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FREE EXERCISE IN THE FREE STATE: MARYLAND'S ROLE IN THE DEVELOPMENT OF FIRST AMENDMENT JURISPRUDENCE

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I. INTRODUCTION

With the bicentennial of the Bill of Rights upon us, perhaps it is both inevitable and appropriate that debate over the scope and meaning of the First Amendment to the United States Constitution remains as heated as ever. The limits of free speech, press, and assembly are frequently drawn and challenged, but few issues are argued more keenly than those involving religion: the constitutionality of crèches during Christmas, school prayer, Sunday closing laws and a myriad of others. The Supreme Court's docket is still liberally sprinkled with petitions calling for renewed interpretation of the religion clauses. Does the rule against establishment prohibit any relationship between state and church, however non-preferential it may be? Does the guarantee of free exercise demand accommodation?

Maryland arguably holds the distinction of being the state whose early history most directly ensured, and whose citizenry was most directly affected by, the First Amendment's protection of religious freedom. Because of its relatively diverse religious population, Maryland stood out as both a champion of tolerance and a hotbed of discrimination for much of its colonial experience.[1] Similarities have been pointed out between the first provincial government in St. Mary's, Maryland and the American plan under the Constitution,[2] particularly with respect to religious liberty.

This article offers a brief overview of the religious history of Maryland, focuses on important state cases that have contributed to the jurisprudence of the Establishment and Free Exercise Clauses in the First Amendment and examines several unresolved issues engendered by recent litigation and legislation.

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1. Truman, *Maryland and Tolerance*, 40 MD. HIST. MAG. 85, 86 (1945). A number of historians have noted that between the two original havens for the religiously persecuted — Rhode Island and Maryland — the latter seems to have stood for a truer concept of religious toleration as it is thought of today. *See, e.g.*, J. IVES, THE ARK AND THE DOVE — THE BEGINNING OF CIVIL AND RELIGIOUS LIBERTIES IN AMERICA 240-47 (1969); E. RILEY, MARYLAND, THE PIONEER OF RELIGIOUS LIBERTY 34 (1917); W. RUSSELL, MARYLAND: THE LAND OF SANCTUARY 279-87 (1908).

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

II. MARYLAND EARLY ON: TOLERANCE AND PERSECUTION

When George Calvert, the first Lord Baltimore, was granted a charter to establish a colony in the new world, his primary goal was to create a haven for those persecuted by virtue of their religious beliefs. Calvert himself was a Catholic in limbo: by one measure a respected nobleman, by another an outcast in his own land. Although most of the settlers of early Maryland were Protestant, Calvert's plan was to create an environment where all Christians could worship freely.[3]

Indeed there were so few non-Christians in the colony that it is likely the famous Toleration Act of 1649[4] — even though it protected only those who believed in the Trinity — was widely regarded as a notable monument to religious liberty at the time of its enactment.[5] Although conflicts did occur, the outward religious life of Maryland in the early seventeenth century was characterized by fair measures of conciliation and respect. "To foster union, to cherish religious peace, these were the honest purposes" of the various Lords Baltimore during their long supremacy.[6]

Nevertheless, despite the noble policies openly espoused by the Calverts and their subordinate governors, and the glowing pictures painted by optimistic poets of the age, an undercurrent of hostility persisted. *Protection* rather than toleration became the reason for refuge in Maryland. The seeds of dissent were evident in 1676 when leading Protestants submitted a proposal for "maintenance of a Protestant ministry."[7] Charles Calvert, the third Lord Baltimore, responded with a "Paper Setting Forth the Present State of Religion in Maryland," which firmly pointed out that the colonists would not want to be made to support the ministers of another religion.[8]

In 1702, local Protestants finally succeeded in having the Church of England officially established as the Church of Maryland. From the moment of Establishment until the Declaration of Independence some seventy-five years later, non-Protestant Marylanders suffered as much, if not more, religious persecution and intolerance than any of the other American colonists. Discrimination was not selective, but was levied against any faith other than the established one. Blasphemy was punishable by fine, imprisonment or death.[9] Only believers could vote, hold office and

3. *See* E. ALLEN, MARYLAND TOLERATION 17-18 (1855); *see also* B.F. BROWN, EARLY RELIGIOUS HISTORY OF MARYLAND (1876).
4. Act of April 21, 1649, 1 ARCHIVES OF MARYLAND 244.
5. *See* C. HALL, THE LORDS OF BALTIMORE AND THE MARYLAND PALATINATE 66 (1902).
6. G. BANCROFT, A HISTORY OF THE CONSTITUTION OF THE UNITED STATES 327 (1882).
7. Letter of May 25, 1676 from John Yeo, Minister of Maryland, to the Archbishop of Canterbury, 5 ARCHIVES OF MARYLAND 130-31.
8. 5 ARCHIVES OF MARYLAND 133-34.
9. *See* R. SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND 165-66 (1938).

practice a profession.[10] By 1749, exactly a century after the Act of Toleration, Catholics could not celebrate the Mass publicly.[11] So keen was their persecution that the Catholic community authorized Charles Carroll, father of the signer of the Declaration of Independence, to apply for a tract of land in Louisiana.[12] "Religion among us," concluded the Reverend Thomas Bacon, "seems to wear the face of the country: part moderately cultivated, the greater part wild and savage."[13]

Against such an historical backdrop, it is easy to understand how Maryland's evolution from a state which originally insisted on the peaceful co-existence of different religious sects to its subsequent gross intolerance toward Catholics and other dissenters influenced its participation in the American Revolution.[14] Bitter experience encouraged Maryland to lead the other colonies in the struggle to be free from taxes supporting a religion to which the taxpayer did not belong; to prohibit laws compelling dissenters to attend services of the Established Church; to provide equal economic opportunities for dissenters; and indeed, to end *all* preferences held by members of the dominant faith.

On the eve of the Revolution, Baptists lay in Virginia jails for publishing their religious views, Catholics were still being threatened with death, and non-Christians were barely recognized. James Madison had just met his countryman and soon-to-be mentor Thomas Jefferson, and the two of them had begun to articulate their classic views on civil liberties, particularly on freedom from the religious persecution they saw in their own and neighboring colonies. "Compulsion stincks in God's nostrils," said Jefferson.[15] "Religious bondage shackles and debilitates the mind and unfits it for every noble enterprize, every expanded prospect," wrote Madison.[16] Madison also felt strongly that without freedom of conscience there could be no freedom of speech, press, assembly or association,[17] and that moral decay was not the result of the absence of an

10. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT — FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 17 (1963); J. GAMBRILL, EARLY MARYLAND: CIVIL, SOCIAL, ECCLESIASTICAL 112-13 (1893).

11. S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 35-77 (1902). In 1700, the Book of Common Prayer was made standard in the English Church, and in 1704 Mass was permitted to be held only within a private family setting. *Id.* at 338-39, 397.

12. W. RUSSELL, *supra* note 1, at 414.

13. *Id.* at 458.

14. When in 1763 a tax for the support of the Established Church was revived, "a war of essays, as fierce as the war of words that preceded it" began in the press. It ultimately sparked a debate between Daniel Dulaney, the provincial secretary, and Charles Carroll of Carrollton, who spearheaded Maryland's fight for religious freedom and entry into the American Revolution. 2 J. SCHARF, HISTORY OF MARYLAND 125-26 & n.1 (1879).

15. L. LEVY, JEFFERSON AND CIVIL LIBERTIES 4 (1963).

16. I. BRANT, THE FOURTH PRESIDENT: A LIFE OF JAMES MADISON 17 (1970).

17. *Id.* at 35.

established church but of wars and bad laws.[18]

Although there was no general aid to religion in Maryland during the immediate post-Revolutionary period, the State did indirectly support various churches and church-related schools.[19] Many states, in fact, thought it proper to aid the cause of religion and religious education by authorizing churches to conduct lotteries.[20]

Indeed, non-preferential aid received the active backing of some of the new nation's most influential statesmen. In 1779, Patrick Henry introduced a bill in the Virginia legislature for a general taxation to support all religions, and his efforts won the endorsement of none other than George Washington himself.[21] Madison and Jefferson led the fight in opposition to Henry's proposal, a battle Jefferson would later regard as the severest he had ever undertaken.[22] In 1784, Madison delivered his famous "Memorial and Remonstrance Against Religions Assessments" — to many historians the most powerful defense of religious liberty ever written in America.[23] It claimed the right of every man to exercise religion according to the dictates of his own conscience. Such a right, argued Madison, was inalienable by nature, "a duty towards the Creator" that was much older and deeper than the claims of civil society and "wholly exempt from its cognizance." The preservation of freedom, he declared, requires that governments not transgress the rights of the people: "The rulers who are guilty of such an encroachment . . . are tyrants. The people who submit to it . . . are slaves."[24]

For his part, Jefferson opposed both the plural establishments that existed in most of the states as well as non-preferential aid to all religions. To him, the concept of toleration was not much lesser an evil than an exclusive established church, because it implied that the state recognized only one "true" faith and that the others were merely granted a revocable license to exist. Matters of conscience, he felt, should be entirely free and

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18. *Id.* at 126.

19. G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 44-45, 76-77 (1987); *see also* W. MARNELL, THE FIRST AMENDMENT 67-68, 110 (1964).

20. W. MARNELL, *supra* note 19, at 74. Non-preferential support was the primary form of establishment. Protestant Christianity became South Carolina's state church in 1778. In Massachusetts, a tax to support Christian religions was passed in 1780. New York reserved certain parcels of land for Gospel schools in 1781. Finally, Connecticut passed a church-aid bill in 1784, as did Georgia in 1785.

21. *See* L. LEVY, *supra* note 15, at 5. The tax proceeds were to be divided among the different denominations in the state. Each taxpayer was to designate the denomination to which the proceeds would be distributed. If no denomination was designated, the money would be divided equally among the churches in the taxpayer's county. *Id.*

22. *Id.* at 3-4.

23. *See* I. BRANT, *supra* note 16, at 128.

24. *Id.* The effect of Madison's Remonstrance — together with his strategic support of Patrick Henry for Governor of Virginia, (from which position he could not as effectively push for his general assessment to support churches) — was so great that Henry's bill lost without even a vote. *See* L. LEVY, *supra* note 15, at 7.

private.[25] Accordingly, Jefferson introduced a "Bill for Establishing Religious Freedom," which, in diametric opposition to Henry's proposal, provided that "no man should be compelled to frequent or support any religious worship, place, or ministry whatsoever," nor be restrained in any way on account of his religious opinions.[26] In 1785, Jefferson's bill was enacted by the Virginia legislature. "I flatter myself," Madison wrote, that the act has "extinguished forever the ambitious hope of making laws for the human mind."[27] Jefferson's pride of authorship was so great that he felt the measure as important as the Declaration of Independence, at least insofar as it was a contribution for which he wanted to be remembered.[28]

In the matter of non-preferential aid to religions, Madison and Jefferson also differed with their Maryland counterparts. Even Charles Carroll of Carrollton, one of the signers of the Declaration of Independence, had voted in favor of a general tax to support religion in Maryland, as did Governor William Paca and future Supreme Court Justice Samuel Chase.[29] What would have been the counsel of George Calvert, whose dream of religious freedom one hundred and fifty years earlier had still not been fulfilled, must be left to speculation.

Good historical arguments can be mounted to support *either* view — that the Founding Fathers favored strict separation or that they favored non-preferential encouragement. There were eloquent spokesmen for each position, and the language ultimately adopted in the First Amendment allows for both interpretations.

Prior to adoption of the Bill of Rights, in every state constitution where "establishment" of religion was mentioned, it was equated or used in conjunction with preference towards a favored religion.[30] From such evidence, it could be inferred that Congress intended the First Amendment more as a protection of free exercise than as a prohibition of all government aid, however non-preferential.

Indeed, part of the opposition to Maryland's ratifying the Constitution emanated from the convention's failure to adopt a bill of rights that would limit federal, but not state, control over religion. Among the amendments submitted by William Paca to the state's ratifying convention was one guaranteeing religious liberty to all and opposing national establishment.[31] Although the convention adjourned without agreeing to

25. L. LEVY, *supra* note 15, at 4.
26. *Id.* at 6-7; *see also* G. BRADLEY, *supra* note 19, at 37-38. For the text of Jefferson's "Bill for Establishing Religious Freedom," see *id.* at 149-50.
27. I. BRANT, *supra* note 16, at 129.
28. *See* L. LEVY, *supra* note 15, at 7.
29. *See* G. BRADLEY, *supra* note 19, at 76-77.
30. *See id.*
31. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 10, at 132; *see also* Marbury, *Maryland Ratifies the United States Constitution: An Introduction*, 83 MD. HIST. MAG. 1 (1988) (special issue on the state's role in development of the federal Bill of Rights).

the proposed amendment, a large number of dissenting delegates had endorsed the policy " 'that there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty.' "[32] The majority in Maryland was satisfied to leave such protection to the sovereign states.[33] Even the minority members, such as Carroll, Paca and Chase, were for the most part just multi-establishmentarians who favored non-preferential church aid.[34]

During the course of debate on the federal Bill of Rights, the first Congress undoubtedly was responding not only to the religious concerns urged by Madison and Jefferson of Virginia, but as well to those espoused by Daniel and John Carroll of Maryland. Daniel Carroll was an especially eloquent and respected advocate of an amendment. The House Committee reporter paraphrased in part Mr. Carroll's thoughts as follows:

> As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed. He would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.[35]

There was considerable debate over the language originally proposed for the First Amendment: "No religion shall be established by law nor shall the equal rights of conscience be infringed."[36] Many were concerned about avoiding the impression that religion should be abolished altogether.[37] Ultimately, the present Establishment and Free Exercise Clauses were adopted: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."[38] And on September 25, 1789, the First Amendment to the United States Constitution was accepted by Congress.

But the debate over whether the religion clauses require complete separation or accommodation has never been put to rest. There can be

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32. *See* G. BRADLEY, *supra* note 19, at 76; *see also* A. WERLINE, PROBLEMS OF CHURCH AND STATE IN MARYLAND DURING THE SEVENTEENTH AND EIGHTEENTH CENTURIES 203 (1948).
33. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553 (Elliott ed. 1859); *see also* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 10, at 132.
34. A. WERLINE, *supra* note 32, at 203.
35. L. LEVY, THE ESTABLISHMENT CLAUSE 77 (1986).
36. *Id.* at 91; J. IVES, *supra* note 1, at 393.
37. *See generally* L. LEVY, *supra* note 15, at 5; I. BRANT, *supra* note 16, at 234-35.
38. U.S. CONST. amend. I.

little doubt that Madison, the principle architect of the Bill of Rights, favored strict separation of church and state.[39] He had long opposed non-preferential aid to churches. In the First Amendment, his clear intention was to prohibit states as well as the federal government from establishing any religion. Later, as president, he vetoed a federal grant of land to a Baptist church with a strict-separation explanation.[40]

Madison's views, however, were hardly accepted in full by Congress. The Senate threw out his proposal to subject the states to a similar but separate restriction regarding establishment — the provision which Madison called the most valuable on his entire civil liberties agenda.[41] It is likely that Madison's proposal fell victim to the legislators' sensitivity about avoiding anti-religious references.

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

> What was the meaning of the Constitution in providing against a religious establishment? Does any man but Mr. Madison imagine it was to prevent the District of Columbia from enjoying legal church regulations, and from exercising corporate rights in their congregations? Does the Legislature of Maryland believe it is creating a religious establishment when it is occupied in granting charters to the churches of the different sects of christians as often as they apply? — Where all are equally protected and accommodated, where each sect . . . has its own establishment . . . the best security exists against 'a religious establishment,' that is to say, one pre-eminent establishment which is preferred and set up over the rest, against which alone the constitutional safeguard was created.[42]

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39. *Accord* G. BRADLEY, *supra* note 19, at 86. Bradley contends that Madison's depiction as a supporter of accommodation is a historical misperception. *Id.* at 86-87.
40. *Id.* In his early political life, however, Madison had voted several times for bills which reserved lands for religious organizations. *Id.*
41. *Id.* at 87-93; I. BRANT, *supra* note 16, at 264-67.
42. Baltimore Fed. Republican & Com. Gazette, Feb. 26, 1811, at 3, col. 1.

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

    > We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instructions or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service of our spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

    Id. at 313-14. A 1956 Tennessee case pointed out that the doctrine of separation of church and state "should not be tortured into a meaning that was never intended by

Indeed, the guarantee of religious freedom did not become binding on the states until after passage of the Fourteenth Amendment in 1868 and its subsequent interpretation by the Supreme Court in 1947 — almost eighty years later.[43]

When the First Amendment is viewed from *this* historical perspective, a case can be made for concluding that nothing more than a firmly bipartisan relationship of state to church was intended by the Founding Fathers. Consequently, arguments have been advanced like the following:

> The separation of the government from religion represents a definite departure from the intent of the Founding Fathers, who never intended to purge public life in America entirely of religion. They never intended to establish irreligion, nor was that the purpose of the First Amendment. Those who founded our nation did not hesitate to declare their dependence upon God, to mention Him in public utterance, to open Congress with prayer, to set up chaplaincies, and to ask the President to call a day for prayer and thanksgiving to God. They did not feel that this was inconsistent with the principle of 'a free Church in a free State.' As a matter of fact, they knew that the very concept of religious civil liberty was founded upon Christian principles and teachings.[44]

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the Founders of this Republic. . . ." Carden v. Bland, 199 Tenn. 665, 678, 288 S.W.2d 718, 724 (1956).

More recently, the Court of Appeals of Maryland took an expressly favorable view of bible reading in the public schools, claiming that "neither the First nor the Fourteenth Amendment was intended to stifle all rapport between religion and government." Murray v. Curlett, 228 Md. 239, 244, 179 A.2d 698, 701 (1962), *rev'd sub nom.* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963). *See* D. BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS 99 (1965). Even the dissenters in the *Murray* case did so because they felt that the required saying of the Lord's Prayer and bible reading plainly favored "one religion and [did] so against other religions and against non-believers in any religion." *Murray*, 228 Md. at 257-58, 179 A.2d at 708 (Brune, CJ., dissenting). The dissenters neither denied that the First Amendment could involve non-discriminatory laws without being a violation of the freedom of religion nor insisted upon strict separation of church and state. Although the decision was reversed by the Supreme Court in School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), Justice Clark, speaking for the majority, was careful to warn against a "religion of secularism." *Id.* at 225. Justice Brennan, concurring in the same case, said that certain practices are to be considered constitutional — among them, churches and chaplains at military bases, "In God We Trust" on currency, tax exemptions for churches, draft exemptions for seminary students, and "one nation, under God" in the pledge of allegiance. *Id.* at 295-304 (Brennan, J., concurring). But other Justices have voiced opposing views. *See* Note, *Constitutional Law—Juries—Oath Required of Grand and Petit Jurors Held Unconstitutional — Schowgurow v. Maryland*, 17 S.C.L. REV. 778, 780 (1965) [hereinafter Note, *Unconstitutional Oath Requirements*].

43. *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

44. J. KIK, CHURCH & STATE—THE STORY OF TWO KINGDOMS 130 (1963).

> [A] regard for the separation principle should not obscure the fundamental consideration that there is a necessary interdependence of religion and

Other readers of history, however, can make just the opposite point, and just as cogently. If Madison were the primary author of the First Amendment, shouldn't *his* intentions be given the most credence? In Maryland itself, in 1785, a non-preferential church-aid bill, which exempted non-Christians, was voted down by a resounding two-to-one majority of the legislature.[45] In the nine states with multiple establishments, the pre-Bill-of-Rights revolution against an established religion took the form of a fight against taxation to support *any* churches. Mustn't we learn from this that the Founding Fathers' original intention was to prohibit even non-preferential accommodation, to carve in stone the principle of strict separation?

The choice between these interpretations is not clear, except through selective use of historical references. In the absence of more definitive history, the question remains to be answered by the Supreme Court as a determination of what sound public policy should be. Regardless of the outcome, however, it is apparent that the colonial experience in Maryland — together with the combined efforts of the Calverts and the Carrolls — contributed as much as any other single factor to laying the foundations for religious liberty and equality in the new republic. Largely through their efforts did the spirit of old Maryland make its way into that of the new America.

III. RECENT MARYLAND CASES AND POTENTIAL PROBLEMS

The twentieth century has seen no abatement of cases originating in Maryland and involving interpretation of the religious liberty clauses in both the state and federal constitutions. Over the past quarter-century, a number of landmark decisions have been handed down by the Court of Appeals of Maryland and the Supreme Court of the United States — involving test oaths, school prayer, grants to sectarian colleges, clergy disqualification provisions, autopsies, religious headgear, Sunday closing laws, legislation to support religious dietary laws and divorces, and the erection of religious symbols on public property. A brief catalogue of the more important cases is presented here.

A. Test Oaths

In *Torcaso v. Watkins*,[46] a notary public duly appointed by the gov-

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government, that religion and the churches have a role to play with respect to the public order and the common life, that government has a role to perform in the protection and advancement of religious liberty, and that government and the churches share some overlapping concerns and functions.

P. KAUPER, RELIGION AND THE CONSTITUTION 118 (1964); *see also* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 30 (1963).

45. L. LEVY, *supra* note 35, at 48.

46. 223 Md. 49, 162 A.2d 438 (1960), *rev'd*, 367 U.S. 488 (1961).

ernor was denied his commission because he refused to declare a "belief in the existence of God," as required by article 37 of the Maryland Declaration of Rights.[47] The court of appeals upheld the requirement, pointing out in the process:

> [W]e find it difficult to believe that the Supreme Court will hold that a declaration of belief in the existence of God, required by Article 37 . . . is discriminatory and invalid. As Mr. Justice Douglas, speaking for a majority of the Court in *Zorach v. Clauson* said: 'We are a religious people whose institutions presuppose a Supreme Being.'[48]

Perhaps to the great disbelief of the court of appeals, the Supreme Court did find the test to be an unconstitutional violation of the First and Fourteenth Amendments and reversed. It said:

> Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept.[49]

Torcaso's rejection of the requirement that an office-seeker declare his belief in a deity would likewise seem to invalidate the language, "attestation of the Divine Being" in article 39 of the Maryland Declaration of Rights.[50]

In *Schowgurow v. Maryland*,[51] a Buddhist convicted of homicide challenged the requirement in article 36 of the Maryland Declaration of Rights that jurors profess a belief in the existence of G-d.[52] Largely on

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47. *Id.* at 52-53, 162 A.2d at 439-40. Article 37 of the Maryland Declaration of Rights provides:
> That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.

MD. DECL. RTS. art. 37.

48. *Torcaso*, 233 Md. at 58, 162 A.2d at 443 (citation omitted).

49. Torcaso v. Watkins, 367 U.S. 488, 494 (1961) (footnote omitted); *see also* P. KURLAND, RELIGION AND THE LAW 107-08 (1961).

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

MD. DECL. RTS. art. 39. *See generally* White v. State, 244 Md. 188, 223 A.2d 259 (1966).

51. 240 Md. 121, 213 A.2d 475 (1965).

52. *Id.* at 124-25, 213 A.2d at 478. Article 36 of the Maryland Declaration of Rights provides in pertinent part:
> [N]or shall any person, otherwise competent, be deemed incompetent as a

the basis of *Torcaso*, the court of appeals reversed:

> If, as was held by the Supreme Court in *Torcaso*, a notary public cannot constitutionally be required to demonstrate his belief in God as a condition to taking office, it follows inevitably that the requirement is invalid as to grand and petit jurors, whose responsibilities to the public and to the persons with whom they deal are far greater.[53]

Thus, the court held unconstitutional the article 36 exclusion from jury duty of atheists, agnostics and religious groups such as Buddhists whose members do not believe in a Supreme Being.[54]

B. School Prayer

It is doubtful that Madalyn Murray had any thoughts of challenging prayer in public schools before, by chance, she found herself in a Baltimore City classroom during opening exercises. It was then that Mrs. Murray, an avowed atheist, happened to hear the reading of a biblical passage — pursuant to a rule of the school commissioners that required "the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer."[55] She quickly took up the cudgels and challenged the practice as violative of the First Amendment's Establishment Clause.[56] The trial court agreed, but was reversed by the Court of Appeals of Maryland — which held that the amount of time and public funds expended on the Bible reading was negligible, and that any student who did not want to participate could be excused upon presentation of a written note from his parents.[57] Mrs. Murray appealed to the Supreme Court.

A year earlier, the Court had decided that a *state-composed* school prayer, even though expressly non-denominational, was unconstitutional.[58] Now it was faced with both *Murray v. Curlett* and *School District of Abington Township v. Schempp*,[59] the latter a Pennsylvania case

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> witness, or juror, on account of his religious belief, provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

MD. DECL. RTS. art. 36. For a discussion of the *Schowgurow* decision, see Note, *Unconstitutional Oath Requirements*, *supra* note 42.

53. *Schowgurow*, 240 Md. at 127, 213 A.2d at 479.
54. *Id.* at 128-31, 213 A.2d at 480-82.
55. Murray v. Curlett, 228 Md. 239, 241, 179 A.2d 698, 699 (1962), *rev'd sub nom.* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).
56. William Murray, now a born-again Christian, says that the challenge would never have taken place had his mother not belatedly returned from a trip to Europe where she had been studying Communism, and in turn belatedly registered him after the school term had begun. Videotape interview between Jerry Fallwell and William Murray (Old Time Gospel Hour: Special Presentation).
57. *Murray*, 228 Md. at 244, 179 A.2d at 701.
58. *See* Engel v. Vitale, 370 U.S. 421 (1962).
59. 374 U.S. 203 (1963). Both *Murray* and *Schempp* were consolidated for hearing.

testing that state's ritual daily Bible reading.[60] In each case, the Court found that the prayers, however non-compulsory they may have been, had a primarily religious effect and thus ran afoul of the Establishment Clause;[61] moreover, even though the rules may have had secular purposes such as promoting morality, countering materialism, or maintaining tradition, they nevertheless amounted to an unconstitutional establishment of religion.[62] The Court concluded that:

> [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'[63]

At the same time, however, the Court said that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' "[64]

In 1964, the General Assembly of Maryland passed a law allowing for a period of silent meditation in the opening exercises on each morning of a school day.[65] Mrs. Murray immediately sought to challenge the statute, but moved out of the state before any decision was rendered.

In 1982, the Reagan administration proposed a constitutional amendment to permit school prayer, which would remove the policy determination from the purview of the Supreme Court.[66] The measure, however, received little support and ultimately failed.[67]

Litigation on the subject, however, continues. In *Wallace v. Jaffree*,[68] the Supreme Court invalidated an Alabama statute which had au-

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60. The statute at issue in *Schempp* provided:
> At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

Schempp, 374 U.S. at 205.

61. *Id.* at 223-25.
62. *Id.* at 224-25.
63. *Id.* at 225.
64. *Id.* (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
65. Act of April 7, 1964, ch. 189, 1964 Md. Laws 452 (codified at MD. EDUC. CODE ANN. § 7-104 (1985)).
66. The proposed school prayer amendment provided: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer." *See* S.J. Res. 199, 97th Cong., 2d Sess. 3 (1982); S.J. Res. 73, 98th Cong., 1st Sess. 1 (1983); *see also* S. REP. NO. 347, 98th Cong., 2d Sess. (1984); S. REP. NO. 348, 98th Cong., 2d Sess. (1984); S. REP. NO. 165, 99th Cong., 1st Sess. (1985).
67. The measure failed for want of the two-thirds majority of the House and Senate needed to propose a constitutional amendment.
68. 472 U.S. 38 (1985).

thorized a minute of silence at the start of each school day for "meditation or voluntary prayer." By a 6-3 majority, the Court held that the state legislature's sole purpose in passing the law was to endorse religion and, therefore, the law was violative of the First Amendment under the tests enunciated in *Lemon v. Kurtzman*.[69] According to *Lemon*, there is no Establishment Clause violation if the law has a secular purpose, if its primary effect neither advances nor inhibits religion, and if it does not foster excessive governmental entanglement with religion.[70]

In concurrence in *Jaffree*, however, Justices O'Connor and Powell said they would uphold the constitutionality of any such statute which had an explicitly secular purpose.[71] Their chance to do just that came in 1987 when the Court was faced with a New Jersey measure that called for a minute of silence before the start of each school day "for quiet and private contemplation or introspection."[72] But the Court dismissed on jurisdictional grounds an appeal of the judgment below, which had struck down the statute as unconstitutional.[73]

Current administrative guidelines in Maryland appear to ignore the Supreme Court's prohibitions against prayer in the public schools. Principals and teachers "may require all students to . . . participate in opening exercises . . . and to meditate silently for approximately 1 minute. . . . During this period, a student or teacher may read from the holy scripture or pray."[74]

Most recently, a student at the University of Maryland sought to enjoin that institution from having religious invocations and benedictions at its commencement exercises. The district court denied a temporary restraining order,[75] and the case became moot when the student graduated. But the Supreme Court's primary concern in the school-prayer cases has been the impressionability of young children — a concern clearly not as notable with college students, whom the Supreme Court has already characterized as "less susceptible to religious indoctrination."[76] Moreover, opening prayers at occasional graduation ceremonies do not have the same impact as daily opening exercises, any more than do prayers at the beginning of legislative sessions.

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69. *Id.* at 55-61; Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court's conclusion in *Jaffree* was based largely on testimony from the state's chief sponsor that the bill's primary purpose was to return voluntary prayer to the schools, and that an existing Alabama statute had already provided for a moment of silence. *See Jaffree*, 472 U.S. at 43-44 n.22.
70. *Lemon*, 403 U.S. at 612-13; *see also* Walz v. Tax Comm., 397 U.S. 664, 674 (1970); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).
71. *See Jaffree*, 472 U.S. at 62-67 (Powell, J., concurring), 67-84 (O'Connor, J., concurring).
72. N.J. STAT. ANN. § 18A:36-4 (West Supp. 1988).
73. Karcher v. May, 484 U.S. 72 (1987).
74. *See* MD. EDUC. CODE ANN. § 7-104 (1985).
75. Barry v. University of Maryland, C/A R-87-3253 (D. Md. Dec. 3, 1987).
76. Tilton v. Richardson, 403 U.S. 672, 686 (1971); *see also* Marsh v. Chambers, 463 U.S. 783, 792 (1983); Roemer v. Board of Pub. Works, 426 U.S. 736, 765 (1976).

C. Grants to Sectarian Colleges

The potential for much greater church-state entanglement exists where legislatures seek to support sectarian schools by direct grants of financial assistance. Here too, Maryland has contributed some seminal jurisprudence.

In *Horace Mann League, Inc. v. Board of Public Works*,[77] Maryland had provided outright matching grants for the construction of buildings at four private colleges: Hood College, Western Maryland College, College of Notre Dame of Maryland and St. Joseph College. The appropriations were challenged as violative of both the First Amendment and article 36 of the Maryland Declaration of Rights.[78]

Although the lower court dismissed the complaint, the Court of Appeals of Maryland, in a 4-3 decision, found that the grants to three of the institutions (all but Hood College) were unconstitutional.[79] The court explained that every religious observance by a college does not make it sectarian; what is important is "a consideration of the observances, themselves, and the mode, zeal, and frequency with which they are made."[80] If the schools are in fact sectarian, " '[n]o tax, in any amount, large or small, can be levied to support [them], whatever they may be called, or whatever form they may adopt to teach or practice religion.' "[81] The court found that, as to Hood College, the Protestant sect with which it was affiliated contributed only 2.2 percent of the school's operating budget and, moreover, there were no sectarian requirements for teachers or students.[82] The other schools, however, were more denominationally oriented; their governing boards were controlled by religious orders and their faculties were either committed to a Christian philosophy or were predominantly of one sect.[83]

Interestingly, the court of appeals found that none of the grants violated article 36 of the Maryland Declaration of Rights. In support of this view, the court cited a number of cases to the effect that "grants to educational institutions at a level where the state has not attempted to provide universal educational facilities for its citizens have never, in Maryland, been held to be impermissible under Article 36, even though the institutions may be under the control of a religious order."[84]

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77. 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966).
78. Article 36 of the Maryland Declaration of Rights provides in pertinent part: "[N]or ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry. . . ." MD. DECL. RTS. art. 36.
79. *Horace Mann League*, 242 Md. at 676, 679, 681, 684, 220 A.2d at 68, 70, 71, 73.
80. *Id.* at 671, 220 A.2d at 65.
81. *Id.* at 668, 220 A.2d at 63 (quoting Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947)).
82. *Id.* at 675, 220 A.2d at 67.
83. *Id.* at 676-84, 220 A.2d at 68-73.
84. *Id.* at 690, 220 A.2d at 76 (citing Speer v. Colbert, 24 App. D.C. 187 (1904), *aff'd*, 200 U.S. 130 (1906); Mt. St. Mary's College v. Williams, 132 Md. 184, 103 A. 479 (1918); Baltzell v. Church Home, 110 Md. 244, 73 A. 151 (1909)).

In a vigorous dissent, Judge Hammond argued that the grants of state aid served a sufficiently secular purpose to withdraw them from First Amendment prohibition.[85] Both sides appealed the majority decision to the Supreme Court, which denied *certiorari*.[86]

The Supreme Court, however, did agree to hear *Roemer v. Board of Public Works*,[87] which tested Maryland's annual subsidies to any accredited private institution of higher learning for whatever use it prefers, with but one exception: "None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes."[88] The district court had found the programs constitutional.[89]

Basing its analysis on the three-part test of *Lemon v. Kurtzman*,[90] the Supreme Court affirmed. The Court agreed with the lower court's finding that the primary *purpose* of the Maryland program "is the secular one of supporting private higher education generally, as an economic alternative to a wholly public system."[91] If the college in question were so "pervasively sectarian" that its secular and sectarian activities could not be separated, then the grant's primary *effect* would be the unconstitutional advancement of religion.[92] No such effect was found to exist in *Roemer*.

The Court also cited its earlier decisions in *Tilton v. Richardson*[93] and *Hunt v. McNair*[94] — each of which had found no excessive entanglement where the government had funded the construction of various buildings at church-related colleges. In both cases, the facilities were not going to be used for sectarian purposes. But unlike *Tilton* or *Hunt*, which involved "one-time, single purpose" construction grants, *Roemer* involved annual subsidies which required regular audits and "governmental analysis of . . . expenditures"[95] — both potentially "excessive entanglements" under *Lemon*.[96] The Supreme Court dismissed the excessive entanglements argument on the grounds that such contacts are "quick and non-judgmental," and are not likely to be "any more entangling than the inspections and audits incident to the normal process of the colleges' accreditation by the State."[97]

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85. *Id.* at 698-99, 220 A.2d at 81 (Hammond, J., dissenting). Judge Hammond was joined by Judge Horney and Judge Marbury in dissent.
86. Horace Mann League, Inc. v. Board of Pub. Works, 385 U.S. 97 (1966).
87. 426 U.S. 736 (1976).
88. MD. ANN. CODE art. 77A, §§ 65-69 (1975).
89. Roemer v. Board of Pub. Works, 387 F. Supp. 1282 (D. Md. 1974).
90. 403 U.S. 602 (1971); *see also supra* text accompanying note 70.
91. *Roemer*, 426 U.S. at 754 (footnote omitted).
92. *Id.* at 755; *see also* Hunt v. McNair, 413 U.S. 734, 743 (1973).
93. 403 U.S. 672 (1971).
94. 413 U.S. 734 (1973).
95. *Roemer*, 426 U.S. at 763.
96. *See supra* text accompanying note 70.
97. *Roemer*, 426 U.S. at 764.

D. Clergy Disqualifications

From early on, Maryland tried to draw a sharp line between clergymen and men of government: "No Minister or Preacher of the Gospel, or of any religious creed, or denomination . . . shall be eligible as Senator, or Delegate."[98] This provision appeared in Maryland's first constitution in 1776. It was eliminated in 1864 but was reinstated in the constitution of 1867 where it remained for more than a century.[99]

In *Kirkley v. State*,[100] the plaintiff was a minister at St. Paul's United Methodist Church in Kensington, Maryland. Running for election to the House of Delegates, Kirkley challenged the constitutional restriction through an action seeking a declaratory judgment that the provision noted above violated the First Amendment.[101] The precise issue before the *Kirkley* court was whether disqualifying a minister from holding elective office would infringe upon the minister's right to free exercise of religion.[102] In deciding that such a disqualification did indeed infringe upon the free exercise guarantee, the United States District Court for the District of Maryland rejected the argument that there is no element of religious coercion within the disqualification provision in view of the fact that no one is compelled to hold public office.[103] The court pointed to *Torcaso v. Watkins*,[104] where the Supreme Court had invalidated the Maryland requirement that one assuming a public office take an oath affirming his belief in G-d:

> The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. . . . This Maryland religious test for public office unconstitutionally invade[d] the appellant's freedom of belief and religion. . . .[105]

Likewise, the *Kirkley* court rejected the argument that the burden placed upon a minister who seeks elective office is indirect (*i.e.*, that the provision does not deny the minister his freedom to minister).[106] It cited *Sherbert v. Verner*,[107] in which a Seventh Day Adventist had been denied unemployment compensation benefits as a result of her refusal to work on Saturday. In *Sherbert*, it was argued that even though all other available jobs required a willingness to work on Saturday, the appellant's free

98. *See* Kirkley v. State, 381 F. Supp. 327, 328 (1974); 56 Op. Att'y Gen. 25, 25 (1971).
99. *See* 56 Op. Att'y Gen. at 26.
100. 381 F. Supp. 327 (D. Md. 1974). The author represented Kirkley in the litigation described.
101. *Id.* at 328. The State of Maryland made no attempt to block Kirkley's filing with the Board of Election Supervisors, in view of the Attorney General's opinion filed in 1971. *See* 56 Op. Att'y Gen. 25 (1971).
102. *Kirkley*, 381 F. Supp. at 329.
103. *Id.* at 329-31.
104. 367 U.S. 488 (1961); *see also supra* text accompanying notes 46-50.
105. *Torcaso*, 367 U.S. at 495-96.
106. *Kirkley*, 381 F. Supp. at 330.
107. 374 U.S. 398 (1963).

exercise of religion was only indirectly burdened — she was not, after all, precluded from continuing to worship as a Seventh Day Adventist. But the Supreme Court in *Sherbert* ruled that the denial of benefits imposed an unconstitutional burden on free exercise: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[108]

The court in *Kirkley* analyzed the clergy disqualification rule as a means of insuring the separation of church and state, in itself a compelling governmental interest.[109] It found that disqualifying clergymen from holding elective office is by no means the least restrictive alternative of assuring the separation of church and state. Put another way, the disqualification is not "narrowly tailored" to the state's interest.[110] The court concluded:

> Yet today there are members of the clergy sitting in the Congress of the United States and, in all probability, in the legislatures of other states. Surely, this exclusion of ministers from elected office, if it were necessary to insure the proper separation between Church and State, would extend also to federal office. This Court can discern no interest of the State of Maryland which would justify the burden upon the free exercise of religion imposed by Article III, Section 11 of the Maryland Constitution.[111]

Thus, more than a hundred years after its enactment, the Maryland clergy-disqualification provision was held to be unconstitutional. In 1977, the clause was formally removed from article III by a special legislative amendment.[112]

E. Autopsies

Maryland law requires post-mortem physical examinations where the deceased has died "suddenly [when] in apparent good health . . . or in any suspicious or unusual manner."[113] This provision was challenged in

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108. *Id.* at 404 (footnote omitted); *see also* Frazee v. Illinois Dept. of Employment Sec., 109 S.Ct. 1514 (1989).
109. *Kirkley*, 381 F. Supp. at 331.
110. *Id.*
111. *Id.* Tennessee was the last state still to have a clergy disqualification provision in its constitution. The Supreme Court of Tennessee upheld the provision, but the Supreme Court of the United States struck it down in McDaniel v. Paty, 435 U.S. 618 (1978), as violative of the guarantee of free exercise of religion. Justice White, concurring in *McDaniel*, questioned the free exercise basis of the majority's decision; he would have struck down the clergy disqualification provision as violative of the Equal Protection Clause of the Fourteenth Amendment. *McDaniel*, 435 U.S. at 643-46 (White, J., concurring).
112. Act of April 26, 1977, ch. 681, § 1, 1977 Md. Laws 2756.
113. MD. HEALTH-GEN. CODE ANN. § 5-309(a)(iv), (v) (1982 & Supp. 1988). A post-mortem physical examination is also required where the deceased has died by violence, suicide or casualty. *Id.* § 5-309(a)(i)-(iii).

Snyder v. Holy Cross Hospital[114] by a father whose eighteen-year-old boy died suddenly in his home, and who asserted that the autopsy ordered by a deputy state medical examiner would violate the family's religious principles.[115]

The Court of Special Appeals of Maryland, analyzing the father's rights rather than those which might have survived the deceased, refused to enjoin the autopsy.[116] It held that *acts* in pursuit of a religious belief, as distinguished from the beliefs themselves, "may be regulated by the State to safeguard the peace, health, and good order of the community," and that here there was "a compelling state need to ascertain the cause of death."[117]

Apparently in response to cases such as *Snyder*, in 1982 the Maryland General Assembly enacted a statute providing that if the family of the deceased objects to an autopsy on religious grounds, the procedure may not be performed unless authorized by the state's chief medical examiner or his designee.[118]

F. Religious Headgear

A similarly compelling state need in the context of religious expression was found in *Goldman v. Weinberger*,[119] where a captain in the United States Air Force challenged a military rule which prohibited the wearing of a skullcap while on duty. A sharply divided Supreme Court held that the military's uniform dress code — designed to encourage "the subordination of personal preferences and identities in favor of the overall group mission"[120] — deserved greater deference than the plaintiff's free-exercise rights under the First Amendment.[121]

Four members of the Court wrote three dissenting opinions, led by Justice Brennan, who stated:

> I find totally implausible the suggestion that the overarching group identity of the Air Force would be threatened if Orthodox Jews were allowed to wear yarmulkes with their uniforms. To the contrary, a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States servicemen embraces and unites religious and ethnic pluralism.[122]

While the *Goldman* case was working its way through the courts, the Department of Defense promulgated a regulation allowing various

114. 30 Md. App. 317, 352 A.2d 334 (1976).
115. *Id.* at 320-22, 352 A.2d at 335-37. The Snyders were Orthodox Jews.
116. *Id.* at 328-33, 352 A.2d at 340-43.
117. *Id.* at 332-33, 352 A.2d at 343.
118. MD. HEALTH-GEN. CODE ANN. § 5-310(b)(2) (Supp. 1988).
119. 475 U.S. 503 (1986).
120. *Id.* at 508.
121. *Id.* at 509-10.
122. *Id.* at 519 (Brennan, J., dissenting).

religious practices by servicemen (including the wearing of a skullcap) unless military necessity dictated otherwise.[123] The obvious ambiguity of this policy was removed, at least as it pertained to headgear, by a 1987 act of Congress.[124]

While the Defense Department has in recent years been liberal in permitting religious headgear, it has been generally reluctant to grant exceptions where other religious practices are involved.[125]

G. Sunday Closing Laws

In *McGowan v. Maryland*,[126] the United States Supreme Court upheld Maryland's Sunday Closing Laws[127] against a number of constitutional attacks. The Court found valid secular purposes in the so-called "Blue Laws," which generally prohibited the sale on Sunday of all merchandise other than food, medicine and gasoline.[128] In turning aside various First Amendment and Equal Protection challenges, the Court said:

> Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws . . . and their validity has been sustained by the highest courts of the States.[129]

Despite the fact that choosing Sunday as the day of rest coincides with a specific religious practice, the Court held the law to be social welfare legislation and not a violation of the Establishment Clause.[130]

In 1987, Maryland effectively repealed the Blue Laws in all counties

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123. DEPARTMENT OF DEFENSE DIRECTIVE NO. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (1985), *cancelled by* DEPARTMENT OF DEFENSE DIRECTIVE NO. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (1988).

124. This Act provides that members of the armed forces may wear items of religious apparel while wearing the uniform of the member's armed force except where the Secretary determines that the wearing of the item would interfere with the performance of military duties or where the apparel was not neat and conservative. National Defense Authorization Act for Fiscal Year 1988 and 1989, Pub. L. No. 100-180, Tit. V, § 508, 101 Stat. 1086-87 (1987) (codified at 10 U.S.C. § 774 (Supp. V 1987)).

125. For example, numerous cases have been brought by Seventh Day Adventists, many of whom came from Takoma Park, Maryland, seeking to be excused from active service on Saturdays. Telephone interview with Chaplain General Israel Drazin, Apr. 5, 1989; *see also* Letter for Secretary of Defense Frank Carlucci (Sept. 29, 1988) (removing basic-training exception from DEPARTMENT OF DEFENSE DIRECTIVE NO. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (1988)).

126. 366 U.S. 420 (1961).

127. Specifically MD. ANN. CODE art. 27, § 521 (1987).

128. *McGowan*, 366 U.S. at 433-37.

129. *Id.* at 436 (quoting Soon Hing v. Crowley, 113 U.S. 703, 710 (1885)).

130. *Id.* at 445-52.

except Wicomico and Allegany.[131] A notable exception allows individuals who observe the Sabbath from sundown Friday to sundown Saturday, and who actually refrain from secular business and labor during that period, to work on Sunday.[132] Thus, observant Jews and Seventh Day Adventists are exempt from application of the Blue Laws throughout Maryland.

Germane to this discussion is *Estate of Thornton v. Caldor, Inc.*,[133] a 1985 case in which the Supreme Court struck down a Connecticut statute which provided that "[a]n employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."[134] The Court maintained that this statute was not merely a permissible accommodation to religion, but granted an "absolute and unqualified right" that employees could impose on employers regardless of the burden placed upon the employers. It thus had an impermissible "primary effect" of advancing religion:

> This unyielding weighing in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand: 'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'[135]

In the absence of Blue Laws, *Thornton* takes on a new significance in Maryland. What protection is now available to a Marylander who on religious grounds refuses to work on Sunday but whose employer has decided to open for business on that day? Obviously, the Connecticut approach will not help the employee. The Maryland exception allows an employee the right to notify his employer of a special day of rest, and prohibits his discharge if he refuses to work on that day.[136] It is difficult to distinguish this provision from the Connecticut statute struck down in *Thornton*.

H. Dietary Laws and Divorce

Like many states, Maryland has enacted statutes to protect all people (but particularly Orthodox Jews) who abide by the Biblical laws pertaining to the slaughtering of fowl and animals and the consumption of kosher foods. Maryland's statutory scheme is contained in several sections of the Commercial Law Article of the Maryland Annotated Code.[137] These sections are couched in the language of consumer protec-

131. The Blue Laws still in effect can be found in MD. ANN. CODE art. 27, §§ 492-534X (1987).
132. *Id.* § 521(e)(2).
133. 472 U.S. 703 (1985).
134. CONN. GEN. STAT. § 53-303e(b) (1985).
135. *Estate of Thornton*, 472 U.S. at 710 (citing Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2nd Cir. 1953)); *cf. supra* notes 107-108 and accompanying text.
136. *See* MD. ANN. CODE art. 27, § 492(b) (1987).
137. MD. COMM. LAW ANN. §§ 14-901 to -907 (1983).

tion law, and deal primarily with the misrepresentation of non-kosher food as being kosher and the labeling of specific products as "Kosher for Passover."[138]

While there has not been significant litigation regarding Maryland's laws regarding kosher food, some questions about their constitutionality have been raised. Do such statutory provisions violate the Establishment/Free Exercise Clauses? Is the characterization "kosher" unconstitutionally vague, since "[n]o two rabbis could agree as to the meaning of the word?"[139]

Courts have answered both of these questions in the negative, maintaining that laws regulating kosher foods, far from violating the religious guarantees of the First Amendment, in fact *protect* the free exercise of religion.[140] It has been held that the laws are not void for vagueness: because they require a specific intent to defraud, specificity as to the meaning of "kosher" is not required. Furthermore, such statutes have been upheld as necessary for effective consumer protection.[141]

The Maryland Code gives particular protection to the Orthodox Jewish method of slaughtering animals, describing it as "humane."[142] As it happens one of the Code sections is titled "Protection of freedom of religion."[143] In addition, Maryland has enacted consumer legislation to protect the purchasers of specific religious articles such as phylacteries and doorpost parchments (*mezuzohs*) from misrepresentations by the seller as to their genuineness.[144]

Jewish divorces create different problems. There are three possible domestic relations contracts under which a secular court could be called upon to compel a husband to appear before a religious court for the purpose of forcing him to grant a divorce to his wife:

(1) a clause in the *ketuba*, or Jewish marriage contract;

(2) an antenuptial agreement;

(3) a separation agreement.

The problem arises when the parties to these contracts have agreed

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138. *See, e.g.*, MD. COMM. LAW ANN. § 14-903 (1983) ("False or misleading representations in sale of food products"); *Id.* § 14-905 ("Preparation and service of food products"); *Id.* § 14-906 ("Advertisement of place of business or food products").

139. Erlich v. Municipal Court, 55 Cal. 2d 553, 555-57, 11 Cal. Rptr. 758, 759, 360 P.2d 334, 335 (1961).

140. *See, e.g., Erlich*, 55 Cal. 2d 553, 11 Cal. Rptr. 758, 360 P.2d 334 (definition of Kosher not void for vagueness); Sossin Systems, Inc. v. Miami Beach, 262 So. 2d 28 (Fla. App. 1972) (ordinance which prohibited fraudulent sale of food labeled as Kosher served to safeguard free exercise of religion); People v. Goldberger, 163 N.Y.S. 663 (Sp. Sess. 1916) (protection afforded by fraudulent food statute was in accord with free exercise and enjoyment of religious worship).

141. For a general discussion of dietary laws with respect to freedom of religion, see Annotation, *Validity and Construction of Regulations Dealing With Misrepresentations in the Sale of Kosher Food*, 52 A.L.R.3D 959 (1973).

142. MD. ANN. CODE art. 27, §§ 333A-333D (1987).

143. *Id.* § 333C.

144. MD. COMM. LAW ANN. § 14-908 (1983).

to arbitrate their domestic relations disputes before a religious tribunal known as a *beis din*. Arbitration clauses have generally been upheld by the courts through application of neutral principles of contract law.[145] It is possible, however, that the right-to-divorce clause in a *ketuba* would raise questions as to the enforcement of a religious document by a secular court — a potentially impermissible entanglement of church and state. At least one court, however, has held that a *beis din* clause, although grounded in religious belief, could be enforced under secular law.[146]

An interesting question arises when there is no specific divorce clause in the marriage contract. The *ketuba* obligates the parties to abide by the "Laws of Moses and Israel" — one of which requires the husband to deliver a divorce document to his wife. Arguably, a court using neutral principles of contract law could order specific performance by *requiring* the husband to give his wife a divorce, not just to appear before a *beis din*.[147]

I. Religious Symbolism

1. Crèches and Menorahs

The first case to come before the Supreme Court regarding the constitutionality of a state-sponsored crèche on Christmas was *Lynch v. Donnelly*,[148] decided in 1983. Every holiday season for approximately forty years the city of Pawtucket, Rhode Island, had been placing the manger scene in a park owned by a nonprofit organization. It was part of a display which included a "Season's Greetings" banner, a Santa Claus house, and a Christmas tree, all of which were owned by the city.[149]

In holding that the Pawtucket crèche did not violate the Establishment Clause, the Supreme Court, by a 5-4 majority, stated:

> [O]ur history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people.'[150]

145. *See, e.g.*, Waxstein v. Waxstein, 90 Misc.2d 784, 395 N.Y.S. 2d 877 (1976), *aff'd*, 57 A.D.2d 863, 394 N.Y.S.2d 253, *cert. denied*, 42 N.Y.2d 806, 398 N.Y.S.2d 1027, 367 N.E.2d 660 (1977).

146. *See* Avitzur v. Avitzur, 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 464 U.S. 817 (1983).

147. In fact, this was the holding in Minkin v. Minkin, 180 N.J. Super. 260, 434 A.2d 665 (1981).

148. 465 U.S. 668 (1984).

149. In 1973, Pawtucket acquired the crèche in question for $1,365. Erection and dismantling of the display cost the city about $20 per year, with similarly nominal expenses incurred for lighting. *Id.* at 671.

150. *Id.* at 677-78.

In each case, said Chief Justice Burger for the majority, the inquiry calls for line-drawing; the purpose of the Establishment Clause " 'was to state an objective, not to write a statute.' . . . The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test."[151]

Though emphasizing its "unwillingness to be confined to any single test or criterion in this sensitive area,"[152] the Court nevertheless found that the Pawtucket crèche violated no part of the famous three-prong standard enunciated in *Lemon v. Kurtzman*: it had a secular purpose; its primary effect neither advanced nor inhibited religion; and it did not result in excessive church-state entanglement.[153] The Court concluded that "[*w*]*hen viewed in the proper context of the Christmas Holiday season*, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message."[154]

In 1984, *McCreary v. Stone*[155] extended what seemed to have been the narrow holding of *Lynch*. The Village of Scarsdale, New York, sought to prohibit a private citizens' group from placing its crèche on public property. The Court of Appeals for the Second Circuit had used a freedom of speech analysis in ruling that the Scarsdale crèche amounted to symbolic speech.[156] Governmental interference with the content of speech in a traditional public forum must survive strict scrutiny in order to be constitutional.[157] The court rejected the Village's argument that maintenance of the separation between church and state was a compelling reason for outlawing the display on public property, finding instead that the prohibition was not necessary at all.[158] An equally divided Supreme Court affirmed the Second Circuit, though such a result has no binding precedential value for other jurisdictions.[159]

Indeed, the law on the crèche issue is far from settled. *McCreary* extended *Lynch* in two significant ways. *Lynch* had found that a publicly owned crèche may be placed on private property, but it also had confined its permissive holding to a scene which was part of a larger secular display (Santa Claus, reindeer, etc.).[160] Not only did *McCreary* permit a *privately* owned crèche, standing alone, on *public* property, it rejected all

151. *Id.* at 678-79 (citation omitted).
152. *Id.* at 679.
153. 403 U.S. 602, 612-13 (1971); *see also supra* text accompanying note 70.
154. *Id.* at 680 (emphasis added).
155. 739 F.2d 716 (2d Cir. 1984), *aff'd*, 471 U.S. 83 (1985) (equally divided).
156. *Id.* at 723.
157. *Id.*
158. *Id.*
159. Full briefs were submitted and oral arguments heard, but no opinion was written. Scarsdale v. McCreary, 471 U.S. 83 (1985). Justice Powell took no part in the decision.
160. *See supra* text accompanying note 154.

attempts at distinguishing between the displays in Scarsdale and Pawtucket. The Second Circuit stated:

> [T]he Village's reading of *Lynch* is erroneous as applied to this case. The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the crèche was situated; rather the Court consistently referred to 'the crèche in the context of the Christmas season.'[161]

In 1987, the Seventh Circuit put at least a temporary halt to the expansive reading given *Lynch* by the *McCreary* court. In *American Jewish Congress v. Chicago*,[162] the court held that the placement of the crèche in city hall — both seat and symbol of government power and action — was in and of itself violative of the Establishment Clause.

Although the crèche in *American Jewish Congress* was placed in the City Hall of Chicago, not in the "traditional public forum" (a park) as in Scarsdale, it is important to the religious symbol issue that the Seventh Circuit clearly accepted the "physical-context-of-the-display-as-a-whole" argument, which had been rejected outright by the Second Circuit in *McCreary*.[163]

Other seasonal symbols, such as Christmas trees and Chanukah menorahs, have long been displayed on public property and have seldom provoked litigation. When a challenge does arise, some courts, using the *McCreary* analysis, have permitted the erection of a menorah on public property for the lighting ritual.[164] If there is any common thread to the cases, it is that the decisions of local authorities as to whether to ban or permit menorahs will be upheld by the courts.[165]

In *Lubavitch of Iowa, Inc. v. Walters*,[166] the Lubavitch, a chassidic group, sought permission to erect a menorah on the grounds of the Iowa State House. The State, based on an informal opinion from its attorney general, told the group that it could have a lighting ceremony on state

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161. *McCreary*, 739 F.2d at 729.

162. 827 F.2d 120 (7th Cir. 1987).

163. *Id.* at 125. The court in *McCreary* had also rejected an attempt to distinguish *Lynch* by the ownership of the property upon which the crèche would be placed. *McCreary*, 739 F.2d at 729. It is interesting to note that the *American Jewish Congress* court did not seem especially concerned about whether a crèche itself—or a park in which it might be displayed—is publicly or privately owned. It lumped *Lynch* (private park) and *McCreary* (public park) together as "park cases," to be distinguished from those where a governmental building is involved. *American Jewish Congress*, 827 F.2d 126 n.2.

164. *See, e.g.*, ACLU v. County of Allegheny, C/A 86-2617 (W.D. Pa. 1986); Okrand v. Willeins, #C-577-925 (Sup. Ct., L.A. County 1986). However, there are those who argue that once the ritual is over the menorah may not be left on public property because it is no longer an implement of symbolic speech. *See* M. Stern, The Year of the Menorah 12 (May, 1987) (The David V. Kahn Resource Center — The Fund for Religious Liberty of the American Jewish Congress).

165. The Year of the Menorah, *supra* note 164, at 19 (Appendix A).

166. 808 F.2d 656 (8th Cir. 1986).

property each night if it would remove the menorah afterwards.[167] The Lubavitch filed suit, arguing that the menorah is not a religious symbol, that the State House grounds are a public forum, that the placement of a menorah does not "establish" religion, and that banning menorahs but not Christmas trees unconstitutionally favors one religion over another. The federal district court rejected these arguments and denied the request for a preliminary injunction against the State.[168] The Court of Appeals for the Eighth Circuit affirmed, by a 2-1 vote.[169]

A number of other state courts have allowed a public menorah-lighting ceremony each night of Chanukah, but have required that the menorah be removed after the ceremony.[170] The rationale seems to be that under *McCreary*, a person has a free-speech right to place a religious symbol in a public forum, but this right is limited to the person in the forum. Once the ceremony is over and the symbol's advocate has left, it begins to look like official state sponsorship of a particular religion.[171]

No such erection/dismantling analysis has ever been applied to a crèche, perhaps because it is not the subject of any ceremony nor is its placement, in and of itself, the symbolic speech of its advocate. Such distinctions, however, appear strained and unpersuasive. If a menorah can only be placed in a public forum when an advocate stands next to it, why is the same not true for a crèche?

In Maryland, there has been widespread and long-standing toleration of both crèches and menorahs. In 1987, however, the issue became the subject of heated debate. For many years Christmas trees and menorahs had been erected by neighborhood associations on public property, but the more specifically religious manger scenes were usually displayed only by Christian groups on church grounds. In recent years, though, the Baltimore County government has constructed a crèche on the front lawn of the county courthouse. In response to protests from a coalition of Christian and Jewish organizations, the County Executive said that he would order the crèche placed in the midst of a "wide variety of symbols."[172] He appeared determined to keep the county's crèche, but to stay well within the guidelines indicated by the Supreme Court in *Lynch v. Donnelly*.[173] As it happened, however, the County Executive backed

167. *See* The Year of the Menorah, *supra* note 164, at 21 (Appendix A).

168. Lubavitch of Iowa v. Walters, C/A 86-901-B (S.D. Iowa 1986), *aff'd*, 806 F.2d 656 (8th Cir. 1986).

169. Lubavitch of Iowa v. Walters, 806 F.2d 656 (8th Cir. 1986). In dissent, Judge Arnold argued that he would not enjoin the display of a menorah on state-house grounds if Christmas trees were allowed to stand there. *Id.* at 657 (Arnold, J., dissenting).

170. *See* The Year of the Menorah, *supra* note 164, at 19-24 (Appendix A).

171. *See id.* at 12.

172. Letter from Baltimore County Executive Dennis Rasmussen to Baltimore Director Maggie Gaines (Aug. 11, 1987).

173. 465 U.S. 668 (1984); *see also supra* notes 148-154 and accompanying text. Certainly, the Baltimore County crèche would not have survived the Seventh Circuit's

down, and there was no crèche on the courthouse lawn in 1988.[174]

In February 1989, the Supreme Court heard arguments in two cases involving religious symbols placed inside the main entrance of a courthouse and on the steps of a county office building.[175] The Court of Appeals for the Third Circuit held that such a placement of both a crèche and menorah violated the Establishment Clause, because the symbols were placed near "core functions" of government in prominent view where visitors would see them, and because neither symbol was "subsumed by a larger display of non-religious items."[176] As of this writing, the Supreme Court has not decided the case.[177]

2. Eruvs

An *eruv* is a symbolic enclosure which enables Orthodox Jews to perform certain tasks on their sabbath which they would otherwise be unable to do. It is usually constructed by using the wires strung along existing utility poles that are located on public property. The costs of construction are minimal and are borne privately. Many communities around the country currently have *eruvs* in operation. Those in Baltimore and Silver Spring are among the largest.

It is difficult to argue that such physically innocuous enclosures, which in and of themselves are not holy symbols, could constitute excessive entanglements between church and state — especially in light of the Supreme Court's recent pronouncements allowing crèches on public property.[178] Nevertheless, in 1987, the American Civil Liberties Union challenged the *eruv* around Long Branch, New Jersey as a violation of the Establishment Clause.[179] In granting the defendant's motion for summary judgment, the United States District Court for the District of New Jersey held that the city's authorization of an *eruv* on public property was not excessive entanglement where no public funds were expended and where the *eruv* boundaries were invisible and had no independent religious significance.[180] The court concluded that:

> Providing equal access to public facilities to people of all religions and enabling individuals to get to and from their chosen

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analysis in American Jewish Congress v. Chicago, 827 F.2d 120 (7th Cir. 1984). *See supra* notes 162-163 and accompanying text.

174. Meanwhile, when the Baltimore City Council sought to erect a public menorah which would be ceremonially lit by a rabbi, the attempt failed because no rabbi was willing to participate. The Year of the Menorah, *supra* note 164, at 11 n.12.

175. County of Allegheny v. ACLU, 57 U.S.L.W. 3563 (Feb. 22, 1989) (oral argument summary).

176. ACLU v. County of Allegheny, 842 F.2d 655, 662 (3rd Cir.), *cert. granted*, 109 S.Ct. 53, 54 (1988). The court also noted that a menorah "is not associated with a holiday with secular aspects." *Id.*

177. County of Allegheny v. ACLU, 57 U.S.L.W. 3563 (Feb. 22, 1989).

178. *See supra* notes 148-177 and accompanying text.

179. ACLU v. City of Long Branch, 670 F. Supp. 1293 (D. N.J. 1987).

180. *Id.* at 1295.

> place of worship safely are permissible accommodations by the government. The government is permitted to fix sidewalks outside churches, provide police protection and basic utilities for mass outdoor religious gatherings, provide police to direct traffic into synagogue parking lots and authorize a house of worship to install additional street lights on public property to facilitate access to evening services.[181]

J. Restrictive Zoning

There have been many cases nationally where communities have sought to protect or limit various religious activities. Most of them involve the use of new or existing ordinances to allow or prevent the construction of churches or synagogues.

In *Winchester Reform Temple v. Brown*,[182] for example, the Court of Appeals of New York held that although zoning ordinances find their justification in the state's police power, nevertheless "churches and schools occupy a different status from mere commercial enterprises."[183] Likewise, in *Lubavitch Chabad House v. City of Evanston*,[184] the Appellate Court of Illinois held that the denial of a special use permit to a nonprofit religious organization to use a building as a sanctuary was an infringement of its religious freedom, particularly where the only apparent difference between the plaintiff organization and others in the immediate area was its adherence to strict orthodox observance of Jewish (Hasidic) practices and customs.[185] "First Amendment rights and freedoms," said the court, "far outweigh considerations of public inconvenience, annoyance, or unrest."[186]

The state must draw fine lines, however, in order to avoid violating the Establishment Clause through excessive entanglement with existing churches. In *Larkin v. Grendel's Den*,[187] for example, the Supreme Court struck down by an 8-1 margin, a Massachusetts statute which vested in the governing bodies of religious organizations the power to veto applications for liquor licenses within a 500-foot radius of church buildings.

In 1987, an ordinance was proposed in the Baltimore City Council which would have limited the construction of new churches, temples, and synagogues by increasing the minimum lot area and off-street parking spaces required in certain zones.[188] The bill was originally suggested

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181. *Id.*
182. 22 N.Y.2d 488, 293 N.Y.S.2d 297, 239 N.E.2d 891 (1968).
183. *Id.* at 492-94, 293 N.Y.S.2d at 300-01, 239 N.E.2d at 894.
184. 112 Ill. App. 3d 223, 445 N.E.2d 343 (1982), *cert. denied*, 464 U.S. 992 (1983).
185. *Id.* at 227-28, 445 N.E.2d at 347.
186. *Id.* at 227, 445 N.E.2d at 347.
187. 459 U.S. 116 (1982). Justice (now Chief Justice) Rehnquist was the lone dissenter in *Larkin*. *See id.* at 127-30 (Rehnquist, J., dissenting).
188. Baltimore City Council Bill No. 1540 (1987).

by a neighborhood improvement association alarmed by the proliferation of churches and synagogues in its area. Although the proposal was withdrawn by its sponsors before its constitutionality could be debated, sentiment both pro and con ran deep in the community involved, and attempts to enact similar restrictive laws in the future may be inevitable.

Such efforts to "zone out" churches and synagogues could be challenged under a variety of theories, the most obvious of which are the Equal Protection and Free Exercise Clauses of the United States Constitution. A more novel and perhaps more efficacious approach might be a lawsuit under Section 1982 of the Civil Rights Act, which guarantees all Americans "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," and forbids both state and local interference with property rights.[189] Unlike Equal Protection and Free Exercise challenges, a section 1982 lawsuit does not require state action in order to be viable. In addition, attorneys' fees may be recoverable.[190]

IV. CONCLUSION

The question most directly involved in interpreting the Establishment Clause of the First Amendment is whether the Founding Fathers intended a complete separation of church and state or instead, would permit non-discriminatory government participation.

Prior to adoption of the Bill of Rights, in every state constitution where "establishment" of religion was mentioned, it was equated or used in conjunction with "preference." A logical inference might be drawn that Congress intended the First Amendment to serve more to protect "free exercise" than to forbid all government aid, however non-preferential. Undoubtedly, some of the Framers — particularly Madison and Jefferson — favored full severance of church and state. But that feeling was hardly unanimous, and there is historical evidence to support a contrary view. Moreover, because the Constitution is a living document and must be read in the light of contemporary standards and events, it may be (and has been) argued that the intent of the Framers is not necessarily determinative. From these perspectives, those who emphasize the importance of free exercise and those who are concerned with prevention of establishment can each debate with convincing logic.

Even now, two hundred years after the birth of the First Amendment, the questions have not been conclusively decided. In light of ample history to support each of the competing views, the Supreme Court

189. 42 U.S.C. § 1982 (1982); *see also* Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (upholding the right of a Jewish person to sue under the Civil Rights Act in a case involving synagogue vandalism).

190. For a good discussion of zoning ordinances and houses of worship, see Annotation, *Zoning Regulations as Affecting Churches*, 74 A.L.R.2d 377 (1960 & Later Case Service). *See also* Edwin Meese III, *G-d and Man at the Zoning Board*, Intermountain Jewish News, Mar. 31, 1989, § A, at 32.

will have to make an independent judgment — one not based on inconclusive eighteenth-century evidence — as to whether the nation in 1990 needs accommodation or strict separation. Regardless of the outcome, the Court will build upon the enduring foundations laid in Maryland. The policies so vigorously espoused by the Calverts and the Carrolls in the sixteenth and seventeenth centuries—their roots firmly embedded in the law of the land—are still being refined, two hundred years later.