

AN “UNGRACIOUS SILENCE”: THE INFLUENCE OF CATHOLIC THOUGHT UPON THE FIRST AMENDMENT AND ITS IMPACT UPON THE INTERPRETATION OF THE FREE EXERCISE CLAUSE

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INTRODUCTION

When many people think of the greatness of America and the principles it was built upon, they would undoubtedly identify America and its form of government or Constitution with Protestantism. However, according to the Protestant James Wilson, who is considered to be the “second most influential” person behind the Constitution and was one of the first Supreme Court Justices appointed by President George Washington,¹ there has been an “ungracious silence” to the Catholic influence of religious freedom in this country.² This silence unfortunately means that two of the most significant tests to have ever interpreted the First Amendment’s “free exercise” of religion clause³ are flawed. Since both tests failed to account for the Catholic understanding of the relationship between religious freedom and the common good, the Supreme Court has jeopardized a person’s right to exercise freely his or her religion in America.

Perhaps the reason for this silence is due to the fact that since the American Founding and until the late Twentieth Century, there has been a general “fear, distrust, and hostility” toward the Catholic Church.⁴ These

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1. Kermit L. Hall, *Introduction* to JAMES WILSON, COLLECTED WORKS OF JAMES WILSON xiii (Kermit L. Hall & Mark D. Hall eds., Liberty Fund, Inc. 2007), available at http://oll.libertyfund.org/index.php?Itemid=287&id=1157&option=com_content&task=view.

2. James Wilson, Of the Study of the Law in the United States (1790–91), in BIRD WILSON & JAMES WILSON, 1 THE WORKS OF THE HONOURABLE JAMES WILSON 3–8 (1804), available at <http://www.constitution.org/jwilson/jwilson1.htm>.

3. U.S. CONST. amend. I.

4. John Courtney Murray et al., “*The Crisis in Church-State Relationships in U.S.A.*” *A Recently Discovered Text* by John Courtney Murray, 61 REV. POL. 675, 687 (1999).

sentiments partially stemmed from the idea that the Catholic Church and “the American way of life” (Americanism) were fundamentally incompatible.⁵ The Church’s teaching that “error has no rights”⁶ was viewed by Americans as meaning that the Church would only nominally support fundamental American freedoms (e.g., religion, speech, press and association), until it could influence government to use its “coercive power . . . to deny legal existence to beliefs which the Church regarded as erroneous.”⁷ Thus, since it was once believed that Catholicism was incompatible with the First Amendment, it may come as a surprise that Catholic thought helped enrich and shape the First Amendment.

The first part of this Note will proceed through history briefly examining the works of St. Augustine, Pope St. Gelasius, Pope Gregory VII, and Pope Boniface VIII in order to see a strain of Catholic thought that viewed the Church and State as two separate, but mutually beneficial spheres. Moreover, the writings of St. Thomas Aquinas and St. Thomas More will continue this vein of Catholic thought not only regarding the relationship of Church and State, but also regarding how freedom of conscience and religion promotes the common good. This strand of Catholic theology will ultimately provide the basis for the implementation of Catholic thought in the New World.

The second part of this Note will show the first realization of Catholic thought in America through the lives of the first two Lords Baltimore (George Calvert and Cecil Calvert). Through their influence, Maryland not only passed The Act Concerning Religion, which was the first document to use the “free exercise of religion” clause in the colonies,⁸ but also became the true “land of sanctuary” for those suffering from religious persecution.⁹ Charles Carroll of Carrollton and Daniel Carroll, two of the finest Catholic-

5. *Id.* at 688–89.

6. *Id.* at 700. One can see why Americans were wary of the Catholic Church when Thomas Jefferson wrote these words: “It is error alone which needs the support of government. Truth can stand by itself.” John Courtney Murray, *Freedom of Religion, I: The Ethical Problem*, 6 THEOLOGICAL STUD. 229, 282 (1945), available at <http://www.ts.mu.edu/readers/content/pdf/6.2/6.2.4.pdf>.

7. Murray et al., *supra* note 4, at 700.

8. See *City of Boerne v. Flores*, 521 U.S. 507, 551 (1997) (O’Connor, J., dissenting); BRADLEY T. JOHNSON, *THE FOUNDATION OF MARYLAND AND THE ORIGIN OF THE ACT CONCERNING RELIGION OF APRIL 21, 1649* 1–33 (1883), available at http://books.google.com/books/about/The_foundation_of_Maryland_and_the_origi.html?id=TgQNAAAAYAAJ. See also *Maryland Toleration Act; September 21, 1649: An Act Concerning Religion*, The AVALON PROJECT, http://avalon.law.yale.edu/18th_century/maryland_toleration.asp [hereinafter *Maryland Toleration Act*] (last visited Feb. 24, 2014) (containing actual text of the document).

9. See generally WILLIAM T. RUSSELL, *MARYLAND: THE LAND OF SANCTUARY* (2d ed. 1908), available at <http://www.google.com/books?id=ur4-AAAAYAAJ> (discussing Maryland’s tolerance policies).

American Representatives, continued to implement this strain of Catholic thought and ultimately influenced the framing of the First Amendment.

The third part of this Note will examine the impact that the Catholic influence on the First Amendment should have on the Supreme Court’s interpretation of the Free Exercise Clause. Lastly, this Note will conclude with a brief reflection upon what the Catholic influence on the First Amendment means for all Americans, especially Catholics, today.

Since Catholic thought influenced the First Amendment, the Supreme Court should use Catholic thought to help interpret the original meaning of the Free Exercise Clause. Currently, the Supreme Court’s interpretation of the Free Exercise Clause is flawed because its “neutral” and “generally applicable” test, as formulated in *Employment Division v. Smith*,¹⁰ does not adequately account for the Catholic thought behind the free exercise of religion. This failure inevitably leads to the Court missing what was inherent in the strand of Catholic thought that was influential in shaping the Free Exercise Clause—the common good. Furthermore, even if the Supreme Court returned to the “compelling interest” test originally laid out in *Sherbert v. Verner*,¹¹ and partly reinvigorated by Congress in the Religious Freedom Restoration Act of 1993 (RFRA),¹² it would still not adequately account for the Catholic ideas behind the Free Exercise Clause.

Therefore, a more accurate interpretation would embody the Catholic thought that influenced the First Amendment by allowing government to only prevent religious conduct that is detrimental to the common good. Due to a narrowly construed understanding of common good in Catholic thought, it would actually impose greater limitations upon the State before it could justify interfering with religion as seen below.¹³ The basic definition of common good is directing man toward his final end, happiness.¹⁴ Not happiness in the subjective sense (“Just do whatever makes one happy”), but the natural right to pursue happiness, i.e., man’s final fulfillment or end with God,¹⁵ as shown in the Declaration of Independence.¹⁶ Since the Supreme Court established two flawed tests to interpret the Free Exercise Clause, it has consequently come to wrong legal conclusions. Therefore, until the

10. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990).

11. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

12. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1993).

13. *See infra* Part I.

14. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I-II, Q. 90, Art. 2 (Fathers of the English Dominican Province trans., Christian Classics 1981) [hereinafter *SUMMA THEOLOGICA*].

15. *Id.* at Q. 91, Art. 4. *See also id.* at Q. 3, Art. 7.

16. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Supreme Court factors into its analysis what has been there all along and ends its “ungracious silence” toward Catholicism, the Court will continue to misinterpret the Free Exercise Clause.

I. CATHOLIC THOUGHT ON THE CHURCH-STATE RELATIONSHIP AND RELIGIOUS FREEDOM

Unlike some branches of American thought, Catholicism has never held that there should be an absolute “wall of separation”¹⁷ between Church and State.¹⁸ Rather, the Catholic Church teaches that the Church and State should work together to build a unified and virtuous society striving toward justice and the common good.¹⁹ This common good is achieved through the Church contributing to the legislative process by advising the State on how to make laws that conform to the natural law and ultimately the divine law.²⁰ Conversely, the State has a duty to make and uphold the laws, punish wrongdoing, and respect the rights of individuals in order to promote the common good.²¹ However, in a democratic political state where religious pluralism and “We, the People,” are sovereign, it seems counter-intuitive to argue that the hierarchical Church could have ever influenced the First Amendment.²² Nevertheless, by examining Catholic thinkers like Augustine and Aquinas on the Church-State relationship and religious freedom, one can comprehend how Catholic thought influenced the First Amendment’s Free Exercise Clause.

A. *Catholic Thought on the Church-State Relationship*

1. *St. Augustine’s Contribution to the Church-State Relationship*

St. Augustine viewed the Church-State relationship in terms of the City of God and the City of Man. The City of God consisted of love of God and

17. Thomas Jefferson, *Letter to the Danbury Baptists*, LIB. CONGRESS, <http://www.loc.gov/loc/leib/9806/danpre.html> (last visited Feb. 24, 2014).

18. See Charles Macksey, *State and Church*, in 14 THE CATHOLIC ENCYCLOPEDIA 250, 253 (Charles G. Herbermann et al. eds. 1912), available at <http://www.newadvent.org/cathen/14250c.htm>. See generally HEINRICH ROMMEN, THE STATE IN CATHOLIC THOUGHT (discussing the origins of Catholic political thought).

19. Macksey, *supra* note 18, at 250–51.

20. *Id.* at 253.

21. *Id.* at 251–53.

22. Murray et al., *supra* note 4, at 696.

neighbor.²³ It was an eternal place where perfect justice and virtue were found.²⁴ The Church and certain men and women lived in this realm.²⁵ In contrast, the end of the City of Man was man himself²⁶—a temporal place (secular realm) where the Church and man also dwell but where there is no perfect justice due to man’s sinful nature.²⁷ Thus, whenever one is a member of the human community, one is a part of the City of Man.²⁸ This dichotomy between the two cities shaped St. Augustine’s understanding of the Church-State relationship.

The Church and State were ultimately to exist in a symbiotic relationship.²⁹ The Church’s role was directed at the highest good (God) by helping man become moral and virtuous—a member of the City of God.³⁰ This virtuous man would ultimately help the State achieve order by increasing honest interactions and contracts between men, decreasing violence, and ultimately achieving obedience to the State.³¹ The Church also benefits from the State because it needs a level of peace and stability in society in order to fulfill its divine mission.³² Thus, for St. Augustine, there is no absolute separation of Church and State; rather, the City of God and the City of Man can mutually support each other to effectuate the common good of man and his ultimate end—happiness.³³

Although it would be ideal for the City of God and the City of Man to support each other, St. Augustine speaks about the potential conflict between the two realms. On the one hand, this conflict finds form when the State tells the Church or an individual person to support indirectly or directly something contrary to his faith, or when the Church’s freedom and autonomy are taken away.³⁴ On the other hand, there is also a problem when the Church becomes

23. Thomas Merton, *Introduction to ST. AUGUSTINE, THE CITY OF GOD* xi, xv (Marcus Dods trans., Modern Library ed., Random House 1993) (1950).

24. *Id.* See also ST. AUGUSTINE, THE CITY OF GOD Bk. XIV, Ch. 28 (Marcus Dods trans., Modern Library ed., Random House 1993) [hereinafter THE CITY OF GOD].

25. THE CITY OF GOD, *supra* note 24, at Bk. XIII, Ch. 26. Augustine also points out that those who are a part of the City of God are hidden amongst those people who belong to the City of Men. See *id.* at Bk. I, Ch. 35.

26. *Id.* at Bk. I, Ch. 35.

27. *Id.*

28. *Id.* at Bk. XIII, Ch. 14.

29. Merton, *supra* note 23, at xvi; THE CITY OF GOD, *supra* note 24, at Bk. XIX, Ch. 17.

30. Merton, *supra* note 23, at xv; THE CITY OF GOD, *supra* note 24, at Bk. XIX, Ch. 17.

31. Merton, *supra* note 23, at xvi; THE CITY OF GOD, *supra* note 24, at Bk. XIX, Ch. 17.

32. Merton, *supra* note 23, at xv–vi; THE CITY OF GOD, *supra* note 24, at Bk. XIX, Ch. 17.

33. Merton, *supra* note 23, at xv–vi; THE CITY OF GOD, *supra* note 24, at Bk. XIX, Ch. 17.

34. Merton, *supra* note 23, at xv–vi; THE CITY OF GOD, *supra* note 24, at Bk. XIX, Ch. 17.

too involved in the State and then uses the State as a tool to coerce faith.³⁵ As St. Augustine explained, and Pope Leo XIII emphasized in his encyclical *Immortale Dei*, neither the Church nor the State should coerce another to “embrace” the faith, because “[m]an cannot believe otherwise than of his own will.”³⁶ Augustine, therefore, wants to uphold the role of the secular order unless it is undermining the precepts of God and the Church.

Through the dichotomy of the Two Cities, St. Augustine highlights that there is a real danger to the common good when the State interferes with spiritual affairs, because it inevitably pits the State against religion instead of promoting a mutually beneficial relationship.³⁷ Thus, St. Augustine contributed to the Catholic understanding of the Church-State relationship and their roles in the world.

2. *The Contributions to the Church-State Relationship from Pope St. Gelasius, Pope Gregory VII, and Pope Boniface VIII*

From the fifth century until the thirteen century, Pope St. Gelasius I, Pope Gregory VII, and Pope Boniface VIII provided a consistent strand of Catholic thought regarding the Church-State relationship. Each of these three popes was forced to deal with a temporal ruler that overreached into the affairs of the Church.³⁸ For example, Gelasius wrote a letter to Emperor Anastasius advocating for the Church to remain free from interference from the State’s power.³⁹ Pope Gelasius stated two things to the Emperor: “There are *two powers* . . . by which this world is chiefly ruled, namely, *the sacred authority of the priests* [the Church] and *the royal power* [the State].”⁴⁰

35. Robert Dodaro, *Between the Two Cities: Political Action in Augustine of Hippo*, in AUGUSTINE AND POLITICS 99, 100 (John Doody, Kevin L. Hughes & Kim Paffenroth eds., 2005).

36. Pope Leo XIII, *Immortale Dei* [Encyclical Letter on the Christian Constitution of States] ¶ 36 (1885), available at <http://www.papalencyclicals.net/Leo13/113sta.htm> [hereinafter *Immortale Dei*].

37. Merton, *supra* note 23, at xvi; THE CITY OF GOD, *supra* note 24, at Bk. XIX, Ch. 17.

38. See, e.g., Klemens Löffler, *Conflict of Investitures*, in 8 THE CATHOLIC ENCYCLOPEDIA 84, 84–87 (Charles G. Herbermann et al. eds., 1910), available at <http://www.newadvent.org/cathen/08084c.htm> (discussing the struggle between Pope Gregory and King Henry IV over whether the Church or the State had the power to appoint bishops to rule over certain church lands by investing them with the symbols of their office); see also Thomas Oestereich, *Pope Boniface VIII*, in 2 THE CATHOLIC ENCYCLOPEDIA 662, 662–68 (Charles G. Herbermann et al. eds., 1907), available at <http://www.newadvent.org/cathen/02662a.htm> (discussing Pope Boniface’s struggle with King Philip of France over the use of ecclesiastical goods for a secular purpose).

39. Pope Gelasius I, *Letter to Emperor Anastasius* (494), reprinted in 1 READINGS IN EUROPEAN HISTORY 72, 72–73 [hereinafter *Letter to Emperor Anastasius*] available at <http://www.fordham.edu/halsall/source/gelasius1.asp>.

40. *Id.* (alteration in original) (emphasis added).

Similarly, Pope Boniface VIII stated in *Unam Sanctam* that the Church had in its hands "two swords; namely, the spiritual and the temporal."⁴¹ The spiritual power or sword was wielded only by the Church and it symbolized the Church's authority over issues of faith and morals.⁴² After making these distinctions, all three popes emphasized the importance of the State respecting the authority of the Church over spiritual matters in order that the earthly power was "led upwards," i.e., toward its final goal of happiness.⁴³

Conversely, all three popes acknowledged that the State's power or temporal sword rightly controls and demands obedience from all of its citizens (priests included) to the civil laws and public order.⁴⁴ For example, Pope Gelasius, concludes his letter to the Emperor stating that just as Church leaders are bound to obey the civil laws in the course of "secular affairs," so should the Emperor not obstruct the "divine affairs" or spiritual work of the Church to lead men to God.⁴⁵

The examples of these three popes can each be seen as advocating or reaffirming a "natural and necessary separation of Church and State" in the sense that the king should neither obstruct the spiritual matters of the Church nor should the Church obstruct the civil laws of the State.⁴⁶ However, despite the threats from temporal rulers trying to control spiritual matters, these popes never advocated for a complete separation between the "two powers," but rather advocated for their peaceful coexistence.⁴⁷ Thus, each pope continued Augustine's idea that in order to effectuate the common good there needs to be a naturally separate, but mutually respectful and beneficial relationship between the Church and the State.

41. Pope Boniface VIII, *Unam Sanctam* [*Papal Bull on Papal Supremacy*] ¶ 2 (1302) [hereinafter *Unam Sanctam*], available at <http://www.papalencyclicals.net/Bon08/B8unam.htm>. See also J. P. Kirsch, *Unam Sanctam*, in 15 THE CATHOLIC ENCYCLOPEDIA 126, 126 (Charles G. Herbermann et al. eds., 1912), available at <http://www.newadvent.org/cathen/1512a.htm> (arguing that *Unam Sanctam* is a consistent product of Catholic thought on the issue of Church-State relations).

42. Kirsch, *supra* note 41, at 126. See also Löffler, *supra* note 38, at 85 (discussing Pope Gregory VII's affirmation of the supremacy of the Church over the spiritual realm by excommunicating the King for unduly influencing the Church and failing to acknowledge the Pope's authority in spiritual matters).

43. *Unam Sanctam*, *supra* note 41, ¶ 3. See also *Letter to Emperor Anastasius*, *supra* note 39.

44. *Letter to Emperor Anastasius*, *supra* note 39. See also Kirsch, *supra* note 41, at 126.

45. *Letter to Emperor Anastasius*, *supra* note 39.

46. Andrew M. Greenwell, *Two There Are: The Church, the State and Dangers of Radical Secularism*, CATHOLIC ONLINE, (Feb. 29, 2012), <http://www.catholic.org/hf/faith/story.php?id=44955>. See also *Letter to Emperor Anastasius*, *supra* note 39; Macksey, *supra* note 18, at 252.

47. Greenwell, *supra* note 46. See also Macksey, *supra* note 18, at 252–53.

3. *Summary of Catholic Thought on the Church-State Relationship*

At this point, it should be clear that Catholic teaching did not support a theocracy, where certain clergy members have control over both the secular and ecclesiastical powers.⁴⁸ Since all authority both secular and spiritual comes from God,⁴⁹ the Church maintains that it still holds the greater of the two swords because its sword gives guidance on matters of faith and morals to the temporal sword.⁵⁰ Aquinas nicely summarizes the traditional Catholic thought regarding the Church-State relationship:

Both powers originate in God. Therefore the secular power is subordinate to the spiritual power in matters that concern the salvation of souls. In matters that concern more the civil common good, a person is obliged to obey the secular rather than the spiritual power.⁵¹

Even though the Church-State relationship was often associated with a monarchy, the Church does not unqualifiedly support only one form of government, because it recognizes that all forms of government are subject to corruption due to man's fallen nature.⁵²

Thus, there are two main points that can be gathered from this vein of Catholic thought regarding the Church-State relationship. First, to procure the common good, there should neither be a strict separation of Church and State nor an established state religion.⁵³ The Church-State relationship instead should be built upon a respect for the natural separation and an understanding that they can exist together in a mutually beneficial relationship.⁵⁴ Second, the State should be careful before it interferes with the free exercise of religion and breaches that natural separation. Such decisions can ultimately pit the State against the Church instead of allowing

48. David Palm, *Separation of Church and State: Manifest Destiny or Manifest Heresy?*, SEATTLE CATHOLIC (June 15, 2005) <http://www.seattlecatholic.com/a050615.html>.

49. *Romans* 13:1 ("Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God.")

50. *Unam Sanctam*, *supra* note 41, ¶ 3. See also *Letter to Emperor Anastasius*, *supra* note 39; *Immortale Dei*, *supra* note 36, ¶¶ 11–12.

51. Palm, *supra* note 48. See ST. THOMAS AQUINAS, *SCRIPTA SUPER LIBROS SENTENTIARUM* Sent. II, Dist. 44, *reprinted in* ST. THOMAS AQUINAS, *ON KINGSHIP* 106, 107 (Gerald B. Phelan, trans.). For the original text in Latin, see ST. THOMAS AQUINAS, *SCRIPTA SUPER LIBROS SENTENTIARUM*, available at [http://capricorn.bc.edu/siepm/DOCUMENTS/AQUINAS/Aquinas%20Super%20libros%20Sententiarum%201%20\(1929\)%20ocr.pdf](http://capricorn.bc.edu/siepm/DOCUMENTS/AQUINAS/Aquinas%20Super%20libros%20Sententiarum%201%20(1929)%20ocr.pdf).

52. Palm, *supra* note 48.

53. See *infra* Part I.B.3.

54. See *infra* Part I.B.3.

the Church to help the State lead people to their final end.⁵⁵ The State, therefore, should ensure that it has man’s common good in mind before interfering with religion lest a civil framework is established that does not endear the people to its government.⁵⁶

B. *A Catholic Perspective on Faith and Religious Liberty*

Similar to the Catholic position on the Church-State relationship, the Catholic understanding of faith has also influenced its understanding of religious liberty. St. Augustine reminds his readers that neither the Church nor the State has the ability to coerce faith: “Man cannot believe otherwise than of his own will.”⁵⁷ This understanding of faith has consistently shaped the Catholic Church’s teaching on conscience and religious liberty. Thus, both the Church and government should respect the individual’s right to practice freely his faith unless the individual’s right to religion conflicts with the common good.

1. *St. Thomas Aquinas’s Understanding of Faith and Religious Freedom*

Aquinas’s understanding of grace and faith has profoundly influenced Catholic thought. Since faith is bestowed upon people through grace, which is a gift from God, Aquinas logically concludes that faith is also a gift from God.⁵⁸ The things of faith are “*proposed to man*,”⁵⁹ not imposed upon him. In *Dignitatis Humanae*, the Church reaffirms such a teaching: “The truth cannot impose itself except by virtue of its own truth . . . a wrong is done when government imposes upon its people . . . the profession or repudiation of any religion, or when it hinders men from joining or leaving a religious community.”⁶⁰

Furthermore, faith requires man’s assent and becomes a matter of the man’s will (strengthened by grace) to continue believing in matters of faith.⁶¹ Aquinas, therefore, concludes that non-Christians and Jews should not be

55. See *infra* Part I.B.3.

56. MARY V. GEIGER, DANIEL CARROLL: A FRAMER OF THE CONSTITUTION 164 (1943).

57. *Immortale Dei*, *supra* note 36, at ¶ 36.

58. SUMMA THEOLOGICA, *supra* note 14, Pt. I-II, Q. 112, Art. 2, Pt. II-II, Q. 6, Art. 1. See also *Ephesians* 2:8–10.

59. *Id.* (emphasis added).

60. Pope Paul VI, *Dignitatis Humanae* [*Declaration on Religious Freedom on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious*] ¶¶ 1, 6 (1965) [hereinafter *Dignitatis Humanae*].

61. SUMMA THEOLOGICA, *supra* note 14, Pt. II-II, Q. 10, Art. 8.

compelled to the faith because believing is an act of the will.⁶² However, through law, Aquinas states that the faithful may prevent non-believers from working against the Christian faith because their conduct may hinder the common good.⁶³ If such a law “forbidding acts of vice or mandating those proper to virtue” is passed, it must be done so with “prudent legislative reserve.”⁶⁴ This prudence is informed by an understanding that not only is law connected to ultimately furthering man’s pursuit of happiness or ethical virtues,⁶⁵ but that its goal is to forbid the “grosser forms” of evil.⁶⁶ In other words, since law’s main purpose is to limit the “grosser forms of vice [it] certainly cannot prescribe the finer points of virtue.”⁶⁷

Thus, since faith is ultimately a gift from God and should not be coerced, this teaching allows people of different religions to practice freely their religion insofar as it is not detrimental to the common good.⁶⁸ Determining whether certain religious acts are detrimental to the common good should be done with prudent legislative reserve, i.e., understanding that the State cannot realistically prevent all evil but can still try to limit the grosser forms of it.⁶⁹ The effects of lawmakers exercising prudence and ultimately toleration of certain religious acts may actually result in better promoting the common good.⁷⁰ Thus, as Aquinas stated: “[M]oderation in repressing what one judges to be absolute religious error may better serve to reveal charity and attract others to faith over time through patient persuasion.”⁷¹

2. *St. Thomas More’s Contribution to Freedom of Conscience and Faith*

Due to his characters in *Utopia* engaging in the Socratic form, it is difficult to say with certainty if Thomas More was strongly advocating for

62. *Id.*

63. *Id.*

64. MARY M. KEYS, AQUINAS, ARISTOTLE, AND THE PROMISE OF THE COMMON GOOD 219 (2006) (alteration in original).

65. *Id.* at 229.

66. *Id.* at 219. *Cf.* SUMMA THEOLOGICA, *supra* note 14, Pt. I-II, Q. 96, Art. 2–3 (where Aquinas uses the word “griever” instead of “grosser” and discusses the need for legislative prudence).

67. ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 47 (1993) (alteration in original). *But see* KEYS, *supra* note 64, at 27, 219 (claiming that government has a duty in legislating morality).

68. *Dignitatis Humanae*, *supra* note 60, ¶¶ 6–7.

69. KEYS, *supra* note 64, at 219.

70. *Id.* at 236.

71. *Id.*

religious freedom when writing his controversial *Utopia*.⁷² Nevertheless, considering that Thomas More was killed by King Henry VIII for adhering to his Catholic beliefs, had indirectly influenced Lord Baltimore through his descendants,⁷³ and is known as a “precursor of [Thomas] Jefferson,”⁷⁴ Thomas More’s view on religious freedom in *Utopia* seems to carry on Aquinas’s thoughts on religious freedom.⁷⁵

Thomas More sheds light on religious freedom through his dialogue between his characters, Morus and Hythlodæus.⁷⁶ Like Augustine’s and Aquinas’s thoughts on the State respecting a person’s religion, the main principle Morus points out to Hythlodæus is that “no one should suffer for his religion,” because persecution ultimately will work against creating civic peace and the common good.⁷⁷ The application of this principle meant enacting statutes respecting the right of conscience and prohibiting coercion in matters of faith.⁷⁸ However, similar to Aquinas’s understanding on the purpose of law to limit the “grosser forms” of evil, More understood that “[w]hat you cannot turn to the good, you must at least make bad as little as you can.”⁷⁹ This protection of the rights of conscience, therefore, did not mean freedom to profess doctrines that degrade human beings, cause civil strife or discord, or reject divine providence.⁸⁰ This meant that religious doctrines that shaped the mind were allowed, but not religious doctrines that influenced both mind and promoted action that was dangerous to the general welfare.⁸¹

Thus, according to Russell Ames’s interpretation of More’s underlying principles in *Utopia*, the effects from this type of religious freedom would

72. Sanford Kessler, *Religious Freedom in Thomas More’s Utopia*, 64 REV. POL. 208, 211–12 (2002). Critics continue to debate whether he categorically intended to oppose religious freedom, allow for it in some circumstances, or promote religious freedom. *Id.* On a side note, Kessler says if More truly believed what he wrote in *Utopia*, his position would “put him at odds” to the Church’s teaching on religious freedom. *Id.* at 212. However, on that point, I disagree with Kessler. As discussed above, the Church’s teaching on faith, speaks to the contrary. *See supra* Part I.A.1–3, B.1.

73. JOHNSON, *supra* note 8, at 12, 14–15.

74. RUSSELL AMES, *CITIZEN THOMAS MORE AND HIS UTOPIA* 6 (1949).

75. Kessler, *supra* note 72, at 211.

76. *Id.* Morus was a fictitious representation of Thomas More. *Id.*

77. *Id.* at 218.

78. *Id.*

79. Gerard Wegemer, *The Political Philosophy of Sir Thomas More, in* SAINTS, SOVEREIGNS, AND SCHOLARS: STUDIES IN HONOR OF FREDERICK D. WILHELMSSEN 137, 137–43 (R.A. Herrera, James Lehrberger, & M.E. Bradford eds., 1993), <http://thomasmorestudies.org/docs/The%20Political%20Philosophy%20of%20Sir%20Thomas%20More.pdf>.

80. Kessler, *supra* note 72, at 219.

81. *Id.*

almost “[achieve] a truly Christian ideal. . . [whereas] bigoted repressions may halt that revival of true religion.”⁸² Therefore, since faith cannot be imposed but proposed, Thomas More’s writings carry on the work of Aquinas by the fact that man should be free to practice his religion unless it degrades human beings or causes civil strife or discord.

3. *Summary of Catholic Thought on Church-State Relationship, Faith, Religious Freedom, and its Relationship to the Common Good*

Since the Fifth Century, Catholic theologians have intellectually wrestled with the dynamics of the Church-State relationship as well as a person’s ability to exercise freely his religion.⁸³ With always the common good in mind, a consistent strain of Catholic thought emerged throughout the centuries as shown by Augustine, Pope Gelasius I, Pope Gregory VII, Pope Boniface VIII, Aquinas, Thomas More, and many others.⁸⁴ First, Catholic thought recognized that the State and Church should exist harmoniously together in a mutually beneficial relationship.⁸⁵ This meant that the State did not need to either establish a religion or erect a complete wall of separation between both “powers” in order to achieve the common good.⁸⁶ Rather, since a “natural separation” existed between the two realms, a state should be very careful before it interferes with matters of the soul.⁸⁷ Second, if the State is going to breach that separation and interfere with the free exercise of religion, then it needs to take into account that faith cannot be imposed upon another, but proposed.⁸⁸ Third, the lawmakers need to understand that laws should be aimed at limiting the “grosser forms” of evil from religious acts.⁸⁹ As More illustrated in *Utopia*, these “grosser forms” of evil called for the degradation of human beings and social or civil discord.⁹⁰ Finally, the State should realize that when it creates a law that inhibits religious freedom it not

82. AMES, *supra* note 74, at 9–10.

83. *See supra* Part I.A–B.

84. St. Robert Bellarmine and Bartolome de las Casas are two more examples of this consistent thread of Catholic thought. *See* Gerald J. Russello, *What Barack Obama Could Learn from St. Robert Bellarmine*, CRISIS MAGAZINE (Sept. 10, 2012), <http://www.crisismagazine.com/2012/what-barack-obama-could-learn-from-st-robert-bellarmino>; *see also* Robert Ellsberg, *Las Casas’ Discovery*, AMERICA (Nov. 5, 2012), <http://americamagazine.org/issue/las-casas-discovery>.

85. *See supra* Part I.A.1.

86. *See supra* Part I.A.3.

87. *See supra* Part I.A.3.

88. *See supra* Part I.B.1–2.

89. *See supra* Part I.B.1–2.

90. *See supra* Part I.B.2.

only creates a greater risk of pitting religion against the State, but it is also loses the opportunity to change the hearts of those affected by such a law through peaceful persuasion and charity.⁹¹

This rich strain of Catholic thought would be put to the test in the American experiment with both Lords Baltimore and the representatives from Maryland, Charles Carroll and Daniel Carroll.

II. THE IMPLEMENTATION OF CATHOLIC THOUGHT IN AMERICA

A. *George and Cecil Calvert: Bringing Catholic Thought to the New World*

Throughout much political and religious turmoil in England during the late sixteenth and early seventeenth centuries, George Calvert and Cecil Calvert were working to create a place of peace and religious freedom for Catholics and Protestants in the New World.⁹² The first Lord Baltimore, George Calvert, while serving King James I on the Privy Council was able to procure a charter for the British territory of Avalon in Newfoundland in 1623.⁹³ However, when King James died and was replaced by Charles I, George Calvert was required either to take the Oath of Supremacy or step down from public office.⁹⁴ Since the oath required him to renounce the Pope as head of the Church, George, a devout Catholic convert, was obliged to resign and eventually chose to leave for Avalon.⁹⁵ Despite the persecutions he endured, George was committed to ruling his colony upholding the ability of both Protestants and Catholics to freely exercise their religion.⁹⁶ He was committed to Christian charity between the religions and even opened up his house for the worship services of both religions.⁹⁷ But due to his colony suffering from the harsh weather conditions of Newfoundland, George asked

91. See *supra* Part I.B.1–2.

92. RUSSELL, *supra* note 9, at 26–27.

93. JOHNSON, *supra* note 8, at 17–18.

94. JOHN D. KRUGLER, *ENGLISH AND CATHOLIC: THE LORDS BALTIMORE IN THE SEVENTEENTH CENTURY* 85 (2004). Despite the fact that Lord Baltimore was openly Catholic, some historians believe King Charles wished to retain Lord Baltimore on his council. These historians assert that Lord Baltimore may have been able to retain his office by taking the oath of allegiance instead of the oath of supremacy. Lord Baltimore, nevertheless, refused to take either oath knowing that the duties of his office on the King’s council would conflict with his faith. See RUSSELL, *supra* note 9, at 41 n.3.

95. KRUGLER, *supra* note 94, at 41–42.

96. *Id.* at 97–98.

97. *Id.* at 98.

the King to grant him a new charter for a colony further south.⁹⁸ Although George Calvert died before attaining a new charter, his commitment to religious liberty for the common good of the pluralistic community inspired his son to carry on his legacy.⁹⁹

After the first Lord Baltimore's death, the King granted the Maryland Charter of 1632 to Cecil Calvert, the second Lord Baltimore.¹⁰⁰ This charter bestowed upon Cecil Calvert absolute power as Lord Proprietor to found and govern the colony of Maryland as well as its territorial specifications.¹⁰¹ But most importantly, the Charter reflected Cecil's main purpose in embarking to the New World: spreading the Christian faith and creating a place of true Christian charity founded upon religious freedom.¹⁰² The very first lines of the Charter read: "Caecilius Calvert . . . treading in the steps of his Father, being animated with a laudable, and pious Zeal for extending the Christian Religion, and also the Territories of our Empire, hath humbly besought Leave of us. . . ."¹⁰³ With the Charter in hand, Cecil Calvert was free to carry on his father's legacy of religious freedom to the New World.

As he recruited colonists to join him in America, the second Lord Baltimore displayed and implemented Catholic thought regarding the Church-State relationship and freedom of religion.¹⁰⁴ In a similar format to Aquinas's *Summa Theologica*, Cecil and the Society of Jesus wrote *Objections Answered Touching Maryland* in order to attract both Protestants and Catholics to live with freedom of religion and conscience in Maryland.¹⁰⁵ Furthermore, in the first objection, similar to Aquinas's and More's argument on faith, they argued that the State should not force or coerce a person to a religion.¹⁰⁶ Moreover, due to his friendship with Thomas More's grandson

98. WM. HAND BROWNE, MAKERS OF AMERICA: GEORGE AND CECILIUS CALVERT BARONS BALTIMORE OF BALTIMORE 24–25 (1890), available at <http://books.google.com/books?id=Nf4MAAAAYAAJ>.

99. KRUGLER, *supra* note 94, at 153. See also RUSSELL, *supra* note 9, at 52, 297.

100. JOHNSON, *supra* note 8, at 21.

101. *Id.* at 21–22. See generally *The Charter of Maryland: 1632*, THE AVALON PROJECT [hereinafter MARYLAND CHARTER OF 1632], available at http://avalon.law.yale.edu/17th_century/ma01.asp.

102. RUSSELL, *supra* note 9, at 298. Some people claim that the main purpose was not religious because many charters used the same words regarding the proclamation of the Christian religion. However, Russell states that even though it may have been commonplace, it does not mean that Cecil Calvert was not motivated by his faith. As his acts after being granted the charter show, he was guided by faith. *Id.* at 298–301. Cf. JOHNSON, *supra* note 8, at 23.

103. MARYLAND CHARTER OF 1632, *supra* note 101, ¶ 2.

104. JOHNSON, *supra* note 8, at 12–13.

105. *Id.* at 23–30.

106. *Id.* at 24–25.

and his understanding of Thomas More’s *Utopia*,¹⁰⁷ Cecil Calvert made liberty of conscience and religion the founding principles of his pluralist land.¹⁰⁸ In fact, Cecil gained the support of the Jesuits, who agreed to go to Maryland knowing full well that he would not be establishing the Catholic Church as the State’s religion but that the “principle of religious toleration was to be adopted” in Maryland.¹⁰⁹ Thus, Cecil Calvert, influenced by the teachings of Aquinas and Thomas More, began his colony “consistent with his fidelity to the dogmas and the faith of the Roman Catholic Church.”¹¹⁰

In 1648, England’s constant turmoil between either King and Parliament or Protestant and Catholic spread to Maryland.¹¹¹ Despite Calvert and his administration justly applying the laws to both Catholics and Protestants alike,¹¹² the hatred in England toward Catholics was reflected in the emotional changes in Maryland.¹¹³ With the right to religious liberty in jeopardy, Lord Baltimore appointed a Protestant governor to appease Protestants abroad and domestically.¹¹⁴ Furthermore, Lord Baltimore, foreseeing that the entire foundation of his colony was at stake, secured the passage of the Act Concerning Religion in 1649.¹¹⁵ This historic document embodied “the principles, which had, in fact, governed the colony from the beginning.”¹¹⁶

The Act Concerning Religion was a prelude to the Free Exercise Clause in the First Amendment.¹¹⁷ The Act Concerning Religion did mainly four things: (1) refuted the idea of coercing faith or support for another religion; (2) disallowed blasphemy against Christianity or against another’s Christian

107. *Id.* at 12–14.

108. *Id.* at 12, 25–30.

109. *Id.* at 30. According to the author, Catholics did not have a problem binding themselves to render all civil obedience to king and magistrate. The Jesuits and Lord Baltimore actually argued with Cromwell that the Pope did not want unlawfulness, but rather wanted laws to reflect the free exercise of religion. *Id.* at 105–06.

110. *Id.* at 12.

111. *Id.* at 96, 110–11.

112. KRUGLER, *supra* note 94, at 165.

113. JOHNSON, *supra* note 8, at 110–11.

114. *Id.* at 110–12.

115. *Id.* at 111–12, 119. Due to some inconsistencies within the Act Concerning Religion, some historians believe the Act was a compromise between Catholics and Protestants. For example, while the Act first promotes religious freedom for all (the Catholic view), it then proceeds to limit religious freedom to only Christians (the Protestant view). For this discussion, see RUSSELL, *supra* note 9, at 203–08.

116. RUSSELL, *supra* note 9, at 287.

117. *See City of Boerne v. Flores*, 521 U.S. 507, 538 (1997) (Scalia, J., concurring).

religion due to the civil unrest such words could cause;¹¹⁸ (3) prohibited the establishment of a government religion; and (4) established that no Christian be “troubled, molested, or discountenanced, for or in his or her *religion, nor in the free exercise thereof*.”¹¹⁹ Thus, a crucial aspect of the original understanding of the Free Exercise Clause was intentionally or unintentionally stating Catholic thought from Augustine, Aquinas, and More: (1) faith should not be coerced, (2) civil laws should respect people’s ability to exercise freely their religion insofar as it does not affect the common good; and (3) freedom of conscience should be protected.¹²⁰

Moreover, the Act’s limitations upon a person freely exercising his religion reflected More’s and Aquinas’s thoughts on how accounting for the purpose of law, i.e., limiting the “grosser forms” of evil, promotes the common good. For example, at this time in England, governments were overthrown and violent wars waged on account of the differences in faith between Protestants and Catholics.¹²¹ Furthermore, the Act’s restriction upon the free exercise of religion by disallowing blasphemy against another’s religion was in fact a practical measure to protect his colony from the “grosser form” of evil, civil discord.¹²² Thus, Lord Baltimore’s Act was a move toward establishing a free English state built upon the Catholic understanding of religious freedom, conscience, and the common good.¹²³

Although the Act Concerning Religion was written to give only Christians the ability to freely exercise their religion and civil rights, the Act,

118. The fact that the Act established religious freedom only for Christians, and prohibited blasphemy and similar crimes should not slightly discredit this enormous achievement in America. At the time of its passing, England and many other Christian countries still had laws punishing people for blasphemy and similar crimes. See RUSSELL, *supra* note 9, at 285–89.

119. JOHNSON, *supra* note 8, at 188 (emphasis added). See also RUSSELL, *supra* note 9, at 288.

120. See *supra* Part I.B.1–3. See also RUSSELL, *supra* note 9, at 276.

121. JOHNSON, *supra* note 8, at 96, 110–12, 154.

122. RUSSELL, *supra* note 9, at 272–75, 287, 301. When the court tried to prosecute the Jewish Jacob Lumbrozo for blasphemy under the Act Concerning Religion of 1649, Lord Baltimore pardoned and granted “full rights of citizenship to Lumbrozo, and furthermore granted him the privilege to trade.” *Id.* at 274. Unlike Rhode Island, which actually denied the rights of citizenship to Jews and believed such acts were consistent with its first principles, in Maryland, denial of the rights of citizenship to Lumbrozo would have been “wholly inconsistent with the first principles upon which the colony was founded [i.e., the toleration of all].” *Id.* at 274–76. Furthermore, interestingly enough, Lord Baltimore’s fears of religious differences causing violent social discord were justified because he ultimately was overthrown by Protestants on account of his faith. JOHNSON, *supra* note 8, at 159–60. As exemplified by two of the express purposes of the Act Concerning Religion, Lord Baltimore was attempting to prevent civil discord or “dangerous consequences” to the commonwealths and preserve “quiet and peaceable government.” *Id.* at 187–88.

123. JOHNSON, *supra* note 8, at 158–59.

in practice, was never enforced against non-Christians.¹²⁴ In fact, Maryland under Catholic rule was truly “the land of sanctuary” for both Christians and others.¹²⁵ First, from 1632–1649, it had been the practice to ensure “all freemen” were present or represented at the Maryland Assembly.¹²⁶ Second, unlike Rhode Island, which disenfranchised all Catholics and non-Christians in 1663 despite its charter of absolute religious toleration, Lord Baltimore, influenced by his Catholic faith, displayed his love of religious liberty by granting the rights of citizenship to Jacob Lumbrozo, a Jew, in 1663.¹²⁷ Finally, when Lord Baltimore was separately urged by both Catholics and Protestants to repeal the Act and establish a state religion, he refused.¹²⁸ Inspired by his faith and the common good of his colony, Lord Baltimore would never assent to a repeal of the Act.¹²⁹ Thus, even though the Act Concerning Religion “insisted on Christian belief,”¹³⁰ Maryland inspired by the Catholic principles of Lord Baltimore was a beacon of religious liberty for the whole world.¹³¹

Yet, despite Lord Baltimore’s contributions to religious freedom, many people, including Catholics, have seemingly remained blind to the reality that Catholic thought profoundly influenced the rights all Americans cherish. Now, this is in no way meant to take any credit away from the clearly visible contributions of James Madison and Thomas Jefferson, who helped ensure religious liberty in this great country.¹³²

124. MILTON R. KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE: RELIGION, SPEECH, PRESS, ASSEMBLY* 20 (2003). See also RUSSELL, *supra* note 9, at 203, 204, 271–72, 274–75, 276, 285, 300–01 (discussing how there is nothing in the historical records showing that the Act was enforced against non-Christians, and that the only record available shows Lord Baltimore extending the privileges of citizenship to non-Christians, such as Unitarians and Jews).

125. See generally RUSSELL, *supra* note 9 (discussing Maryland’s toleration policies).

126. *Id.* at 286–87. “The history of Maryland toleration does not begin with the famous Act of 1649. That was merely a legislative confirmation of the unwritten law. . . in Maryland the doctrine of religious liberty was clearly proclaimed and practiced.” *Id.* at 196.

127. *Id.* at 287.

128. See Wilson, *supra* note 2, at 7. See, e.g., JOHNSON, *supra* note 8, at 306, n. 1 (dealing with Jesuits and Puritans urging intolerance toward the other). See also ROBERT J. BRUGGER, *MARYLAND: A MIDDLE TEMPERAMENT 1634–1980*, 20–22 (1988) (dealing with the Anglicans and Puritans who attacked and tried to repeal the Act Concerning Religion).

129. Wilson, *supra* note 2, at 7.

130. KONVITZ, *supra* note 124, at 20.

131. RUSSELL, *supra* note 9, at 276–77.

132. See generally ROBERT S. ALLEY, *JAMES MADISON ON RELIGIOUS LIBERTY* (1985) (containing many of Madison’s writing and papers, including his famous “Memorial and Remonstrance”, and discussing Madison’s impact on religious liberty and the Bill of Rights). See generally JOHN A. RAGOSTA, *RELIGIOUS FREEDOM: JEFFERSON’S LEGACY, AMERICA’S CREED* (2013) (discussing Jefferson’s true understanding of the separation of church and state, religious liberty, and its impact on American society).

Moreover, this Note is not attempting to take away from John Locke's Doctrine of Toleration that inspired much of Madison's and Jefferson's work on religious liberty.¹³³ However, as Supreme Court Justice James Wilson¹³⁴ declared to President Washington and many other influential policymakers in a law lecture in 1790:

[W]hy should an *ungracious silence* be observed, with regard to the name and character of Calvert? Let it be known, that, before the doctrine of toleration was published in Europe, the practice of it was established in America. A law in favour of religious freedom was passed in Maryland, as early as the year one thousand six hundred and forty nine.¹³⁵

Wilson, moreover, continued to praise Lord Baltimore for boldly following his faith in the face of opposition and ensuring the natural rights of man to have freedom of action and thought by declaring that he would never repeal the Act Concerning Religion.¹³⁶ Cecil Calvert, according to Wilson, deserved a shrine that said in bold words, "FOR THE MOST WORTHY," because "[h]e was truly *the father of his country*."¹³⁷ Thus, since Catholic theology cannot be completely separated from Cecil Calvert's Act Concerning Religion, then the First Amendment, which is partially inspired by the Act, is also influenced by Catholic thought.

Furthermore, unlike John Locke who disallowed civil rights to Catholics in his *Letter Concerning Toleration*,¹³⁸ Lord Baltimore, following the teachings of Aquinas and More,¹³⁹ established a colony where Protestants and Catholics both were citizens and free to practice their religion. The First Amendment, therefore, not only uses similar language found in the Act Concerning Religion, but in substance and effect is much closer to Lord Baltimore's Act than Locke's toleration doctrine.

In conclusion, the passage of the Act Concerning Religion was not the work of the Puritans in England or an "'echo' of any British order, or ordinance of the Long Parliament."¹⁴⁰ With the support of Roman

133. See generally Sanford Kessler, *Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom"*, 25 J. CHURCH & ST. 231, 231–32 (1983).

134. See generally COLLECTED WORKS OF JAMES WILSON, *supra* note 1 (illustrating his profound influence on the Constitution).

135. Wilson, *supra* note 2, at 7 (emphasis added).

136. *Id.* (emphasis added).

137. *Id.* at 7–8.

138. JOHN MARSHALL, JOHN LOCKE, TOLERATION AND EARLY ENLIGHTENMENT CULTURE 690 (2006).

139. JOHNSON, *supra* note 8, at 12–13. See also RUSSELL, *supra* note 9, at 276.

140. JOHNSON, *supra* note 8, at 157.

Catholics in England and the Jesuits, Lord Baltimore rightly deserves the title as “the father of his country” because he ensured liberty of conscience and freedom of religion.¹⁴¹ Although Catholics were eventually denied the right to freely exercise their religion with Protestants repealing the Act in 1689 and overthrowing Lord Baltimore, Calvert’s Act would become the “ancient foundation” of the First Amendment.¹⁴² Moreover, through the work of Charles Carroll of Carrollton and Daniel Carroll, the Catholic principles embodied in the Act would not only be “restored by the people in 1776” and reiterated in Maryland’s Constitution, but also throughout the rest of America.¹⁴³

B. *Charles Carroll of Carrollton: Embodying, Restoring, and Championing Catholic Thought in America*

Charles Carroll of Carrollton was a true embodiment of the Catholic principles that Lord Baltimore brought to America one-hundred years before.¹⁴⁴ Born into a devout Catholic family with a longstanding history of defending liberty and unsuccessfully resisting anti-Catholic laws,¹⁴⁵ Charles Carroll would accomplish what his ancestors could not—the restoration of Maryland’s “first principles.”¹⁴⁶

In Europe, Charles Carroll received a Jesuit and legal education that shaped his understanding of liberty and rights. According to one of his biographers, Carroll’s views on liberties and common law were profoundly influenced by Augustine, Aquinas, Cicero, Thomas More, Robert Bellarmine, and other Catholic theologians and philosophers.¹⁴⁷ He also received a Catholic understanding of the first principles established by the English-Catholic King Alfred the Great, as well as the rights reserved to the

141. *Id.* at 158.

142. *Id.* at 159–60.

143. *Id.* at 158–60.

144. See generally BRADLEY J. BIRZER, *AMERICAN CICERO: THE LIFE OF CHARLES CARROLL* (2010) (discussing Carroll’s life, the importance of Catholicism to his political philosophy, and the actions he took to secure religious freedom in Maryland and America).

145. See, e.g., *id.* at 16–17. For years, Charles’s grandfather, the Attorney-General for Lord Baltimore, tried to convince the Protestant government to reinstate the Act Concerning Religion and abolish the anti-Catholic laws. In particular, one Maryland law forbade Catholic parents from giving their children a Catholic education. ELLEN HART SMITH, *CHARLES CARROLL OF CARROLLTON* 28–30 (1942). If the parents were caught disobeying this law, the punishment was taking the child away from his parents and forcing him to be educated in the Protestant religion. *Id.* Out of fear of these laws, Charles Carroll was sent away to Europe to receive a Catholic education. *Id.* at 30.

146. See BIRZER, *supra* note 144, at XII, XVIII, 42–43, 49, 80, 92, 93, 98.

147. *Id.* at xi, xvii, 2, 3, 11, 51.

people in the Magna Carta.¹⁴⁸ Furthermore, Carroll studied natural law, natural rights, and Catholic theories regarding tyranny and liberty.¹⁴⁹ Most importantly though, Carroll's education prepared him to not only communicate his Catholic education in a way that allowed him to connect in an anti-Catholic world, but also instilled in him the desire to reinstate the first principles of Lord Baltimore, where Catholics and Protestants enjoyed the same rights.¹⁵⁰

After several years in Europe, Charles Carroll returned to his beloved homeland, where he would "champion" the rights of all people.¹⁵¹ Carroll, a disenfranchised Catholic, emerged into the spotlight when the Governor of Maryland issued the Fee Proclamation.¹⁵² This Proclamation bypassed the people's legitimate representatives in the Maryland Assembly and required them to pay a fee to the government and the established Anglican Church.¹⁵³ It was essentially taxation without representation and pitted the people against the Governor.¹⁵⁴ This controversy resulted in Carroll openly debating the Governor's staunch advocate, Daniel Dulany,¹⁵⁵ in a series of letters known as the First Citizen Debates.¹⁵⁶ Using the principles of natural rights and common law, Carroll decisively defeated Dulany.¹⁵⁷

In these debates, Dulany played on the people's anti-Catholic sentiments by personally attacking Carroll for his faith several times.¹⁵⁸ Dulany claimed that it was a contradiction to argue for the people's rights as a patriot and still be a Catholic.¹⁵⁹ In fact, Dulany not only argued that Carroll's faith was the reason why Catholics were unsafe and unfit to be citizens or serve in political office, but he also stated that Catholics were fortunate to even be tolerated in Maryland.¹⁶⁰ In response to these attacks, Carroll drew from his Catholic education and argued that the principles of the Fee Proclamation were

148. *Id.* at 21.

149. *Id.* at 2–3.

150. *Id.* at 15, 21, 24.

151. *Id.* at 190.

152. *Id.* at 40–41.

153. *Id.* at 41–43.

154. *Id.*

155. *Id.* at 40–43. Dulany's works were influential in convincing England to repeal the Stamp Act because it was a violation of their right to no taxation without representation. *Id.* at 49, 68.

156. *Id.* at 40.

157. *Id.* at 42–43.

158. *Id.* at 42, 51.

159. *Id.* at 69.

160. *Id.* at 69–70.

incompatible with natural rights and liberty.¹⁶¹ Furthermore, Carroll made Dulany’s anti-Catholic arguments backfire when he wrote how his faith should not preclude him from thinking politically.¹⁶² But Carroll did not stop there. Indirectly referencing the anti-Catholic laws and the established religion of Maryland, Carroll echoed Aquinas, Augustine, and More by boldly declaring his hatred for all religious bigotry and the cramming of a religion down “peoples [sic] throats.”¹⁶³ In one fell swoop, Charles Carroll reconciled patriotism with Catholicism and opened the door for the reestablishment of the first principles: a proper separation of the Church and State and religious freedom.¹⁶⁴

Carroll’s works as the First Citizen were being widely read, supported, and published throughout the colonies.¹⁶⁵ In a few months, Carroll had become a national figure, Maryland’s leading patriot and Whig for the next twenty-five years, and the prominent Catholic leader in America.¹⁶⁶ Almost immediately after his rise to prominence, Maryland chose not to enforce the anti-Catholic laws when they openly elected Carroll to serve in various state positions.¹⁶⁷ No matter the political office, Carroll worked to reestablish the same Catholic thought, which inspired Lord Baltimore in 1649 and honored and reflected the natural rights from the Western Christian tradition.¹⁶⁸ Carroll’s intellectual prowess and advocacy for religious liberty in Maryland attracted the attention of the Second Continental Congress, which appointed Carroll for a diplomatic mission to Canada.¹⁶⁹

Due to the First Continental Congress’ Quebec Act, which essentially condemned Catholicism, Charles Carroll’s assignment to Canada in early

161. *Id.* at 53–55.

162. *Id.* at 74.

163. *Id.* at 75. Carroll wrote:

I am as averse to having a religion crammed down peoples [sic] throats, as a proclamation These are my political principles in which I glory[,] principles not hastily taken up to serve a turn, but what I have always avowed since I became capable of reflection. . . . Knaves, and bigots of all sections and denominations I hate, and I despise. . . . We catholics, who think we were hardly treated on that occasion, we still remember the treatment, though our resentment hath intirely subsided.

Id. (emphasis and internal quotations omitted).

164. *Id.* at 44, 46, 64, 76, 81.

165. *Id.* at 65, 76, 81.

166. *Id.* at 81.

167. *Id.* at 16, 80, 82, 99, 173. For example, there was an old law passed in 1689 that forbade all Catholics from participation in “civil matters.” *Id.* at 16.

168. *Id.* at 80, 82.

169. Carroll went on this mission with Benjamin Franklin and Fr. John Carroll. *Id.* at 103, 106–07.

1776 served two purposes: (1) convince Canada to become America's ally and (2) assure them through the representation of two Catholics (Charles Carroll and Father John Carroll) that Congress "h[e]ld sacred the rights of conscience."¹⁷⁰ Being delegated to this mission not only showed Congress' faith in Charles Carroll's ability to advocate for religious freedom, but also his influence over some of the most prominent members of Congress.¹⁷¹ For example, John Adams, despite being an outspoken anti-Catholic, praised Carroll for his "zealous" writings advancing the cause of liberty and consulted with him several times throughout his career.¹⁷² Furthermore, the famous patriots, Patrick Henry, Richard Henry Lee, and Benjamin Rush all sought counsel from Charles Carroll and deemed him to be a true patriot.¹⁷³

After Carroll's mission to Canada, Carroll was elected to represent Maryland in the Second Continental Congress.¹⁷⁴ Despite initial instructions from the Maryland Convention to not declare independence from England,¹⁷⁵ Carroll persuaded the Maryland Convention otherwise and went to Philadelphia, where he, the lone Catholic, signed the Declaration of Independence.¹⁷⁶ With all disenfranchised Catholics in mind, Carroll signed it with the belief that it would not only be a return to the first principles, but it also would "usher in an era of religious liberty."¹⁷⁷ In fact, for the first time, his Catholic education was considered an "asset" and no longer a detriment by the Continental Congress and Maryland.¹⁷⁸

When Carroll returned to Maryland, he immediately went to work reestablishing Catholic thought in Maryland's Constitution and Declaration of Rights. Both of these documents were widely read and influential in the formation of the United States' Constitution,¹⁷⁹ especially as a foreshadowing of the First Amendment.¹⁸⁰ The Declaration of Rights declared:

170. *Id.* at 108.

171. *Id.*

172. *Id.* at 106–07, 178–79.

173. *Id.* at 97, 114.

174. *Id.* at 112–13.

175. *Id.* at 113.

176. *Id.* at 112–13, 115.

177. *Id.* at 116.

178. *Id.* at 114, 127.

179. *Id.* at 120–21, 125. For example, Alexander Hamilton and James Madison were particularly influenced to model the United States Senate after Charles Carroll's model in Maryland. *Id.* Furthermore, Madison sent him his "Vices Concerning the Political System" in order to consult with Carroll regarding the Constitution. *Id.*

180. *City of Boerne v. Flores*, 521 U.S. 507, 553–54 (1997) (O'Connor, J., dissenting).

[N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights.¹⁸¹

Although Maryland’s Constitution allowed the state government to tax for religious purposes, the Constitution abolished the establishment of a specific state religion by giving the citizen the ability to allot his religious tax to the Church of his preference.¹⁸² Through these documents, Carroll reestablished the very same Catholic principles that Lord Baltimore implemented in Maryland over a hundred years before. It was a return to the “[P]re-‘Glorious Revolution.’”¹⁸³

Finally, as a United States Senator, Charles Carroll of Carrollton fulfilled the vision of Lord Baltimore and ensured that “an era of religious liberty” would be ushered into America by “[participating] in the joint Senate-House committee that approved and finalized the wording for the Bill of Rights.”¹⁸⁴ From the very beginning, Carroll understood and advocated that rights were given to men by God as a human being and thus the rights of property, life, and liberty (conscience and religion) were sacred.¹⁸⁵ Constantly motivated by his Catholic faith and a desire for religious liberty,¹⁸⁶ Carroll ensured religious freedom reigned supreme in America by supporting and passing the Bill of Rights.¹⁸⁷

Thus, as the First Citizen, the signer of the Declaration of Independence, the writer of Maryland’s Constitution, the author of Maryland’s Declaration of Rights, and a framer of the Bill of Rights, Charles Carroll of Carrollton showed how Catholicism not only shaped his “political and cultural outlook on the world,” but also its influence in establishing every American’s first and most sacred liberty.¹⁸⁸

181. *Id.* (emphasis omitted). See also BIRZER, *supra* note 144, at 120–21 (discussing the Maryland Declaration of Rights).

182. BIRZER, *supra* note 144, at 121–22.

183. *Id.* at 120–21.

184. *Id.* at 116. *Charles Carroll of Carrollton*, SOC’Y OF THE DESCENDANTS OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE (NOV. 30, 2011), <http://www.dsdi1776.com/signers-by-state/charles-carroll-of-carrollton>. See also SCOTT MCDERMOTT, CHARLES CARROLL OF CARROLLTON: FAITHFUL REVOLUTIONARY 204–05 (2002).

185. BIRZER, *supra* note 144, at 137, 139.

186. *Id.* at 173, 176.

187. *The Catholic Review*, *First 4th: Carroll the Lone Catholic Independence Declaration Signer*, CATHOLIC ONLINE (June 30, 2006), http://www.catholic.org/diocese/diocese_story.php?id=20387.

188. BIRZER, *supra* note 144, at 176.

C. *Daniel Carroll: A Framers of the First Amendment*

Another Catholic champion of religious liberty that served in Congress was Daniel Carroll, the cousin of Charles Carroll of Carrollton and a close relative of the Second Lord Baltimore, Cecil Calvert.¹⁸⁹ Daniel Carroll, who kept in close contact with his cousin throughout his political career,¹⁹⁰ was also deeply inspired by his faith. Because he lived in a time of religious bigotry toward Catholics, Daniel was also given a Catholic education in Europe, where he became a devout Catholic for his entire life.¹⁹¹ From his education and experiences with religious oppression, Daniel Carroll learned that religious liberty was essentially rooted in the dignity of man; therefore, he was profoundly motivated to ensure religious freedom for all Christians.¹⁹² Thus, with this goal in mind, Daniel Carroll, as President of the Maryland Senate and as a United States Congressman, was able to influence and enshrine Catholic thought in the First Amendment.¹⁹³

As President of the Maryland Senate, Daniel Carroll advocated for religious liberty for all Christians. In 1788, Daniel Carroll introduced a bill in Maryland that would incorporate all Christians throughout the state in order that they could equally and freely exercise their religion.¹⁹⁴ Repeating the words of Lord Baltimore's Act Concerning Religion, Daniel Carroll declared that those who conduct themselves peacefully should "receive . . . equal rights and privileges, without partiality . . . [and] [t]hat in every christian church, society or congregation shall [be] . . . protected in the *free and full exercise of their religion*, by the constitution and laws of the same."¹⁹⁵ This bill not only illustrated Daniel Carroll's dedication to protecting religious liberty and conscience, but it also foreshadowed his future influence upon the First Amendment.¹⁹⁶

Due to his invaluable service in the Continental Congress and the Federal Convention where he helped both the war efforts and James Madison frame the Federal Constitution in 1787,¹⁹⁷ Daniel Carroll was already a man of great influence when he was elected to serve in the first Congress of the

189. GEIGER, *supra* note 56, at 4–5, 24.

190. *Id.* at 28–29, 137. See also BIRZER, *supra* note 144, at 166–67.

191. GEIGER, *supra* note 56, at 183.

192. *Id.* at 83, 183.

193. *Id.* at 83–84, 183–84.

194. *Id.* at 83.

195. *Id.* at 83–84 (emphasis added) (alteration in original).

196. *Id.* at 164–65.

197. *Id.* at 183–84.

United States.¹⁹⁸ In fact, Daniel Carroll was a close friend of James Madison and was in constant correspondence with him from 1781 until the end of his career in the mid-1790s.¹⁹⁹ Furthermore, Daniel Carroll was a respected friend and consultant to George Washington, Benjamin Franklin, Governor Morris, and James Wilson.²⁰⁰ These famous founders often depended upon Carroll's influence to get certain bills passed and, most importantly, the Constitution in 1787.²⁰¹ When Daniel Carroll entered the debates regarding the First Amendment, he wanted to ensure that it substantially protected the rights of the people.²⁰²

Being appointed to a congressional committee tasked with the job of framing the First Amendment, Daniel Carroll played a critical role in ensuring that the First Amendment would secure the rights of conscience and religious liberty as well as survive the heated debates that potentially threatened its passage on almost the last day of the Federal Convention.²⁰³ After Madison proposed the model Bill of Rights to Congress, his first proposal regarding the First Amendment was changed to state: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."²⁰⁴ When a heated and confusing debate ensued over the Bill's language, Daniel Carroll did not want to contest the "phraseology" of the Amendment, but, rather, desiring to secure the substance of the rights of conscience and religion motioned for its passage.²⁰⁵ Reminding Congress of its duty to the people and seemingly echoing Catholic thought, Daniel Carroll declared:

As the rights of conscience, are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present Constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of

198. *Id.* at 127, 148–49.

199. *Id.* at 121, 141.

200. *Id.* at 129.

201. *Id.* at 143.

202. *Id.* at 164.

203. Patrick Carey, *American Catholics and the First Amendment: 1776–1840*, 113 PA. MAG. HIST. & BIOGRAPHY 323, 328 (1989). See also GEIGER, *supra* note 56, at 163–64.

204. GEIGER, *supra* note 56, at 163–64. See also Harold D. Tallant, *Proposed Constitutional Amendments on Freedom of Religion (1789)*, GEORGETOWN C. (Feb. 26, 1999), <http://spider.georgetowncollege.edu/htallant/courses/his338/1stamend.htm> (listing all the proposed versions of the First Amendment).

205. GEIGER, *supra* note 56, at 164.

the people to the Government than almost any other amendment he had heard proposed.²⁰⁶

Catholic thought is not only consistent with this statement, but can be inferred in three ways. First, Daniel Carroll echoes Aquinas's and More's understanding that rights of conscience are a matter of faith, i.e., "in their nature, of peculiar delicacy."²⁰⁷ Second, by stating that the religious right of conscience cannot even "bear the gentlest touch of governmental hand," Daniel Carroll's statement is consistent with the Catholic thought that advocated for the government to be cautious before it interferes with matters of the soul or the free exercise of religion.²⁰⁸ Finally, Daniel Carroll illustrates that a government that protects religious freedom by restricting itself to only regulating the grosser forms of evil can promote the common good by "conciliating the minds of the people to the Government."²⁰⁹ Thus, although the bill would be amended by both the Senate and House a few more times before its final and current version was passed by Congress in September of 1789, Daniel Carroll's speech successfully gained the votes to pass his motion and brought the proposed amendment into the House.²¹⁰

Through his dedication to religious liberty and his patriotic work in the Continental Congress, Federal Convention, Maryland Senate, and the United States Congress, Daniel Carroll not only gained the respect of America's Founding Fathers, but influenced them as well.²¹¹ Like his cousin Charles Carroll of Carrollton, Daniel Carroll was able to follow in the footsteps of Lord Baltimore by implementing Catholic thought regarding the rights of conscience and religious liberty in not only Maryland, but in America's founding documents.²¹²

Lord Baltimore, Charles Carroll, and Daniel Carroll are responsible for the implementation and influence of Catholic thought in the Free Exercise Clause of the First Amendment. These three men ensured that religious liberty was founded upon a proper grasp of faith, conscience, and the dignity of man. Furthermore, they ensured that religious liberty would never be separated from the Catholic understanding of the common good or pursuit of

206. *Id.*

207. *See supra* Part I.B.1-3. *See* GEIGER, *supra* note 56, at 164.

208. GEIGER, *supra* note 56, at 164; *see also* discussion in *supra* Part I.A.3.

209. GEIGER, *supra* note 56, at 164; *see also* discussion in *supra* Part I.B.1-2.

210. GEIGER, *supra* note 56, at 164.

211. *Id.* at 119, 121, 127-29, n. 87. *See generally* GEIGER, *supra* note 56, ch. 5-6 (discussing Daniel Carroll's influence over the founders and the newly written Constitution at the Federal Convention, especially the First and Tenth Amendments where his words are inscribed in American history forever).

212. *Id.* at 184.

happiness. This means that before the government breaches the natural separation of Church and State, it should remember that the goal of any law or regulation interfering with religious freedom should be to limit the grosser forms of evil—such as the degradation of human beings or civil discord.²¹³ For as Daniel Carroll once said, the rights of conscience are of a “peculiar delicacy” and can little “bear the gentlest touch of governmental hand.”²¹⁴ Thus, it is time for American Jurisprudence to end its “ungracious silence” toward Catholicism and allow for it to bring about a true interpretation of the Free Exercise Clause.

III. HOW CATHOLIC THOUGHT SHOULD INFLUENCE FIRST AMENDMENT JURISPRUDENCE

Since Justice Scalia wrote the majority opinion in *Employment Division v. Smith*, a state government must no longer show a “compelling interest” before it can directly or incidentally burden a person’s right to exercise freely his religion under the First Amendment.²¹⁵ The immediate effect was that as long as the state government action or law was neutral and generally applicable it was not unconstitutional under the First Amendment.²¹⁶ Seemingly frustrated by the evolving compelling interest test over the past 50 years, Justice Scalia wrote: “the sounder approach . . . is to hold the test inapplicable to such challenges. The government’s ability to enforce generally applicable prohibitions . . . cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.”²¹⁷ As a direct response to *Smith*, Congress passed RFRA in order to limit government’s ability to infringe upon the Free Exercise rights of the people by reinvigorating the compelling interest test.²¹⁸

Yet, even with the enactment of RFRA, it is troubling that historically the Supreme Court Justices, excluding James Wilson, have failed to recognize the influence of Catholic thought behind the First Amendment. Although Justice Scalia refers to Lord Baltimore’s Act Concerning Religion of 1649 in *City of Boerne v. Flores*,²¹⁹ the principles behind the Act that were

213. See *supra* Part I.B.1–2.

214. GEIGER, *supra* note 56, at 164.

215. *Emp’t Div. v. Smith*, 494 U.S. 872, 883–85 (1990). See also Chris Day, Note, *Employment Division v. Smith: Free Exercise Clause Loses Balance on Peyote*, 43 BAYLOR L. REV. 577, 580 (1991).

216. Day, *supra* note 215, at 580.

217. *Smith*, 494 U.S. at 885.

218. *City of Boerne v. Flores*, 521 U.S. 507, 532–34 (1997).

219. *Id.* at 538.

later implemented into the founding documents remain unnoticed. This judicial oversight has led to a flawed interpretation of the Free Exercise Clause. Therefore, whether the Supreme Court uses the compelling interest test or the neutral and generally applicable test, it will continue to produce results inconsistent with the strand of Catholic thought that helped shape the Free Exercise Clause.

Since a proper understanding of the common good was inherent in the principles of religious freedom that helped shape the First Amendment, the Supreme Court should make the common good a factor in their analysis of the Free Exercise Clause. The additional query should be whether the government's regulation of a religious act is justified because it harms the common good. In other words, religious conduct harms the common good when it is a grosser form of evil by either (1) degrading human beings or (2) causing social or civil discord.²²⁰ If religiously motivated conduct does either one of those two things, the government is justified in interfering with that person's free exercise of religion. Factoring in the Catholic understanding of the common good would not only bring a more accurate understanding of the Free Exercise Clause, but it would also limit the government's ability to interfere with religion.²²¹ Thus, the result is greater accommodation and protection for the free exercise of religion.

In *Smith*, two plaintiffs, Smith and Black, ingested peyote at their church's religious ceremony and were subsequently fired from their jobs as drug counselors.²²² When they applied for unemployment benefits from the state government, they were denied since their termination was based upon "work-related misconduct."²²³ Even though there was a law that criminalized the sacramental use of peyote, Smith and Black sued the state government claiming a violation of their right to Free Exercise of Religion under the First Amendment.²²⁴ Abandoning the compelling interest test, the Supreme Court held that the Free Exercise clause did not prohibit Oregon from enacting a law that banned peyote use as long as it was a generally applicable and neutral law.²²⁵ One of the Justice Scalia's reasons for not

220. See *supra* Part I.B.2. It is possible that further research may find that this list of grosser forms of evil is not exhaustive.

221. The government's ability to interfere with religion would be more limited because, even if the law was neutral and generally applicable, this would not be the end of the inquiry. The government would be required to show that not granting an exemption to its law to the religious organization promotes the common good because its law is only interfering with religious conduct that causes a grosser form of evil.

222. *Smith*, 494 U.S. at 874. See also Day, *supra* note 215, at 579.

223. *Smith*, 494 U.S. at 874. See also Day, *supra* note 215, at 579.

224. *Smith*, 494 U.S. at 875, 876. See also Day, *supra* note 215, at 579.

225. *Smith*, 494 U.S. at 884–85, 890. See also, Day, *supra* note 215, at 587–88.

applying the compelling interest test was that he believed a religiously diverse society would be "courting anarchy" if courts granted free exercise exemptions to every law that allegedly conflicted with one's religious beliefs.²²⁶ Justice Scalia stated, "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."²²⁷ Therefore, because the law was generally applicable and neutral, the plaintiffs did not receive an exemption to the law.²²⁸

However, if Justice Scalia in *Smith* had factored in the original intent of the Catholic founders' understanding of the common good in relation to religious freedom, which is to limit the grosser forms of evil, the result would have been reversed.²²⁹ Similar to granting an exemption for the use of wine in Christian services during the era of Prohibition,²³⁰ granting an exemption for the ingestion of peyote in a religious ceremony for the Native American Church is not a grosser form of evil, because it neither degrades human beings nor causes social discord. The religious use of peyote has not only existed for many years, but, as Justice Blackmun pointed out in his dissenting opinion, has never been shown to harm anyone.²³¹ Furthermore, in regards to the second factor of causing social discord, the Native American Church has heavily supervised its use in a religious setting and has strongly discouraged its recreational use.²³² To the Native American Church, peyote is a "means for communicating with the Great Spirit" and curbing the tragic effects of alcohol upon the Native American population.²³³ Finally, even though peyote was on the list of federally banned substances, the federal government tolerated the religious use, but not the recreational use of it.²³⁴ Thus, since the religious use of peyote does not harm the common good by degrading human beings or causing social discord, the Court's decision in *Smith* should have reflected the Catholic thought behind the Free Exercise Clause and allowed for the use of peyote in religious rituals.

Even though the state government would argue, and did in fact suggest in *Smith*, that the religious use of peyote is degrading to the human person

226. *Smith*, 494 U.S. at 888–89. Day, *supra* note 215, at 592.

227. *Smith*, 494 U.S. at 882; *see also* Day, *supra* note 215, at 592.

228. Day, *supra* note 215, at 593.

229. *See supra* Part I.B.

230. DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE 28 (2011).

231. *Smith*, 494 U.S. at 911–13 (Blackmun, J., dissenting).

232. *Id.* at 913.

233. *Id.* at 912, 919.

234. *Id.* at 912.

because it can cause incapacitation and potentially put others at risk of harm,²³⁵ the goal is to limit the grosser forms of evil. Unlike cannibalism, self-mutilation, or human sacrifices, the religious use of peyote has never been shown to actually harm anyone.²³⁶ Moreover, despite the government's potential argument that peyote could be traded or cause unhealthy addictions, there was "practically no illegal traffic in peyote."²³⁷ Furthermore, unlike Lord Baltimore's fear of civil uprising due to the absolute free exercise of religion, the religious use of peyote is not going to cause social discord.²³⁸ Perhaps, similar to Aquinas, More, and Daniel Carroll, the accommodation of the Native American Church's religious use of peyote would conciliate their minds to the government²³⁹ or "may better serve to reveal charity and attract others to faith over time through patient persuasion."²⁴⁰

After the Court in *Smith* eliminated the compelling interest test, Justice Scalia later attempted to justify his interpretation of the Free Exercise Clause in his concurring opinion in *Boerne v. Flores*. Justice Scalia used Lord Baltimore's Act Concerning Religion to show that it actually lent credence to *Smith*.²⁴¹ However, Scalia's interpretation of the Act Concerning Religion is missing one key aspect: the Catholic notion of the common good inherent within the Act. Missing this crucial influence would presumably have changed the outcome of *Boerne* and answered Scalia's seeming challenge²⁴² for an alternative to *Smith* that more accurately tracks the original understanding of the Free Exercise Clause.

In *City of Boerne*, the Catholic Archbishop (Patrick Flores) of San Antonio sued the city of Boerne under RFRA because its zoning laws did not permit him to enlarge his Church in the city's historic district.²⁴³ Flores claimed that this was a substantial burden on the free exercise of religion, because he would be unable to meet the spiritual needs of his growing

235. *Id.* at 904–05 (discussing whether peyote is harmful or dangerous to people).

236. *Id.* at 911–12.

237. *Id.* at 916.

238. *See, e.g., id.* at 916–19 (refuting the State's fear that granting an exemption for the religious use of peyote will bring on "a flood of other claims," which will ultimately result in social discord).

239. GEIGER, *supra* note 56, at 164.

240. KEYS, *supra* note 64, at 236.

241. *City of Boerne v. Flores*, 521 U.S. 507, 538–39 (1997) (Scalia, J., concurring).

242. *Id.* at 539, 543–44. In these passages, Justice Scalia criticizes the dissent for trying to use the Act Concerning Religion and Charles Carroll's Declaration of Rights as evidence to support the compelling interest test. Justice Scalia, however, seems open to the possibility that this evidence may support another "theory" that has not been "proposed as an alternative to *Smith*." *Id.* at 544.

243. *Id.* at 512 (majority opinion).

congregation.²⁴⁴ The Supreme Court, however, held that RFRA’s attempt to reinvigorate the compelling interest test was unconstitutional, because it violated the Separation of Powers doctrine.²⁴⁵ Congress was not permitted to circumvent the Supreme Court’s interpretation of the First Amendment in *Smith* by reestablishing the compelling interest test.²⁴⁶ Since the court reasserted that the neutral, generally applicable test was the correct interpretation of the Free Exercise Clause, Flores was unable to expand his church because the zoning laws were neutral and generally applicable.²⁴⁷ However, if the Catholic influence behind the Free Exercise Clause was factored into the Court’s decision, Flores would most likely have been allowed to expand his church because his action neither degraded human beings nor caused social discord.²⁴⁸

In his concurring opinion, Justice Scalia responded to the dissent’s attack on *Smith*’s interpretation of the Free Exercise Clause.²⁴⁹ Scalia believed the dissent’s main issue was whether constitutionally compelled exemptions were within the contemplation of the Framers as the only way to interpret the Free Exercise Clause.²⁵⁰ Answering in the negative, Scalia used the language of the Act Concerning Religion to partly illustrate his reasoning.²⁵¹ Scalia stated that the Act’s use of words, such as “for” or “in respect of” religion or “free exercise,” supports the idea that the government was only disallowed from discriminating against one’s religion.²⁵² Thus, a neutral and generally applicable law would be allowed because it does not constitute a law that was made to target or “in respect of” religion.²⁵³

To strengthen his position, Scalia argued that the “provisos” in the Act confirm this idea.²⁵⁴ The first proviso in the Act Concerning Religion stated that one was free to exercise his religion as long as it was not in a manner “unfaithful to the Lord Proprietary.”²⁵⁵ According to Scalia, this proviso

244. *Id.* at 512, 515, 532.

245. *Id.* at 536.

246. *Id.* at 536.

247. *Id.* at 534–35.

248. However, if, for example, the government could somehow show that expanding the Church would have *grossly* disrupted the entire neighboring community, the government could argue that the expansion caused social discord.

249. *City of Boerne*, 521 U.S. at 537.

250. *Id.* at 537–38.

251. *Id.* at 538–39.

252. *Id.*

253. *Id.*

254. *Id.* at 539–40.

255. *Id.* at 539.

meant that religious exercise is “permitted so long as it does not violate general laws governing conduct.”²⁵⁶ The second condition in Lord Baltimore’s Act was that all were free to exercise their religions as long as it was not in a manner that “molest or conspire against the civill Government [sic].”²⁵⁷ Since this provision was aimed at keeping the peace, Justice Scalia interpreted it as consistent with both John Locke’s theory that freedom was the right “to do only what was not lawfully prohibited” and the idea that keeping the peace simply meant obeying the law.²⁵⁸ The government, therefore, can deny religious freedom not only where religiously motivated conduct is violent or forceful, but also when it is illegal according to a neutral and generally applicable law.²⁵⁹ Unless the dissenters were willing to interpret the provisos to mean that the government can only interfere when there is religiously motivated conduct that is “violen[t], force[ful], or any other category of action (more limited than ‘violation of law’),” Scalia concluded that the *Smith* test is closer than the compelling interest test to the original understanding of the Free Exercise Clause.²⁶⁰

However, both the *Smith* test and the compelling state interest test are flawed interpretations of the Free Exercise Clause. First, to refute Scalia’s neutral and generally applicable test, the words “unfaithful to the Lord Proprietary”²⁶¹ or “molest or conspire against the civill Government”²⁶² do not support the idea that religious exercise is permitted as long as it does not violate general laws governing conduct. Even Justice Wilson knew back in 1790 that Lord Baltimore’s understanding of religious freedom predated John Locke’s theory of freedom, i.e., “a right to do only what is not unlawful.”²⁶³ As explained above,²⁶⁴ Lord Baltimore’s Charter of 1632 only allowed him to enact laws for the common good of the colony.²⁶⁵ Thus, the Charter’s purpose coupled with the Act Concerning Religion would inherently include the Catholic understanding of the common good. In other words, the right to practice freely one’s religion was accommodated as long as it was not advocating a grosser form of evil, such as social discord or the degradation of

256. *Id.* (emphasis omitted).

257. *Id.* at 551 (O’Connor, J., dissenting).

258. *Id.* at 540 (Scalia, J., concurring).

259. *Id.*

260. *Id.* at 540, 544 (alteration in original).

261. *Id.* at 539. *See also Maryland Toleration Act, supra* note 8 (actual text of the Act).

262. *City of Boerne*, 521 U.S. at 551 (O’Connor, J., dissenting). *See also Maryland Toleration Act, supra* note 8 (actual text of the Act).

263. *City of Boerne*, 521 U.S. at 540. *See also Wilson, supra* note 2, at 6.

264. *See supra* Part II.A.

265. MARYLAND CHARTER OF 1632, *supra* note 101.

human beings.²⁶⁶ This interpretation is consistent with the understanding that the State should be very wary before it breaches the natural separation of Church and State and forces a person to act against his or her belief.²⁶⁷ Moreover, it is consistent with the understanding that faith is a gift from God and that “no one should suffer on account of his faith.”²⁶⁸ It is also consistent with the idea that a representative government that protects the substantive rights of freedom of conscience and religion can better “[conciliate] the minds of the people to the Government.”²⁶⁹ Finally, as illustrated by Justice O’Connor, Charles Carroll’s Declaration of Rights in 1776 along with other Founding documents contained provisos to show the idea that “the right to free exercise was viewed as generally superior to ordinary legislation.”²⁷⁰ Therefore, religious conduct that acted in a way “unfaithful to the Lord Proprietary” or “molest[ed] or conspire[d] against the civill Governemt [sic]”²⁷¹ meant that government was limited to prohibiting only the grosser forms of religious conduct.

The compelling interest test is also not the correct interpretation of the Free Exercise Clause. The compelling interest test as first promoted in *Sherbert v. Verner*²⁷² allowed a state to substantially burden the free exercise of religion as long as the government could show two things: (1) the burden furthered “a compelling governmental interest” and (2) the law was “the least restrictive means of furthering that compelling governmental interest.”²⁷³ Although this test appears to offer greater protection to religious liberty than *Smith*, it also poses a potential danger to religious freedom since it does not account for the Catholic influence.²⁷⁴ For example, if (more likely when) access to free birth control and same-sex marriage become fundamental human rights,²⁷⁵ the Court may find that the State is justified in burdening

266. See *supra* Part I.B.1–2.

267. See *supra* Part I.A.3.

268. Kessler, *supra* note 72, at 218. See also *supra* Part I.B.1–2.

269. GEIGER, *supra* note 56, at 164.

270. *City of Boerne*, 521 U.S. at 555 (O’Connor, J., dissenting).

271. *Id.* at 539 (Scalia, J., concurring); *id.* at 551 (O’Connor, J., dissenting). See also *Maryland Toleration Act*, *supra* note 8 (actual text of the Act).

272. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

273. *City of Boerne*, 521 U.S. at 515–16.

274. The very fact that the Court would have to engage in an analysis of whether the government has a compelling interest to force a religious organization to provide birth control coverage or recognize same-sex marriage is already enough of a danger to religious liberty.

275. See *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (where the Supreme Court struck down the Defense of Marriage Act’s definition of marriage as between one man and one woman). Although the Supreme Court’s decision seems to rest upon federalist principles, the strong language (“harm”, “degrade”, “disadvantage”, or “demean”) utilized against defenders of traditional marriage

religious organizations that disobey a law like the recent “birth-control mandate.”²⁷⁶ Assuming the government satisfies the second part of the test, religious organizations would be forced to violate their conscience or suffer on account of their faith. Similarly, the *Smith* test also does not provide adequate protections to religious organizations that are caught in the midst of a neutral, generally applicable law that may require everyone to provide contraceptives or recognize gay marriage.²⁷⁷

Thus, if the Supreme Court ended its “ungracious silence”²⁷⁸ and recognized the Catholic influence behind the Free Exercise Clause, government would only be allowed to limit the grosser forms of religiously motivated evil, such as the degradation of human beings or social discord. By providing more limitations upon the government’s ability to interfere with the free exercise of religion, the Catholic understanding behind the first Free Exercise Clause in America better protects “our first” and “most cherished” liberty.²⁷⁹

CONCLUSION

With the rise of threats against religious freedom as seen quite clearly in the HHS Mandate, which forces religious businesses and organizations to provide contraceptives,²⁸⁰ there has never been a more pressing time to end the “ungracious silence” to the Catholic thought that influenced the Free

suggest that the Court is veering toward the recognition of same-sex marriage as a fundamental human right. *Id.* at 2693, 2696. *See also id.* at 2709 (Scalia, J., dissenting) (discussing the implications of the majority’s holding upon states that attempt to defend their traditional marriages laws). *See also* John Schwartz & Adam Liptak, *U.S. Asks Justices to Reject California’s Ban on Gay Marriage*, N.Y. TIMES (Feb. 28, 2013), <http://www.nytimes.com/2013/03/01/us/politics/administration-to-urge-justices-to-overturn-a-gay-marriage-ban.html?pagewanted=all>. *See also* Ben Johnson, *UN Agency Declares Birth Control a “Human Right”*, LIFESITENEWS.COM (Nov. 14, 2012, 5:43 PM), <http://www.lifesitenews.com/news/un-declares-birth-control-a-39human-right39>.

276. David Rivkin & Edward Whelan, Op-Ed., *Birth-Control Mandate: Unconstitutional and Illegal*, WALL ST. J. (Feb. 15, 2012, 6:35 AM), <http://online.wsj.com/article/SB10001424052970204795304577223003824714664.html>.

277. Richard Schragger, *The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, The “War on Terror”, and Religious Freedom*, 32 CARDOZO L. REV. 2009, 2029–31 (2011) (discussing some of the possible effects on religious groups due to Justice Scalia’s neutral and generally applicable test).

278. Wilson, *supra* note 2, at 7.

279. U.S. CONFERENCE OF CATHOLIC BISHOPS, OUR FIRST, MOST CHERISHED LIBERTY: A STATEMENT ON RELIGIOUS LIBERTY 10–11 (2012), <http://www.usccb.org/issues-and-action/religious-liberty/upload/Our-First-Most-Cherished-Liberty-Apr12-6-12-12.pdf> [hereinafter A STATEMENT ON RELIGIOUS LIBERTY].

280. *Id.* at 2–3.

Exercise Clause. Inspired by Augustine, Aquinas, More, and others, this influence should help all Americans boldly advocate for greater protection to exercise freely one’s religion.²⁸¹ Furthermore, it should also help Catholics to not fall prey to the idea that the First Amendment only guarantees the right of freedom of worship instead of freedom of religion.²⁸² This distinction between worship and religion is the key to ensuring that Catholic thought will be realized in the public square.²⁸³ Finally, this Note should provide the desired portal for those who wish to reinsert Catholic thought into contemporary debates in political theory and explore the various ways Catholic thought might enrich American Jurisprudence.²⁸⁴

In conclusion, the strand of Catholic thought implemented by Lord Baltimore, Charles Carroll, and Daniel Carroll should provide a basis for the Supreme Court to reevaluate its current and former tests under *Smith* and *Sherbert*. Both tests are not only flawed interpretations of the Free Exercise Clause, but they also present a real threat to every American’s right to religious freedom. Thus, until the rather deafening and “ungracious silence” regarding the Catholic influence on the First Amendment is broken, “our first” and “most cherished” liberty²⁸⁵ is in danger.

281. *Id.* at 7, 9–11.

282. *Id.* at 4–5.

283. *Id.*

284. KEYS, *supra* note 64, at 8.

285. A STATEMENT ON RELIGIOUS LIBERTY, *supra* note 279, at 10–11.