



3-4-1998

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Recommended Citation

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Passage of Religious Freedom Act necessary to fulfill Maryland's national leadership role

March 04, 1998 | By Kenneth Lasson

THREE HUNDRED sixty-four years ago this month, two tiny sailing ships arrived near what is now St. Mary's City with the first settlers in Maryland. The Ark and the Dove were sent to the New World by Cecil Calvert. Lord Baltimore had founded his small colony as a haven for those persecuted in England because of their religious beliefs.

On numerous occasions since then -- from passage of the Act of Toleration in 1649 to the achievement of full civil liberties for Jews in 1825 to landmark Supreme Court decisions involving the state in the 1960s -- Maryland has been a beacon of religious liberty in the United States.

Passage of the Religious Freedom Act (currently before the General Assembly as House Bill 1041 and Senate Bill 515) would prevent state and local governments from adopting any measure that would infringe upon an individual's religious beliefs, unless such actions were essential (and the least-restrictive means) to furthering a "compelling state interest."

Indeed, for many years that had been the constitutional standard of review for federal and state courts in all cases where First Amendment freedoms -- speech, press, religion and assembly -- were involved.

In 1990, however, the Supreme Court replaced the compelling state-interest standard with a substantially less-rigorous requirement in religion cases. In *Smith vs. Oregon*, the court ruled that a state could infringe upon a person's religious beliefs so long as the law in question was equally applied. State actions would no longer have to be strictly scrutinized.

The court's 5-4 decision was widely criticized. Justice Sandra Day O'Connor argued that the decision "dramatically departs from well-settled First Amendment jurisprudence and is incompatible with our nation's fundamental commitment to individual religious liberty."

Congressional action

Popular response to the *Smith* case was equally swift and strong. By nearly unanimous votes in both houses, Congress -- at the urging of an extraordinarily broad coalition of religious and civic groups (as well as by legislation then proposed in Maryland) -- restored the compelling state-interest standard by passing the Religious Freedom Restoration Act of 1993.

Last year, however, the Supreme Court found that Congress did not have the constitutional power to legislate a judicial standard. That decision does not prevent a state from doing so, according to the attorney general of Maryland. Thus, the historic initiative now being considered.

There are many good reasons for Maryland to enact the proposed Religious Freedom Act, and no apparent bad ones. The practical effect of restoring the compelling-state-interest standard would simply be a return to the pre-*Smith* status quo, when appropriate accommodation could be struck between the interests of the state and religious beliefs of the individual.

For example, in 1996, when the state began requiring crabbers to take off Sunday or Monday as a conservation measure, exceptions were made for people with religious conflicts, such as Seventh-day Adventists. Likewise, the government would have to think twice before placing limitations on wine-drinking when used for sacramental purposes, animal slaughter when done in observance of dietary laws, or autopsies when forbidden by religious laws.

On the other hand, courts have never had a problem finding compelling state interests in adopting regulations that would ensure security in prisons or the welfare of children -- even if in so doing they would infringe upon the religious beliefs of prisoners or parents.

While the effect of the Religious Freedom Act would be largely symbolic -- few courts would entertain a state action that substantially infringed upon religious liberty unless there were no other way to achieve a legitimate goal -- such a legislative gesture would keep faith with Maryland's founding fathers and their belief in freedom of conscience.

Thus, in 1634, it was no coincidence that the Colonial settlers laid out St. Mary's City with the government building on the opposite end of town from the chapel -- symbolically separating church matters from those of state.

Legislating toleration

The Act of Toleration, passed by the fledgling colony some 350 years ago, was specifically intended to prevent Protestant discrimination against Catholics, who were in greater numbers here than anywhere else in America.

A century and a half later, there were still no more than a handful of Jews in Maryland. Not one of them had ever met Del. Thomas Kennedy, a Scottish Presbyterian from Hagerstown who was disturbed by the idea that Jews could not legally hold public office. He waged a decade-long battle to remove such restrictions.

Another 150 years passed before the Supreme Court ruled in a series of cases involving Maryland that religious oaths no longer could be required as a condition of state employment, that blue laws were unconstitutional and that financial aid to public colleges had to be used for nonsectarian purposes.

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All of these had practical and symbolic significance. Now, more such pragmatism and principle are on the legislative line.

The Religious Freedom Act deserves support. Other states are carefully watching what we do here. Restoring a widely accepted and reasonably applied judicial standard from the past would be another step forward in the long and largely successful quest for religious liberty in the United States.

And Maryland once again would light the way.

Kenneth Lasson is a law professor at the University of Baltimore.

Pub Date: 3/04/98

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