversion. Massachusetts, unlike Virginia, did not immediately regulate church attendance: until 1635 no compulsion was necessary. Each Bay settlement asserted authority to banish heretical groups or ministers and to regulate behavior to conform to Christian virtue. Laws of the 1630s and 1640s, before codification, already punished idleness, stubbornness, card playing, fishing out of season, bowling, drunkenness, lying, swearing, and taking the Lord’s name in vain. Other laws punished single women for entertaining men at home or corrupting youth. Notably, however, enforcement of sexual morality was largely free of gender bias: eradication of sin meant male as well as female sin.

Laws also fostered communal interdependence. In 1635 the General Court ordered that no home be built more than one-half mile from a church. This proved impractical, but later modifications served similar goals. In business dealings, subordination of private interest to common good meant merchants and artisans faced criminal fines and civil liability for the “oppression” of charging more than a “fair” price for goods or services. Leaders also discouraged controversy and litigation. Before the 1670s most disputes were arbitrated by clergy and resolved on principles of equity and community norms, with the goal of preserving the integrity of the community.

Puritans did not think that this communitarianism compromised individual liberty. Rather, they defined liberty as the freedom necessary to conform one’s life to God’s teachings. Liberty, which they cherished, was a pre-condition to the construction of godly community – the opportunity to fuse Christian piety with service to the public good. Communal peace and

reciprocal charity were the ends of liberty, not alternatives to the protection of individual freedom. Accordingly, disputes resolved in law tribunals were not subject to different goals than those which proceeded to arbitration. As late as the 1740s, judges charged juries “to use law to create ‘a civil and Christian state’” so as to eliminate “vice, profaneness, and immorality” and reform mankind “with a Due Regard to God.”

Later generations, beginning perhaps with Hawthorne, have looked with morbid fascination on Puritan laws that attacked free expression and sexual license. Such laws, however, simply recognized widely shared Christian norms; similar laws existed in England and other colonies, but were enforced mainly when public peace was threatened. New England is distinctive chiefly for its prosecutorial rigor and consistency (with enforcement rates between 200 and 400 percent higher than in the South), and extended retention (sometimes into the nineteenth century). Massachusetts law texts explicitly noted their dependence on religion: in 1665 the General Court stated that “subjection to ecclesiastical discipline is necessary for the well-being of any Christian society,” and until 1672 the title page of the code book often carried a quote from Romans 13:12 – “Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.” Even in exacting punishment the colony conformed to scripture. Deuteronomy provided punishment with up to forty stripes; Massachusetts’s judges usually assessed up to thirty-nine strokes, always to a bare back, but sometimes “well” or “severely laid on.”

Sex offenses and offenses against marriage constituted over half the prosecuted crimes and covered a wide range of behaviors, reflecting the crucial role of family as a microcosm of the public moral order. Puritans were robustly enthusiastic about sex in marriage, but they feared its errant, defiant tendencies (mirroring human disobedience of God) and its consequent capacity to disrupt community. John Hobell in 1641 and Robert Crocker in 1642 were each whipped for breaching promises to marry. In 1640, Margery Rugs was given “39 lashes, well-laid on” for behaving in “enticing and alluring” ways. Two years earlier Alice Burwoode was whipped for “yielding” and “not crying out” during apparently consensual sex with John Bickerstaffe, who received thirty-nine lashes for fornication.

The General Court in 1677 required towns to appoint tithing men to inspect the lives and homes of neighbors, looking for Sabbath-breaking, intemperance, sexual misconduct, and profanity. These oversight duties, moreover, were assumed by all townspeople: in 1682, 19-year-old Mary Brown testified to seeing James Creeke kiss and tickle the wife of another man. Speech laws not only protected the names of God and Jesus but also Calvinist doctrine. In 1684, during heated debate between two Calvinists,

Joseph Gatchell argued that if Christ had spoken as his companion asserted, He was “an Imperfect Saviour.” Gatchell was taken to the pillory, where his tongue was drawn and pierced with a hot iron.

The history of the Bay colony can be summarized as a tenacious struggle to perpetuate Calvinist doctrine within a community radically altered by immigration, aggressive territorial expansion, Enlightenment thinking, and a market economy based on profitable international trade. Whether one sees persistence, declension, or reformulation of Calvinist doctrine depends as much on perspective as on record. In 1646, confronting declining church membership and increased heresy, ministers met in synod and drafted the Cambridge Platform to reassert that all public institutions were derived from the “Word of God” and were dependent on the true church of visible saints. Church elders were still to make and enforce the laws, control church discipline, and shape political debate. The problems did not end, however. In 1657, again at synod, the ministers adopted the “half-way covenant,” which gave partial participation in the church and hope of salvation to baptized persons unable to give testimony of regeneration. More willing than men to give experiential accounts of conversion, women had become the majority in full church membership. The half-way covenant provided the inclusiveness expected of an established church and perpetuated clerical power.

As compared to other colonies, Puritan New England preserved much of its ethnic and religious homogeneity and even its relative economic equality, but it was not exempt from change. By century’s end, growth and land scarcity led to family dispersal, extended governance, and impersonal trade relations. Accommodating business transactions between strangers and even people with different languages, transactional law imposed new objective standards, reflecting and contributing to rising individualism. Preachers saw in these changes the erosion of communal ideals: sermons excoriated listeners for the selfish pursuit of luxury and described plagues and Indian violence as proof of God’s wrath.

The quest for cultural homogeneity sometimes took a desperate tone. The witchcraft scares of the late 1600s, for example, may evince the depth of desire to perpetuate communitarianism amidst fears arising from increased diversity, social change, and religious uncertainty. Authorities applied old concepts of law, which integrated Calvinist doctrine and communal values, both to define and eliminate problems of non-conformity, but the law, the doctrine, and the values were found wanting. Salem ended its persecutions with grave doubts about the efficacy of spectral evidence (visions and spiritual forms), bringing into question the extent to which law could fully incorporate religious belief. That question hung as a Damocles’ sword over the viability of a jurisprudence rooted in Calvinist doctrine, but even in the

mid-eighteenth century, Massachusetts' courts still admitted hauntings and spiritual presences as evidence in valuing real property.

Challenges to the Puritan establishment also mounted from outside Massachusetts. After the English Restoration, Charles II demanded suffrage rights for Anglicans. The Bay colony, in response, repealed its restrictions, but then passed new ones requiring all voters to prove, by card or letter from an orthodox minister, that they were Calvinist in religion, virtuous in lifestyle, and current in paying taxes and taking communion. In 1684 the Crown vacated the charter for the colony's failure to conform to charter prescription and the laws of England: in support, London cited the Bay's refusal to extend the franchise to non-orthodox Christians, its punishment of dissenters, its use of scripture as the primary source of law, and its incomplete fidelity to the King. James II installed royal governors to rule Massachusetts.

The Revolution of 1688 was thus as "glorious" in Massachusetts as in England, but it did not help the colony regain its old charter. Increase Mather agreed to a second charter in 1691 that provided for a Crown-appointed governor with veto power over all legislation. The General Court survived as a single house of representatives, popularly elected, but all Protestants could vote and practice their own religion and all legal decisions were ultimately appealable to London.

The laws of 1692 accommodated England's demand for limited religious toleration, consistent with its own new Act of Toleration. Each town was ordered to appoint and support an "able learned, orthodox minister or ministers." Costs of the minister's salary, church, and teaching were paid by general taxes, but dissenters were free to attend and support their own churches. In 1727, in response to petitions to England, Massachusetts also created tax exemptions for dissenters, although to be eligible a taxpayer needed a document from his minister stating he attended a dissenting church located within five miles of his home and objected to the established religion as a matter of conscience. Dissenting churches also needed legislative recognition to receive tax support from an exempt taxpayer. The paucity of dissenting churches, even in the 1720s, limited the effectiveness of the exemption provision; Baptist churches had become common in Massachusetts, but members of less popular sects often had no nearby church, and irreligious people were required to support their town's Congregational churches.

Massachusetts adopted a new court system after consolidation of the colonies and imposition of the new charter. Even then, struggling against change, it perpetuated the jurisdictional overlap between law courts and churches, and churches continued to urge members to resolve disputes over property and tort among themselves. Also, until the mid-eighteenth century, election to the jury, by town meeting, required attending a

Congregational church: the jury, like the congregation of the elect itself, approximated God's voice on earth and decided law as well as facts.

Massachusetts consistently sought religious conformity despite growing resistance. As late as the mid-eighteenth century, laws were passed to give Jesuits only weeks to remove themselves, and throughout the century crimes against morality dominated criminal courts. On average, 50 percent of criminal prosecutions addressed sex offenses (other than rape), violations of Sabbath, and use of profanity. Until the Revolution Massachusetts punished adultery with up to forty stripes and the black letter "A." By mid-century all colonial America confronted the tension between an emerging modern economy and the communitarianism of an earlier era, but nowhere was this tension so great as in Massachusetts, where communitarianism retained such powerful Calvinist vibrancy.

#### *New England: Rhode Island*

The colony of Rhode Island emerged after the legal prosecution of dissenters had revealed theological dilemmas deep at the core of Massachusetts's experiment in applied Calvinism. After banishment, Roger Williams founded Providence, and Anne Hutchinson settled in Portsmouth. As other dissenters followed, religious quarrels soon intersected with land disputes, leading to disruptive township controversies and border conflicts with Massachusetts and Connecticut. Outside observers saw only anarchy in the absence of religious establishment. Routinely invoking images of cesspools and contagion (metaphors of defilement from within), they cited Rhode Island as proof that toleration of schismatics would always lead to civil chaos. Nevertheless, by moving from radical church/state separation to legally protected denominationalism, Rhode Island in fact achieved a high level of stability by the mid-1700s.

With no charter from England, Rhode Islanders confronted the question of legal legitimacy as a theological matter of first principle. Williams had denounced the Massachusetts effort to use law, even law based on the Old Testament, to serve religion. Such use, he argued (with a characteristic reversal of metaphor) contaminated Christian freedom and defiled the purity of Christ's church with the coercions of the earthly city. Some Rhode Islanders were eager to take the next logical step: if Christian freedom superseded the law when the New Testament superseded the Old, then the true Christian should not be bound by any law. Thus arose the famous Rhode Island tendency to see even the most minimal civil restriction as yet another instance of illegitimate tyranny – an antinomian zeal for liberty no less rooted in Protestantism than the Massachusetts zeal for coerced moral conformity. In contrast to some of his followers, however, Williams himself did not dispute



the need for secular law; he disputed law's contamination of the sacred, and its claim to divine sanction. Unlike the true church founded by Christ, he insisted legal authority, tainted by coercion, was a merely human construction, a concession to human imperfectability. Thus its legitimacy was no more than provisional: while individuals could be baptized and redeemed, the state could not.

Given their commitment to Christian liberty the earliest Providence settlers relied on equality, not religion, to foster community and showed their Baptist aversion to coercion by trying to minimize the role of formal law. Government originated as a fortnightly meeting of household heads. When the first newcomers arrived, villagers laid out equal house lots, fields, and commons – the New England village without inequality or common church. The guiding principle was complete religious toleration and church/state separation. Householders agreed to land distribution and dispute settlement by five arbitrators, a method considered more rooted in true natural law than fixed rules. Early records show little crime, with freemen collectively subduing the rare delinquent. Rhode Island (not uniquely) was slow to build jails.

Subsequent newcomers were compelled to sign an agreement to obey the original freemen, who claimed, as a right automatically flowing to risk-taking founders, the privilege to structure their community by limiting others' suffrage and land ownership. Newcomers challenged this freeman definition of "equal" rights and "free" consent, which was never approved by Williams. The contested inequality at the core of Providence society produced fateful conflicts that soon reached out to neighboring colonies – as any Protestant schooled in Augustine should have predicted. The meaning of religious liberty was itself contested when a woman attended more of Williams' religious meetings than were sanctioned by her husband. The town tried to protect the wife from her husband's beatings, which he considered his religious privilege to administer. When Rhode Island law refused to recognize this husband's freedom to perform his "religious duty," he led his wife back to Massachusetts with a rope.

Radical theologians pushed Rhode Island into ever more radical realms of social liberty. Portsmouth settlers avoided the problem of legal legitimacy by establishing no secular government at all. Eschewing political authority, for a time they simply conveyed governance to William Coddington, who like Hutchinson sought his own direct communion with Christ. Samuel Gorton, espousing a similar antinomianism, was serially banished from Plymouth, Portsmouth, and Providence for denying the legitimacy of all civil authority. Welcome nowhere, he and followers founded Warwick to live with God as their only judge. In Rhode Island community was achieved more often by withdrawal and reformation than by law.

Contested definitions of liberty led to conflicts that threatened the whole colony with invasion. Rhode Islanders finally asked Williams to seek a patent from England, by then the only available source of legal legitimacy. Granted in 1643/4 and reconfirmed after the Restoration by corporate charter, the patent conveyed full lawmaking and judicial authority. Rhode Island government could claim English legitimacy, even if not, as Williams insisted, divine sanction. After the grant of the patent, Warwick and Providence loosely joined the governments of Newport and Portsmouth, which had, without complete success, attempted reconsolidation under the hopeful motto, “Amor Vincet Omnia.”

In 1647 Rhode Island enacted its first Code of Law. The Code established a superior court, the Court of Tryals, which for a time simply consisted of a general assembly and later became a traveling sessions court that heard both criminal and civil disputes. The prickly question, as always, was legitimacy. The (unknown) drafters of the Code implicitly rejected the Old Testament model, as superseded by gospel freedom. Instead, they looked to scriptural authority for their recourse to English law by basing organization of the Code on 1 Timothy 9–10, wherein Paul explains that law is not for the godly, but for the sinful – for those who kill their father or mother, for murderers, whoremongers, sodomites, and the like. The Code therefore organized crimes by following those headings, as in “Touching Murdering of Fathers and Mothers” and “Touching Whoremongers.” This reference to Paul presumably justified Christian recourse to secular forms of legal coercion. Then, more than in any other colony, the drafters used English law as their source, specifically Dalton’s manual for justices of the peace. Approximately 85 percent of Rhode Island criminal law had its direct source in England; by way of contrast, Massachusetts took only about 40 percent of its penal law from England and roughly the same from the Bible.

Consistent with separatist principles, the Code recognized no crimes of heresy, Sabbath violation, or blasphemy. Reflecting its recent history and still irrepressible Christian desire for community, however, it did give unusual attention to crimes of general disorder. For example, it not only retained the law against riot (dropped by other colonies) but also described with specificity how riots and breaches of the peace should be handled. Assault, slander, and defamation were criminalized under the general category of disturbing the peace, and contempt was described as a “kind of Rebellion.” Notably absent were offenses against trade, such as fair price violations, perhaps suggesting the conceptual link between religious disestablishment and free markets.

The 1663 Charter affirmed Rhode Island’s “livelie experiment” to prove that a “civill state may stand and best bee maintained . . .” with religious liberty and that “true pietye rightly grounded upon gospel” will give sufficient

“security to sovereignty . . .” A further clause released the colony from conformity to the Church of England. Rhode Island was, indeed, utterly unique in its degree of church/state separation. It had no parish taxes or boundaries, no land grants to churches, no tax exemption for church property, no laws requiring church attendance or urging family devotion, no clergy authority to license marriages, no public support for education, and no oaths in court or for swearing in officers.

The disruptive early years might have suggested that Rhode Island’s “livelie experiment” was doomed to failure; the Christian charity required to sustain community seemed to require some degree of legal compulsion. While some groups, notably the Quakers, provided communal cohesion and mutual support, elsewhere basic services like education and poor relief, publicly supported within a parish structure, were often neglected. Williams was forced to urge aid for specific cases of need, suggesting the lack of routine care. Eventually, however, a new set of legal understandings began to emerge that would remain workable even for the post-Revolution state government. By the mid-seventeenth century, radical separatism had left churches with minimal institutional structure – often not even a building – and no ties to the legal order. This stark separation began to change in the late seventeenth and early eighteenth centuries in ways that shaped legal culture, even as a proliferation of printed legal forms and an expanding legal professionalism began to shape religion.

One example, recently traced, serves as an illustration. In 1676 John Clarke, a leader of the First Baptist Church in Newport and Charter negotiator, died leaving a large bequest in trust for relief of the poor and education of poor children, with instructions to trustees to have special regard for those who feared God. A charitable trust specifically to benefit poor Baptists was arguably precluded by English law, which prohibited donations to religious uses outside the Church of England, and by Parliament’s Charitable Uses Act of 1601, which limited permissible charitable uses largely to the secular, underscoring their public nature. Charter language about repugnancy to English law therefore might void colonial bequests to a non-Anglican church. While Clarke had not confined charitable benefits to Baptists, he had clearly wanted First Baptist oversight of the trust and its uses.

Trouble arose when an irresponsible Baptist trustee used trust land for his own benefit. A fellow congregant sought the Newport Council’s help, and the Council tried to seize the property for town use. Extensive legal proceedings, including threatened appeal to England and two Acts of the Rhode Island General Assembly, produced Rhode Island’s first charitable trust law, which uniformly protected charitable bequests in trust to any religious denomination or secular charity. In practice the law allowed extremely broad trustee discretion while also authorizing legal supervision

to prevent corruption. Subsequent trustees of the Clarke bequest submitted accounts to prove honest management, but otherwise owed nothing to the public and in fact used the trust for a building and for clergy salary, not just charity.

Starting with complete disestablishment, early Rhode Island law thus began to pre-figure reconceptualizations of church/state relations in post-revolutionary America whereby religion would support charity and moral community from within a realm of private ordering, with resources protected by the (public) law of property, corporation, and trust – and ultimately by the Constitution. The public construction of moral community, and of conscience itself – a task central to Puritanism – would drop from view, as would the public nature of private law categories themselves.

Another aspect of the Clarke case also illustrated emerging trends. When litigation produced church conflict, a sister Baptist church was called to arbitrate. Arbitration exerted moral pressure on the wayward trustee to surrender authority, averting Council intervention. This move strengthened denominational ties, once almost non-existent among Baptists, and illustrated the subtle coordination of (public) legal action and (private) religious persuasion – pointing toward religion's future role in the new republic.

Institutionalism grew quickly. Baptists owned property, erected buildings, paid educated ministers with endowments, and founded a college (now Brown University) – all activities that embroiled them in the legal system to a degree that would have shocked John Clarke no less than Roger Williams. This involvement with law strengthened the legitimacy of legal professionalism while protecting the strength of professionalized institutional religion. Denominationalism advanced on a foundation of institutional strength secured by legally protected wealth and autonomy, producing structures of hierarchical authority that roughly paralleled, and subtly reinforced, the formalized hierarchical legal order under the charter. Other denominations, especially Congregationalists, brought links to other colonies, and even Baptists formed intercolonial ties. Quakers flourished, as did a Jewish synagogue at Newport. Anglicanism was popular among the upper classes, although Rhode Island resisted all moves toward its establishment.

Incorporation paralleled trust law. The Anglicans' Trinity Church in Newport was the first to seek incorporation. Other Anglican, then Congregational, and one Baptist church followed. Incorporation guaranteed property protection and some degree of state coercion to enforce church rules, as with pew rents, but never became the instrument of political establishment it was in some colonies. Quakers, rejecting the government support that incorporation still implied, achieved similar goals by the adept use of trust and property law.

With no established church, Rhode Island experienced Great Awakening intra-denominational controversy, but not upheaval. Even the Revolution did not destabilize forms of governance that had become traditional. Church and state achieved a mutual accommodation and reinforcement that strengthened both law and religion without undermining a shared cultural commitment to religious freedom, as it was understood. Ironically, given the quarrels that led to Rhode Island's founding, "as it was understood" meant as defined, in large part, by the state's legal culture.

*The Middle Colonies: New York*

The story of law and religion in New York is in part the story of America's future. From the start the colony dedicated itself to trade and profit, not religious purity, and its population was characterized by a religious and ethnic diversity unimaginable in New England. On the eve of the Revolution, however, the shared culture of mutually defining and reinforcing legal and religious forms, which had finally emerged in Rhode Island, still eluded New York. Instead, religious quarrels intersected with quarrels over the meaning of crucial legal categories like property and corporation. New York had accommodated rampant diversity; nevertheless, it still struggled over a basic question of governance – freedom's relation to hierarchical authority and the coercions of law.

The Dutch preceded the British to New York and profoundly influenced the province. The charter founding New Amsterdam in 1628 stipulated an established Calvinist Dutch Reformed Church: no other religion could be publicly admitted, and the West India Company (WIC) pledged to provide suitable preachers under supervision of the church governing body, the Classis, in Amsterdam. The first minister, or dominie, arrived promptly, expecting to build a structured religious life coordinate to the structured polity planned by Governor Stuyvesant – tight burgher regulation of both civic life and economic activity. Stuyvesant assumed that civic control depended on religious uniformity and cooperated with the dominies by stamping out dissidents: he jailed Lutherans just for conducting home worship services.

Nevertheless, by the 1640s this tidy model of cooperative church/civic control confronted a social reality of inhabitants from at least a half-dozen countries speaking eighteen languages and practicing religions that included Catholicism, Judaism, and a dizzying variety of Protestant sects. The WIC, eager for the profits that accompanied population growth, directed Stuyvesant to lift regulation over both religion and trade. The dominies despaired but after mid-century abandoned the goal of unity and successfully built up their own thirteen Dutch churches – until the English takeover.

The English seized New York in 1664 and ruled under a proprietary patent from Charles II to his brother, James, which conveyed virtually unlimited political, economic, and religious authority. James delegated authority to a series of English governors who established a small provincial aristocracy: huge manorial land grants, with the option of manor courts, were combined with commercial monopoly privileges and government contracts to consolidate aristocratic power.

Anglican and some Dutch clergy located themselves within this aristocracy, but during the first years of English rule there was no move toward establishment. Instead, under the plural structure of the early Duke's Laws, limited toleration masked subtle forms of civil control. The Laws mandated a parish system wherein each parish elected overseers who called (chose) an ordained Protestant minister – not necessarily an Anglican. Overseers, backed by courts, collected money for church construction, salary payment, poor relief, and general management of parochial affairs. These civilly elected church officials also reported, in open sessions, all “swearing, prophaneness, Sabbath breaking, drunkenness, fornication, adultery, and all such abominable sinnes.”

Governors and courts rigorously enforced support for churches, but taxes were resented and local ministers became identified with the colonial political order. Moreover, officials easily exerted pressure over potentially disruptive ministers: dissenting preachers who moved in anti-Anglican directions of greater church purity (for example, by refusing infant baptism) could be threatened with no salary. In consequence, often Tory ministers preached to rebellious congregations. Antagonism ran high, linking political grievances to religious dissent.

Dutch resentment was especially intense. Close ties linked Dutch and English upper classes to conservative Dutch and English clergy, but the majority of the Dutch still resented English rule. Resentment mounted when the English instituted aggressive Anglicanizing measures, closing Dutch schools and imposing English Law and a Naturalization Act. Under English coverture law women lost their legal identity at marriage and could no longer manage property. By contrast, Dutch women were accustomed to owning property, engaging in trade in their own names, and enjoying the benefit of inheritance laws that reflected their relatively strong position in Dutch culture. The economic and cultural subservience expected by the English was alien to them.

New Yorkers stubbornly resisted English attempts to impose uniformity. An “anti-Catholic” rebellion, waged with Dutch leadership in the name of Calvinism and England's Glorious (Protestant) Revolution, succeeded briefly between 1689 and 1691. When it was quelled, the new governor, Benjamin Fletcher, convinced the Assembly to pass a Ministry Act, which

he interpreted as establishing the Church of England in New York City and four provincial counties. Nevertheless, elected vestry and wardens, backed by the Assembly, refused to call an Anglican minister. Fletcher then granted a corporate charter to Trinity, New York City's new Anglican church. Under that charter the elected civil vestrymen were required to collect funds for Trinity's rector from city inhabitants; the rector could sue them for refusal. The corporate body of Trinity elected separate vestrymen, so that the governing body of the church was insulated from control by the (usually dissenting) elected civil vestry – an ironic move in the direction of privatizing the corporation even while publicly enforcing Anglican establishment. In a parallel move Fletcher incorporated the Dutch Reformed Church, so that Dutch and Anglican churches, both under the control of conservative ministers, formed a mutually congenial elite. Both Trinity and elite Dutch churches received extensive land grants; one Dutch dominie with close ties to the Anglicans also received a personal grant of 700,000 acres.

The Fletcher grants of land and corporate privileges, given exclusively to Dutch and Anglican churches and to a few powerful individuals, contaminated religion and politics for decades. Identified with a monopolized and Crown-controlled economy and at odds with growing commercialization, the grants left many inhabitants disillusioned with religion in general. Poor relief and education, entrusted to churches, suffered from conflict and indifference. The result was quiet alienation among the Dutch (who resented their own privileged clergy's alliance with the English) and also among most of the English (who were never majority Anglican).

During the early eighteenth century the Society for the Propagation of the Gospel in London dedicated new resources to Anglican missionary work. With London financing and provincial government support, Anglicans could proselytize on a scale no other religion could match. Books of Common Prayer, many in Dutch, inundated the province. Anglicans made inroads among French Protestants and also among Long Island Congregationalists, as Cotton Mather noted with dismay in 1706. So too, they finally converted many disheartened Dutch. Missionaries taught children English while catechizing them: the goal was cultural as well as religious conversion. To aid Anglican education, the governor under Queen Anne pressured the Assembly to pass an Act for Encouragement of a Common Free School, with the salary of an orthodox Anglican schoolmaster paid by a general tax.

In reaction, there was a brief resurgence of Dutch culture. Indeed, the first stirrings of the Great Awakening in America occurred among the New York Dutch, brought by Theodorus Frelinghuesen of the Raritan Valley. Frelinghuesen attacked the hierarchical structures and formalized worship that characterized both the Church of England and conservative Dutch

churches, and his emphasis on the intense awareness of sin that must precede the experience of grace led him to challenge upper-class complacency. Preaching for a time in a barn when conservatives took over his church, he drew on the ordinary experience of Dutch farmers, not the conventions of formalized worship, to convey his radicalized message of sin and redemption. Soon, however, he was just one of many New Light preachers forming evangelical alliances across denominational and cultural boundaries; Dutch distinctiveness dropped out.

By 1750 the colony's embrace of commerce had influenced its law, and many New Yorkers did not attend church: the unchurched, the New Lights, and religious traditionalists emerged as three separate political forces. Religious splits had also been exacerbated by the pressure of extensive grants on land availability. Whereas some governors favored the Fletcher policy of achieving legal/religious control through land conveyance, others, following Crown policy, disfavored huge grants because they stifled development, despite lenient tenancy terms. The Crown also defended Indian land claims for the sake of retaining Iroquois allegiance; attacked by the French and their Indian allies, the Iroquois were not protected by white settlers, whose main concern was land, not the honor of alliance. Repeated government grant revocations and rerevocations rendered titles uncertain; so too did vague boundaries, Indian claims, and frequent failure of proprietors to honor semi-feudal obligations like quitrent payments – even while tenants were pressured to honor theirs. Conflicts arose as settlers, often with governor approval, established dissenting New England-type townships on lands claimed by proprietors.

Such conflicts, often violent, became commonplace after mid-century. They dramatically juxtaposed two models of religious life, Anglican and dissenting (with unchurched liberals often joining dissenters). And they illustrated, in externalized form, the same Protestant tension between hierarchical public order and radical Christian egalitarian freedom that the Puritans tried so hard to contain. Legally, such conflicts dramatically pitted ownership by title against ownership through labor and use. In handling resulting disputes, lawyers began to construct a conception of rights that could protect property from either religiously sanctioned political hierarchy or disruptive, dissenting, leveling usurpation. But that process was far from complete on the eve of the Revolution.

Similar conflicts occurred in relation to incorporation, which in Rhode Island already meant impartial legal protection for a variety of independent associations but in New York still represented religious and political privilege. During the King's College debates, right before the Revolution, a famous "Triumvirate" of Enlightenment Whig journalists of the type



represented by Franklin in Pennsylvania joined with Presbyterians to argue that an educational corporation should mean a self-governing corporate body chartered by the Assembly, not, as proposed, a delegation of Crown authority subject to and incorporating Anglican ecclesiastical authority; the Triumvirate made explicit comparison to an economy weighed down by monopoly privilege and Crown control, in contrast to the vigor of free commerce. They lost the battle, and King's College (now Columbia) was incorporated under the Crown. They lost because conservative Dutch clergy, promised an endowed professorship, helped urge Assembly passage of the Anglican corporate form. Debates during the 1769 elections compelled the Assembly to extend incorporation rights to all Protestant churches and to allow exemptions from church taxes in the four counties where they were still collected. The governor vetoed even those changes, however, although fewer than one in ten New Yorkers attended an Anglican church.

Thus, the much-cited (and very real) pluralism and materialism of New York masked lingering vestiges of starkly hierarchical conceptualism, incorporating ecclesiology, legal form, and social/economic ordering. That hierarchy had suffered repeated challenge. Resulting conflicts remained unresolved but an evolving legal conceptualization had started the process of aligning religious and market freedom, each as associated with an emerging privatization of property and corporation rights.

### *The Middle Colonies: Pennsylvania*

Pennsylvania emerged from paradox. Founded by a pacifist sect that shunned worldly power, it quickly produced a sophisticated legal framework for government, an effective system of social control, and a learned and prosperous group of leaders. In short, it mirrored the paradoxes of its founder, a dedicated Quaker who was also a skilled profit-seeking gentleman lawyer. Pennsylvania contained such sectarian diversity that visiting ministers commonly likened it, with New York, to Babel – a reference once reserved for quarreling Europe. In contrast to the hierarchy/voluntarism conflicts of New York, Pennsylvania's competing religious directions moved horizontally, so to speak, from all-inclusive spiritualism to strict Biblicist separatism. Quakers were its dominant influence, but that influence created a legally secured spiritual ecumenicalism that precluded religious establishment and opened the way for the rationalized ecumenicalism of the Enlightenment.

By the 1680s, when they came to Pennsylvania in large numbers, Quakers were already dispersed throughout the colonies but usually as a despised sect. Quakers publicly ridiculed hierarchy in church and polity, taking it as sign of sinful pride. Three New England colonies passed laws banning

Quakers; when they reappeared in Massachusetts magistrates resorted to tarring, ear cropping, and, in four cases, hanging. The named crime was sedition.

Quaker theology was Protestant, but tended toward universalism by describing grace, not as an unearned gift to the elect, but as living spirit present in all. Quakers believed this spirit, or light of grace dwelling in each person, could overcome original sin, but in the fallen world carnal pride had led to hierarchy and violence. Eschewing that violence, Quakers stressed the role of family and community in nurturing the inner light: tender conversation, free from self-serving pretenses, could perfect children's spirits and maintain the community in near-Edenic innocence. Given this Quaker emphasis on domesticity – as well as the role of Margaret Fell as almost co-equal founder of the movement, with George Fox – women equaled men in influence.

William Penn's own background was a complex mix of spirit and worldliness. Son of an admiral favored by the Stuarts, Penn learned law and became a Quaker against his father's wishes. In England he challenged Quaker persecution by appealing to traditional English legal rights; one of his victories helped establish juror independence. Granted Pennsylvania in payment for a debt owed his father, Penn set out to found a "Holy Experiment" in religious toleration, which he conceived in terms of legally protected liberty. As profit-seeking proprietor he also retained traditional feudal legal rights like quitrents, escheat, and tax exemption, which soon led to conflict with the Quaker-dominated Assembly. Nevertheless, Penn's effort to use law in service of liberty served as one precedent for American constitutionalism.

Penn's first "Frame of Government" was a Quaker document informed by both liberal and republican political theory. After addressing, in typical republican fashion, the nature of monarchy, aristocracy, and democracy, Penn incorporated all three in an institutional framework with a governor (Penn), an elected Council of 72 to propose law, and a rotating Assembly to accept it – a separation of "debate" from "result" possibly taken from Harringtonian republicanism but also consistent with decision making in Quaker meetings, where debate was followed by a separate "sense of the meeting." (Later the Assembly demanded a more powerful unicameral legislature, granted in a 1701 Charter of Liberties that included amendment rights.) In a "Prologue" Penn laid out his theology of government, starting with the Augustinian assumption that the unfortunate reality of evil in the world justified legal coercion, which was required for order but was never itself free of sin. Penn also proposed, however, the ideal of a tender government, used not just to terrify evildoers but also to "cherish those that do well," and he argued for "kindness, goodness, and charity," in cares "more soft, and daily necessary." Since social nurturing would have occurred

without the Fall, presumably it escaped the taint of sin otherwise implicit in law.

A “Great Law” followed the Frame, laying down Penn’s goal of toleration among Christians and making notable changes in penal law. The Law’s rights-based purpose was to preserve “Christian and Civill Liberty” against both private injustice and government tyranny. The first law guaranteed freedom of conscience (since God alone is “Lord of Conscience”) for all who acknowledged a Supreme Being; all but atheists were citizens, no taxes supported churches, and abuse of another’s religion constituted breach of the peace. Nevertheless, only Christians could hold office and the Law prohibited blasphemy, profanity, and breach of the Sabbath along with the usual sex offenses, drunkenness, and “harmful” games like cards and cockfighting. Thus the Law reflected Quaker belief that the spirit cannot be coerced, but should be protected from worldly sin – an uneasy combination.

Penal law reform was equally Quaker. Elsewhere physical punishment was the norm, including flogging, cropping, and the rack. Public corporal punishment instructed the community’s conscience as well as the offender’s; except in capital cases, a quick return to community followed and prisons played a minor role. The Great Law, by contrast, eliminated the death penalty for all crimes except premeditated murder; and, except for whipping in cases of adultery, rape, or sodomy, limited punishment to fines and imprisonment (with labor) in a house of corrections. The Christian purpose was rehabilitation – a rekindling of the spirit through removal from the carnal world and direct communion with God. (Repealed by England in 1718, these reforms were reintroduced with the Revolution, becoming the penitentiary system.) Also consistent with honest Quaker conversation were reforms like plain language in pleadings, open publication of laws and official salaries, and protection of Indians from liquor-induced land sales; such reforms became well known in the colonies, while Penn’s Christian goal of a “cherishing” government was reflected in Pennsylvania’s unusual civil provisions for poor relief.

Religion was a powerful coordinate means of social control. At monthly meetings Quakers considered no concern too “private” for intervention: excessive ornamentation, prideful speech, untender childrearing, harsh treatment of servants, indebtedness, or the need for charitable relief. Marriage, which provided nurture for children’s tender spirits, was of particular importance; committees carefully monitored a couple before granting approval, and parents encouraged “in meeting” marriage by rewarding couples with ample land.

Given that reward system, Pennsylvania became a rural landscape of large separate family farms, linked by invisible but effective family and religious control. Accordingly, government operated at the county, not

township, level, and both taxation and participation in public life were minimal. Despite Penn's defense of law, most Quakers disliked legality. They discouraged suits against each other, refused to take oaths (assuming honesty in all speech), and as pacifists might refuse to apprehend criminals. Early Assemblymen were notorious for a reluctance to pass laws and a refusal to speak except when moved by the spirit. County courts were used chiefly to register deeds, wills, or transactions and to recover debts; letters to Europe praised the near absence of government. For disputes that did go to court, over debt or fences or occasional crime, records indicate a high level of compliance (as with uncontested debt recovery); Quaker legal reforms apparently helped induce cooperation.

Despite its egalitarianism, a hierarchy emerged not explicitly based on wealth and power, but incorporating both. Wealthy Quakers were the ones most successful in keeping children in meeting, thus earning moral prestige. Chosen for high-level meeting tasks, they were also, in practical effect, chosen at meeting for Assembly and judicial office. Notwithstanding formal disestablishment, meeting authority and political power became intertwined. As the prestige of a selective Yearly Meeting in Philadelphia grew, paralleling Philadelphia's growth as a commercial center, a powerful, religiously based political force emerged: the "Quaker Party" was arguably the first major American political party.

The Quaker family model of land distribution, more than either the (dissenting) township or (Anglican) estate model, provided extraordinary surplus productivity and hence the foundation for Quaker trading wealth and political dominance until the 1750s. It was also the foundation for an increasingly privatized conception of property, at odds with Penn's own feudal model. By mid-century, however, Quakers were only a fourth of the population, and Germans close to half. The intersection of German with Quaker culture produced complex, sometimes conflicting, currents of influence. For example, German Moravians shared the Quaker tendency toward spiritualized universalism, but not the emphasis on protected domesticity and distinct community. Moravians effectively embraced Indians, given the shared spiritualist interest in trances, and they sought to unite all Pennsylvanians in one ecumenical Community of God in the Spirit. At the other extreme, sectarian perfectionists sought separation from the world for the sake of strict conformity to scripture. Between those ecumenical/separatist extremes were large numbers of Lutherans. Some brought (from the influential Prussian Halle academy) a tradition stressing public life as service and property as responsibility. More common, however, was a pietism that defined property and liberty, for both church and individual, in negative terms – as protection of the pious household, not opportunity for public virtue, and as protection from plunder, not public obligation. Abused by

local German rulers, these settlers sought in Pennsylvania's promised liberty a household and religious freedom from official demand for services, funds, and conformity.

This negative conception of liberty was reinforced by the colony's corrupt land system. Escaping otherwise effective law reform, Penn's sons vigorously enforced escheat and quitrent privileges and refused to curtail dishonest speculator ejections based on false surveys and uncertain boundaries. Specialized land-dispute tribunals earned only disdain. In reaction, German immigrants, who were highly literate, engaged with Philadelphia's emerging legal culture to give liberty a legal, property-based definition, and their emphasis on property protection helped shift Pennsylvania's focus from community to individual. A pietist printer, Christopher Sauer, sold a widely read paper containing technical advice on avoiding English intestate law (which disfavored widows), and on using English law both to protect inheritances in Germany and to secure title to colonial land. He encouraged naturalization, which protected families against proprietor escheat and, with property ownership, also secured voting rights. Sauer's periodicals combined piety, practical household advice, and technical English law – all representing some part of the pietist meaning of liberty.

Sauer's experiment in legal education through journalism was carried forward by Henry Miller, a cosmopolitan ex-Moravian who learned printing in Europe and from Ben Franklin. He published a widely distributed legal handbook that precisely translated English legal categories to German. Knowledge of law, the book explained, paralleled knowledge of scripture; both protected the pious household from injurious error. In his paper, moreover, Miller also moved beyond negative liberty by pressing the connection between Christian virtue and its secularized, republican parallel, with increasing emphasis on the latter. When the Stamp Act imposed a double tax on foreign-language papers, it reached an audience well schooled in protecting (negative) legal rights through (positive) political action, with the tension between those two directions unresolved. By then German culture had effectively combined legal self-protection with political clout. After mid-century the Quaker Party, with Franklin's support, had sought a royal charter to undercut proprietor power. To split the usually pro-Quaker German vote, Thomas Penn instituted property law reforms that provided first-purchase rights for squatters, surveyor supervision, and an impartial board to settle disputes. Germans, accepting increased quitrents in return for secure titles, provided the decisive votes for Penn – who now represented legal security for property, not its opposite. When the Crown threatened that same security, Germans rallied to the Revolution.

Church incorporation provided another legal vocabulary for emerging, if not always consistent, conceptions of liberty. Henry Muhlenberg, an

influential Halle minister, knew his church lacked sufficient legal status to secure property or delineate internal authority. Familiar with the use of English law to cheat unincorporated New York Lutherans, Muhlenberg assiduously studied law and sought incorporation for his church – despite his astute suspicion of incorporation’s lingering dependence on political influence. He fashioned a constitution that defined spheres of pastoral and vestry authority and stipulated free annual elections and an expanded lay right of veto – claimed by his congregation as part of the religious liberty Penn had guaranteed. This incorporation of the church as a predominately private organization with considerable legally protected lay self-determination aligned the legal protection of religious freedom with both property protection and consent-based governance. While still incomplete, this process of protected privatization and internal quasi-constitutionalism advanced further in Pennsylvania than in other colonies outside Rhode Island and paralleled an emerging political conceptualism that would surface during the Revolution.

In Pennsylvania the Great Awakening was more complex than a simple challenge to structured authority. Penn had provided a legal framework for tolerance but no religious or political direction. By 1700 the result had been a confusion of competing sectarian influences that opened the way for mounting materialism and indifference; people mocked the rampant diversity of religious messages, and even Quaker discipline grew lax. During the Awakening strict separated sects died out or, like Mennonites, survived intact, still separated. Quakers simply excluded Awakening participants and achieved reform from within. Awakening fervor did, however, empower Protestant denominations that had once played a muted role in Pennsylvania’s sectarian Babel, and Pennsylvania’s material success contributed to denominational strength as congregants gained influence and respectability. Pennsylvania became the institutional center for the organization of intercolonial denominationalism, but another Awakening effect was equally important. Those who crossed sectarian lines had experienced religion as a matter of private choice, not communitarian authority. As distinct Protestant denominations grew in the Awakening, the goal of universalism was transferred to secular society. Ecumenicalism became a rationalist, philosophical ideal, typified by Franklin’s promotion of a print-dominated public citizenship – a project much advanced, not coincidentally, by Franklin’s publication of Whitefield’s Awakening sermons.

By mid-century, in fact, a tradition of non-sectarian voluntary civic organization had already grown, due to weak local government, religious diversity, and the absence of parishes. Schools, for example, while usually started by churches, were by 1750 often maintained across sectarian lines. So too with cemeteries, fire companies, and even some libraries. County courts

assigned public overseers of poor relief, but charity was often handled semi-privately by inhabitants in groups with indeterminant legal status. Thus, in this most sectarian of colonies, non-sectarian cooperation had become a norm. Franklin built on that civic tradition by promoting interdenominational groups like the Philosophical Society and Library Company, creating, in effect, a public secular version of the ecumenical community of believers, a secularism with its own millennial zeal to promote progress through reason and science. A telling symbol: to promote education Franklin skillfully arranged transfer, to a set of secular trustees, of a valued building once built for Whitefield's tour and then quarreled over by Presbyterians and Moravians; it became the academy that was later the University of Pennsylvania.

One vocabulary for emerging patriotic secularism was, of course, law. After mid-century, men from the best Pennsylvania families studied law in London. In 1764 alone ten lawyers were admitted to practice, and they used the Enlightenment vocabulary of natural rights, not just common law writs. This vocabulary drew people together more than did theology. Sauer had already explained natural law to German readers, and Muhlenberg, while distrusting the atheistic Franklin, had read law texts and he supported Franklin in the Revolution despite Lutheran reservations. In other words, after the Great Awakening people joined denominations with new enthusiasm, but they united across denominational lines under legal, not biblical texts.

#### *The Southern Colonies: Virginia*

The written laws and formal administrative procedures of early Virginia evince a superficial similarity to New England's religious establishment. The Anglican Church was established by charter prior to the landing of the first settlers at Jamestown in 1607. Virginia's early governments compelled church attendance and the maintenance of orthodoxy. By the 1650s elected vestries enforced moral discipline in their parishes, collected taxes to support the church and its minister, and maintained the only birth, death, marriage, and tax records of the time. As in New England, laws integrated religion and civil government in providing Christian education, care for the poor, and the preservation of social tranquility. The General Court had jurisdiction over both ecclesiastical and civil causes of action and relied on biblically derived concepts of morality and popular conceptions of equity and good conscience in reaching its decisions, as well as on rules of secular law. In this way, Virginia common law came to embody religious teachings. Statutory laws reflected a similar orientation, as moral standards of equity and fairness were imposed on commercial activities. Even after its second

decade, when widespread cultivation of tobacco as a cash crop fragmented Virginia society, laws perpetuated the myth of communal integrity and social interdependence. Virginian's law code restricted the hours people could work, the prices that could be charged, and the number of economic ventures that could be pursued simultaneously.

Leaders of the Virginia Company believed that settlers in the New World required religious instruction and discipline. They were also committed, at least in part, to spreading the gospel, a commitment derived from the practical need to fight Poperly (France and Spain) in the New World. Anglican minister Robert Hunt was among the first 105 men who disembarked at Jamestown in May of 1607. A temporary church was the first structure erected, and Communion was held there on the third Sunday after landing. In 1610 and 1611 ministers accompanied new settlers to the colony. Governor Dale arrived with the latter group and immediately employed martial law to enforce productive labor and religious practice. All men and women were required to attend church services morning and evening and were subject to the watchful eyes of churchwardens, magistrates, and soldiers for moral conformity.

Virginia's first House of Burgesses in 1619 met in the Jamestown Church and took an oath of office swearing fealty to God. In its first session the Burgesses passed laws requiring church attendance and punishing idleness, gaming, and immoderate dress. This legislative body also divided the colony into four parishes, set aside glebe lands for the support of the Anglican Church, and prepared to support missionary efforts to the Indians. Within the parishes elected vestrymen were responsible for enforcing moral laws, which included not only those passed at the first session of the Burgesses but also sexual offenses, blasphemy, and various forms of antisocial behavior, such as lying and shrewishness. The vestrymen selected churchwardens, prominent members of church and community, to investigate the morals of the parish and present written findings in the county court. County judges usually ordered public whippings for breach of moral laws.

Yet, despite the apparent priority given to religion in its early laws, Virginia never fully embraced its mission as a religious one. The growth of the colony after 1620 far exceeded the increase in Anglican clergy. Parishes could be fifty miles long, making church attendance and enforcement of religious discipline nearly impossible. Virginians frequently buried their dead in family plots and married without clergy. Responding to instructions from England, the General Assembly in 1664 ordered that all ceremonies and rites "be according to the orders and canons of England, and the Sacraments . . . performed according to the Book of Common Prayer." The law was seemingly forgotten before the ink was dry. The extent of religious laxity is evident in the few attempts made by religious leaders to impose



greater conformity to Christian teachings. In the 1680s, James Blair, an official of the Church of England, arrived in Virginia under orders to manage ecclesiastical affairs so as to establish uniform discipline in the colony. The ministers with whom he met complained that the courts had ceased enforcing moral laws and sought his aid in creating a more consistent system of ecclesiastical courts to punish “all cursers, swearers, blasphemers, all whoremongers, fornicators and adulterers, all drunkards, ranters and profaners of the Lord’s day.” This proposal never reached the stage of government debate at any level.

Subordination of religion to economic pursuits is evident in the Virginians’ relative toleration of religious dissent. While compelled to contribute to the established church, dissenters were seldom troubled in their own religious practices. After Massachusetts warned the Virginia burgesses of a likely southern influx of Quakers after banishment from New England, the Virginians welcomed the newcomers as laborers. In the 1630s Virginians protested the creation of a haven for Catholics to the north, but their reaction resulted more from the loss of land than from fear of Catholics. Moreover, limits to economic activity and social amusement were rarely enforced. In 1650 a grand jury in Lower Norfolk County, when presented with a case of alleged Sabbath-breaking, chose to indict the entire town rather than single out an individual for punishment.

By 1700 colonial Virginia showed few signs of following the strict religious prescriptions of its founders. Virginia had built sixty-two Anglican churches by 1662, and clergy reported attendance rates of about 60 percent, indicating more attention to religion than some historians have recognized. Nevertheless, churchgoing for many became a social function more than an exercise in piety; true piety was a sentiment reserved for the old and dying. Household religious practices like family prayer declined as gambling, cockfighting, and horse racing came to characterize Southern culture. Sponsorship of these activities by local gentry reinforced their stature at the head of a society premised on norms of honor and prestige, not Christian selflessness. A hierarchy thus arose very different from that which evolved in New England. Property ownership bestowed social rank and semi-feudal political power, with prominent gentry acting, in effect, like manor lords – untitled, but very much responsible for the livelihood and behavior of those who worked on their estates. In the absence of influential clergy and local town governments, the gentry assumed economic, intellectual, and political leadership.

The gentry also provided the Church’s financial support, not so subtly influencing the nature of religion in the colony. The gentry preferred secular law to scripture and their own individual authority to social responsibility. Virginia judges obliged by emphasizing property rights and owner

freedom; they worked to secure gentry rights over land and servants or slaves, not to foster a community of reciprocal benevolence. In 1749 the clergy approached the Virginia Assembly seeking to escape economic dependence on the gentry. In an action indicative of religious sentiment in the colony, the legislators passed a law providing taxpayer support of Anglican clergy, but at an extraordinarily low salary: the bill was derisively known to as the “Two Penny Act.”

During the Great Awakening the established Anglican Church came under attack from Virginians who bemoaned clerical laxity in doctrine and morals. Dissenters, mostly poor farmers, the less educated, and a small number of merchants, flocked to hear traveling evangelical preachers. Itinerant Presbyterian ministers such as William Robinson found a ready audience for their passionate revivals in western Virginia. Baptists, with energetic and emotional preachers Shubel Stearns and Daniel Marshall in the vanguard, garnered even more converts while Anglican converts to Methodism in the 1760s developed a stronghold in Brunswick County.

Even as dissenters were attacking the established clergy for its liberality, the gentry was scolding it for failure to control the masses: the disruption of the Great Awakening, with its emotional egalitarian message of self-empowerment, challenged gentry control of Virginia society and the hierarchical code of honor and prestige on which it was premised. In response, acting through the Assembly, the gentry secured, after 1740, complete political domination of the church, eschewing the need for bishops and other ecclesiastical offices. Under gentry control the church preached a message equating legitimate paternalistic authority with ethical responsibility. This message at once questioned the legitimacy of British rule while it augmented the local authority of the gentry who provided for the welfare of the populations: liberty, virtue, and paternalism were interwoven.

The Anglican Church in Virginia consistently supported both slavery and laws directed toward brutal slave control. Like frontier wars against the Indians that provided land for white settlers, slave laws were instituted in part to gain the solidarity of lower class whites who, in the 1670s, had demonstrated a dangerous capacity to rebel. In 1680 the Assembly reinforced the construction of lower class “whiteness” by forbidding slaves to defend themselves against whites, even when bullied; in 1705 it passed a law allowing vestries to seize any livestock claimed by slaves, to be sold for the benefit of poor whites. Interracial marriage and sex were forbidden, except of course for the freedom that male slave owners could in secret exercise over slaves. Free Africans, in turn, lost many of their earlier privileges, ensuring unremitting inequality. Many fled to escape Virginia laws.

In 1670 the legislature justified slavery in part by reference to Africans’ paganism, but the church, despite urging from London, made insignificant

efforts to minister to the slaves. This inaction protected the legislature's expressed justification for slavery, while the church's message of sacralized hierarchy provided slave laws with religious sanction. Many slaveholders rationalized their authority as the exercise of an obligation to care for "heathens" of an "inferior" race who could not care for themselves. When dissenters succeeded in converting slaves during the later eighteenth and early nineteenth centuries, however, the church and the slaveholders reversed position, arguing that slavery offered to African heathens the means of salvation through Christ.

Dissenters, especially Baptists, challenged both the Anglican refusal to convert slaves and the church's privileged legal status in Virginia. Baptists openly attacked the colony's establishment as early as the 1760s, arguing that faith cannot be legally compelled. Practical grievances also fueled the Baptist crusade: dissenters were forced to support a church they did not accept, and they could not secure for their own churches the legal right to incorporate, to receive and hold bequests, or to proselytize. To gain these rights, dissenters aligned themselves with Enlightenment reformers, often deists, atheists, or humanistic Unitarians who were using a secular vocabulary of rights to advocate greater protection of individual liberty – encompassing rights of property ownership as well as freedom of conscience. By the 1770s law provided a common vocabulary that united these two very distinct cultures. Their anomalous alliance brought disestablishment after the Revolution, but did not usher in the Christian nation the Baptists envisioned.

### *The Southern Colonies: Maryland*

Maryland is often cited as early precedent for religious toleration in America. Yet, for many years Maryland maintained the strongest Anglican establishment in North America; its earlier, limited religious toleration masked de facto Catholic control. Maryland represents, in fact, not toleration, but the bitterness of Catholic/Protestant antagonism. Indeed, to the extent that Maryland embraced toleration, it did so only at the command of England and not on colonial initiative.

Initially, for political and economic reasons, Maryland did not rely on religion as a foundation for community. James I had intended to give the colony to George Calvert, a devout Catholic, the first Lord Baltimore and trusted servant of the King. When Calvert died, his son, Cecilius, inherited the title, and in 1629 Charles I gave him Maryland. Immediately, representatives of the failed Virginia Company, fearing further land devaluation, protested this grant to a Catholic as a violation of English law and an invitation to Spanish or French intervention. Protests delayed settlement until

1633 and shaped the religious character of the colony. The new Lord Baltimore, knowing his estate was precarious, tried to minimize the influence of religion altogether. He insisted Catholics “preserve unity and peace” by refraining from public discussion or practice of religion, a policy that precluded not only Catholic establishment, but even construction of Catholic churches.

Baltimore exercised extraordinary proprietary authority. Owning all land, he was also sole source of legal authority. He appointed the governor, a council of advisors, magistrates, and judiciary; his authority to promulgate laws was limited only by the requirement that no law be “repugnant to English law” or violate English rights. In recognition of those rights Baltimore created an Assembly that at first only reviewed legislation proposed by the Lord Proprietor, but soon began initiating bills and later established two courts.

Baltimore managed Maryland as a profit-generating enterprise, with income from taxes, fines, and fees. It appealed to younger sons of the English Catholic gentry who wanted land and influence without compromise of belief, a combination impossible in England. Calvert gave the largest tracts and most powerful political positions to Catholics, but to attract laborers he encouraged religious diversity, leaving Catholics a distinct minority.

Tension between Catholic rulers and Protestant settlers arose almost immediately. Many Jesuits migrated to Maryland in the 1630s, settling without legal title. Committed to reclaiming Catholic universalism, they traveled the colony, converting Indians and threatening Protestant laborers with eternal damnation. Catholic landowner toleration of Jesuits prompted claims of persecution by Protestants, who appealed to Virginia to rescue them, militarily if necessary, from Jesuit harassment. Maryland’s governor, Lord Baltimore’s brother, acted quickly to suppress unrest, convicting one of the proselytizers of “offensive and indiscreet speech” for warning Protestants of damnation.

Legal action to temper Jesuit enthusiasm pacified workers but also attracted dissenters to the colony. Religious diversity, however, did not mean toleration: each religious enclave exercised its own rules regarding conformity with a sectarian defensiveness that stemmed from the precarious state of any religion in Maryland. Only one Anglican minister preached in the colony before the late 1650s, and most Protestants could not afford to support a minister, build a church, or maintain a school. For three generations most people did not attend a single formal church service, and responsibility for public services vested instead in the gentry. As a result, prior to 1700 Maryland maintained practically no poor relief, schooling, or records and lacked the usual signs of community – churches, town squares,

or schoolhouses – that foster public life. Nevertheless, every town had stocks, pillory, and a whipping post, while vacant country homes served as jails.

Laws in Maryland were similar to those in Massachusetts, but enforcement was not. Drunkenness was a crime in both colonies, but Maryland only punished one who “abuse(s) himself by frequent drunkenness,” and required multiple witnesses to repeated incidents. Many penal statutes addressed sex offenses, but most actual prosecution resulted from unusual circumstances – forced miscarriages or infanticides, a husband accusing wife and lover, or a female servant charging a master for child support.

Conflict in England profoundly affected Maryland. During the English Civil War nervous Maryland Catholics acted to solidify their position with a 1649 “Act concerning Religion.” Known for providing religious toleration, the Act in fact was explicitly designed to protect Catholics from the “dangerous consequence[s]” they feared. Specifically incorporating protection of Catholicism into criminal law, the Act prescribed execution for any who openly denied the Trinity; it also ordered that the Virgin and Apostles be spoken of with reverence and prohibited slanderous religious designations, with particular mention of the term “papist.”

By 1651, however, the Protestant majority controlled the Assembly, which abrogated the Toleration Act of 1649 and also passed laws reflecting Puritan influence, with strict penalties for drunkenness, profanity, swearing and cursing, adultery, fornication, blasphemy, and violating the Sabbath. Only the governor’s veto prevented a tax-supported Protestant establishment. In 1654, angered by persistent interference from Calvert, the Assembly launched its own civil war by repudiating the Lord Proprietor’s authority to govern. The governor raised an army to defend his proprietary rights, but was defeated in 1655. Now unencumbered, the Assembly made Catholicism a crime. Radical Puritans plundered homes of Catholics and forced them and their priests into exile, executing at least four who resisted. Thus self-government in Maryland resulted in violent religious persecution, not toleration. Refusing defeat, Baltimore worked through a hostile Puritan Parliament to reestablish dialogue with the Maryland Assembly: he regained control but on radically modified charter terms, which included installation of a Protestant governor. Baltimore retained his income, but his role in governance was never the same.

Charles Calvert succeeded his father as Lord Baltimore in 1676 and took advantage of the Restoration in England by trying to exclude Protestants from Maryland government. In response, the Assembly complained to London that Baltimore overused his veto, filled powerful offices with Catholics, and denied Protestants their rights of self-government. With continuing Puritanical zeal, the Assembly also prohibited Sabbath labor

and required church attendance or private worship. While not explicitly anti-Catholic, the legislation was so perceived.

In the political skirmishes that followed, the Lords of Trade generally favored the Protestants, especially after a report from an Anglican minister, John Yeo, was forwarded by way of the Archbishop of Canterbury. Yeo described Maryland's lack of churches, its general irreligion, and its "notorious vices . . . soe that it is become a Sodom of uncleanness and a pest house of iniquity." Baltimore, however, stubbornly resisted pressure from the Lords to stop favoring "those of the Papish Religion to the discouragement of his Majesties' Protestant subjects."

As in New York, England's Glorious Revolution of 1688 brought revolution to Maryland. An anti-Baltimore assemblyman, John Goode (variously spelled "Coode"), a one-time Anglican minister, planter, and businessman, recruited a small army with support from Protestant lawyers and merchants who had recently fled the English Restoration. Goode's band marched toward the capital, and the Council and Governor surrendered without resisting. The rebels, called the "Associators," were not anarchists. They claimed only to object to a government that rested on a charter rendered invalid by Parliamentary supremacy, and that now refused to recognize the new Protestant monarchs as the lawful Crown. Immediately congratulating the Crown, the Associators implored them to stabilize a Protestant Maryland government. Only near the end of 1689 did the Protestants, claiming fear of violence, also close Catholic churches and imprison priests; in addition, Associators undertook investigation of the Baltimore administration, turning up evidence of misused funds and abuse of power, which they reported to England. In 1690 Whitehall charged Baltimore with fifty-two Articles of mismanagement; the Privy Council recommended suspension of his charter, with retention of only a small portion of the colony's income. A new governor, Copley, arrived in 1692, and the Lords of Trade selected a Council containing many Associators.

English diplomacy, however, imposed limits on Protestant triumph in Maryland. Seeking good relations with Spain, his military ally against France, King William promised Spain that Catholics would be free to worship both in England and the colonies. After the Associators' attacks on Catholics in 1689, Spain pressed William to act. William extended to the colonies the limited religious freedom guaranteed in the English Act of Toleration (1689) and ordered Governor Copley to restore liberty of conscience to Catholics. In response the Assembly passed a bill establishing Anglicanism; Copley refused to implement it.

Toleration during the period of royal control did not amount to religious freedom. Non-Christians had few rights; they could not bestow property by will, vote, or hold office. The Governor and Assembly renewed laws

against Sabbath-breaking, sexual misconduct, alcohol consumption, and various forms of gaming and entertainment, all with the expressed purpose of ensuring Christian morality. Catholics were an isolated minority, shorn of political power. They could practice their faith in public, but were not granted full rights of property ownership or political participation until the Revolution. Many, feeling betrayed, supported a return of Baltimore and Stuart restoration. Jesuits aggressively asserted proselytizing rights in 1697, resulting in then-Governor Nicholson's private condemnation of Catholicism as an "idolatrous religion," but Nicholson's hands were tied by royal policy and he incurred Protestant wrath by tolerating Catholics.

By the turn of the century Catholic plantation owners, mostly Calvert friends or relatives, had witnessed the decay of Maryland's manorial system. Local government replaced manor courts in administering justice and providing social needs. The colony remained religiously and ethnically diverse, with Quaker and Catholic "undesirables" from other colonies, along with immigrants from Scotland and slaves from Africa. The 1692 "Act of [Anglican] Establishment" had never been implemented, despite growing Anglican influence; three times the Lords of Trade under William rejected it. Then, when Queen Anne succeeded King William in 1702, she confirmed the 1692 Act and revoked orders securing freedom of religion for Catholics. As in other colonies, Queen Anne's reign represented a period of intensified Anglicanism, embraced by Maryland's Assembly because of its implicit anti-Catholicism. When Anne's royal governor, John Seymour, arrived, his first action was to arrest and threaten Catholic proselytizers; he then urged adoption of criminal laws to address the "audacious misbehavior of Romish Clergy," resulting in prohibition of Catholic worship in public and severe penalties for Catholic proselytizing.

Legally the Anglican establishment was relatively weak. It permitted practice of any Protestant religion and did not require attendance at Anglican services. The Assembly did, however, support establishment by organizing vestries as quasi-governmental organizations in twenty-two of the thirty parishes and provided new church buildings for most of those parishes. Elected vestrymen collected taxes to pay for churches, poor rates, support of a minister, and, often, a church school. A 1715 law allowed vestrymen to remove children from a Catholic mother if their Protestant father died, so they "be Securely Educated in the protestant religion." For funds to pay for the French and Indian War, the Assembly taxed Catholics double for their land and allowed lower tax rates on trade among Protestants.

Only after the fourth Lord Baltimore converted to Protestantism and successfully petitioned for return of his family's land did Anglicanism flourish as the chosen religion of the proprietary family. For the first time, social status attached to participation in the Anglican Church; legal establishment,

formally weak, was coupled with real political clout. Anglican establishment, however, did not prefigure the colony's future. Western Maryland grew dramatically from 1720 to 1776, but Anglican attempts to benefit from establishment there failed. Westerners were largely recent immigrants – Germans, French Huguenots, and Scots-Irish – who were disinclined to adopt Anglicanism. Some brought solid commitments to home churches, such as Dutch Reformed, Moravian, Mennonite, or Lutheran. Others followed Great Awakening preaching, which, as in Virginia, appealed openly to lower classes and slaves. Participants usually became Baptists or Methodists, and local churches, with their growing strength, served as *de facto* established churches throughout the frontier: they collected money for the poor, funded education and medical care, delivered mail, and kept records. One church task was to construct schools and hire teachers; Bibles served as texts until the decline in Christian education in the 1770s. In 1750, the Lutheran Ministerium also founded an orphanage for children of deceased German immigrants. Government performed none of these functions on the frontier, and even along the seaboard dissenting churches assumed many such tasks. Disturbed by dissenters' success, the Anglican ministry sent missionaries to the west, but they chiefly encountered hostility to Anglicanism's official establishment.

Limited toleration existed throughout most of the colonial era, but it was frequently imposed by a distant government primarily concerned with political and economic goals. Even in its more liberal incarnation, religious toleration never became the freedom to believe and to practice any or no religion without the loss of political, economic, or civil privileges. On the eve of Revolution, Maryland stood as an Anglican establishment that relied on churches to perform many public functions, relied on Christian teachings for many of its laws, and persecuted non-Christians and non-Anglican Christians to varying degrees. Maryland, in this way at least, was a typical British-American colony.

## CONCLUSION

Four main themes emerge from these accounts. The first is the theme of Christian community and its erosion. Yearning to regain lost community is, of course, a recurrent American motif. The historian is challenged to separate fact from myth; complete separation may be impossible. Yet, clearly in colonial America religion was integrated with law as a means of building communities rooted in common Christian values, and many colonists lamented when their contemporary reality fell short of an idealized past or failed to prefigure the millennial future.



A second theme is the shift in influence from public religious establishment to a “private” denominationalism with complex links to the public order. Denominational linkages to the public realm were achieved partly through legal forms that would soon be located, like religion itself, within a sphere of private ordering – property, corporation, and charitable bequest. As denominationalism became the dominant model for American religious life it employed and reinforced those legal categories, thereby shaping reconfigurations that would later transform American conceptions of private right and public authority. For example, tasks considered both public and religious under colonial establishment – charity, education, promotion of morality – would be redistributed across a public/private divide, posing dilemmas with which we still wrestle.

The third theme is the one of difference. American colonies were overwhelmingly Protestant, but Protestants fiercely disputed the role of political authority in relation to Christian freedom – in other words, the relation between law and grace or between the City on Earth and the City of God. Those dilemmas deep at the core of Christian theology were illustrated in the colonies, as theological differences shaped the legal structuring of communities and became inseparable from social and economic differences. It might fairly be said that American Protestants did not solve the problem of law, but at least many took it seriously, as a question of theological legitimacy.

Finally, of course, is the theme of colonization. The meaning of “Christian community” in the colonies was inextricably linked to the constant presence of those who had been conquered. In confronting the colonized, white Christians reenacted yet another Augustinian paradox as they found themselves defining communitarian inclusion by its flip side – by exclusion and by the coercion of enforced boundaries. Without boundaries, the pious community seemed to dissolve into the corruptions of the world, and thence into pagan darkness. That radical dissolution was embraced by Roger Williams when he took up residence among the Indians and declared Massachusetts to be the real pagan wilderness, since coerced exclusions had replaced true Christian love. For most colonists, however, community came to be defined in part by an “other” that could be both racially identified and variously described as heathen or Satanic. That “otherness” united whites and reminded them of the vigilance needed to build Christian community. As a result, “community” increasingly rested on foundations of bloody conquest and enslavement. For example, during the attacks of the 1670s Puritans believed God had unleashed Indians as a punishing force from Satan, in part because, in the wilderness, Massachusetts had itself become too heathen and was no longer a godly community. Puritans slaughtered

Indians to prove God's power and their own worth and sold Indian children ("young Serpents") as slaves.

These inclusion/exclusion decisions, defining the meaning of Christian community, set in motion ironic forces and cross-currents that played themselves out for decades in post-Revolutionary Era America. For example, the all-enveloping, anti-Puritan Anglican church in the South embraced both unregenerate masses and privileged elites, the former frustrating New Englanders' conceptions of a true church, the latter asserting a status New Englanders found unchristian. Yet, Southern Anglicans rejected African slaves the New Englanders might well have welcomed. By contrast, dissidents during the Great Awakening excluded from their definition of Christian community New England latitudinarianism, commercial wealth, and the values of elite Southern culture, which they labeled immoral, while including slaves and the lower classes. Ensuing struggles to define the "true" meaning of community in America would last until the Civil War, and beyond.