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Colonial Counterfactuals, the American Separationist Mindset, and Open-Minded Discourse on the Establishment Clause

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Abstract: This work first develops the idea of an American Separationist Mindset—a deeply rooted and often unthinking supposition that the strict separation of church and state is the only defensible church-state arrangement under the Establishment Clause of the United States Constitution. Such a Mindset can make arguments for religious accommodationism difficult to be assessed openmindedly in contemporary constitutional discourse. The essay next surveys the potential of a counterfactual history of topics long thought settled to weaken prevailing views and treasured interpretations so to allow greater critical engagement with alternative assessments. The work in turn deploys a counterfactual reconstruction of Maryland's colonial Anglican establishment. This account imagines the founding vision for Maryland's establishment of Anglicanism developed by Rev. Thomas Bray as having been sustained. The cogency of this counterfactual can assist contemporary constitutional discourse by weakening the prejudicial potential of the American Separationist Mindset.

Keywords: colonial Maryland; religious establishment; Anglicanism; strict separationism; accommodationism; counterfactual history



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1. Introduction

Debates surrounding the Establishment Clause remain at the center of constitutional discourse in the United States. Two of the most widely debated interpretations among legal scholars are strict separationism and religious accommodationism. According to the former, the Establishment Clause must be construed as strictly separating religion and public life such that the Clause proscribes any overlap at all of religion and the structure and operations of government. According to the latter, the Clause should be interpreted as excluding only direct coercion in matters of religious conscience and direct state support of one particular religion, allowing, in turn, the state non-coercively to endorse and/or support certain elements of the religious life and practice of the nation understood in a broad sense, that is, in a way not limited to one particular religious expression.¹

In this work, I seek to contribute to constitutional debate by developing an argument against strict separationism. This argument, I believe, can bear special importance, for it can supply at once an argument against certain defenses of strict separationism while also indirectly contributing to the overall quality of debate concerning the proper meaning of the Establishment Clause.

In the foundational 1947 decision in *Everson v. Ewing Township*, the Supreme Court deployed the now-famous wall of separation metaphor to describe strict separation, and it deployed this metaphor through rather absolutist rhetoric: America must have a “high and impregnable wall of separation” between church and state, and “must not tolerate even the slightest breach.” This case, along with subsequent ones such as *Engel v. Vitale*, as well as the defenses of these cases by scholars and jurists, have advanced at least three points in support of strict separationism: that religion in public life is particularly divisive; that it will invariably produce tensions that develop to the point of discrimination and

persecution, violating the conscience of dissenting individuals; and that support by the state for a particular religion will inevitably corrupt and enervate the religion itself.

However, although these are claims capable of and in need of rational debate, the Court's *Everson*-borne position on strict separation is susceptible of creating what I call an American Separationist Mindset: a rigid, almost unthinking view that strict separationism is self-evidently the best constitutional arrangement for a liberal democracy—a mindset that can make openminded debate about alternatives difficult to achieve. The captivating simplicity of the metaphor of a "wall of separation," the Court's shrouding of the metaphor around luminary figures in American history such as Thomas Jefferson and James Madison, and the absolutist rhetoric by the Court as well as its reliance on often conclusory assertions in its opinions, risk shaping the debate in a particular way that narrows open-minded discourse on the relationship between church and state.

The Separationist Mindset can constitute a serious impediment to constitutional debate over the proper meaning of the Establishment Clause; it is a serious risk that needs to be addressed. One way the discourse-eroding potential of a Separationist Mindset can be mitigated is through engagement with a field of contemporary research in the history and social science disciplines known as counterfactual history: the study of plausible alternative courses of events that could have arisen had certain circumstances changed only rather slightly. Rather than being a parlor game anyone can indulge or a speculative lark unprofitable for serious inquiry, recent scholarship shows that counterfactual history done right is a rigorous area of scholarly research. Moreover, it can be especially fruitful as a means to facilitate receptivity to self-critique among those who take a particular viewpoint as settled and in need of no critical discourse. As the contemporary exponent of counterfactual history Rebecca Onion maintains, seeing that events—especially events that shaped the emergence of the institutions and practice one most holds dear—could have turned out otherwise is a recognition that can powerfully stimulate adherents to "think twice" about the views firmly held, allowing greater critical discourse to occur among a range of contending positions.²

Counterfactual history would hold promise to enrich contemporary debates on the Establishment Clause by puncturing such a Separationist Mindset if a rigorous counterfactual account could show that an establishment of religion in the original constitutional sense—the state support of one branch of Christianity³—might have promoted the public good without divisive conflict or violation of the rights of conscience had only certain circumstances changed only slightly. If a rigorous accounting of the historical record can show the potential of a regime based on the state promotion of one branch of Christianity to advance the public weal—a potential that only contingently failed—then *a fortiori* the lesser overlapping of religion and the state found in accommodationism—with its acceptance of a variety of religious contributions to government without any direct state coercion—could lose the sting it suffers as a result of a Separationist Mindset—it could lose its status as the unthinkable and insufferable breach of the unscalable wall of strict church-state separation. The Separationist Mindset could in turn be broadened.

This broadening could allow a more open-minded conversation about religion and its association with the power and authority of American government. And just such open-minded debate is especially necessary, for the arguments for strict separation that derive from *Everson* remain serious ones. Just dispelling the Separationist Mindset that can too easily develop still leaves serious questions to be discussed about whether religion in public life is indeed especially divisive; whether it tends to produce tensions that develop to the point of discrimination and persecution; and whether support by the state for religion will exact a corrosive influence on religion itself. A counterfactual history would provide a reason to question the strict separationist answers to these questions, but it would not on its own disprove them. What dissipating the Separationist Mindset *would* do is to allow the range of accommodationist responses to strict separationism to receive as much as possible a full and open hearing.

Moreover, as a constitutional doctrine, accommodationism faces a number of genuine challenges that require careful consideration and assessment, questions such as whether the equal status under law of non-religious citizens is meaningfully impaired by accommodation (Eisgruber and Sager 2007); whether non-preferential state religious endorsement violates the Establishment Clause (Koppelman 2013, p. 719); and whether accommodationism is even feasible given the tremendous diversity of new and emerging religious traditions (Sullivan 2018). This paper cannot address such issues. What it can do, again, is to help facilitate an intellectual environment in which the accommodationist responses to these challenges⁴ are assessed in a way less colored by the possibility of bias that a Separationist Mindset can engender.

An application of counterfactual history, I argue, can indeed help to sustain just such an intellectual environment, for a rigorous counterfactual history of religious establishment and disestablishment in the American context can be developed. This is especially true in reference to colonial Maryland. The chief architect of Maryland's establishment of Anglicanism as the one official religion of the colony, a law enacted in 1702, was Rev. Thomas Bray. Bray developed a view of a religious establishment radically at odds with core aspects of the Separationist Mindset, as Bray's view was a vision according to which establishment, rather than being poisonous, served the common good of all.

In this work I put forth the counterfactual history of a colonial Maryland with more men like Bray and Bray's followers—a Maryland that achieved a considerable measure of Bray's vision for Maryland's Anglican establishment. Such a counterfactual is one that can meet the rigorous standards for a strong counterfactual analysis as defined by the field's leading experts. On a rigorous basis, therefore, we can cogently show that a radically different history of religious establishment—an establishment of Bray's understanding—only contingently failed to emerge. This conclusion can undermine the rigidity that risks forming as a result of the Separationist Mindset, a rigidity that can marginalize the arguments in support of religious accommodationism. For, again, if only contingently did an establishment of one denomination that served the public good not come to pass, then the separationist view that would ban a wider array of religions from influencing, even if non-coercively, public life should be viewed with greater humility and openness to self-critique.

I develop this argument in four stages. First, I explore the concept of a Separationist Mindset—a pervasive assumption that the strict exclusion of any influence of religion on public affairs is almost self-evidently the best arrangement for a liberal democracy.

Second, I survey recent work in counterfactual history. I show the criteria leading scholars in the field require for a counterfactual history to be compelling. I then survey the way the leading practitioners of counterfactual history hold it can instill greater self-criticism among adherents of deeply held positions.

Third, I apply counterfactual history and its discourse-enhancing prowess to the history of religious establishment and disestablishment in the American context, with a special focus on colonial Maryland and the work of the indefatigable Anglican churchmen and architect of Maryland's colonial religious establishment, Rev. Thomas Bray, as well as those in Maryland who came immediately following Bray and sought to embed his vision for the establishment, including men such as Rev. Thomas Bacon. I propose the counterfactual where colonial Maryland was more heavily influenced by Bray and Bray's admirers (Middleton n.d.).

To develop this counterfactual history according to the standards required to ensure that counterfactual history is done right, I survey in some detail the actual history of Maryland's colonial Anglican establishment and the formal disestablishment of Anglicanism in the state. To do so adequately requires a step-wise elaboration of phases in the history of Maryland's established church. I start by describing the condition of religion in Maryland before the creation of the Anglican Establishment—a time of pronounced spiritual desiccation—and highlight the pre-establishment calls for major religious reforms to revitalize the influence of religion and the depth of popular religious conviction. I then briefly sketch the process of creating Maryland's Anglican establishment. I next turn to

Bray, the intellectual and legislative architect of the Maryland establishment. In doing so, I outline Bray's distinctive vision for the Anglican establishment in Maryland and review just what a religious establishment was *not* for Bray. Establishment according to Bray's vision was to serve the public good, advance inter-religious comity, and, rather than diminish religious faith, provide for its growth in conditions of spiritual desiccation. I next survey the failure of Maryland to adopt Bray's vision of establishment, including the rise of religious persecution and the lingering moral irregularity in the behavior of the established ministry. I end with a review of the disbandment of the Established church in 1776.

I then present more specifically the colonial counterfactual of a Maryland with more men like Bray, describing an alternative condition defined by a strong establishment operating in accordance with Bray's vision of religion and the common good.

Using the criteria of counterfactual history its defenders have set forth, I then argue that this counterfactual view is indeed a strong one. By examining the reasons for the failure of Bray's vision, I show that it was often the *weakness* of the ties between church and state—and not the fact of a religious establishment per se—that caused Bray's establishment enterprise to falter, and that able men attempted to keep his vision alive and that they had a genuine chance to prevail against contending forces at odds with Bray's vision for the Anglican church in Maryland.

Fourth and lastly, I argue, based on the rigor of the plausibility of this counterfactual history of Maryland's religious establishment, that the counterfactual can and should stimulate greater self-criticism among strict separationists. The colonial counterfactual I specify can therefore inspire a more openminded assessment of the leading positions in the debate over how properly to interpret the Constitution's Establishment Clause.

2. A Separationist Mindset

In the landmark case of *Everson v. Ewing Township*, Justice Black, writing for the majority, makes his point starkly: the American nation as a whole must have a "high and impregnable wall of separation" between church and state and it must "not tolerate even the slightest breach."⁵ Many defenders of this view, which has becoming a pervading one in American discourse, see it as embodying the pinnacle of progress in matters of religious freedom and the public good. Three claims are often made on behalf of strict separationism's vaunted status.

One core aspect of this pervasive viewpoint is the conviction that U. S. District Court Judge Barbara Crabb expressed, the view that religion when mixed with and supported by the state holds a "unique danger . . . for creating 'in groups' and 'out groups'" in a way that harms the common good.⁶

A second aspect of the pervasive Separationist Mindset involves the supposition that religious establishment necessitates serious violations of individual conscience. As the Supreme Court maintains in *Everson*, when religion influences public life, it has "repeatedly threatened to disrupt the peace" through its divisiveness and has in turn threatened to engender "turmoil [and] civil strife." Such strife can cause the civil liberty of religious freedom of those in disfavored sects to be reduced—eventually leading to "cruel persecutions."⁷

A third constituent claim of the Separationist Mindset is that state support of a religion will inevitably produce an indolent, vain, entitled clerisy that only weakens the message of the established faith. In both *Everson* and *McCullum* this point is reiterated in the concurring and the majority opinions. As Justice Frankfurter in the concurrence in *Everson* intones, "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state *and best for religion*."⁸ And as Justice Black asserts in the majority opinion in *Everson*, "both religion and government can *best* work to achieve their lofty aims if each is left free from the other within its respective sphere."⁹ Further, in *Engel v. Vitale*, Black states that "religion is too personal, too sacred, too holy, to permit its '*unhallowed perversion*' by a civil magistrate."¹⁰ The Wall of Separation at once protects the state and permits religion to reach its full potential.

These views risk congealing into a Separationist Mindset—a frame of mind that holds that these positions are self-evidently correct. In fact, they have taken on the character, to some degree, of a personal faith. As Daniel Dreisbach points out, “in the last half of the 20th century, the metaphor” of a high and impenetrable wall between church and state has emerged as a “dogma,” with its image of a safety-conferring wall of protection being something like a “secular icon.” (Dreisbach 2006). As a result, “for many” this “metaphor has supplanted the actual text of the First Amendment to the U.S. Constitution.”¹¹ Many see—in the sense of seeing through a rigid interpretive lens—the text of the Constitution requiring what the words of the constitutional text never state: a strict separation of church and state.

Such a rigid mindset can readily arise, I believe, because of the following factors: the Supreme Court’s use of a simple yet captivating metaphor; the Court’s shrouding of that metaphor in the trappings of American heroes; and the Court’s own uncompromising rhetoric and frequent use of conclusory assertions.

First, as to the force of the Wall of Separation metaphor, as Dreisbach argues, “the more appealing and powerful a metaphor, the more it tends to supplant or overshadow the original subject, and the more one is unable to contemplate the subject apart from its metaphoric formulation.”¹² The Wall of Separation metaphor is just such an appealing and powerful metaphor, as it effectively “render[s] abstract concepts” about constitutional matters “concrete,” and “condens[es] complex concepts into a few words”—all while “enrich[ing] [the] language” of constitutional discourse “by making it dramatic and colorful.”¹³ In sum, by the Court’s use of a simple but arresting metaphor, the Court risks hampering Americans’ ability to “contemplate the subject apart from its metaphoric formulation.” Indeed, it is precisely because of the power of such a simplifying metaphor that Dreisbach describes the “Wall of Separation” as a “dangerous” metaphor, “in the sense that it endangers openminded debate on the proper meaning of the Establishment Clause.”¹⁴

Second, the strict separationist position, in addition to its metaphorical efficacy, takes on further force by being associated with the trappings of American historical personage such as Thomas Jefferson¹⁵ and James Madison, leaders both historically revered and lionized further by the Supreme Court itself. Justice Black accords, for example, Virginia’s disestablishment of Anglicanism in 1785 a special pride of place. To his mind, Virginia, the land of leading lights such as Jefferson and Madison, contained men of eminent wisdom and insight. It is here where “Thomas Jefferson and James Madison led the fight against any form of state support for religion.” Here Madison (1785) wrote his “great work *The Memorial and Remonstrance*,”¹⁶ and it was here where Madison and Jefferson “provided a great stimulus and able leadership for the movement” toward a robust form of disestablishment.¹⁷ Indeed, in the case that Black cites approvingly in *Everson* as enshrining the special position of Madison and Jefferson in the determination of the meaning of the Establishment Clause—*Reynolds v. United States*¹⁸—Thomas Jefferson is, in the words of David Reiss, “reverentially depicted.” (Reiss 2002, p. 107). Indeed, the author of the *Reynolds* opinion, Justice Waite, gives an account of the origins of the First Amendment in which Jefferson and Madison are presented “as Mosaic lawgivers”¹⁹ who “conquer the forces of intolerance.”²⁰ They constitute “icons” of Religion Clause jurisprudence.²¹ As such, *Reynolds*—and by extension *Everson*, which relies so heavily on it—work to establish the “identification of Madison and his compatriots with the true meaning of the First Amendment.”²² This historical trapping further solidifies strict separationism as an unimpeachable proposition—for wouldn’t it be un-American to oppose it?

Third, the Court’s own absolutist rhetoric about the truth of strict separationism in its rulings announcing this principle contributes to the principle’s status among many as an accepted dogma not in need of critical debate. Indeed, one of the most striking things about the Court’s rulings in *Everson* and *McCullum* requiring strict separationism throughout the country is the conclusory nature of the holdings. The opinions are largely unmoored to traditional legal reasoning—as if the Supreme Court thought its conclusions were so

transparently true as to need no debate at all. As the former dean of the University of Virginia Law School John Jeffries and his colleague James Ryan have argued, the *Everson* and *McCullum* decisions appear best to be seen as political or moral pronouncements by the Court, not legal determinations: “in terms of the conventional sources of ‘legitimacy’ in constitutional interpretation,” by which is meant argumentation based on “text, history, and structure,” the Supreme Court’s “establishment clause decisions [imposing strict separation] are at least very venturesome, if not completely rootless.” (Jeffries and Ryan 2001, p. 281). Indeed, Philip Munoz asserts that Justice Black in *Everson* “quietly and efficiently managed” to impose a specific outcome—that of nationwide strict separationism—“without making a substantive legal argument.” Instead, he secured his desired outcome “with the wave of his pen.”²³ This feature of the Court’s strict separationist holdings further risks engendering a rigid Separationist Mindset, since the Court treats this position as almost in need of no defense whatsoever.

3. The Value of Counterfactual History Done Right

A fascinating area of history and social science research that has gained increasing prominence is the field of counterfactual history. Counterfactual history involves carefully recounting “the details of past events and shows how plausible changes to actions by various individuals highly involved in the events would have likely produced significantly different outcomes.”²⁴ Advocates of counterfactual historical research include Niall Ferguson of Stanford University, whose edited volume *Virtual History: Alternatives and Counterfactuals* has become a standard work in the field (Ferguson 2011). Other prominent scholars of counterfactual history include Gavriel Rosenfield and Jeffrey Gurock, historians at Fairfield University and Yeshiva University respectively, who apply this methodology in studies of world and American Jewish history, as well as Jeremy Black of the University of Exeter.²⁵ This growing body of work constitutes what Rebecca Onion calls a “new wave of counterfactual writing.”²⁶

To be sure, the exercise of counterfactual history has to be approached with some measure of caution lest it become conjectural woolgathering with no intellectual substance behind it. Well aware of the possibility that counterfactual history as a discipline could become idle speculation, its leading scholars have developed criteria they see as essential to counterfactual history being done right. First, as Ferguson recounts, “a key methodological restraint” on counterfactual history is “that counterfactuals be [courses of action] which contemporaries contemplated.”²⁷ Second, as Onion remarks, the views or positions that were actually entertained must have been realistic and plausible courses of action given the circumstances at the time that decisions were made or positions adopted. To judge this, the positions, choices or actions not taken must be studied with careful attention “to what’s actually known—about the setting, the time, or the people involved.”²⁸ Only in this way can the counterfactual be determined to have been a viable alternative outcome. As such, “the closer the counterfactuals can hew to actual historical possibility, the more plausible [the entertained view that was not chosen] can be judged to be.”²⁹

Even while acknowledging these key criteria distinguishing good and bad counterfactual histories, some leading historians still question the value of the counterfactual enterprise. Distinguished historian Richard Evans, for example, remarks, “What If? Is a waste of time.” (Evans 2014). Such a view is hard to call entirely off base: it can often be hard enough simply to know what *actually happened* in the past, such that the further task of asking what *would have* occurred if certain events and decisions had been different can seem a distraction. However, beyond the fact that a number of historians do see value in counterfactual history,³⁰ the enterprise has been embraced by many outside of the confines of the history discipline. Indeed, some of the most important counterfactual work has been conducted by scholars doing interdisciplinary work that combines history with political and legal studies. In fact, perhaps the first great work in 20th century counterfactual writing was the interdisciplinary volume by Cambridge social scientist Geoffrey Hawthorn (1993), *Plausible Worlds: Possibility and Understanding in History and Social Science*. Examples of more

recent interdisciplinary research utilizing counterfactual history can be seen in the work of Political Scientist Philip Tetlock, Political Theorist Richard Ned Lebow, and historian Noel Geoffrey Parker in their book *Unmaking the West: “What-If” Scenarios that Rewrite World History* (Tetlock et al. 2006).

What is it that makes counterfactual history so appealing to a range of historians and a growing number of interdisciplinary researchers? Onion notes that “counterfactuals can encourage readers to think about the contingent nature of history—an exercise that can help . . . diminish feelings of national, cultural, and racial exceptionalism.”³¹ It can thereby “rupture the idea that our history is one of an evolution toward moral perfection.”³² Tetlock, Lebow, and Parker echo this sentiment by defending their work in the following way: “the primary value” of counterfactual history, they affirm, “is humility” about the value of a status quo taken as unassailable.³³ Counterfactual history and social science research, therefore, has the potential to enhance open-minded discourse in circumstances where a prevailing mindset might occlude genuinely critical debate.

4. A Counterfactual History of Religious Establishment: A Maryland with More Thomas Brays

I shall now apply these insights about an American Separationist Mindset and the value of counterfactual history to debates over the interpretation of the Constitution’s Establishment Clause. I shall do so by developing a colonial counterfactual. The scenario I propose is to imagine colonial Maryland with a resident Anglican bishop in the mold of Rev. Thomas Bray, one embodying Bray’s vision of the meaning and value of a religious establishment, and with this bishop aided by more Anglican priests in the colony such as Rev. Thomas Bacon, men who in Maryland’s actual history were able to advance Bray’s vision with notable success. To assess this counterfactual will require us first to set our bearings by outlining the key points in the history of Maryland’s Anglican establishment.

4.1. The State of Religion in Maryland before Establishment and the Call for Major Religious Reform

The Anglican establishment in Maryland was formalized in 1702 when royal approval of it was conferred by Queen Anne. How did this establishment come to be constructed? To answer this question we must survey briefly the early history of colonial Maryland. As many know, Maryland was founded in 1632 as a proprietary province of the Catholic second Lord Baltimore, Cecil Calvert, and began to develop with the arrival of Englishmen, mostly Protestant, to the region in 1634. A colonial assembly was formed and first met in 1635. From the time of the charter, Calvert as proprietor held the right to approve churchmen which he did in a way that allowed Christian ministers of all denominations to establish congregations in the colony.

By the 1640’s Protestants, both Anglicans and dissenters, came greatly to outnumber the Catholic population in Maryland. In turn, the Protestant majority gained control of the General Assembly; and in part to solidify its prerogatives under a Catholic proprietor, the General Assembly formally enacted a broad provision ensuring the rights of Christian conscience to all inhabitants of the colony. The so-called Toleration Act of 21 April 1649 formally extended to all groups who recognized the divinity of Christ and the Holy Trinity complete freedom of religious practice. Additionally, the act created what some commentators have called America’s first hate-speech law, banning the use of derisive terms describing fellow Christians (McConnell 1992).

As a proprietary colony, bills passed through the General Assembly required approval from Calvert to take full effect. Calvert approved the law, and so it fully became binding law. This much of Maryland’s history is relatively well known. But what may be less well known, however, is that Calvert neglected the religious life of the Maryland territory, seeming to make even a conscious effort to deemphasize any matters that might assist the development of religion in the colony. Theodore Gambrell in his important work, *Studies in the Civil and Ecclesiastical History of Maryland*, asserts that Calvert demonstrated “an absolute

indifference" to the condition of religion in the struggling colony—especially Protestantism, but an indifference extending also to his Catholic brethren (Gambrall 1893, p. 130).

Further evidence of Lord Baltimore's indifference to religion can be seen in the fact, as Gambrall documents, that Lord Baltimore even made the advancement of religion purposefully difficult by manipulating the laws of mortmain in the Maryland colony. Before 1692, it appears to have been very difficult for churches to secure rights in mortmain, or the right to receive charitable gifts held in perpetuity, a burden that was impressed on Catholic and Protestant churches alike (Middleton 1992, p. 10). As Gambrall recounts, Calvert had "an extreme prejudice against churches acquiring property, and so it was forbidden without special license" (Gambrall 1885, p. 11). that was expensive to obtain, and which, even if granted, often extended to the proprietor generous reserve rights to escheat from land given in bequest to support churches.³⁴

The condition of religion in the territory was in fact quite abysmal. Indeed, there were only three Anglican ministers in Maryland throughout the 1670s and 1680s, and only three Presbyterian ministers—each struggling to attend to a rapidly growing Protestant population (van Voost 1989, p. 110; Carr and Jordan 1974, p. 34). Catholic priests were somewhat more numerous, although Lord Calvert did nothing to encourage more ministers, Protestant or Catholic, to enter the colony. As evidence of the low status of religion in the colony at this time, many Anglicans in early Maryland did not view the sacrament of baptism as necessary. Indeed, as late as 1700 many clergy of all denominations complained that there were many adults who refused to be baptized.³⁵ "By the late 1600s, many Marylanders had grown up unchurched and were relatively unfamiliar" with foundational Christian "practices and beliefs." (Hardy 2003, p. 15).

Moreover, there was a widespread perception that the few ministers attending to the Protestant majority were men of dissolute morals and scandalous living. Further, the perception of rampant immorality in Maryland extended beyond the misdeeds of the Protestant clergy to a more general perception of a colony-wide moral profligacy. Gambrall makes this point curtly: "we know Maryland at this time to be a very immoral community,"³⁶ one "wretched in the extreme."³⁷ The perception of a widespread "gross character"³⁸ to the province was registered by a wide variety of prominent leaders, including the president of the General Assembly who recorded, in detail, vestry accounts of sins, such as adultery, which he showed to be much in excess of those recorded by vestries in England.³⁹ In such an environment, many felt that religion and its associated moral requirements were held in derision and disrepute.

This perceived condition of widespread disdain for faith engendered a backlash by a group representing a variety of Protestant leaders. These individuals met in Calvert County to express their protest against Proprietor Calvert for his dismissiveness toward the moral and religious condition of his colony. The group sent a passionate letter to royal authorities in 1676 titled "A Complaint from Heaven with a Hue and Cry." (Brugger 1996, p. 36). The letter expressed in what Gambrall calls "the strongest language" the sentiment that faith was utterly neglected, and that a wide disregard reigned "for religion and the proprieties of morality."⁴⁰ Following quickly on the heels of the "Hue and Cry," the Maryland Anglican minister Rev. John Yeo sent his own impassioned plea to the crown. He complained with exasperation that "the province of Maryland is in a deplorable condition," a condition arising, he attests, because "religion is so despised."⁴¹

In response to these overtures, the King's Privy Council demanded that Calvert account for the claims of religion's wretched condition. Yet Lord Baltimore made no change to his de facto policy of religious neglect.⁴² In response to Calvert's inaction, a proposal was tendered to the General Assembly of Maryland by the Lords of Trade in London in 1678 for there to be created a system of public support, through tax levies, for all Protestant religions in the Maryland province. But this proposal was rejected by the General Assembly, an opposition led, as Lois Carr and David Jordon point out, by the Protestant groups themselves.⁴³ Many were both fearful of Calvert's Catholicism and

fearful he would impose upon them social duties such as registering births, which many individual denominations felt themselves too overstretched and too weak to perform, even if some measure of financial support were to have been made available. Yet, as Lawrence Worth has found, many non-Anglican Protestants did support the idea of an Establishment of Anglicanism, “recognizing the need in the province of such a moral force as [an] Establishment promised to provide.” (Worth 1916).

Concern for the moral and religious condition of the state came to be joined with political concerns in the aftermath of the Glorious Revolution. After William and Mary ascended the throne in 1689, so called Associators rallied across the colony, and a convention was called in the capital city of St. Mary’s on 23 August 1689. The members of the meeting eventually stormed the capitol and deposed the Baltimore proprietorship. King William subsequently sustained this act of revolution, which, as James McSherry and Bartlett James have pointed out, was “merely a continuation of the kinds of revolutionary actions which had placed him and Mary on the throne.” (McSherry 1904, p. 76). Maryland thereafter became a royal colony until the proprietorship was given back to the Calvert family in 1715, by which time the Calverts had converted to Anglicanism.

In 1691 King William appointed Sir Lionel Copley as the royal governor of Maryland. Lord Copley summoned the General Assembly, which met on 10 May 1692. It acknowledged William and Mary as the sovereign and confirmed Maryland’s status as a royal colony. It is here that the issue of government support for religious establishment was again broached. The General Assembly enacted unanimously a statute making Anglicanism the official religion of the colony and calling for a general tax to repair (the very few) Anglican churches and to build new ones.⁴⁴ The bill first was put forward by the Assembly for discussion by the Maryland citizenry. When a vote was finally held in the Assembly, the measure received unanimous support by the General Assembly. It is important to note that the law establishing religion was enacted at a time when the Toleration Act was still in force. All Christian landowners could vote in Maryland for representatives to the General Assembly at the time of the passage of the establishment act by the legislature.⁴⁵

As a royal colony, the law passed by the General Assembly was only provisionally binding as it required royal approval to be considered fully legal. Yet the Assembly did have the power to enforce the law while royal approval was being sought (Rightmyer 1956, p. 32). Nevertheless, the leadership of the executive branch of the Maryland government saw no special need to enforce the provision for taxation support for the Anglican Church, and, in fact, the government failed to take *any* measure concerning religion beyond a nominal statement by the General Assembly endorsing Anglicanism. In any case, to be fully legally binding the establishment provision passed by the General Assembly needed the approval of the crown.

In the mid-1690s royal governor Francis Nicholson became deeply concerned about the state of religion in Maryland. Prodded by many figures across the region, he put considerable effort behind securing the full legality of the establishment act by receiving royal approval. A major way by which Nicholson along with frustrated members of the General Assembly sought to do so was by beseeching the Bishop of London to send an official representative to visit Maryland and exact discipline among the dissolute clergy, consult the General Assembly on the establishment bill, and return to England to secure the necessary royal assent.

4.2. Approval, Bray and His Vision for Establishment, and the Early Actions of the Established Church

In reply to Governor Nicholson’s request, in 1695 Henry Compton, the Bishop of London, appointed Rev. Thomas Bray to the task of being the first Commissary of the Bishop of London to the American colonies, an office that conferred upon its holder all episcopal powers save ordination and confirmation. The Bishop of London by this time had been extended ecclesiastical control over the colonies and served as the Ordinary of the British Empire in North America. Accepting this charge, Thomas Bray sailed—at his

own personal expense—to Maryland on 4 January 1700. He stayed until the end of May. While in Maryland he visited each parish, and held in Annapolis a general visitation of all the Anglican clergy.

Bray's charge was two-fold: to secure royal approval for an establishment and to lay the foundations for an effective establishment, should it secure royal approval. At the first task Bray was undoubtedly successful. For upon his return to England he worked tirelessly to secure royal assent for the establishment. And, finally, in 1702, Queen Anne gave her assent, and Anglicanism became fully established in the Maryland province.

The parson who secured approval for the establishment was as we noted Thomas Bray. But who was Bray and what was his vision for the Anglican Establishment in Maryland (Prud'homme 2011)?

Bray was born in Marton England in 1656, and he received his bachelor's degree from All Souls' College, Oxford in 1678 followed by a Doctor of Divinity degree from Magdalen College, Oxford in 1696. He achieved prominence in England as the result of a very well-received set of sermons published under the title *Lectures upon Church Catechism*, also known as his *Catechetical Lectures*, written while he was rector of the Sheldon church in Warwickshire. He soon amassed a strong reputation for good judgment and personal piety (Steiner 1901, p. 15). Bray would go on to an illustrious career. He founded the Society for the Propagation of Christian Knowledge—an organization still prospering today; and the Society for the Propagation of the Gospel in Foreign Parts—an organization that would rouse many Christians to the need for global evangelism, including a young John Wesley, who came to North America as an SPG missionary in the 1730s. In 1724 Bray's admirers founded Dr. Bray Associates, an organization dedicated to creating and maintaining schools for Africans (free and slave) across the British Empire. He was involved in numerous additional eleemosynary activities. A passionate moral reformer and dedicated churchman, Bray had deep concern, as David Holmes recounts, "not only for the unchurched but for persons on the margins of society." (Holmes 1993, p. 44). As one historian remarks, he was "a leader in awakening dozing consciences." He did so through a robust set of programs ranging for calls for reforming the Royal Navy, whose sailors were subjected to "savage" discipline, to reforms of the prisons to ensure improved treatment of inmates—he, in fact, is reported to have given James Oglethorpe the idea of establishing a reform-based penal colony in today's Georgia. He also worked tirelessly to establish lending libraries, both abroad and in England, a topic to which we shall return later (Steiner 1903, p. 292). Personally deeply opposed to slavery, Bray worked for the goal of improving the treatment of slaves, including through the establishment of African schools and a robust missionary outreach to slaves, all with the goal of realizing eventual abolition.

By these efforts Bray became a legendary figure in the Church of England. Indeed, the Archbishop of Canterbury Thomas Tenison would come to call Bray's activities "of the greatest consequence imaginable."⁴⁶ He died on 15 February 1730. A celebratory biography was published soon following his death, a book entitled *Publick Spirit illustrated in the Life and Designs of the Reverend Thomas Bray*.

Bray sought to lay the foundations for an establishment of Anglicanism in Maryland in a way that would have Anglicanism effectively promote the common good. He felt that the establishment must have four elements. First, he sought to create sufficient financial resources to create at least a few new Anglican churches for celebration of the sacraments and the moral instruction of youth and adults (McCulloch 1945a, p. 16). Second, he sought to ensure a stream of resources with which to recruit able, learned, and upright ministers of the Church of England to undertake the arduous journey of over 3000 miles to care for the colonial population.⁴⁷ Third, he sought to create improved mechanisms for disciplining priests' moral misbehavior. Fourth, he sought to empower the Anglican church so she could work to convert Native Americans, the Catholics, and the Quakers—the last of whom Bray considered to be effectively atheists, given their radical rejection of so much in Christianity as it was then practiced.⁴⁸ He sought to achieve this goal through creating a compelling witness that attested to the strength of the Church of England, her sacramental

purity, her clear and compelling sermonizing, and her benevolent works in the community, all transacted by “that paternal care and pious assistance” that flows from a dedicated Christian ministry (Steiner 1901, p. 167). A Christian ministry that for Bray could only grow from a “pious Anglican traditionalism” (Noll 2005, p. 27; Woolverton 1984, p. 184) based on “traditional teaching that exalted divine grace as the key to salvation.”⁴⁹

More concretely, Bray sought to establish a legally enacted division of the colony into 31 Anglican parishes. He sought recognition of each parish as a royally chartered corporation allowed to receive gifts that would be conferred perpetually to the churches. He further sought to levy a tax of 40 pounds of tobacco per taxable individual per year to support the activities of the Anglican church in the taxpayer’s parish, a tax to be collected by the sheriff and repaid to the church vestry. What is more, Bray sought to require the “chief vestryman,” who was always the rector, to read aloud four times a year the state’s longstanding morals legislation concerning swearing, drunkenness, and violations of the Sabbath laws.⁵⁰ Additionally, Bray sought state assurances of a heightened physical protection to be afforded church building and the ability of the state to levy extraordinary taxes to support the Anglican churches in cases of emergency.

Lastly, Bray’s vision involved the creation of a system of church-based public libraries that would expel ignorance, inspire a love of truth, and immunize individuals from the contagion of sloth, profligacy, and susceptibility to deviant interpretations of sacred scripture. “Knowledge is the fairest ornament of the soul of man,” Bray frequently asserted (McCulloch 1945a, p. 336). Indeed, Bray was the first advocate of a system of public, circulating libraries in North America. He sought to have a significant library in each parish.⁵¹ These libraries would be available to all Anglican ministers (Ransome 1955, p. 332) and were to be open also to all literate individuals in the colony.⁵²

Bray’s views on the power of public libraries are fascinating and deserve much more comment than scholars have so far afforded. These libraries were to contain a wide range of topics, and so were not to house only theological volumes. To be sure, the libraries that did get created were rather top-heavy with volumes of theology, yet even here it is critical to observe that the libraries were genuinely broad in composition. The libraries were to contain, and those created do seem to have contained, many staples of Anglican and Protestant thought, but they also contained works by Catholics, Quakers, and even infidels. In fact, Bray himself wrote that “I particularly recommend . . . reading all those virulent books that are written by the enemies of our order . . . for as the excellent Plutarch . . . shews, the best rules and measures for an exact and prudent conduct are to be taken from our enemies.”⁵³ As Clyde McCulloch has pointed out, Bray firmly believed that “education would destroy atheism . . . error, idleness . . . and immorality.”⁵⁴ Hence, the libraries were to contain not only anti-Catholic and anti-Quaker tracts, but also “a rich” and “comprehensive” set of books by Catholic and Quaker apologists.⁵⁵ In all, as Gambrall recounts, the libraries came to have “the best works of their day.”⁵⁶

As a critical part of all the preceding objectives, the libraries would, Bray thought, create a genuine incentive for able men of learning and high character to take the journey to Maryland to serve as curates. He writes of the libraries that they would be “all the better to enable ministers to come to preach the gospel, [they] hav[ing] been fitted out with good libraries to remain there for the use of them and their successors forever.”⁵⁷ As Frank Klingberg recounts, “The genius of Thomas Bray . . . lies in his complete understanding of the frontier problem of intellectual poverty in all its ramifications. With superb intelligence he took steps to remedy this colonial poverty of the mind and soul.”⁵⁸

Lastly, Bray sought an establishment that would eventually be under the government of a resident Anglican bishop—and one who would promote Bray’s vision of Anglicanism serving the public good. Such a leader would discipline wayward Anglican priests and promote Christian values across the colony.

It is also critical in understanding Bray’s vision for a religious establishment that we indicate just what establishment was *not* according to Bray. Four points deserve special

attention. First, Bray did not want the establishment of Anglicanism to impose any burden upon the liberty of religious practice of any Christian community in Maryland. He did not seek to compel the use of any Christian text such as the Book of Common Prayer in Protestant services.⁵⁹ Nor did he seek to ban Catholic churches or celebrations of the mass or other Catholic services; such measures formed no part of his understanding of a religious establishment.

The same is true for Quakers. In a work written with the purpose of cultivating support for Maryland's establishment in London titled *A Memorial Representing the Present Case of the Church in Maryland with Relation to its Establishment by Law*, Bray forcefully asserts that the plenary rights of Quakers to religious liberty were to be secure under the Maryland establishment. He there asserts his firm conviction that there is now and should always remain "liberty of conscience."⁶⁰

This lack of a persecutorial approach is found not only in matters of religious practice but also in terms of the political rights of Quakers and Catholics. As Beatriz Hardy notes in her work *Papists in a Protestant Age: The Catholic Gentry and Community in Colonial Maryland, 1689–1776*, the establishment act of 1702 in no way clearly extended to Maryland the penal laws in force in England, laws that did severely restrict the political rights of Catholics.⁶¹ In his writings Bray strongly opposed restrictions on political rights based on religious differences (Hardy 2004, p. 74).

In regard to his rejection of an Establishment that would wield persecutory power, it is important to note that Bray suppressed the initially rather exuberant views of those in Maryland who were seeking to establish Anglicanism. In early iterations of the proposal for an establishment, there were measures that would have mandated that all Christian churches comply in their worship with the ordinances of the Church of England—which would have been a very considerable imposition on the religious liberty of non-Anglicans. One early iteration of the establishment bill issuing from the Maryland legislature would have required that "every minister, or reader in every church, or other place of public worship, within this province" be required to use "the Book of Common Prayer and the administration of the Sacraments with the rites and ceremonies of the church according to the use of the Church of England." (Seabrook 1970, p. 293). But Bray "took matters into his own hands"⁶² and eliminated this restrictive element in the initial establishment proposals.⁶³ This kind of violation of religious liberty played no part in Thomas Bray's conception of established religion.

Further, Bray eschewed any eristic, competitive state-supported missionizing. That is, when a non-Anglican (and non-Quaker) Protestant group had gained success in a particular mission field, the state-supported Anglican church should not Bray held compete with them. Bray wrote to his fellow priests in Maryland the following admonition: "My design is not to intermeddle, where Christianity under any form has obtained Possession." John Woolverton called such an approach an admirable instance of broad-gauged "ecumenical comity."⁶⁴

Bray also sought to avoid any establishment that could crush the liberty of the established church. Bray firmly rejected the idea of a "cesearo-papist," or fully Erastian religious establishment⁶⁵—that is, an establishment whereby the church would remain under the thumb of state the power. To this end, he sought to remove the right of governors to induct ministers and to lodge that right in a Commissary, and eventually a resident bishop, thus removing ecclesiastical appointments from political supervision and interference.⁶⁶

Bray also sought to craft a form of establishment that would instill no clerical indolence through state-supported sureties. That is, he did not want establishment to permit any clerical sloth bred of the guarantee of a state subsidy. To see this we must appreciate the relative burden for Marylanders of a tax per annum of 40 pounds of tobacco in the early 1700s. Determining the burden of the 40 pound tax is hard to calculate precisely, but some measure of perspective is possible. Many agricultural workers by the late 17th century earned in Maryland between 1500 and 1800 pounds of tobacco a year, making their tax burden to support the established church rather light, indeed. Bray himself certainly thought of the taxable amount as small: In his *Memorial* he calls the tax "a maintenance so

slender.”⁶⁷ Subsequent historians have confirmed Bray’s assessment: Arthur Middleton, for example, in his history of Anglicanism in Maryland notes that the tax “that supported its operations was modest . . . far from onerous.”⁶⁸

Moreover, the taxable standards were heavily weighted toward slave owners—which necessarily reduced the onerousness of the tax on the Quakers, who by this time held very few slaves. The taxation standards defined a taxable individual as any free male of working age, but also included slaves, both male and female, over 16 years of age.⁶⁹ Hence, wealthy planters were required to pay 40lbs for themselves and for each slave of age owned on their estates. Therefore, almost all Quakers and a great number of the working class free male population, who owned no slaves, found their tax burden comparatively slender.

Furthermore, we should appreciate that Bray was perfectly willing to leave vaguely defined the *quality* of tobacco that had to be offered to the state for use by the church. Bray never argued for mandating the grade of tobacco to be given as tax. Indeed, he acknowledged that “it often happens” that “public tobacco can scarcely find those who will do much more than ship it home.”⁷⁰ Yet he never demanded standards for the quality of tobacco given as tax. It might be tempting to say that Bray did not specify the quality of tobacco because he was afraid of some form of a political backlash had he done so. But Bray was certainly willing to make assertions that politicians disagreed with. It would seem closer to the truth, therefore, to think of the failure to specify the quality of tobacco as a deliberate measure by Bray. What purpose could leaving undefined the quality of tobacco serve? First, it would reduce the taxation burden on Marylanders during times of financial difficulty, which Bray would likely have seen as a humane measure of Christian benevolence. Second, leaving the quality of tobacco variable would serve to create incentives for ministers to *earn* the best pounds of tobacco in return for exemplary Christian service.

Moreover, Bray states that he expected to be able to reduce the amount of taxation as his plans for the Anglican church in Maryland unfolded. In his *Memorial* he states, “so far are we from rendering religion, or the ministers of it, burdensome to the country . . . [for] all possible ways are being contrived at home, to assist the province in raising a sufficient support.”⁷¹ Bray used the idea of establishment as a means for securing support from wealthy individuals across the British Isles.⁷² He made constant “solicitations to the wealthy”⁷³ to support the church in Maryland.

He energetically pursued donations in part by assessing, with considerable sophistication, the tendencies of human nature. Bray would frequently speak to the *honor* of men of means to contribute to what was now a part of the very fabric of the English constitution—what was now dear-Mother-England’s official religious confession. Indeed, Bray had a very keen sense of the intangible benefits that the designation as the official faith of the government would accrue to the Anglican church in Maryland. Bray astutely recognized that any state will always seek to protect its dignity—will always seek to avoid *lese majeste*—a lessening of its majesty. States may well do so in different ways in different areas at different times, but states will always seek to be seen as *dignified* by the population whom they govern, lest their writs fail to run. Attachment to the state, therefore, always affords a religion some association with the awe-inspiring power states always seek to project. This in turn enhances the stature of the established faith.

Lastly, Bray saw an establishment as a stabilizing force in society in the sense that it would restrain furious and frenzied actions by those who might see the religion established by law as facing decline, or being under siege, or threatened in any way. An establishment allowed Anglicans to worry less about the fate and future of their faith, since they could see at least its basic maintenance as somewhat guaranteed by state support. In turn, this allowed Anglicans to approach other faiths in a way freer from fear, fortifying in return Christian magnanimity and toleration. An Anglican establishment also anchored the faith to the longstanding political regime of the British monarchy, which Bray felt created a disposition of mind among clerics and adherents alike of calm stability, avoiding

emotionally charged cries for dramatic change that can destabilize society and harm the public good.⁷⁴

The establishment of Anglicanism when finally fully enacted in 1702 did to a very large extent instantiate Bray's vision, and remained true to that vision for some period of time. As a result, the church did indeed experience some demonstrable growth, reviving the fortunes of the Anglican faith in the provincial life of the far-removed colony. The Establishment began to reverse Maryland's condition of spiritual desiccation, a point we can see in four lines of evidence.

First, through the implementation of the church tax, "the growth of the Anglican church was greatly stimulated." (Houlette 1934, p. 590). For the first time, Anglicans in Maryland "provided for sufficient parishes and a maintenance for their ministers,"⁷⁵ and "the number of resident ministers increased."⁷⁶ In consequence, as religious historian Norman Harrington records, to some real degree the establishment "planted centers . . . wherein high moral truth was taught, and in this way created a standard of good living."⁷⁷

Second, the establishment at first wrought no religious persecution. As we mentioned, the law establishing the Anglican religion did not revoke the Toleration Act of 1634. There was no forced usage of the Book of Common Prayer on any person or congregation in the colony in the initial law. Moreover, legal marriage could be performed by "any minister [or] pastor" in any "church or chappell" as well as by magistrates—a feature uncommon at the time in European countries with established churches.⁷⁸ Indeed, as the Diocese of Easton Maryland noted on the 250th anniversary of the Anglican establishment, "it is distinctly clear that this Act did not set up a State church" in the way Europeans nations had, with their systems of privilege and penalization of nonconformity.⁷⁹

4.3. Bray's Vision Sundered: Catholic Persecution, Clerical Irregularity, No Resident Bishop or Episcopal Commissary, and the Establishment Disbanded

Despite its initial success, four major developments came to pass that took the Established church away from Bray's vision for colonial Anglicanism: Catholic persecution came to be enacted; clerical irregularity in the form of moral profligacy and idleness among Anglican priests remained a recurring problem; opponents of a resident bishop succeeded in thwarting the creation of a colonial bishop or even of a permanent commissary; and the establishment was eventually disbanded.

First, persecution of Catholics emerged in the colony (beyond the fact of the religious tax itself). Catholic persecution began during the administration of Governor John Seymour, who served from 1704 to 1709—a considerable time after the birth of formal establishment and well after the initial calls for establishment in the early 1690s. By securing passage of the Act of 30 September 1704, Seymour was able to impose on Catholics a prohibition on any serving as "a counsellor at law either in public pleading or otherwise."⁸⁰ By 1707, Catholics by law were not allowed to proselytize outside their own communities.⁸¹ Another anti-Catholic governor, John Hart, worked to secure passage of the "Act for the Better Security of the Peace and Safety of his Lordship's Government, and the Protestant Interest within this Province." The law mandated that office-holders swear fealty to King George and, most controversially, required them to swear that no "foreign Prince, Person, [or] Prelate" possessed any "Ecclesiastical or Spiritual" authority "within the Kingdom of Great Britain, or any of the Dominions thereto belonging."⁸² Such a requirement, denouncing as it did the ecclesial position of the pope, was a blow to Maryland's Catholics, effectively disallowing the Catholic faithful from serving in public office. In 1718, Governor Hart initiated a further law banning Catholics' right to vote.⁸³ Lastly, during the French and Indian War, "another wave of anti-Catholicism crashed on the Maryland shores."⁸⁴ In 1756, Catholic landowners in Maryland had their taxes increased "in order to defray the expenses of the war."⁸⁵ Referred to as the "double-tax" by contemporaries and historians alike,⁸⁶ the law essentially mandated that Catholics pay twice as much on certain property taxes as everyone else.⁸⁷

Second, clerical irregularity in terms of immoral behavior remained a continuing problem. The claim was frequently made by the state legislature that the Anglican clergy were men of dissolute morals.⁸⁸ For example, one prominent priest, Rev. Tibbs, rector of St. Paul's in Baltimore, was "a perpetual troublemaker."⁸⁹ When Commissary Henderson in 1730 convened all the Anglican clergy of the colony, he found "a sufficiently high percentage" who were of questionable morals as "to bring disrepute on the whole body of clergymen."⁹⁰ The charge of clerical immorality continued to surface as long as the establishment remained.⁹¹

Third, approval never could be secured for the creation of a resident bishop. Moreover, even the office of an episcopal legate in the form of Commissary could never be achieved. Indeed, after the work of Commissary Henderson, who left Maryland in 1733, "no commissary ever functioned again" in Maryland.⁹²

Fourth, the establishment eventually withered away. In 1776, the tax support given exclusively to the Anglican church was revoked in the Maryland Bill of Rights, and the church never again was extended direct material support by the government.

So much for the vision of Reverend Bray.

4.4. *Stating and Defending the Colonial Counterfactual: Bray's Vision Triumphant*

We can now set forth with greater precision the colonial counterfactual concerning the Anglican religious establishment so as to judge the counterfactual by the requirements for a strong counterfactual history specified by leading scholars in this field. Our counterfactual again is of a Maryland that realized a large enough commitment to Bray's conception of an establishment to avoid the deterioration of his vision as occurred in the history we have just surveyed. As we noted, leading scholars of counterfactual history Niall Ferguson and Rebecca Onion provide criteria they see as essential to rigorous counterfactual historical work. As Ferguson points out, "a key methodological restraint" on counterfactual history that ensures its rigor is "that counterfactuals be those which contemporaries contemplated."⁹³ Second, as Onion remarks, the views actually entertained must have been realistic and plausible, which can be established by developing one's "counterfactual scenario . . . with attention to what's actually known—about the setting, the time, or the people involved." In this way, the view or course of events entertained but not chosen can be assessed to have been realistic. "The closer the counterfactuals can hew to actual historical possibility, the more plausible the alternative can be judged to be."⁹⁴ As we outlined above, Bray articulated a bold vision of establishment. It is the second criterion for a strong counterfactual history—its plausibility as an instantiated alternative—that we now must investigate.

As noted, the establishment became a force for anti-Catholic persecution and it failed to ensure a robust clerisy or a resident bishop or even commissary. And it ultimately came to be disbanded. To assess the question of how plausible the alternative we have provided actually is, we need to examine more deeply than many scholars so far have why Maryland's establishment failed to achieve Bray's vision for it and why it failed to live up to the spirit of its initial actions, and we need to do so by looking specifically at why establishment became tied with Catholic persecution, why it failed to raise the quality of the clergy to the heights found in Bray's vision, why no bishop or permanent commissary came to be, and why establishment eventually was disbanded. Space will not permit a comprehensive review of these topics. Instead, we shall here focus on two questions: was the persecution of Catholics an inevitable outcropping of Maryland's Anglican establishment? And was an indolent and morally lax clerisy also an inevitable effluence of Anglicanism as Maryland's established faith? If these two points can be problematized by a strong counterfactual history, then that will be sufficient for the present purposes.

4.4.1. *What Drove Anti-Catholic Persecution and Were Establishment-Related Causes Inevitable?*

To judge whether colonial Anti-Catholic measures (beyond the tax to support Anglicanism) were inevitable outcroppings of establishment, we need to investigate more

deeply those who were opposed to Catholic persecution, those who supported Catholic persecution, and whether the historical dynamics indicate an inexorable victory for the former. Our investigation will show that those supporting expansive persecution of Catholics were precisely individuals whom Bray would have deemed inconsistent with his vision for establishment; and that it was most often leading churchmen in the vein of Bray, who shared his vision for the colony, who were at the forefront of opposing Catholic persecution. From this we can further glean that the victory of the anti-Bray forces was far from inevitable.

(a) Those Supporting Catholic Persecution: The Anti-Braysians

That there was a reservoir of concern about Catholicism on the part of non-Catholics in colonial Maryland can't be doubted. However, the specific forces that coalesced to drive anti-Catholic measures following the enactment of the Establishment law comprised a fusion of the following elements: rash governors; populists in the Lower House; foreign affairs alarmists joined by panic-stricken millenarian religious enthusiasts; crackpot Anglican ministers and men of shady motives; and self-described enlightened clergy of a strongly deist bent. Individuals in each of these categories embodied values inconsistent with Bray's vision of the Anglican establishment.

First, anti-Catholic persecution was initially the brainchild of rash colonial governors. One of whom, Governor Hart, even attempted to "remove children from Catholic widows and place them into Protestant homes"—a provision so extreme as to have never been enacted.⁹⁵ Yet Governor Hart did ensure the denial of the Catholic right to vote in 1718. What animated his desire to persecute? It appears to have been a combination of religious hatred and lust for political power. Hart especially "hated the wealthy Catholics." (Breslaw 2019, pp. 129–30). In addition, he undertook the effort to disenfranchise Catholics in large part because he resented their appeal to London to uphold their rights, seeing this as "an affront to his power as governor," which he sought jealously to guard.⁹⁶

Second, the work of rash governors was joined with that of foreign-policy alarmists, often influenced by millenarian religious panics that occasionally beset the colonial Assembly. The first rise in Anti-Catholicism came in response to fears over tensions with French Catholics in the areas west of the colony. In fact, it was during Queen Anne's War with the French in North America that persecution of Catholics first began in Maryland. As Beatriz Hardy shows, "rising tensions on the colonial frontier between the British and French governments added to the woes of Maryland Catholics, whose loyalties consistently came under scrutiny in times of conflict with Catholic France."⁹⁷ During the major period of increased tensions with France before and during the French and Indian War, the lower assembly of the colonial legislature introduced bills that would have confiscated the land of Catholic clergymen. Although this bill failed to pass in the colonial senate, it was "just as French and Indian forces began to exert their pressure on the frontier" that the only anti-Catholic bill in the 1750s that received support in the Senate became law: the double tax.⁹⁸ Hence, it is to a large degree as a result of "sporadic anti-Catholic war hysteria," that Catholics would experience considerable persecution in Maryland.⁹⁹

Moreover, an emotionally charged millenarian religiosity which was rather widespread among the members of the lower house propelled in part the double tax. Nathan Hatch has demonstrated that during the French and Indian War, many Americans interpreted the cause and the outcome of the war in millennialist terms, "positing that Protestant Christianity was engaged in a cosmic conflict with the forces of darkness."¹⁰⁰ The "civil and religious liberty of British Protestants," Hatch affirms, "became the divine standard against the antichristian foe of French popery." (Hatch 1977, p. 47; Bloch 1985, p. 46; Kidd 2010, pp. 9, 361). Many Protestants believed Catholics were part of a conspiracy headed by the pope and implemented by rulers of Catholic countries like France that was attempting to enslave the world to an unthinking Catholic dogma. If Catholics were left unmolested, the reasoning went, "all of the civil and religious liberties Protestant Englishmen cherished most would be usurped by the 'scarlet whore of Rome.'"¹⁰¹ These kinds of tropes pervaded

newspapers, pamphlets, diaries, and books written between 1753 and 1759, including many across Maryland.¹⁰²

Third, much of the early agitation for harshly anti-Catholic measures was advanced by crack-pot Anglican ministers who had come to the region in the earlier, pre-establishment period. One such example is Rev. Colonel John Coode, an Anglican priest of profoundly immoral habits and a cynical view of the faith. He led the rebellion against the proprietor in 1688, and was later elected governor. He both advanced Catholic oppression—and was charged with atheism, blasphemy, and chronic drunkenness, and was even convicted of illegal actions later in life.¹⁰³ Such men, however popular at times, were both disgraceful to the cloth and often at the very forefront of anti-Catholic advocacy.

These miscreants of the cloth were abetted by laymen of questionable motives. A prime example can be seen in the mischievous work of Dr. Charles Carroll, a cousin of Charles Carroll the settler, and convert to Anglicanism from his ancestral Catholicism. The wave of attempted and successful persecution of Catholics in the 1750s started in fact as a family conflict over finances. Dr. Charles Carroll and Charles Carroll the settler had been dually appointed to administer the estate of a relative, James Carroll. The settler Carroll charged Dr. Carroll with embezzlement, who seems to have been “guilty as charged.”¹⁰⁴ In an effort “to avoid legal sanctions, Dr. Carroll began a relentless assault on Catholic civil, economic, and religious rights that lasted until his death in 1755, by which time the Seven Years War was exacerbating anti-Catholic anxieties throughout the Anglo-American world.”¹⁰⁵ During the war, Dr. Carroll “started rumors regarding nefarious Catholic acts to undermine the war effort by ‘caballing’ with ‘Negroes’ for ‘joyful celebrations’ at English defeats,” further stoking tensions in an already tense period.¹⁰⁶

Fourth, members of the Anglican clergy in colonial Maryland who fancied themselves especially enlightened, and who were very often prone to Deism, were also sharp denouncers of Catholicism, and fierce supporters of anti-Catholic persecution. Indeed, much of the worst anti-Catholic agitation was advanced by self-described Enlightened Anglican ministers, who sought to update Anglicanism with secular Enlightenment ideals. These men included the Reverends Archibald Spencer, William Brogden, and Thomas Chase. For these men, “once liberal [theological ideas] were accepted, traditional Christian orthodoxy was weakened and with it came other beliefs . . . that manifested in sometimes virulent anti-Catholic[ism].”¹⁰⁷ Rationalist priests such as Brogden and Chase, for example, accused Catholic priests “of confining children in convents, torturing of innocents, instigation of mob cruelties, conspiracies to overthrow ‘our civil and religious liberty,’” and other devious practices that led to the perpetration of “many Plots, Rebellions and Murders.”¹⁰⁸ As Breslaw notes, “the intolerance on the part of adherents of reason and enlightened thought” grew out of their fear that the life of the body politic was threatened by “an intellectually stultifying religious creed with a history of cruel persecution.”¹⁰⁹ Indeed, the bitterness of these attacks by the self-described vanguards of Anglican clerical enlightenment against the Catholic population in Maryland was not exceptional or inconsistent with [their] rationalist views. [They were] convinced that Roman Catholic dogma was part of a conspiracy to keep men in ignorance of the truth and that such dogma was the negation of true knowledge. Therefore extraordinary measures were justified to block the expansion of those ‘false doctrines’ in the name of that same truth. The use of civil authority to repress the institution [of Catholicism] itself was seen as the only means of protection consistent with the spirit of the[se] early deists.¹¹⁰

Nor did these clergymen express their views only to those who would hear their sermons or read their religious tracts. “The debate over the status of the Catholics was carried into the legislature where the anti-Catholic clerics . . . swore to a variety of incidents alleging that Catholic clergy were violating the law regarding schools, were interfering with the recruitment of soldiers to fight the French in the latest war, and were attempting to influence the election among other complaints”—all of which added considerably to the episodic frenzy of anti-Catholicism.¹¹¹

Men of all such stripes—the rash colonial governors, the war-fearful hotheads, the millenarian enthusiasts, the scandal-prone priests and laymen, and the enlightened rationalists of the Anglican clergy—would have scandalized Bray. Just these kinds of men a Braysian establishment would have disciplined. For, once again, Bray saw establishment as providing less tension by embedding calmness and a feeling of security. He rejected religious enthusiasm, and sought prelates who would witness to Christian moral discipline and Christ's love of neighbor. And he desired priests would be "pious Anglican traditionalist[s] rather than early devotee[s] of an Age of Reason,"¹¹² and who would preach "traditional teaching that exalted divine grace as the key to salvation."¹¹³

(b) Those Who Opposed Catholic Persecution: The Spiritual Children of Thomas Bray

One of the strongest forces opposed to harsh anti-Catholic policies were the commissaries who followed Bray along with the new priests encouraged to come to Maryland to participate in the building of an Anglican establishment embodying Bray's vision.

We can see this in how the commissary Rev. Jacob Henderson—a man whom William Russell in his work, *Maryland: Land of Sanctuary* calls "the most respectable clergyman" in the colony—spoke "just words" for Catholics in terms of their civil and political rights, following the tradition of Bray (Russell 1908, p. 407).

We can also see this in the work of Anglican parish priests who came to Maryland after Bray. As Francis Hawkes in his classic history of the early churches in America documents, a number of the more educated clergy¹¹⁴ who came to Maryland in the 1730s and after sought to respond to Catholicism simply through public debate and disquisition (Hawkes 1836, chp. 6). These tendencies were embodied in one especially noteworthy and influential clergyman, Rev. Thomas Bacon. Bacon was highly influenced by Bray and embodied his vision for the Anglican establishment. Indeed, one scholar calls Bacon an "apostle" of Thomas Bray (Wilton 2022, chp. 12). Bacon followed Bray's lead by starting a school to instruct African Americans, by receiving books from the Anglican organization of Thomas Bray for parish libraries,¹¹⁵ and by embodying, as did Bray, "a conservative temperament and convictions . . . fearing both Deism and evangelical [i.e., overly enthusiastic] Christianity."¹¹⁶

Bacon also followed Bray in repudiating coercion of Catholics. In sharp debates with Rev. Thomas Chase as Chase was marshalling support for anti-Catholic measures, Bacon argued that "Catholic growth was due to the diligence and industry of the priests . . . and their learning and abilities," as well as "their reputed sanctity and apparent regularity of behavior." In response to Catholic growth, Bacon argued against coercion. Instead, he insisted that "the Anglican clergy had access to the same weapons." (Breslaw 2008, p. 262). It would be, he said, "our own Faults if we did not use them with equal Success."¹¹⁷ Moreover, to impose harsh "penalties against the Roman Catholics was to admit," for Bacon, "the weakness on the part of the Anglican establishment."¹¹⁸ Just as Bray maintained, having Anglicanism established by law meant fear of the religious other should be abated and a calm confidence prevail.¹¹⁹ As Breslaw points out, "that argument was crucial" for Bacon.¹²⁰ What is more, for Bacon, to coerce Catholics was "to interfere with freedom of conscience," a value he thought was not to be sacrificed.¹²¹

Like the deist-minded Anglican clerics whom he resisted, Bacon also had influence with the legislature, and especially members of the state senate. Indeed, Bacon was "respected by some of the wealthiest and most influential families of the Chesapeake Bay, [and] achieved a prominence matched by few Maryland clergy."¹²²

In all, men such as Commissary Henderson and Thomas Bacon reflected key elements of Bray's establishmentarianism: they reflected a church staffed by vigorous commissaries, learned traditional clerics, and men of broad sympathy and moderation who would command respect and wield influence throughout the colony.

(c) Was Victory by the Persecutors Inevitable?

It seems difficult to call it a foregone conclusion that the forces of religious oppression would prevail across colonial Maryland. Had there been more commissaries like Henderson and more parish priests like Bacon, coercive intolerance may well have been stifled—and stifled precisely by the force of a Braysian Anglican establishment. For, had the establishment been fully enacted as envisaged by Bray, the established church would likely have been more successful in quieting anti-Catholic assaults, possibly even rendering anti-Catholic political enactments unsustainable.¹²³

In fact, it may not have required many more such men as Henderson and Bacon to do just this, as the anti-Catholic legislation that was eventually enacted was rarely vigorously enforced. Historian Thomas O'Brien Hanley finds that even during the most religiously tumultuous periods in Maryland's colonial history, "Catholics rarely, if ever, incurred the full rigor of the law." (Steiner 1899, p. 291). The ban on Catholic church services outside of the home, in particular, was very lightly enforced,¹²⁴ being "widely ignored."¹²⁵ Even the double tax imposed much less of a burden than it might seem. Enacted during the period of enhanced anti-Catholic agitation in the 1750s during the French and Indian War, the double tax "did not amount to much—Charles Carroll was forced to pay only forty pounds each year on his more than 40,000 acres,"¹²⁶ as the tax imposed only "one shilling per one hundred acres annually." (Hardy 1997, p. 150).

Why, therefore, think that anti-Catholicism was an inevitable consequence of the Anglican establishment? Was it not rather the very *failure* robustly to enact the establishment according to its founder's design that allowed anti-Catholic bigotry to fester?

4.4.2. The Causes of a Poor Quality of Clergy, and Were They Inevitable?

If anti-Catholic legislation was not an inevitable excrescence of establishment, was the relatively poor quality of Maryland's Anglican clergy? To answer this question we need to see the connection between poor clerical discipline and the absence of a resident bishop or permanent commissary. As Rightmyer remarks, "the clergy had often voiced the need" for meetings to discipline reprobate clergy.¹²⁷ Yet those priests most in need of discipline could easily avail themselves of Anglican ecclesiology that required a hierarchical "authority to call [the clergy] into session" to announce judgment and prescribe sanctions on the misbehaving prelates. The clergy therefore "were not lacking in their endeavor to find a proper ecclesiastical means for correcting the wayward clergy."¹²⁸ Their problem was that they had no authorized disciplinary authority in place in the colony.

Evidence of how a resident bishop could have been a major force for improving clerical discipline can be seen in the improvements temporary commissaries were able to effectuate. Although not bishops, the commissaries had powers approximating that of a bishop—including the authority to summon meetings of the clergy and the authority solemnly to condemn clerical misbehavior. Although unable to defrock, the significant influence commissaries could wield on wayward priests can be seen in the way Bray, when in Maryland as a commissary, dealt with one notoriously profligate priest, Rev. Joseph Holt, rector of All Faith's Parishes in St. Mary's County. Holt was known for his drunkenness. Bray "turned upon him the spotlight of public opinion and denounced" his many vices. As a result, "Holt soon sailed to England."¹²⁹ As Rightmyer notes, the response to Rev. Joseph Holt "is an indication of how discipline might have been maintained had [there been] a bishop. Even with the limited authority they had, the commissaries did exercise some kind of discipline."¹³⁰

So the question we commenced with now becomes: why was there no resident bishop in the Maryland colony? Although this is a large question we cannot explore in tremendous detail, we can provide a cursory exploration of this question using the same three-fold progression we deployed above; specifically, by first looking at who supported a resident bishop, then examining those who opposed it, and third, asking if the victory of the anti-episcopal forces can be considered inevitable.

(a) Supporters of a Bishop

The Anglican clergy were the strongest supporters of a resident bishop or a permanent commissary. As Rightmyer records, “the clergy sought the one proper ecclesiastic” whom they would be required “to follow”.¹³¹

(b) Opponents of a Resident Bishop

Opposition within colonial Maryland¹³² to a bishop or permanent commissary was to a large measure the result of three factors: the interventions of Maryland politicians into the workings of Maryland’s Anglican establishment; the concerns of populist forces in the colonial legislature who wanted no hierarchy in the colony; and the desires of questionable priests who desired no disciplinary force above them monitoring their misdeeds.

First, as to political interventions, governors such as John Seymour refused to allow a commissary to come to Maryland. Seymour wanted “no cleric ruling the clergy and offering a challenge to his authority.”¹³³ He thought that commissaries and the Bishop of London “were trying to diminish his gubernatorial privileges . . . and refused to have any commissary within the province during his administration.”¹³⁴ Such was a recurring pattern in colonial Maryland.

Second, the political interventions against creating a resident bishop or permanent commissary were especially pronounced in the lower house of the Maryland colonial assembly. Due in large part to persistent lobbying by the Anglican clergy, the colonial senate passed a bill to create permanently the office of a commissary, and the senate bill would have paid the salary of a clerk to record the proceedings, notes, and decrees of the commissaries. Yet, as Donald Dozer notes, “these requests seemed to many members of the legislature,” and especially members of the lower chamber, with its greatly reduced number of Anglicans,¹³⁵ as “aiming at a too close identification of church and state.” (Dozer 1976, p. 174). Note well: what the lower chamber—which was also at times energetically supportive of anti-Catholic agitation—was seeking to eschew was precisely the *union* of church and state. The consequence was an irregular clergy free to operate without authoritative discipline.

The conjunction of gubernatorial and legislative opposition leads Rightmyer to remark: “the secular authorities prevented the residence of any ecclesiastical authority which would censure, try, or remove a wayward priest from his cure. If some of the clergy were not prevented from excess, the fault lies more at the door of the lay politicians than at the door of the church.”¹³⁶

Third, we can only surmise that miscreant men of the cloth were among the strongest opponents of a resident bishop or permanent commissary, along with laymen of loose morals.

(c) Was the Failure of having a Bishop Inevitable?

Although a definitive answer is hard to determine given the complex politics of the Empire and her central administrators in London, the colonial politics that stalled the creation of a colonial bishopric or commissary appear to be the function of mercurial forces that could well have turned out otherwise.

4.4.3. Review: Bray’s Demise Inexorable?

In all, I submit that a strong historical argument can be made that the establishment failed, not because it was an establishment, but because it was one form of establishment—an establishment that inadequately embedded Bray’s vision for colonial Anglicanism. Despite not being fully implemented, the Anglican establishment afforded social and political prominence to leading champions of toleration, such as Rev. Bacon—so much so that Elaine Breslaw argues that when Catholics were given complete freedom in 1776 “it was a major accommodation to the more humane qualities . . . forged by the Anglican clergy throughout the century.”¹³⁷

Indeed, as Rightmyer maintains, “had the church been free to elect a bishop, had the clergy been free to meet whenever the necessity arose, had there been no interference in the affairs of the church for political reasons, the advance of the church might have been

phenomenal.”¹³⁸ In other words, had Bray’s vision come to pass—as it might well have—the history of Maryland’s Anglican establishment would have been very different, indeed.

5. Counterfactual History and Constitutional Humility: Troubling the Separationist Mindset to Improve Contemporary Constitutional Debate

What relevance can this history bear for us today? Could it be a brief for a re-establishment in the form Maryland maintained until the American Revolution, and some states had as late as the 1830s? Far from it. Such is simply inconceivable in the contemporary west. But, then, what value could this history hold?

I believe it can help to mitigate the Separationist Mindset that threatens constitutional debate by allowing us to think of a religious establishment as not necessarily a constitutional *summum malum*. That establishment of religion in the historic sense of state support for one denomination of Christianity is a *summum malum*, to be avoided at all price, is a key part of the Separationist Mindset. So too is the idea that anything thought to savor of re-establishment—however substantively different it may be from establishments in the historic sense—is a sure route to the horrors of “turmoil, civil strife, and persecutions.” Such a mindset can, as I have argued, emerge from the Supreme Court’s jurisprudence that demands a “high” and impenetrable “wall of separation” between the state and the religious life of the citizens.

By our demonstrating that a plausible counterfactual account can be provided that shows an establishment of religion as a vehicle for public enlightenment, clerical service, and responsiveness to “intellectual poverty” and a spiritual dessert, we can help to ensure that contemporary constitutional debates over the Establishment Clause are infused with the proper intellectual spirit by helping to puncture the discourse-suppressing potential of an American Separationist Mindset.¹³⁹

For, again, if establishment understood as state support of one branch of Christianity through taxation and other subsidies can be conceived through a plausible reading of the historical record as holding the potential to promote the public welfare, then *a fortiori* the lesser overlap of religion and the state found in accommodationism can less certainly be seen as part of a failed, backward practice long ago discarded and in need of no genuine debate. Constitutional dialogue could thus be broadened—ensuring a more open-minded discourse about the proper interpretation of the Establishment Clause. This discourse must include additional in-depth assessments of whether religion in public life really facilitates division, risks the violation of individual rights of conscience, and imperils religion itself, as well as assessments of whether the equal status under law of non-religious citizens is meaningfully impaired by religious accommodationism, whether non-preferential state religious endorsement violates the Establishment Clause, and whether accommodation is even feasible given the tremendous diversity in America’s religious ecosystem.

There is much we must debate. The history we have provided can help to ensure that this debate is open to all that can tell in support of religious accommodation.

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Notes

- ¹ In the words of Alpheus Mason and Donald Stephenson, accommodationism permits “government acknowledgement of and sometimes support for religion.” [Mason and Stephenson \(1996\)](#), pp. 530–31). Most accommodationists follow a non-preferentialist understanding of religion, such as the Supreme Court embraced in *Town of Greece v Galloway* (572 U.S. 565, 2014). In *Town of Greece* the Court permitted meetings of city government to be opened with prayers, on the condition that the opportunity to lead prayers remain open to all religious leaders in the community.
- ² Rebecca Onion, “What If.” *Aeon* ([Onion 2015](#)).
- ³ As Donald Drakeman states, all of the framers of the First Amendment agreed that the Establishment referenced in the First Amendment referred to a condition in which a “formal, institutional” linkage between church and state existed “like the Church of England,” a condition where the state church had guaranteed and exclusive influence over civil and criminal laws in the realm. [Drakeman \(2020\)](#), p. 151).
- ⁴ For a defense of accommodationism, see [Deverich \(2006\)](#); for the coherence of religious accommodation amidst widespread religious diversity, see [Taliaferro \(2019\)](#); for an originalist defense of a more narrowly defined form of accommodationism, see [Strang \(2002\)](#).
- ⁵ *Everson v. Board of Education of Township of Ewing, New Jersey*, 330 U.S. 1 (1947).
- ⁶ *Freedom from Religion Foundation v. Obama* 705 F. Supp 2d. at 1049; and Drakeman, *The Hollow Core*, p. 150.
- ⁷ *Everson*, Black, quoting Madison’s *Memorial and Remonstrance against Religious Assessments*. For the special status of Jefferson and Madison, see *infra*.
- ⁸ *Everson*. Emphasis added.
- ⁹ See note 8 above.
- ¹⁰ *Engel v. Vitale*, 370 U.S. 421 (1962). Emphasis added.
- ¹¹ Dreisbach, “Origins and Dangers”.
- ¹² See note 11 above.
- ¹³ See note 11 above.
- ¹⁴ Dreisbach, “Origins and Dangers.” See also, [Dreisbach \(2003\)](#).
- ¹⁵ The phrase Wall of Separation is of course one used by Jefferson in his letter to the Danbury Connecticut Baptist congregation dated 7 October 1801 ([Jefferson 1801](#)).
- ¹⁶ *Everson*, Justice Black. Emphasis added.
- ¹⁷ See note 16 above.
- ¹⁸ 98 U.S. 145 (1879).
- ¹⁹ Reiss, “Jefferson and Madison as Icons,” p. 108.
- ²⁰ Reiss, “Jefferson and Madison as Icons,” p. 112.
- ²¹ Reiss, “Jefferson and Madison as Icons,” p. 94.
- ²² Reiss, “Jefferson and Madison as Icons,” p. 113. Emphasis in original. As reinforcement for the specialness of Virginia, Frankfurter writes in his concurrence in *McCullum* that the Virginia experience is an “event basic in the history of religious liberty.” Note, it is basic not solely in the history of America, but in the very unfolding of the true essence of religious liberty over time.
- ²³ [Munoz \(2015\)](#), 3. Emphasis added.
- ²⁴ Onion, “What If”.
- ²⁵ See Gavriel Rosenfield’s volume of counterfactual Jewish histories ([Rosenfield 2005, 2016](#)) (and his blog Counterfactual History Review); [Jeffrey Gurock’s \(2015\)](#); and [Jeremy Black’s \(2015\)](#).
- ²⁶ See note 24 above.
- ²⁷ Ferguson, *Virtual History*, pp. 87–88.
- ²⁸ See note 24 above.
- ²⁹ See note 24 above.
- ³⁰ For a defense of its use in historical research, see [Nunzl \(2004\)](#) and [Tenenbaum \(2015\)](#).
- ³¹ See note 24 above.
- ³² See note 24 above.
- ³³ Emphasis added. For example, one of the most widely cited scholars in the legal academy, Cass Sunstein, argues that the failure of America to embed a robust system of positive economic rights is not the result of any deeply rooted element in America deserving of special status, but is the result instead of the contingent victory of Nixon in the closely contested election of 1968, and the decisions of the justices he appointed to the Supreme Court. “It is not too speculative to suggest that if Humphrey had been elected [in 1968], [greater positive economic rights] would have been a solid part of the constitutional landscape . . . if not for a close and contingent electoral outcome . . . the American Constitution would almost certainly recognize some kinds of social and economic rights.” Hence, the current US system of weaker rights of financial security relative to those found other parts of the world is something about which less bold confidence should attach. [Sunstein \(2004\)](#), pp. 169–70).

- 34 Gambrall, *Studies*, p. 127.
- 35 Hardy, "The Papists... have Shewn a Laudable Care and Concern," 29, fn. 28. See also (Bray 1700) "Journal of Dr. Bray's Visitation, May 23rd, 1700," *Archives of the Bishop of London*, Fulham Palace Papers in the Lambeth Palace Library, microfilm at the Library of Congress, 2: 144–45.
- 36 Gambrall, *Studies*, p. 129.
- 37 Gambrall *Studies*, p. 130.
- 38 Gambrall *Studies*, p. 128.
- 39 See note 37 above.
- 40 Gambrall, *Church Life*, p. 13.
- 41 Gambrall, *Church Life*, p. 36.
- 42 Brugger, *Middle Temperament*, 36.
- 43 Carr and Jordan, *Maryland's Revolution*, p. 204.
- 44 McSherry, *History of Maryland*, p. 76.
- 45 Gambrall, *Studies*, p. 131. As the archivist of the Easton, MD Diocese remarked at the *quatermillennial* of the Anglican establishment, "it was passed at a time when all freeholders had the right of franchise, so that the Assembly was not packed but was truly representative of the people." Harrington (1980, p. 94).
- 46 Steiner, "Two 18th Century Missionary Plans," p. 291; Middleton, *Anglican Maryland*, p. 14.
- 47 Since only a bishop could ordain, and there was no colonial bishop, almost all priests came from the United Kingdom to the colonies.
- 48 It is hard for us today to appreciate the depth and breadth of Christian concern about Quakerism. Charges of incoherence were often levelled at their views of the state, given that they held to a "complete severance of Church and State" while seeing "religion to be the basis of the state" and also eagerly advocating for the state "to be Christianized." As later thinkers have noted, "the Quaker concept of a secular State differs from the modern concept in so far as the former is concerned merely with an attitude of tolerance towards all faiths . . . while the latter adopts an attitude of total indifference towards religion." (Kumar 1961, p. 147) It was (and could still be) asked: Can "complete severance" avoid sliding into "indifference toward religion"? The abrasive behavior of Quakers was also often noted—even by fellow supporters of church-state separation as Roger Williams. As Tom van Dyke notes, "Roger Williams spent much of his final decades in protracted debates with Quaker missionaries and refugees to Rhode Island, and what caused him to be so exasperated with his Quaker opponents was primarily their violation of [the] aspect of civility, the need to conduct public conversation respectfully. . . . Williams was taken aback by his Quaker opponents' boisterous behavior and abandonment of common courtesy during the debates. He vehemently objected to their habit of interrupting his arguments, shouting him down, attempting to humiliate him personally with name-calling and ridicule, misrepresenting his convictions, and displaying a noted lack of truthfulness in their own arguments . . . [To Williams] this behavior was not, as the Quakers insisted, an acceptable exercise of free conscience. Instead it was a moral violation of the basic requirements of civility, a signal of deep disrespect and a transgression of the procedural rules for public deliberation that Williams held with the highest esteem, so much so that he was willing to entertain the possibility that violators of civility like the Quakers should be subject to legal restrictions." (van Dyke n.d.). All this from the one who considered himself an impassioned enemy of religious persecution! Lastly, Quakers' initial unwillingness to testify at trial (which historically required affirming an oath, which Quakers refused to do) left them vulnerable to the charge of being hypocritical parasites on the state's administration of criminal justice for public security, something they themselves benefitted from, while failing to assist the state in its enforcement of laws serving public peace by refusing to testify against those charged with crimes (a problem finally resolved by the allowance that Quakers, unlike every other citizen, could at trial swear an affirmation rather than an oath). See Prud'homme, "Rev. Thomas Bray, Colonial Maryland".
- 49 Noll, *America's God*, p. 27.
- 50 Gambrall, *Church Life*, p. 33.
- 51 McCullough, "Dr. Thomas Bray's Trip to Maryland." p. 21.
- 52 Ransome, "Thomas Bray by H.P. Thompson," p. 332.
- 53 McCullough, "Dr. Thomas Bray's Commissary Work," (McCulloch 1945b, p. 339).
- 54 McCullough, "Dr. Thomas Bray's Commissary Work," (McCulloch 1945b, p. 337).
- 55 Gramball, *Church Life*, p. 53.
- 56 Gambrall, *Church Life*, p. 53.
- 57 Steiner, *Rev. Thomas Bray: His Life*, p. 186.
- 58 Quoted in "Thomas Bray," Project Canterbury (Middleton n.d), anglicanhistory.org, at bray.pdf. See also (Lydekker and Klingberg 1943).
- 59 McCullough, "Dr. Thomas Bray's Trip," p. 22.
- 60 See note 57 above.

- At this time in England, Catholics could not vote, hold office, enter certain professions, or attend the ancient institutions of Cambridge and Oxford.
- Seabrook, "The Establishment of Anglicanism in Colonial Maryland," p. 293.
- These were bills passed by the colonial Assembly, but all in Maryland knew they were only provisionally in place until approval was secured from the Crown through a process involving input from the royal attorneys, the Board of Trade, and the Bishop of London.
- Woolverton, *Colonial Anglicanism*, p. 88.
- Middleton, *Anglican Maryland*, p. 21.
- Andrews, *History of Maryland: Province* (Andrews 1920, p. 220).
- Steiner, *Rev. Thomas Bray: His Life*, p. 190.
- Middleton, *Anglican Maryland*, p. 20.
- Middleton, *Anglican Maryland*, p. 19.
- Steiner, *Rev. Thomas Bray: His Life*, p. 189.
- See note 70 above.
- McCulloch, "Dr. Thomas Bray's Commissary Work," (McCulloch 1945b, p. 344).
- Gambrall, *Church Life*, 54; and Woolverton, *Colonial Anglicanism*, p. 89.
- See Rightmyer, *Maryland's Established*, 53 on how establishment can "abate" fear of religious difference.
- Easton Diocese, quoted in Harrington, *Shaping of Religion in America*, p. 94.
- Rightmyer, *Maryland's Established*, p. 25.
- Harrington, *Shaping of Religion in America*, p. 94.
- Rightmyer, *Maryland's Established*, p. 22.
- See note 77 above.
- Maryland Archives, 8: 448. Maryland Archives. Available online: <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/html/index.html> (accessed 15 January 2023); see also Pellegrino (2015).
- Pellegrino, "Reviving a Spirit of Controversy," pp. 123–24.
- Maryland Archives, 30: 614.
- Pellegrino, "Reviving a Spirit of Controversy," p. 134.
- Pellegrino, "Reviving a Spirit of Controversy," p. 146.
- Rightmyer, *Maryland's Established*, p. 93.
- Pellegrino, "Reviving a Spirit of Controversy," p. 162.
- Catholics responded by a "conservative liberalism" that made reference to the original Charter of Maryland that allowed religious liberty for all Christians. Pellegrino, "Reviving a Spirit of Controversy," p. 96.
- Rightmyer, *Maryland's Established*, p. 77.
- Rightmyer, *Maryland's Established*, p. 83.
- Rightmyer, *Maryland's Established*, p. 86.
- As Rightmyer documents, as late as 1774 there were outcries over clerical misbehavior. Rightmyer, *Maryland's Established*, pp. 89–132.
- See note 90 above.
- See note 27 above.
- See note 24 above.
- Pellegrino, "Reviving a Spirit of Controversy," p. 127.
- Breslaw, "Conflicting Views," pp. 129–30.
- Hardy, "The Papists...have shewn a laudable Care and Concern," p. 4.
- Pellegrino, "Reviving a Spirit of Controversy," pp. 161–62.
- Breslaw, "Conflicting Views," p. 130.
- Pellegrino, "Reviving a Spirit of Controversy," p. 160.
- Pellegrino, "Reviving a Spirit of Controversy," p. 160; Hatch, *The Sacred Cause of Liberty*, p. 47.
- Ray (1936, p. 231); see also *Maryland Gazette*, October 10, 1754.
- McSherry, *History*, p. 75.
- Pellegrino, "Reviving a Spirit of Controversy." See also (Graham 1993).
- Pellegrino, "Reviving a Spirit of Controversy," p. 159.

- 106 Breslaw, "Conflicting Views," p. 137. Adding to the tensions created by the war was the fact, as Beatriz Hardy relates, that "since 1751 an anti-Catholic and anti-proprietary faction in the Lower House of Assembly had been seizing every opportunity to stir up trouble for Catholics. This faction hoped to dispossess wealthy Catholic landowners while also weakening the proprietary government that traditionally protected them." Hardy, "The Papists...have shewn a laudable Care and Concern," 4. That the lower houses's anti-Catholicism was often informed to a considerable degree by merely political factors having little to do with religion, and much more to do with attempts to divert revenue from the then-Protestant Proprietor to the colonial budget, is demonstrated by Bosworth (1975).
- 107 Breslaw, "Conflicting Views," p. 124.
- 108 Breslaw, "Conflicting Views," p. 132.
- 109 See note 108 above.
- 110 Breslaw, "Conflicting Views," p. 135.
- 111 Breslaw, "Conflicting Views," p. 136.
- 112 See note 49 above.
- 113 See note 112 above.
- 114 The establishment did to some considerable degree do its job of increasing the quantity and quality of Anglican ministers in Maryland. For example, from 1702 to 1709, 86% of new Anglican ministers arriving in Maryland had university experience; 81% had bachelor's degrees; and 33% had master's degrees—all sharply up from the pre-establishment levels, causing a reduction in the percentage of ministers without robust theological training. Van Voost, *The Anglican Clergy in Maryland*, p. 139.
- 115 "Thomas Bacon," wikipedia at https://en.wikipedia.org/wiki/Thomas_Bacon, accessed on 8 March 2023.
- 116 Thomas Bacon, Wikipedia; and (Deibert 1978, p. 84).
- 117 See note 110 above.
- 118 See note 110 above.
- 119 Having Social calm and harmony were central values for Bacon. As Breslaw remarks, "a pervasive theme in all of the works of Thomas Bacon was the conviction that the way to reduce human suffering was to maintain and extend harmony in human relations." Breslaw, "Conflicting Views," pp. 126–27.
- 120 See note 110 above.
- 121 See note 111 above.
- 122 Deibert, "Thomas Bacon," p. 84.
- 123 Evidence further suggestive of this conclusion follows from the remarkable treatment of the now-Protestant Episcopal Church following Independence. Unlike in Virginia and other newly independent states, the Episcopal Church in Maryland was permitted to keep all of its property acquired during the colonial period. Moreover, a law of 1776 permitted the legislature to provide tax support to churches including the Episcopal Church. Given that wealthy and powerful Catholic landowners after Independence played a substantial role in shaping Maryland's post-Independence laws, that these laws were so charitable to the formerly established church suggests that the Catholic population acknowledged to some degree that the established church had contributed a moderating and positive influence on the colony. See Rightmyer, *Maryland's Established*, pp. 117–18.
- 124 Pellegrino, "Reviving a Spirit of Controversy", pp. 149–50.
- 125 See note 99 above.
- 126 Pellegrino, "Reviving a Spirit of Controversy", p. 162.
- 127 Rightmyer, *Maryland's Established*, p. 91.
- 128 Rightmyer, *Maryland's Established*, pp. 91, 105.
- 129 Rightmyer, *Maryland's Established*, p. 190.
- 130 Rightmyer, *Maryland's Established*, p. 190. To be sure, bishops themselves can fail to be moral guides. Recent examples in the Catholic church provide such evidence, were evidence needed. Nevertheless, a resident bishop would have no doubt assisted discipline.
- 131 Rightmyer, *Maryland's Established*, p. 105.
- 132 Opposition in the imperial metropole to creating a resident North American bishop is an issue requiring a level of examination we are unable to provide it here.
- 133 Rightmyer, *Maryland's Established*, p. 55.
- 134 Rightmyer, *Maryland's Established*, p. 48.
- 135 Rightmyer, *Maryland's Established*, p. 107, noting the "sectarian" differences that ran through the colonial assembly.
- 136 See note 134 above.
- 137 Breslaw, "Conflicting Views," p. 141.
- 138 Rightmyer, *Maryland's Established*, p. 112.
- 139 This is not to say that counterfactual history is the only means to liberate an ossified mindset so to assess contested interpretations with greater openmindedness. Postcolonial theory can potentially provide an additional such avenue. As Liam Gearon argues,

postcolonial theory “provides a potential means of deconstructing the subject’s assumptions about religion’s place in the world today.” The colonial West came to privilege the separation of church and state. Attending to postcolonial thought and its centering of conceptions of religion, culture, and politics in which religion and the state are not so rigidly compartmentalized could provide an additional way by which to ensure that a Separationist Mindset does not occlude the full and open debate about alternative arrangements between state and religion seen across the world. In Gearon’s words, postcolonial thought can engender, in relation to standard Western concepts such as church-state separationism and state secularization, “a spirit of challenge and provocative openness.” (Gearon 2001, p. 106).

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