

Law and Catholicism in Colonial Maryland

The doctrine of toleration in matters of religion, reasonable though it certainly is, has not been long known or acknowledged. . . . [B]ut while immortal honours are bestowed on the name and character of Locke; why should an ungracious silence be observed, with regard to the name and character of Calvert?

– U.S. Supreme Court Justice James Wilson,
Lectures on Law (1790–1791)

Montesquieu’s conclusion in *The Spirit of the Laws* that each form of government has an animating principle – a set of “human passions that set it in motion” – and that each form can be corrupted if its animating principle is undermined plays a central role in this book.¹ The animating principle of a particular English American colony is usually easy to discern. To mention two well-known illustrations, religious freedom was Rhode Island’s animating principle, while Massachusetts’s was the desire to create an ideal Bible commonwealth. The “legend” is that Maryland was founded as a Catholic colony,² although scholars have spent a lot of time disagreeing about the matter over the years.

In 1883, for instance, attorney and former Confederate General Bradley T. Johnson delivered a paper to the Maryland Historical Society that cataloged what he claimed were the three prevailing theories about

¹ CHARLES-LOUIS DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 21, 30 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., 1989) (1748).

² R.J. Lahey, *The Role of Religion in Lord Baltimore’s Colonial Enterprise*, 72 MD. HIST. MAG. 492, 493 (1977). Lahey was referring to the “legend” surrounding George Calvert’s founding of Avalon. The term applies with equal force to his plan for Maryland.

Maryland's animating principle.³ The first was financial: "Lord Baltimore, having acquired a principality, in order to develop it by speedy settlement, and promote his fortune, proclaimed and promised the largest liberality in grants of land and liberty of conscience to all who would emigrate to and colonize his new possessions."⁴ The second traced to the purported benevolence of Maryland's Protestant majority: "The Puritan theory that the Protestants having the numerical preponderance in the Colony in 1649, proclaimed freedom of conscience as the fundamental law of the new commonwealth, being moved thereto by a profound conviction of its justice and the example of the Puritans in England."⁵ The third was the Catholic account:

The Roman Catholic theory that Lord Baltimore, being a devout Catholic, actuated by a desire to provide a refuge for his oppressed co-religionists, founded a Catholic Colony, composed in the main of Roman Catholics, and by his own authority, with their co-operation and sympathy, and through the promptings and teachings of his Church, adopted and proclaimed the Law of Religious Liberty to all Christians of every creed and sect whatsoever, as the fundamental institution of the new State.⁶

Jumping ahead more than a century to the present day, historian Nicholas John Pellegrino summarizes the current state of the academic literature in his dissertation about Catholics and the pursuit of religious freedom in early America, which is worth quoting at length:

Historians have assessed the Maryland experiment in religious freedom by weighing the competing religious, political, and economic ideals that motivated Calvert to found his colony in 1632. While some analysts have lauded his commitment to religious liberty by arguing that, along with his son who carried out his ambitions, Calvert "deserves to be ranked among the most wise and benevolent lawgivers of all ages," others sought to correct this "wholly erroneous view of the Religious Toleration stated to have been declared by Lord Baltimore." These competing views split along denominational lines, with Protestant historians like C.E. Smith ascribing the most deceitful and self-interested motives to Calvert and his heirs, and Catholic historians such as Bishop William T. Russell celebrating Calvert's

³ See Bradley T. Johnson, *The Foundation of Maryland and the Origin of the Act Concerning Religion of April 21, 1649*, at 9 (1883) (paper presented to the Maryland Historical Society), <https://babel.hathitrust.org/cgi/pt?id=nyp.33433068187974&view=1up&cseq=9>.

⁴ *Id.* at 5. ⁵ *Id.* at 6.

⁶ *Id.* at 7–8. Johnson rejected all three of the prevailing theories and proposed a fourth theory of his own: that Lord Baltimore sought to establish a colony in America where the rights of Englishmen, broadly construed, would be secured, and guaranteed to "all its people forever." *Id.* at 9.

magnanimous plan. Most recently, however, scholars of various persuasions have found a more nuanced way to explain the motivations behind the Maryland experiment. Thomas McAvoy, for instance, includes both interpretations in his studies of early Maryland without assessing the relative importance of one over the other. Perhaps the leading historian on the subject, John Krugler concludes that although “Religious freedom was the *modus operandi* of the ‘Maryland design,’” it was “not the purpose of the founding of Maryland. It was a means to an end, which was the creation of a prosperous society.”⁷

Scholars can never know for certain which of the various interpretations of Maryland’s animating principle is correct. As historian Maura Jane Farrelly put it in her book about the making of American Catholic identity: “we have no documentation on what either of the first or second Lord Baltimore’s motives were, other than the fact that they both hoped to make money.”⁸ She continued: “To what degree, then, the Act Concerning Religion was a genuine move to create a refuge for Catholics, and to what degree it was a marketing ploy – designed to attract and protect an English population that was disproportionately wealthy – cannot be fully determined.”⁹

What this chapter now endeavors to demonstrate is that, by focusing on the *law* in colonial Maryland – most notably, the charter, instructions, statutes, and judicial decisions¹⁰ – what becomes apparent is the birth, death, and resurrection of a colony designed to provide refuge for Catholics and that tried to do so by promising toleration for all Christian denominations. Although the chapter discusses the political,

⁷ Nicholas John Pellegrino, *Reviving a Spirit of Controversy: Roman Catholics and the Pursuit of Religious Freedom in Early America 59–60* (2015) (unpublished Ph.D. dissertation, University of Nevada, Las Vegas). See also John D. Krugler, *An “Ungracious Silence”: Historians and the Calvert Vision*, 110 MD. HIST. MAG. 143 (2015) (a historiography about the founding of Maryland).

⁸ MAURA JANE FARRELLY, *PAPIST PATRIOTS: THE MAKING OF AN AMERICAN CATHOLIC IDENTITY* 50 (2012).

⁹ *Id.* But see Matthew Page Andrews, *Separation of Church and State in Maryland*, 21 CATH. HIST. REV. 164, 174 (1935) (“After extensive study, I should say that idealism was uppermost in the purpose of the Calverts; but, being also practical, they held in view the hope of a profitable enterprise.”); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 33 (1986) (“Unless both father and son shared a desire to make their colonial enterprises havens in some sense for their fellow English Catholics, their policy of encouraging Catholics to emigrate to those colonies, providing them with priests, and securing toleration for them – all actions that jeopardized the commercial success of the ventures – is inexplicable.”).

¹⁰ Scholars long have debated the meaning of “law” in colonial America. See, e.g., Mary Sarah Bilder, *English Settlement and Local Governance*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA, VOLUME 1: EARLY AMERICA (1580–1815)* at 63, 90–103 (Michael Grossberg & Christopher Tomlins eds., 2008).

social, and economic context of the various Maryland laws about religion, it emphasizes the text of those laws and the principles derived from the text. The objective is to identify with as much precision as possible the impact of the law itself on regime change in colonial Maryland.¹¹ Note also that there are two major styles of writing about history: articles and books that focus in great detail on a narrow period of time, and those that chronicle in conceptual terms a broad expanse of time. This chapter – this book – is written in the second style.

BIRTH OF THE ANIMATING PRINCIPLE OF COLONIAL MARYLAND

George Calvert served as a member of the English Parliament and later as secretary of state under King James I. He supported the failed marriage alliance between Prince Charles and the Spanish House of Habsburg, a decision that diminished his political power. He resigned all his government offices in 1625 except for his position on the Privy Council and declared publicly that he was Catholic. Later that year the king anointed Calvert as Baron Baltimore of Baltimore in the county of Longford in the Irish peerage as a reward for Calvert's years of loyal service.¹²

Calvert had a longstanding interest in colonization of the Americas that was initially manifested in 1609 through financial investments in the second Virginia Company and the East India Company. He joined the New England Company in 1622, and in 1623 he obtained a royal charter for a colony he called "Avalon" in what is now Newfoundland,

¹¹ Legal historian William E. Nelson emphasizes economics as the basis for regime change in colonial Maryland. See, e.g., William E. Nelson, *The Law of Colonial Maryland: Virginia without Its Grandeur*, 54 AM. J. LEGAL HIST. 168 (2014). The general scholarship about colonial Maryland is voluminous. A few illustrations of books that focus on matters other than law are LOIS GREEN CARR, RUSSELL R. MENARD & LORENA S. WALSH, ROBERT COLE'S WAR: AGRICULTURE AND SOCIETY IN EARLY MARYLAND (1991) (a case study of local agriculture in colonial Maryland); JEAN B. RUSSO & J. ELLIOTT RUSSO, PLANTING AN EMPIRE: THE EARLY CHESAPEAKE IN BRITISH NORTH AMERICA (2012) (a comparative analysis of the political economies of colonial Maryland and colonial Virginia); and ANTOINETTE SUTTO, LOYAL PROTESTANTS AND DANGEROUS PAPISTS: MARYLAND AND THE POLITICS OF RELIGION IN THE ENGLISH ATLANTIC, 1630–1690 (2015) (an exploration of the impact of trans-Atlantic politics on colonial Maryland). The *Maryland Historical Magazine* is a treasure trove of articles about Maryland. Many are devoted to the colonial period. Relevant works are cited throughout this chapter.

¹² See, e.g., JOHN D. KRUGLER, ENGLISH AND CATHOLIC: THE LORDS BALTIMORE IN THE SEVENTEENTH CENTURY ch. 3 (2004).

Canada.¹³ When the newly installed Lord Baltimore traveled to Avalon in 1627, he brought with him two Catholic priests, one of whom remained in the colony through 1629. This marked the first continuous Catholic ministry in English North America. Baltimore secured the right of Catholics to practice their religion unimpeded in the new colony, and he implicitly recognized the principle of religious tolerance for all Christians in Avalon's charter by omitting any requirement that settlers take the Oath of Supremacy acknowledging the monarch as the head of the Church of England.¹⁴ Catholics celebrated Mass in one part of Baltimore's manor house, and Protestants held their services in another part.¹⁵ Avalon was thus the initial North American jurisdiction to practice at least some degree of religious toleration.¹⁶ The colony failed because Baltimore found the weather too severe and it had become a financial drain on him.¹⁷

Lord Baltimore was bound and determined not to give up on his dream of colonization. King Charles I, who had succeeded his father James I on the throne, granted Baltimore a location south of Jamestown, Virginia. Baltimore asked the king for a different spot in light of opposition from other investors interested in settling the new land of Carolina into a sugar plantation,¹⁸ and he eventually accepted redrawn boundaries to the north of the Potomac River, on either side of the Chesapeake Bay.¹⁹ Tragically, he died five weeks before the charter passed the seals. His eldest son

¹³ See, e.g., Gillian T. Cell, *Introduction to NEWFOUNDLAND DISCOVERED: ENGLISH ATTEMPTS AT COLONISATION, 1610–1630* at 1, 48–49 (Gillian T. Cell ed., 1982). Calvert had purchased a smaller plot in Newfoundland in 1620.

¹⁴ See, e.g., PETER E. POPE, *FISH INTO WINE: THE NEWFOUNDLAND PLANTATION IN THE SEVENTEENTH CENTURY* 289 (2004). Religious studies scholar R.J. Lahey emphasized the significance of this omission: "The original grant to the Newfoundland Company in 1610, for example, provided that 'we would be loth that any person should be permitted to pass that we suspected to affect the superstitions of the Church of Rome,' and it specifically required the taking of the Oath of Supremacy, a measure unambiguously obnoxious to Roman Catholics. By that standard, the absence of restriction on Roman Catholic colonization in the Avalon charter is indeed remarkable." Lahey, *The Role of Religion in Lord Baltimore's Colonial Enterprise*, *supra* note 2, at 496. The Charter of Avalon of 1623 is reprinted in *NEWFOUNDLAND DISCOVERED*, *supra* note 13, at 258–69.

¹⁵ See, e.g., EVAN HAEFFEL, *ACCIDENTAL PLURALISM: AMERICA AND THE RELIGIOUS POLITICS OF ENGLISH EXPANSION, 1497–1662* at 157 (2021).

¹⁶ See, e.g., Sir George Calvert and the Colony of Newfoundland, www.heritage.nf.ca/articles/exploration/calvert-avalon-colony.php.

¹⁷ See, e.g., LUCA CODIGNOLA, *THE COLDEST HARBOUR OF THE LAND: SIMON STOCK AND LORD BALTIMORE'S COLONY IN NEWFOUNDLAND, 1621–1649* PT. ONE (Anita Weston trans., 1988).

¹⁸ See, e.g., JOHN FISKE, *OLD VIRGINIA AND HER NEIGHBORS* 265 (1897).

¹⁹ See, e.g., WILLIAM HAND BROWNE, *GEORGE AND CECIL CALVERT: BARONS BALTIMORE OF BALTIMORE* 17 (1890).

Cecilius, who became the second Lord Baltimore, executed his father's design.²⁰ Cecilius organized the expedition of colonists to the New World, although he did not travel with them. Cecilius's brother Leonard served as the first governor of Maryland. The colony was named after Queen Henrietta Maria, wife of Charles I. The initial wave of colonists was thought to have consisted of seventeen Catholic gentlemen, two Jesuit priests, and approximately 123 Protestant indentured servants who set sail on the *Ark* and the *Dove* on November 22, 1633.²¹ Catholics remained a minority of Maryland's population throughout the colonial period.

The Charter of Maryland – the organic law of the colony – announced that “Cæcilius Calvert . . . being animated with a laudable, and pious Zeal for extending the Christian Religion . . . that all that Region . . . may by our Royal Highness be given, granted and confirmed unto him, and his Heirs.”²² The charter then enumerated the new Lord Baltimore's powers and rights in religious matters:

We do grant . . . the patronages and advowisms of all churches . . . within the said region . . . together with the license and faculty of erecting . . . churches . . . and places of worship . . . ; with all and singular such, and as ample lights, jurisdictions, privileges . . . liberties . . . and royal rights, and by temporal franchise whatsoever, as well as by sea as by land . . . to be had, exercised . . . as any *bishop of Durham* . . . ever heretofore hath had, held, used or enjoyed, or of right could, or ought to have, hold, use or enjoy.²³

The Bishop of Durham clause endowed Lord Baltimore with regal powers in Maryland, including, at least technically, with the authority to exclude everyone except Catholics, “if Baltimore so willed.”²⁴ Although the charter specified that Maryland's laws had to conform “so far as conveniently may be” to the laws of England and that inhabitants of the colony were entitled to the privileges of native-born Englishmen, any ambiguity was to be interpreted in Baltimore's favor.²⁵

²⁰ See, e.g., AUBREY C. LAND, *COLONIAL MARYLAND: A HISTORY* 6 (1981).

²¹ See, e.g., MATTHEW PAGE ANDREWS, *THE FOUNDING OF MARYLAND* 22 (1933).

²² The Charter of Maryland of 1632 is reprinted in, among other places, <http://msa.maryland.gov/msa/educ/exhibits/founding/pdf/charter.pdf>.

²³ *Id.*

²⁴ Wm. King, *Lord Baltimore and his Freedom in Granting Religious Toleration*, 32 *RECORDS OF THE AM. HIST. SOC. PHIL.* 295, 298 (1921).

²⁵ Charter of Maryland, *supra* note 22. The favorable terms of the charter have been said to be a manifestation of George Calvert's “legal genius.” Lois Green Carr & Edward C. Papenfuse, *The Charter of Maryland*, 550 *ARCHIVES OF MARYLAND ONLINE* xii, xii (2003). Carr was widely regarded as the leading historian of Maryland's seventeenth-century period. Papenfuse

The charter did not specifically announce the intention to plant a colony protective of Catholics. That should not be surprising. At the time, the laws of England not only forbade the open practice of Catholicism, but Parliament was also demanding stricter enforcement of those laws.²⁶ Consequently, if George Calvert desired to create a haven for Catholics in Maryland, it was unlikely that he would have made that known during the process of obtaining the charter. Calvert's strategy worked: the Virginia Company had accused Calvert of wanting to establish a Catholic colony – calling him a “Catholic Colonizer” – yet Charles I dismissed the accusation and granted the charter as a reward for Calvert's loyalty to King James I. The charter did not contain the standard clauses explicitly excluding Catholics.²⁷

The actions taken by Cecilius Calvert immediately after being granted the charter provide additional circumstantial evidence that the Calverts wanted to create a haven for Catholics and that they concealed that plan from English authorities.²⁸ The day the *Ark* and the *Dove* set sail for Maryland all of the passengers who were onboard at that moment were administered the same Oath of Supremacy and allegiance to the king that George Calvert had refused, as a Catholic, to take and that had led the senior Calvert to resign his government posts. Shortly thereafter the ships made an unannounced stop to pick up the group of Catholic planters who had been recruited to travel to Maryland, including the two Catholic priests. The extra stop was necessary because the Catholic planters had

was the longtime state archivist of Maryland who was responsible for making the Maryland archives accessible via the internet. Citations in this chapter to the Maryland archives are to the internet version, Archives of Maryland Online (“AOMOL”). See <http://aomol.msa.maryland.gov/html/index.html>. AOMOL, as it is commonly known, currently numbers 865 volumes and also publishes occasional essays interpreting the archived records.

²⁶ As the Introduction to this book recited, the anti-Catholic sentiment in England was sparked by Pope Clement VII's refusal to annul the marriage of Henry VIII and Catherine of Aragon. The high-water mark in law was the Act of Supremacy of 1534, which decreed the monarch to be “the only supreme head on earth of the Church in England.” Any act of allegiance to the pope was considered treasonous. See, e.g., I.D. Thornley, *The Treason Legislation of Henry VIII (1531–1534)*, 11 *TRANSACTIONS OF THE ROYAL HIST. SOC.* 87 (1917).

²⁷ See Charter of Maryland, *supra* note 22. The charter did contain language that Maryland's churches “be dedicated and consecrated to the Ecclesiastical Laws of our Kingdom of England.” *Id.*

²⁸ See, e.g., KRUGLER, *ENGLISH AND CATHOLIC*, *supra* note 12, at 133, 134, 137, 138, 143; Thomas O'Brien Hanley, *Church and State in the Maryland Ordinance of 1639*, 26 *CHURCH HIST.* 325, 332 (1957).

informed Cecilius Calvert that they would not take the Oath of Supremacy and allegiance to the king.²⁹

While on the voyage to Maryland the leaders of the expedition were supplied with a document entitled “Lord Baltimore’s Instructions to the Colonists” written by Baltimore himself.³⁰ The Instructions provided more proof of the Calverts’ strategy of keeping the animating principle of the colony under wraps by requiring Catholic planters to practice their religion “as priuately as may be” and “to be silent vpon all occasions of discourse concerning matters of Religion” so that none of the Protestants in the colony would complain to the anti-Catholic forces “in Virginia or in England.”³¹

According to the charter, Lord Baltimore could pass a law only with the advice and consent of an assembly of freemen. But the manner of calling the assembly was left to his will, and what constituted “law” was viewed far less formalistically in seventeenth-century Maryland than it is today.³² For instance, instructions were regarded as law during the colonial period,³³ and the 1633 directive from Baltimore may be fairly characterized as Maryland’s first Toleration Act. The second was the Ordinance of 1639, a basic set of laws enacted by Maryland’s general assembly after the assembly had rejected an initial code proposed by Baltimore in or about 1637 on the ground that the assembly rather than the proprietor should initiate legislation. Perhaps surprisingly, the 1639 Ordinance was more tolerant about religion than the far more celebrated Act Concerning Religion of 1649.³⁴ The Ordinance of 1639 extended toleration to Christians and non-Christians alike, whereas Baltimore’s proposed code – and the more famous Act Concerning Religion of 1649 – afforded toleration to Christians only.³⁵ The language from Baltimore’s proposed code, for example, was “that all

²⁹ See, e.g., 2 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY: THE SETTLEMENTS* 286 (1935).

³⁰ The 1633 Instructions are available at 1 *THE CALVERT PAPERS 131* (1889), www.loc.gov/resource/lhbcb.3364a/.

³¹ *Id.* at 132.

³² See Joseph H. Smith, *The Foundations of Law in Maryland: 1634–1715*, in *LAW AND AUTHORITY IN COLONIAL AMERICA: SELECTED ESSAYS* 92 (George Athan Billias ed., 1965); see generally *THE MANY LEGALITIES OF EARLY AMERICA* (Christopher L. Tomlins & Bruce H. Mann eds., 2001). More will be said about “legalities” later in this book.

³³ See, e.g., Charles M. Andrews, *List of the Commissions and Instructions Issued to the Governors and Lieutenant Governors of the American and West Indian Colonies from 1609 to 1784*, 1 *ANN. REP. AM. HIST. ASS’N* 395, 395 (1913) (for the year 1911 of the historical association); Smith, *The Foundations of Law in Colonial Maryland*, *supra* note 32, at 92.

³⁴ See Hanley, *Church and State in the Maryland Ordinance of 1639*, *supra* note 28, at 325.

³⁵ See *id.*

the Inhabitants of this Province being Christians (Slaves excepted), shall have and enjoy such rights liberties immunities priviledges and free customs within this Province as any naturall born subject of England hath or ought to have.”³⁶ The 1639 Ordinance, by contrast, omitted the qualifications in Baltimore’s proposal and substituted “according to the Great Charter.”³⁷ Indeed, under the 1639 Ordinance a Jewish man served in the legislature.³⁸ Further, unlike in New England’s Puritan colonies, religious felonies were not punishable in court as offenses against religion as such, but rather were sanctionable solely if they rose to the level of a breach of public order.³⁹

When the 1647 death of Governor Leonard Calvert was coupled with England coming under the control of a Puritan government, Lord Baltimore decided to appoint a Protestant governor for Maryland. Revealingly, during the summer of 1643 Governor Calvert, a Catholic, had recruited Protestant immigrants from New England and Virginia with offers of religious toleration.⁴⁰ In 1648 Lord Baltimore required the Protestant governor and council to take oaths of office committing themselves to religious toleration, including of Catholics:

that I will not . . . directly or indirectly trouble molest or discountenance any Person whatsoever . . . professing to believe in Iesus Christ and in particular no Roman Catholick for or in respect of his or her Religion nor in his or her free exercise thereof . . . nor will I make any difference of Persons in Conferring of Offices Rewards or Favours . . . in Respect of their s^d Religion.⁴¹

In sum, although many scholars characterize the Act Concerning Religion of 1649 as “the first act of religious toleration in the British world,”⁴² it was preceded by several other Maryland laws, including the more tolerant Ordinance of 1639.⁴³

³⁶ As quoted *id.* at 337. ³⁷ As quoted *id.* ³⁸ See *id.* at 337–38.

³⁹ See Hanley, *Church and State in the Maryland Ordinance of 1639*, *supra* note 28, at 339.

⁴⁰ See, e.g., HAEFELI, ACCIDENTAL PLURALISM, *supra* note 15, at 218.

⁴¹ 3 AOMOL, *supra* note 25, at 209, 210 (1636–1667). In October 1640, Maryland’s Catholic dominated general assembly passed “An Act for Church liberties.” The law has been called “obscure, probably deliberately so,” a suggestion that is consistent with the previously mentioned point about the desire to keep the animating principle secret in an anti-Catholic climate. FRANCIS X. CURRAN, CATHOLICS IN COLONIAL LAW 19 (1963). The law itself stated: “Holy Church within this Province shall haue and enjoy all her Rights liberties and Franchises wholly and without Blemish.” 1 AOMOL, *supra* note 25, at 96 (January 1637/8–September 1664).

⁴² FARRELLY, PAPIST PATRIOTS, *supra* note 8, at 63.

⁴³ Rhode Island mandated religious toleration from its founding in 1636. See Chapter 2 of this book. Avalon, George Calvert’s first colony, promised it as early as 1623, which is why the book begins with Maryland.

That said, the Act Concerning Religion, enacted on April 21, 1649, has become the most famous law in Maryland's colonial history.⁴⁴ The operative provision of the Act provided: "noe person or psons . . . professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof within this Province."⁴⁵ Settlers who blasphemed by denying either the Trinity or the divinity of Jesus Christ could be punished by execution or by the seizure of their lands. Any person who disparaged the Virgin Mary, the apostles, or the evangelists could be whipped, jailed, or fined. The law outlawed the use of "heretic" and other religious insults.⁴⁶

The Act was inspired in large part by the fact that Lord Baltimore – who wrote most of it – needed to find a way to protect Maryland's Catholics after the 1648 oath that he required the governor and council to take committing themselves to religious toleration had proved insufficient by itself.⁴⁷ Baltimore's goal was to compel both Maryland's non-Catholic and Catholic residents to extend a modicum of civility towards one another on matters of religion, at least until they proved themselves ready to do so voluntarily.⁴⁸ Maryland's Puritan-Protestant general assembly, rather than Baltimore, inserted the draconian punishments into the Act so as to conform to the spirit of the English Long Parliament's approach to punishing heresies and blasphemies.⁴⁹

Lord Baltimore initially had hoped that manorial courts would resolve religious disputes to keep them from dividing the community.⁵⁰ However,

⁴⁴ See, e.g., Paul Finkelman, *Maryland Toleration Act (1649)*, in 1 *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 975 (Paul Finkelman ed., 2006); Edward C. Papenfuse, Jr., *An Act Concerning Religion, April 21, 1649: An Interpretation and Tribute to the Citizen Legislators of Maryland* (1999), <http://msa.maryland.gov/msa/speccol/sc2200/sc2221/000025/html/toleration.html>.

⁴⁵ 1 *AOMOL*, *supra* note 25, at 244, 246.

⁴⁶ Law Professor Michael McConnell called the Act's effort to ban the use of religious slurs and insults the first attempt in American history to proscribe hate speech. See Michael W. McConnell, *America's First "Hate Speech" Regulation*, 9 *CONST. COMM.* 17, 17 (1992).

⁴⁷ See, e.g., John D. Krugler, *Lord Baltimore, Roman Catholics, and Toleration: Religious Policy in Maryland during the Early Catholic Years, 1634–1649*, 65 *CATH. HIST. REV.* 49, 74–75 (1979).

⁴⁸ See FARRELLY, *PAPIST PATRIOTS*, *supra* note 8, at 99.

⁴⁹ See 2 Andrews, *The Colonial Period of American History*, *supra* note 29, at 310–11.

⁵⁰ See John D. Krugler, *The Calvert Vision: A New Model for Church–State Relations*, 110 *MD. HIST. MAG.* 7, 12 (2015). A manorial court, in feudal law, was a court through which a lord exercised jurisdiction over his tenants. Its powers extended only to those who lived within the lands of the manor.

the provincial court quickly came to dominate the colony's judicial process.⁵¹ A handful of religion cases illustrated how the animating principle played out in Maryland's colonial courts. The first, a 1638 case concerning William Lewis, was decided on the basis of Lord Baltimore's 1633 Instruction prohibiting disputes about religion.⁵² Lewis was a devout Catholic and overseer of the Jesuit Plantation of St. Inigoes. He was charged by a group of Protestant servants with harassing them about their religion – he was alleged to have said that Protestant ministers were “Ministers of the divell” and to have banned the reading of Protestant literature on his property – and with trying “with all vehemency craft and subtlety” to convert them and others to Catholicism.⁵³ The provincial court comprised of Governor Leonard Calvert, Commissioner Thomas Cornwallis, and Secretary John Lewger – Catholics all – convicted the Catholic defendant of disturbing the peace. Lewger faulted Lewis for “offensive & indiscrete speech” and for exceeding his authority in forbidding the Protestant servants “to read a booke otherwise allowed & lawfull to be read in the state of England.”⁵⁴ He found Lewis's “vnseasonable disputations” on religion tended “to the disturbance of the publique peace & quiett of the colony” in contravention of the proprietor's 1633 Instruction on the subject.⁵⁵ Cornwallis likewise emphasized Lewis's violation of Baltimore's Instruction, which was “made for the suppressing of all such disputes tending to the cherishing of a faction in religion.”⁵⁶ Lewger fined Lewis “500. weight of tobacco to the lord of the Province,” while Cornwallis fined him £500.⁵⁷ Governor Calvert concurred. The court also placed Lewis on bond of 3,000 lb of tobacco until “tenth of November next” and ordered him not to “offend the peace of this colony or the inhabitants thereof by iniurious & vnnecessary arguments or disputations in matters of religion,” or use “any ignominious words or speeches touching the books or ministers authorised by the State of England.”⁵⁸

A second case occurred when the Ordinance of 1639 was in effect: a March 1641/2 complaint by “the Protestants” against Thomas Gerard,

⁵¹ See WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA, VOLUME 3: THE CHESAPEAKE AND NEW ENGLAND, 1660–1750* at 6 (2016). For the legal history of the judicial power in colonial Maryland, see SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787* ch. 6 (2011).

⁵² The records for the case are available in 4 *AOMOL*, *supra* note 25, at 35–39 (1637–1650).

⁵³ *Id.* at 35–36. ⁵⁴ *Id.* at 38. ⁵⁵ *Id.* ⁵⁶ *Id.* ⁵⁷ 4 *AOMOL*, *supra* note 25, at 38.

⁵⁸ *Id.* at 39.

a Catholic. Gerard was accused of “taking away the Key of the Chappel and carrying away the Books out of the Chappel.”⁵⁹ The general assembly – still dominated by Catholics at this point in Maryland’s colonial history⁶⁰ – found Gerard guilty of a misdemeanor, and ordered him to return the key and the books and to pay a fine of 500 lb of tobacco towards “the maintenance of the first minister as should arrive.”⁶¹ As in the William Lewis case, the Catholic-controlled government was willing to punish one of its own for violating the animating principle of the colony.⁶²

Four other cases about the animating principle were decided after the passage of the Act Concerning Religion of 1649. Two embroiled Thomas Hatton, an Anglican whom Lord Baltimore had dispatched to Maryland in 1648 to deliver the proposed Act to the general assembly and who, upon arrival, was appointed to the council and named secretary of the province.⁶³ In March of 1650/1 the general assembly addressed a dispute between a Catholic member of the assembly named Walter Pakes and Secretary Hatton in which Pakes accused Hatton of making several disrespectful comments about Catholicism. The assembly’s investigation cleared Hatton of any wrongdoing, and Pakes’s legislative colleagues demanded that the governor and council ensure that Hatton’s “Reputation” was “fully vindicated from that fowle imputation which the said Pakes endeavoured to lay vpon him.”⁶⁴

The second reported incident involving Hatton came before the provincial court in April of 1654. Hatton had accused Luke Gardiner of

⁵⁹ 1 AOMOL, *supra* note 25, at 119.

⁶⁰ See, e.g., 2 ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY, *supra* note 29, at 301. Legislators appointed by the Catholic governor tended to be Catholic during the early years, while those elected by the freemen tended to be Protestant. See DAVID W. JORDAN, FOUNDATION OF REPRESENTATIVE GOVERNMENT IN MARYLAND, 1632–1715 at 27 (1987) (table).

⁶¹ 1 AOMOL, *supra* note 25, at 119. Suffice it to say that the 1641/2 decision against Gerard imposing a fine that would be used to support an Anglican minister did not constitute the establishment of Anglicanism as the state religion of the Maryland colony. As the next section of this chapter describes, that would occur later.

⁶² A nonjudicial example of equal treatment by the Catholic-controlled government in the 1640s found Lord Baltimore rejecting the claimed right of the Society of Jesuits for special privileges in Maryland, including special tax privileges. See FARRELLY, PAPIST PATRIOTS, *supra* note 8, at 87, 89.

⁶³ See The Origins of Thomas Hatton: Secretary of Maryland, https://freepages.rootsweb.com/~wrag44/genealogy/Opinion_Pieces/The_Origins_of_Thomas_Hatton.pdf.

⁶⁴ 1 AOMOL, *supra* note 25, at 318–19.

trying to convert Hatton's 12-year-old niece to Catholicism. Unfortunately, the outcome of the proceeding was not memorialized. The court records reported only the charge itself.⁶⁵ But the case is additional evidence that Protestants were confident that the Catholic-controlled judiciary would treat non-Catholics fairly.

In 1658 Reverend Francis Fitzherbert, a Catholic, was charged with trying to "seduce, & draw from their Religion the Inhab^{ts} there mett together" certain persons who had gathered "att a generall meeting in armes of the poeple of the Vpper parts of Patux^t Riuer."⁶⁶ The provincial court promptly acquitted Fitzherbert because the 1649 Act Concerning Religion permitted all Christians – Catholics included – to preach as much as they liked in the free exercise of their religion.⁶⁷

What was probably the most famous case in Maryland's colonial history involved Jacob Lumbrozo,⁶⁸ a Portuguese Jew who had arrived in Maryland in the early-to-mid-1650s. Lumbrozo was charged on February 23, 1658/9, with blasphemy for having spoken in a fashion that two witnesses took as denying the divinity of Jesus Christ. The first witness, John Fossett, testified that Lumbrozo had said that Christ had performed "Negro-mancy, or sorcery," rather than miracles.⁶⁹ A second, Richard Preston, testified similarly, alleging that Lumbrozo had said that Christ had performed "Art Magick," not miracles, and that he had taught his disciples "his Art."⁷⁰

Lumbrozo conceded that he had spoken to Fossett and Preston. He insisted that, as a Jew, he was merely responding to questions about how his religion perceived Jesus and that he had "sayd not any thing scoffingly or in derogaō of him, Christians acknowledge for the Messias."⁷¹ The provincial court ruled that "the s^d Lumbrozo remaine in the Sheriffs

⁶⁵ 10 AOMOL, *supra* note 25, at 356 (1649/50–1657) ("mr Thomas Hatton his Ldps Secretary and Attorney Generall on his Ldps behalf and on the behalf of himself this day declared against Luke Gardiner for detaining Elinor Hatton his Neece a Girle of about twelve years old from him the Said Secretary and her Mother Endeavouring to trayne her up in the Roman Catholick Religion with other things in the Said Attorneys declaration Contained, the Said Luke appearing in this Suit upon a Speciall Warrant from the Governour and both parties being heard at large touching the Matter in question, The Court for the present pronounced noe other order therein, but onely that the Said Elinor Hatton who was present in Court and brought in upon the Said Speciall Warrant, Should be returned and left to the disposition of the Said Attorney her Uncle. The Said Warrant, declaracon and other proceedings thereupon being hereafter upon Record fol.").

⁶⁶ 41 AOMOL, *supra* note 25, at 144–46 (1658–1662). ⁶⁷ *See id.* at 566–67.

⁶⁸ *See, e.g.,* J.H. Hollander, *Some Unpublished Material Relating to Dr. Jacob Lumbrozo, of Maryland*, 1 PUBLICATIONS OF THE AM. JEWISH HIST. SOC. 25 (1893).

⁶⁹ 41 AOMOL, *supra* note 25, at 203. ⁷⁰ *Id.* ⁷¹ *Id.*

Custody untill hee putt in security Body for Body to make answere to what shall be layd to his charge, Concerning those blaspheamous words & speeches, att the next Prouinciall Court, & th^t the persons be there present to testify uiua voce in Court.”⁷² If convicted, Lumbrozo would have been liable to punishment by death and forfeiture of his lands and goods. But the general amnesty proclaimed in the province ten days later, upon the accession of Richard Cromwell to the English Protectorate, conferred upon Lumbrozo his freedom. Lumbrozo received letters of denizen in 1663, which imbued him with the rights of a native or natural born subject, including the right to own land. In 1665 he was awarded a commission to trade with Native Americans.⁷³

DEATH OF THE ANIMATING PRINCIPLE OF COLONIAL MARYLAND

Lord Baltimore was said to have referred to the years 1642–1660 as a “time of troubles” in which the ferment in England had profound consequences for his proprietorship of Maryland.⁷⁴ In the colorful words of one historian, “As a leading Roman Catholic he could hardly expect forbearance from a government of English Puritans accustomed to calling his church ‘the whore of Babylon.’”⁷⁵ With the end of the English Civil War and the execution of King Charles I, Parliament wanted to rein in those English American colonies that had Royalist sympathies. William Claiborne, a bitter anti-Catholic critic of Maryland whose disdain for the Calverts antedated the granting of Maryland’s charter and who had joined forces with Richard Ingle to briefly seize control of portions of Maryland in the mid-1640s, was appointed as a parliamentary commissioner of the colonies on the Chesapeake Bay.⁷⁶ He overthrew Baltimore’s government and secured the enactment of a law on July 22, 1654 that provided that only Protestants could vote.⁷⁷ A new anti-Catholic government was elected, and

⁷² *Id.*

⁷³ See, e.g., Hollander, *Some Unpublished Material Relating to Dr. Jacob Lumbrozo, of Maryland*, *supra* note 68, at 27–29. In another case, the provincial court adjudged in 1669/70 that Robert Pennywell be given twenty lashes in “public view” for breaking the windows of the Catholic chapel at St. Mary’s. 57 AOMOL, *supra* note 25, at 610, 611 (1666–1670).

⁷⁴ See LAND, COLONIAL MARYLAND, *supra* note 20, at 33. ⁷⁵ *Id.*

⁷⁶ See, e.g., TIMOTHY B. RIORDAN, *THE PLUNDERING TIME: MARYLAND IN THE ENGLISH CIVIL WAR, 1642–1650* at 10–17 (2004).

⁷⁷ See 3 AOMOL, *supra* note 25, at 313 (“As alsoe that they Summon an Assembly to begin on the 20th day of October Next. For which Assembly all Such Shall be disabled to give

on October 20, 1654 repealed the 1649 Toleration Act. The Act Concerning Religion that replaced it guaranteed religious freedom to all Christians except those “who profess and Exercise the Popish Religion Commonly known by the Name of the Roman Catholick Religion.”⁷⁸ As the revised Act Concerning Religion made clear, the animating principle of Maryland was dead, a mere two decades after it was born. It was resuscitated on March 24, 1658/9, albeit temporarily, shortly after Lord Baltimore had managed to convince the Commonwealth government in England that he was not disloyal and that his government should be restored. After it was, Baltimore instructed Maryland officials to reenact the 1649 version of the Act Concerning Religion, which they did.⁷⁹ Baltimore’s hold on Maryland nevertheless remained precarious, especially when Charles Calvert became the third Lord Baltimore upon the death of his father Cecilius in 1675. A boundary dispute with William Penn was the most celebrated reason that the third Lord Baltimore was forced to travel to England in 1684 to defend his proprietary rights, but he also was required to address other concerns, not the least of which was his alleged partiality towards Catholics in the colony. The high-water mark of Protestant political ascendancy arrived in the form of the Glorious Revolution of 1688–1689 in England and the concomitant Protestant Revolution in Maryland led by John Coode when the overthrow of the Catholic proprietor’s government in Maryland followed closely on the heels of the overthrow of the Catholic king in England.⁸⁰ Maryland became a royal colony in 1691, and remained so until 1716, when the fifth Lord Baltimore (also named Charles Calvert) swore publicly that he was Protestant.⁸¹

any Vote or to be Elected Members thereof as have borne Armes in Warr against the Parliament of doe profess the Roman Catholick Religion.”).

⁷⁸ 1 AOMOL, *supra* note 25, at 340, 341. The 1654 Act also omitted the provisions against blasphemy and name-calling. Quakers fared no better than Catholics did under the Act. In July 1658, for example, the governor’s council issued a proclamation that all Quakers pledge fidelity to the government or leave Maryland forever. Quakers who failed to do so would be deemed “Rebells & traitors.” 3 AOMOL, *supra* note 25, at 352–53. See generally Kenneth L. Carroll, *Quaker Opposition to the Establishment of a State Church in Maryland*, 65 MD. HIST. MAG. 149 (1970).

⁷⁹ See 3 AOMOL, *supra* note 25, at 324, 325.

⁸⁰ Some scholars suggest that the rebellion in Maryland was triggered by longstanding resentment from Maryland’s Protestant majority over what they perceived as a Catholic monopoly on power in the colony. See, e.g., LOIS GREEN CARR & DAVID WILLIAM JORDAN, *MARYLAND’S REVOLUTION IN GOVERNMENT, 1689–1692* (1974).

⁸¹ See, e.g., 2 ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY*, *supra* note 29, at 325–76. Lord Baltimore retained his rights to the soil during Maryland’s time as a royal colony. See *id.* at 376.

What has been called Maryland's "Penal Period" stretched from 1689 to 1776.⁸² It was not a good time to be Catholic in the colony, at least as far as the law was concerned.⁸³ The self-styled "Articles of Surrender" of 1689 barred Catholics from holding office.⁸⁴ In 1691 Sir Lionel Copley, an Anglican, was appointed the first royal governor of Maryland and he promptly announced that the *Book of Common Prayer* was to be read on Sundays and holidays, "and the blessed Sacrament administered according to the Rites of the Church of England."⁸⁵ The "competent maintenance" of Anglican ministers was to be ensured by a "common charge" upon the public.⁸⁶ In 1692 Catholics were forbidden to practice law.⁸⁷ Also in 1692, the general assembly passed a resolution establishing the Church of England in the colony. King William III rejected it on technical grounds, yet in 1702 Queen Anne accepted a similar proposal.⁸⁸

On March 30, 1698, Governor Francis Nicholson issued a proclamation "prohibitting Romish Priests &c: from drawing ov^r his Maj^{ties} Subjects in this Governm^t to the Romish faith."⁸⁹ A special tax on imported Irish papist servants was enacted in 1699. The Act's title left

⁸² FARRELLY, *PAPIST PATRIOTS*, *supra* note 8, at 136.

⁸³ Legal historian William Nelson argues that the ferocious anti-Catholic sentiment in Maryland during this period was a byproduct of a larger British policy in North America to eliminate Catholicism as a political force and to establish Protestant hegemony that began with King William III. See 3 NELSON, *THE COMMON LAW IN COLONIAL AMERICA*, *supra* note 51, at 134. Some social and cultural historians insist that, notwithstanding the anti-Catholic legal environment during the Penal Period, the lived experience of Maryland's Catholics was usually fine in those areas of the colony where they had first settled. In fact, the argument goes, many prospered, including those who ran the Jesuit plantations in Charles and St. Mary's counties, and the Carrolls in Anne Arundel. See, e.g., "ANYWHERE SO LONG AS THERE BE FREEDOM": CHARLES CARROLL OF CARROLLTON, HIS FAMILY AND HIS MARYLAND (Ann C. Van Devanter ed., 1975).

⁸⁴ 8 AOMOL, *supra* note 25, at 107 (1687/8–1693) ("2ndly That noe papist in the Province being in any Office Military or Civil as by their Majesties Proclamacōn and the Laws of England."). See also 20 AOMOL, *supra* note 25, at 144 (1693–1696/7) ("That no Papist in this province be in any office Military or Civill as by their Maj^{ties} proclamacōn and the Laws of England.").

⁸⁵ *Id.* at 276. ⁸⁶ *Id.*

⁸⁷ *Id.* at 448 ("Ordered also that for the future no Roman Catholick or other Person whatsoever unqualify'd by Law do in any manner directly or indirectly practise as an Attorney or Councillor at Law either in publick pleading or otherwise solliciting any Cause.").

⁸⁸ See, e.g., David William Jordan, *The Royal Period in Colonial Maryland, 1689–1715* at 172–73, 276, 279–80 (1966) (unpublished Ph.D. diss., Princeton University).

⁸⁹ 22 AOMOL, *supra* note 25, at 48 (March 1697/8–July 1699). In 1696 Governor Nicholson had urged the assembly to order Maryland's Catholics to turn in their arms. The assembly declined so as not to upset the "very peaceable and quiet" then existing in Maryland. 19 AOMOL, *supra* note 25, at 389, 390 (September 1693–June 1697).

nothing to the imagination: “An Act for Raising a Supply towards the defraying of the Publick Charge of this Province and to prevent too Great a number of Irish Papists being Imported into this Province.”⁹⁰ The amount of the tax was “Twenty Shillings Sterling p poll.”⁹¹ The anti-Catholic legislation continued at a rapid pace during the early eighteenth century. Another law taxing imported Irish papist servants was passed in 1704, and the tax was doubled in 1717, shortly after the Calverts regained control of Maryland’s government when the fifth Lord Baltimore proclaimed publicly that he was Protestant.⁹²

The Instructions that Maryland’s first three royal governors received omitted the common provision of the day to tolerate any and all religions “except Papists.”⁹³ The provision “except Papists” initially appeared in the 1703 Instructions to John Seymour.⁹⁴ Seymour was personally anti-Catholic, and his agenda and that of his successor reflected that animus.⁹⁵ For instance, in 1704 Seymour shuttered a well-known Catholic church in St. Mary’s because it was “both Scandalous and offensive to the Government.”⁹⁶ Thereafter, Catholic services in colonial Maryland were conducted exclusively in private homes, a practice that was permitted by law on December 9, 1704.⁹⁷ Earlier that year, on October 3, Maryland enacted a draconian law against “Popery,” and the December 9 law was a response to it. The “Act to prevent the Growth of Popery within this Province” forbade any “Popish Bishop Priest or Jesuite” from proselytizing, baptizing any person other than those with “Popish Parents,” or saying Mass.⁹⁸

The Act to Prevent the Growth of Popery proved too much for English authorities, and on January 3, 1705/6, the queen in council ordered that it

⁹⁰ 22 AOMOL, *supra* note 25, at 497. ⁹¹ *Id.*

⁹² See 26 AOMOL, *supra* note 25, at 289, 349 (September 1704–April 1706); 27 AOMOL, *supra* note 25, at 371 (March 1707–November 1710); 33 AOMOL, *supra* note 25, at 109 (1717–1720).

⁹³ See 8 AOMOL, *supra* note 25, at 448 (Instructions to Lionel Copley); 23 AOMOL, *supra* note 25, at 540, 542 (1696/7–1698) (Instructions to Francis Nicholson); 22 AOMOL, *supra* note 25, at 285, 286, 369, 372 (Instructions to Nathaniel Blakiston).

⁹⁴ See CURRAN, CATHOLICS IN COLONIAL LAW, *supra* note 41, at 66.

⁹⁵ See, e.g., Charles B. Clark, *The Career of John Seymour, Governor of Maryland, 1704–1709*, 48 MD. HIST. MAG. 134, 135, 148, 159 (1953).

⁹⁶ 26 AOMOL, *supra* note 25, at 46.

⁹⁷ *Id.* at 431 (“no Popish Bishop Priest or Jesuite shall by vertue of the said Act of Assembly for or by reason of Exercising his ffunction in a private ffamily of the Roman Comunion be prosecuted or Indicted before any her Majestys Justices”).

⁹⁸ *Id.* at 340–41.

be suspended indefinitely, which the Maryland legislature did on April 15, 1707.⁹⁹ The Act was repealed in 1718.¹⁰⁰

The year 1715 witnessed the enactment of what can be characterized as the most offensive of all the anti-Catholic laws in colonial Maryland. The context involved a law about the administration of decedents' estates.¹⁰¹ Subsumed within the necessarily complex rules about the distribution of property upon death was a decree that, to ensure that children would be "Securely Educated in the protestant religion," Protestant widows could be deprived of their children if they married a Catholic man.¹⁰² The provision was repeated in a 1729 amendment to the 1715 law.¹⁰³ Catholics were barred from holding office via laws enacted in 1715 and 1716. The 1715 provision was part of an omnibus election law.¹⁰⁴ The portion about excluding Catholics from office read:

Provided also, That no Ordinary-Keeper within this Province, during the Time of his Ordinary-keeping, or any other Person disabled by any Laws of England from sitting in Parliament, shall be elected, chosen, or serve as a Deputy or Representative in the said General Assembly, so to be here-after called, convened and appointed, as aforesaid.¹⁰⁵

The 1716 law – "An Act for the better Security of the Peace and Safety of his Lordship's Government, and the Protestant Interest within this Province" – spoke more directly to the matter, prohibiting as it did any person in Maryland from holding any public position in the colony without first swearing the Oath of Abjuration, which denied the Catholic doctrine of transubstantiation.¹⁰⁶ In 1718 Maryland's Catholics were disenfranchised by Maryland's Protestants in order to prevent Maryland's Catholics from implementing, the statute said, their "wicked and malicious Designs."¹⁰⁷ The year 1718 further found the members of Maryland's lower house engaged in a maneuver that would have made Niccolò Machiavelli proud: they tried to repeal Maryland's 1704 Act to Prevent the Growth of Popery so that the recusancy laws of England would control, which meant that any Maryland Catholic who

⁹⁹ On the suspension of the Act, see CURRAN, CATHOLICS IN COLONIAL LAW, *supra* note 41, at 82. On the Maryland legislature's action, see 27 AOMOL, *supra* note 25, at 146.

¹⁰⁰ See 33 AOMOL, *supra* note 25, at 289.

¹⁰¹ See 30 AOMOL, *supra* note 25, at 331 (April 26, 1715–August 10, 1716).

¹⁰² *Id.* at 334–35.

¹⁰³ See 36 AOMOL, *supra* note 25, at 485, 488 (1727–1729, with appendix of statutes previously unpublished, enacted 1714–1726).

¹⁰⁴ See 30 AOMOL, *supra* note 25, at 271. ¹⁰⁵ *Id.* at 620. ¹⁰⁶ *Id.* at 612–15, 617.

¹⁰⁷ 33 AOMOL, *supra* note 25, at 288.

violated the English laws would be deported to face trial in the courts of England.¹⁰⁸ As a result, fewer Catholics would be living in Maryland.

Peter Attwood, a Jesuit who had come to Maryland six years earlier, insisted that the lower house's proposal violated Maryland's "constitution," as he called it.¹⁰⁹ Father Attwood maintained that, although Maryland's Catholics were Englishmen, they also were residents of a colony that had been founded to protect their religious freedom in perpetuity.¹¹⁰ The transparent attempt to "depopulate" Catholics from Maryland should be rebuffed, he continued, which it was.¹¹¹

Father Attwood's contention that Maryland's laws, rather than those of England, controlled religious disputes in Maryland was a powerful weapon in the efforts of Maryland's Catholics to defend their property from Protestant overreaching, as a 1724 case involving the Catholic heirs of Robert Brooke illustrated.¹¹² Thomas Brooke, an Anglican convert who had held a number of high-ranking positions in Maryland's government, challenged his brother Robert's share of their father's estate when Robert, a Catholic priest, died. Father Robert had conveyed his property rights to a Catholic mission in Maryland, yet Thomas insisted that the conveyance was invalid because Father Robert could never own land in the colony under England's Act for the Further Preventing the Growth of Popery. Father Robert's interests were represented by Attorney John Darnall, who made the same argument that Father Attwood had previously made: England's laws did not apply in Maryland. Indeed, Darnall insisted, Maryland had its own Act to Prevent the Growth of Popery, and in Maryland's version clergy were entitled to inherit property. Approximately five years later an English court found in favor of Father Robert's beneficiaries for precisely the reason

¹⁰⁸ See *id.* at 289; see generally NICCOLÒ MACHIAVELLI, *THE PRINCE* (1532).

¹⁰⁹ See, e.g., Peter Attwood, *Liberty and Property or the Beauty of Maryland Displayed*, 3 U.S. CATH. HIST. MAG. 235, 240 (1889–1890) (reprinting Father Attwood's manuscript).

¹¹⁰ See *id.* at 242, 248, 249, 252.

¹¹¹ See *id.* at 256; FARRELLY, *PAPIST PATRIOTS*, *supra* note 8, at 201.

¹¹² For a general discussion about the applicability of English law in colonial Maryland, see Jeffrey K. Sawyer, *The Rhetoric and Reality of English Law in Colonial Maryland, Part 1 – 1632–1689*, 108 MD. HIST. MAG. 392 (2013) and Jeffrey K. Sawyer, *The Rhetoric and Reality of English Law in Colonial Maryland, Part 2 – 1689–1732*, 109 MD. HIST. MAG. 81 (2014). Both George and Cecilius Calvert anticipated Father Attwood in maintaining that the English penal legislation did not apply in North America. See, e.g., KRUGLER, *ENGLISH AND CATHOLIC*, *supra* note 12, at 76, 199. The Brooke case is chronicled in 2 THOMAS HUGHES, *HISTORY OF THE SOCIETY OF JESUS IN NORTH AMERICA: COLONIAL AND FEDERAL – FROM 1646 TILL 1773* at 525–27 (1917).

that Father Attwood, and then Attorney Darnall, had insisted: England's laws did not extend to Maryland.

Father Attwood's argument was retested in the 1750s when the lower house of Maryland's assembly again tried to apply England's recusancy laws to Maryland. A unique twist was added this time: anyone who apprehended "any Popish bishop, priest, or Jesuit" was to receive a reward payable from the public treasury.¹¹³ A group of prominent Catholics successfully petitioned the upper house to reject the measure on the Attwoodian ground that it was inconsistent with the animating principle of Maryland.¹¹⁴ The Maryland Catholics' run of good luck was short-lived, however: taxes on their lands were doubled in 1756 to help finance the French and Indian War.¹¹⁵ Frederick Calvert, the sixth and final Lord Baltimore, personally approved the double-tax and went so far as to say, albeit in a separate dispute about whether Maryland's Catholic clergy were allowed to perform Mass in private homes, that the laws of England applied in Maryland.¹¹⁶

RESURRECTION OF THE ANIMATING PRINCIPLE OF COLONIAL MARYLAND

The first two Lords Baltimore were endowed with superb political skills. Their successors were not.¹¹⁷ Maryland was beset by internal bickering between popular and proprietary forces after the death of the second Lord Baltimore, including on the eve of the American Revolution, which meant that Maryland's reaction to the increasingly oppressive British economic program for colonial America was more restrained than that of neighboring colonies. Eventually, though, Maryland responded in kind and in 1774 held a tea party of its own, "less celebrated but even more dramatic than the Boston frolic nearly a year previous," when the tea-laden brig *Peggy Stewart* was burned at Annapolis in protest at British policies.¹¹⁸ No significant military battles were waged in Maryland, but Maryland made substantial contributions of men, arms, and ships. The Continental

¹¹³ As quoted in 2 HUGHES, *HISTORY OF THE SOCIETY OF JESUS IN NORTH AMERICA*, *supra* note 112, at 533.

¹¹⁴ See Petition of Roman Catholics of Maryland Against a Bill Depriving Them of all Civil and Religious Rights, reprinted in 25 AM. CATH. HIST. RES. 261, 261-64 (1908).

¹¹⁵ See 52 AOMOL, *supra* note 25, at 507, 508 (1755-1756).

¹¹⁶ See 6 AOMOL, *supra* note 25, at 539-40 (1753-1757). Maryland law permitted Catholic priests to say Mass in private homes. English law forbade it.

¹¹⁷ See, e.g., *The Calvert Vision*, *supra* note 50, at 16.

¹¹⁸ LAND, *COLONIAL MARYLAND*, *supra* note 20, at 301.

Congress convened in Baltimore during the winter of 1776 and 1777 because of the threat of British occupation faced by Philadelphia.¹¹⁹

Maryland's initial state constitution, like those of many of the newly independent states, was prefaced with a declaration of rights.¹²⁰ Both Maryland's declaration and its form of government were drafted by a committee of seven at the state constitutional convention that convened during the summer of 1776, and the committee's draft was debated extensively by the committee of the whole.¹²¹ Charles Carroll of Carrollton – the widely respected wealthy scion of a prominent Catholic family, the only Catholic signer of the Declaration of Independence, and a person well-versed in political theory – was a leading member of the committee of seven and he was determined to recommit Maryland to its animating principle as a haven for Catholics.¹²² Carroll had laid the groundwork for his efforts at the Maryland constitutional convention in a series of 1773 letters in the *Maryland Gazette* penned under the pseudonym “First Citizen” in which he shifted the intellectual paradigm from distinguishing Marylanders by faith to distinguishing them by those who stood up for liberty and those who sat on their hands as their freedoms receded with each new British infraction.¹²³ The esteem in which Carroll was held by Catholics and non-Catholics alike owed much to his dedicated and effective service on the eve of the American Revolution and thereafter. The fact that Carroll was barred from voting or holding public office until after the American Revolution even though he was an important political voice and a major business and social figure spoke volumes about the central

¹¹⁹ See, e.g., ROBERT J. BRUGGER, *MARYLAND: A MIDDLE TEMPERAMENT, 1634–1980* at 125 (1988).

¹²⁰ See, e.g., SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 90 (1995).

¹²¹ See, e.g., I *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 279 (Bernard Schwartz ed., 1971).

¹²² See Pellegrino, *Reviving a Spirit of Controversy: Roman Catholics and the Pursuit of Religious Freedom in Early America*, *supra* note 7, at 220–33; James R. Stoner, *Catholic Politics and Religious Liberty in America: The Carrolls of Maryland*, in *THE FOUNDERS ON GOD AND GOVERNMENT* 251 (Daniel L. Dreisbach, Mark D. Hall & Jeffrey H. Morrison eds., 2004). Carroll's conciliarist approach to Catholicism provided intellectual support for his commitment to religious toleration by the state. See Michael D. Breidenbach, *Conciliarism and the American Founding*, 73 *WM. & MARY Q.* 467 (2016).

¹²³ See Pellegrino, *Reviving a Spirit of Controversy: Roman Catholics and the Pursuit of Religious Freedom in Early America*, *supra* note 7, at 211–20. The First Citizen letters are reprinted in, among other places, *MARYLAND AND THE EMPIRE, 1773: THE ANTILON-FIRST CITIZEN LETTERS* (Peter S. Onuf ed., 1974).

place Catholicism – or more precisely, anti-Catholicism – occupied in colonial Maryland. The American Revolution itself unified the people of Maryland on many matters, and Carroll used that to his advantage when helping to resurrect Maryland’s animating principle.¹²⁴ For example, the December 8 minutes of Maryland’s 1774 convention contained a resolution encouraging the people of the colony to put aside their differences – religious and otherwise – and present a united front to Great Britain.¹²⁵

The drafting committee, of which Carroll was a leading member, proposed the following language to resurrect the animating principle: “That the rights of conscience are sacred, and all persons professing the Christian religion ought for ever to enjoy equal rights and privileges in the state.”¹²⁶ This provision “rooted out” the discrimination to which Maryland’s Catholics had been subjected for much of Maryland’s colonial history that had prevented them from having their own churches and from participating in public life.¹²⁷ The committee of the whole altered the language a bit and, as adopted, Article XXXIII read in pertinent part: “That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty.”¹²⁸ Plainly, discrimination against persons of Jewish faith and other non-Christians continued, a state of affairs reiterated in Article XXXV:

That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion.¹²⁹

¹²⁴ See Pellegrino, *Reviving a Spirit of Controversy: Roman Catholics and the Pursuit of Religious Freedom in Early America*, *supra* note 7, at 231–33.

¹²⁵ See 78 AOMOL, *supra* note 25, at 10 (1774, 1775, 1776).

¹²⁶ As quoted in H.H. WALKER LEWIS, *THE MARYLAND CONSTITUTION, 1776* at 40 (1976). Carroll kept his father apprised of the drafting committee’s progress. See 2 DEAR PAPA, DEAR CHARLEY: THE PAPERS OF CHARLES CARROLL OF CARROLLTON, 1748–1782 ch. 6 (Ronald Hoffman, Sally D. Mason & Eleanor S. Darcy eds., 2001) (letters between the father and the son). The son, “Charley,” was particularly pleased to mention to his father “the Pena. Convention’s determination respecting religious toleration: they have established it on the broadest basis & admit all persons into offices of trust & profit taking a civil test or oath of fidelity to the Govt.” CCC to CCA, 29 July 1776, 2 DEAR PAPA, DEAR CHARLEY, *supra*, at 934, 935.

¹²⁷ LEWIS, *THE MARYLAND CONSTITUTION, 1776*, *supra* note 126, at 40.

¹²⁸ As reprinted in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 121, at 283. A provision was added against forced contribution to any particular ministry.

¹²⁹ As reprinted *id.* at 284. Article XXXVI permitted Quakers, Dunkers, and Mennonites to testify in all except capital cases by affirmation rather than oath. *Id.*

Religion would not cease to be a test for public office in Maryland until *Torcaso v. Watkins*, a 1961 U.S. Supreme Court decision that ruled that Maryland's requirement for a person holding public office to state a belief in God violated the First and Fourteenth Amendments to the U.S. Constitution.¹³⁰ Reaffirming the Court's 1947 paean to the strict separation of church and state, *Everson v. Board of Education*,¹³¹ Justice Hugo Black wrote for a unanimous Court in *Torcaso*: "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'"¹³² Justice Black continued: "Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."¹³³

Arguably, then, Maryland's animating principle was not resurrected fully until 1961, although it is important to note that, at least as identified in the initial part of this chapter, the animating principle of Maryland was to provide a haven for Catholics specifically, not freedom of conscience generally.¹³⁴ Of course any colony, state, or nation not fully committed to tolerance writ large is vulnerable to criticism, especially with the benefit of four centuries of hindsight. That, however, would be an unfair criticism to levy against George and Cecilius

¹³⁰ 367 U.S. 488 (1961). In 1826 Thomas Kennedy, a Maryland state legislator, secured for Jewish persons the statutory right to hold offices of public trust. Kennedy long had opposed the injustice of excluding an entire group of people based on their religious beliefs. See, e.g., Edward Eitches, *Maryland's "Jew Bill,"* 60 AM. JEWISH HIST. Q. 258 (1971). Kennedy said, when advocating for the bill, "There are few Jews in the United States; in Maryland there are very few, but if there was only one – to that one, we ought to do justice." As quoted in E. MILTON ALTFELD, *THE JEW'S STRUGGLE FOR RELIGIOUS AND CIVIL LIBERTY IN MARYLAND* 97 (1924).

¹³¹ 330 U.S. 1 (1947). *Everson* applied the Establishment Clause of the First Amendment to state law via the Due Process Clause of the Fourteenth Amendment.

¹³² *Torcaso*, 367 U.S. at 495. ¹³³ *Id.*

¹³⁴ Fifty years after signing the Declaration of Independence Charles Carroll of Carrollton proudly proclaimed that he had, as the only Catholic signer, championed "not only our independence of England but the toleration of all sects professing the Christian religion and communicating to them all equal rights." As quoted in RONALD HOFFMAN, *PRINCES OF IRELAND, PLANTERS OF MARYLAND: A CARROLL SAGA, 1500–1782* at 309 (2000). *But see* MICHAEL D. BREIDENBACH, *OUR DEAR-BOUGHT LIBERTY: CATHOLICS AND RELIGIOUS TOLERATION IN EARLY AMERICA* (2021) (exploring why and how Catholics have advocated for their own religious freedom in America, and their contributions to the ability of all citizens to worship God according to the dictates of conscience).

Calvert. After all, what the first Lord Baltimore set in motion – decades before John Locke’s more celebrated *Letter Concerning Toleration*, no less¹³⁵ – and what the second Lord Baltimore was committed to defending, was truly impressive: a polity dedicated to religious toleration so that Catholics could practice their faith without fear.

¹³⁵ See JOHN LOCKE, *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS* (Mark Goldie ed., 2010) (1689). Locke’s famous letter was not tolerant of Catholics. He insisted that Catholics did not deserve toleration because, in his opinion, (1) their allegiance was to a foreign prince (i.e., the pope) and (2) Catholics did not grant religious freedom to others.