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## ARTICLE

### RELIGIOUS LIBERTY IN THE THIRTEENTH COLONY: CHURCH-STATE RELATIONS IN COLONIAL AND EARLY NATIONAL GEORGIA

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*At the time of America's constitutional origins, there was not a singular understanding of the proper relationship between the government and religion, but rather multiple understandings. Those multiple understandings are best understood through a close investigation of the experiences in each of the original states. This Article seeks to add the experience in Georgia—the thirteenth colony—to the larger discussion regarding the status of religious liberty in the various colonies and states in the eighteenth century.*

*From its founding in 1732 throughout the eighteenth century, Georgia was a place of both religious tolerance and religious pluralism. Georgia's Royal Charter provided for liberty of conscience for all, and for the free exercise of religion by all except Roman Catholics. The Charter did not establish the Church of England or any other church. (Although the Church of England would later be established by law in 1758, it was, in practice, a weak establishment with little real ecclesiastical presence.) Between the Revolution and 1800, the new State of Georgia had three constitutions (1777, 1789, and 1798), each of which explicitly addressed religion and provided for varying levels of free exercise (including liberty of conscience) and disestablishment.*

*These principles of religious liberty that were reified and realized in the governing documents stemmed from the necessity of recognizing a variety of religious beliefs,*

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for from early times the colony contained adherents of a number of religious faiths. These included Jews, Anglicans, Lutherans, Presbyterians, and others—who formed, according to one author, “a rich generation of religious ferment in the colony.” This admixture of religious adherents was welcomed—indeed, invited—to the new territory. And the various worshipers were not asked to conform to, nor required to support, the Church of England, but instead received governmental funding and support for their own endeavors (including land grants, salaries for ministers, and some control over church and civil governance).

By analyzing Georgia’s law and experience, this Article seeks to unearth and illuminate those principles of religious liberty valued in early Georgia. This Article reveals that early Georgians cherished liberty of conscience, free exercise, direct (but non-preferential) governmental support for religion, respect for religious pluralism, and non-discrimination on the basis of religion. Further, while Georgians gradually moved toward recognizing the value of disestablishment, there was never an intellectual adherence to a strict Jeffersonian ideal of “separation of church and state.” By adding Georgia’s experience in church-state relations to the larger conversation about religious liberty in the early Republic, this Article opens the conversation to a fuller discussion of the multiple understandings of religious liberty present from the beginning.

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#### INTRODUCTION

[T]he Province of Georgia was intended by His Majesty for an Asylum for all sorts of Protestants to enjoy full Liberty of Conscience Preferable to any other American Colonies in order to Invite Numbers of Oppressed or persecuted People to Strengthen this Barrier Colony by their coming over . . . .<sup>1</sup>

From its founding in 1732 until the end of the eighteenth century, Georgia was a place of both religious tolerance and religious pluralism. Early Georgians valued liberty of conscience and free exercise of religion,<sup>2</sup> direct (but nonpreferential) governmental support for religion, and nondiscrimination on the basis of religion. The initial

<sup>1</sup> 13 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 257–58 (Allen D. Candler ed., 1907) [hereinafter C.R. GA.] (quoting Rev. Johann Martin Bolzius, pastor of Georgia's Salzburger German Lutheran community).

<sup>2</sup> In historical terms, the basic distinction between “liberty of conscience” and “free exercise” was that “liberty of conscience” was the right to believe what one wanted and “free exercise” was the right to act upon one's religious beliefs. See, e.g., JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 45 (2d ed. 2005). Accordingly to John Witte, Jr.:

Liberty of conscience was the right to be left alone to choose, to entertain, and to change one's religious beliefs. Free exercise of religion was the right to act publicly on the choices of conscience once made—up to the limits of encroaching on the rights of others or the general peace of the community.

*Id.* at 41–48, 108–10; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488–500 (1990) [hereinafter McConnell, *Free Exercise*] (discussing distinction between two phrases and reasons for pos-

colonial charter provided for liberty of conscience for all, and for the free exercise of religion by all except Roman Catholics.<sup>3</sup> And from the beginning, the Trustees of Georgia did not restrict the granting of glebe land<sup>4</sup> only to the Church of England, but allowed glebes to minority religious groups also.<sup>5</sup> Further, there was a gradual—and at times arguably halting—movement toward recognizing the value of disestablishment of religion. For example, there was not an established church from Georgia's founding in 1732 until 1758, at which time the Church of England became the “official” religion of the colony until the Revolution. But even then, the legal establishment in Georgia was, in practice, a weak (or “soft”) establishment with little real ecclesiastical presence.<sup>6</sup> In any event, there was certainly no intellectual adherence to a strict Jeffersonian ideal of “separation of church and state” among early Georgians.<sup>7</sup>

These multiple principles of religious liberty<sup>8</sup> that were enconced and realized in the governing legal documents stemmed

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sible substitution of clause “free exercise” instead of “liberty of conscience” in final text of First Amendment).

<sup>3</sup> 2 C.R. GA., *supra* note 1, at 773; *see also* McConnell, *Free Exercise*, *supra* note 2, at 1489–90 (discussing distinction in Georgia's charter).

<sup>4</sup> Glebe lands are defined as:

[L]ands—generally rented out to private tenants—whose profits belong, by law, to the minister of the church. . . . [T]he availability of profits from glebe lands provide[d] financial security for the minister—and thus improve[d] the quality of the ministry—[and also] undergirded a certain independence by making ministers less reliant on financial support from parishioners.

Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7, 9 (2001) [hereinafter McConnell, *Earliest Church-State*].

<sup>5</sup> As glebes were traditionally only given to the Church of England (as the established church), the fact that Georgia gave glebes and other land grants to other denominations, *see, e.g., infra* notes 364–83, is a striking departure from the norm in the colonies.

<sup>6</sup> *Cf.* McConnell, *Earliest Church-State*, *supra* note 4, at 8 (“From its founding at Jamestown to the very eve of the American Revolution, the colony of Virginia maintained perhaps the most rigid and exclusive establishment of religion in America.”).

<sup>7</sup> *Cf.* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1–9 (2002).

<sup>8</sup> I recognize that there is not a standard convention for terminology respecting religious freedom and belief, religious liberty, free exercise of religion, or establishment of religion. *See, e.g., id.* at 5 (discussing need for seeing “the broad history of separation of church and state” in relation “to the *religious liberty* guaranteed by the First Amendment”) (emphasis added); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1386–87 (2004) [hereinafter Esbeck, *Dissent and Disestablishment*] (operating on carefully stated assumption that Free Exercise Clause pertains to securing individual rights and Establishment Clause pertains to relationship between two sovereigns—church and state); *see also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1602 (1989) (asserting that “religious liberty” is “core value of the religion clauses” of First Amendment); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 3–4 (1998) (urging reading of Establishment Clause as

from the necessity of recognizing divergent religious beliefs, for from early times the colony contained adherents of a number of religious faiths. These included Jews, Anglicans, Lutherans, and Presbyterians—who formed “a rich generation of religious ferment in the colony.”<sup>9</sup> This admixture of religious adherents was welcomed—indeed, invited—to the new territory. And the various worshipers were not asked to conform to, nor required to support, the Church of England, but instead received governmental funding and support for their own endeavors (including land grants, salaries for ministers, and some control over church and civil governance).<sup>10</sup>

But the unique story of Georgia’s religious liberty, including its notions of direct aid to religious groups in nonpreferential fashion, its “soft” establishment, its emphasis on liberty of conscience and free exercise from the beginning, and its religious pluralism, has received relatively little discussion in the literature to date. This is unfortunate, as Georgia’s experience may offer useful insights into the relationship of religion and the state in the early days of the Republic. This is especially important in light of the fact that the First Amendment Religion Clauses<sup>11</sup> were not applied to the states until 1940 and 1947.<sup>12</sup> Until that time, religious liberty remained primarily a state

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relating only to relationship between government and religious organizations); *cf.* Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, at 36 U.N. GAOR, 3d Sess., 73d plen. mtg., U.N. Doc. A/RES/36/55 (Nov. 25, 1982) (using slightly different terminology in international context); NATAN LERNER, RELIGION, BELIEFS, AND INTERNATIONAL HUMAN RIGHTS (2000) (discussing “religion” and “belief” in international documents and context).

Despite the difficulties of language, this Article adopts the short-hand term “religious liberty” to encompass at least both major strains of freedom of religion as it is currently understood in its American context: (1) free exercise and (2) disestablishment. Historical discussions of religious liberty are not limited by singular understandings of even those two principles, for there were multiple interdependent principles at play. *See generally* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 372 (1996). As John Witte, Jr. has described, these “essential rights and liberties of religion” included at least the following: liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and disestablishment of religion. WITTE, *supra* note 2, at 41, 42–70. It is beyond the scope of the present Article to flesh out all the ramifications of such principles—particularly when they are in competition with one another. Nonetheless, the phrase “religious liberty” as used hereafter should be read to include multiple, and sometimes competing, principles unless otherwise specified.

<sup>9</sup> Leigh Eric Schmidt, *Church-State Relations in the Colonial South*, in CHURCH AND STATE IN AMERICA: A BIBLIOGRAPHICAL GUIDE, THE COLONIAL AND EARLY NATIONAL PERIODS 75, 85 (John F. Wilson ed., 1986).

<sup>10</sup> *See, e.g., infra* Part III.A.

<sup>11</sup> “Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof . . . .” U.S. CONST. amend. I.

<sup>12</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 8, 17 (1947) (applying First and Fourteenth Amendments to New Jersey statute and finding that it violated neither); *Cantwell v.*

concern.<sup>13</sup> And since that time, the Supreme Court and inferior courts regularly look to practices in the various states for insight into the “proper” interpretation of the First Amendment.<sup>14</sup> For example, just last year in the noted case of *Locke v. Davey*, Chief Justice Rehnquist looked to historical state practice in upholding a Washington statute that prohibited government funds from supporting a student studying theology.<sup>15</sup> As support for his position, he cited to (among other things) the 1789 constitution of Georgia.<sup>16</sup> Despite the fact that his interpretation appears squarely inconsistent with the understanding of the Georgia historical record as set forth in this Article,<sup>17</sup> the prominent use of historical evidence in that majority

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Connecticut, 310 U.S. 296, 303 (1940) (finding Connecticut statute restricting solicitation of religious donations invalid under First and Fourteenth Amendments).

<sup>13</sup> See, e.g., *Permol v. Municipality No. 1*, 44 U.S. (3 How.) 589, 609 (1845) (holding that First Amendment religion provisions do not protect individuals’ religious liberty from actions by states, since Constitution only binds federal government).

<sup>14</sup> I do not opine herein on whether this is a useful or appropriate tack by the courts. Professor Esbeck has plainly said that he thinks using such history for interpretative purposes is less than worthwhile:

For the Supreme Court to search for the original intent of the Establishment Clause as applied to actions by states seems a fool’s errand. . . . [T]here is no original meaning of the clause when applied to the states because the clause was never meant to restrain the residual power of the states.

Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1578.

<sup>15</sup> *Locke v. Davey*, 540 U.S. 712 (2004).

<sup>16</sup> The Chief Justice’s opinion states:

Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry. *E.g.*, Ga. Const., Art. IV, § 5 (1789), reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 789 (F. Thorpe ed. 1909) (reprinted 1993) (“All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own”); Pa. Const., Art. II (1776), in 5 *id.*, at 3082 (“[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent”); N.J. Const., Art. XVIII (1776), in *id.*, at 2597 (similar); Del. Const., Art. I, § 1 (1792), in 1 *id.*, at 568 (similar); Ky. Const., Art. XII, § 3 (1792), in 3 *id.*, at 1274 (similar); Vt. Const., Ch. I, Art. 3 (1793), in 6 *id.*, at 3762 (similar); Tenn. Const., Art. XI, § 3 (1796), in *id.*, at 3422 (similar); Ohio Const., Art. VIII, § 3 (1802), in 5 *id.*, at 2910 (similar). The plain text of these constitutional provisions prohibited any tax dollars from supporting the clergy. We have found nothing to indicate, as JUSTICE SCALIA contends, *post*, at 728, n.1 that these provisions would not have applied so long as the State equally supported other professions or if the amount at stake was *de minimis*. That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk.

*Id.* at 723.

<sup>17</sup> As discussed below, *see infra* notes 190–97 and accompanying text, there was a 1785 law on the books in Georgia that specifically required payment of taxes to the state—

opinion underscores the continuing relevance of such analyses as the one provided in the ensuing pages.

But as Judge Michael McConnell has recently reminded us (and despite the counterexample in *Locke v. Davey*), courts invariably and almost exclusively focus on historical religious liberty in Virginia.<sup>18</sup> This trend is echoed in scholarship.<sup>19</sup> There is certainly some logic to this, for from Virginia arose Madison's *Memorial and Remonstrance Against Religious Assessments* (1785),<sup>20</sup> often pronounced the best synthesis of American religious liberty principles, and Jefferson's *Bill for Establishing Religious Freedom*,<sup>21</sup> which embodied an Enlightenment model of church-state relations and sought to ensure the ongoing separation of church and state.<sup>22</sup> Massachusetts has attracted much research as well, as it was a stronghold for New England Puritans and retained legal establishment until 1833—longer than any other state.<sup>23</sup> Rhode Island, a leader in religious liberty from its

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which the state would then pay directly to clergy of various denominations. This provision was rarely enforced, according to extant records, but it seemingly remained on the books until it was superseded by the 1798 Georgia constitution. The plain text of the 1789 Georgia constitution, contrary to the Chief Justice's interpretation, does not "prohibit any tax dollars from supporting the clergy." *Id.* Rather, at least in Georgia, tax dollars were still *permitted* to flow directly to the clergy, it appears, but they had to be directed to the clergy of one's own choosing.

<sup>18</sup> See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107–08 (2003); see also *Everson v. Bd. of Educ.*, 330 U.S. 1, at 13 (1947) ("[T]he provisions of the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."); cf. *Locke*, 540 U.S. at 727 (Scalia, J., dissenting) (alluding to Madison's *Remonstrance* in Virginia, rather than using discussion of historical record in Georgia or other states, in attempt to counter majority opinion).

<sup>19</sup> See, e.g., sources listed in Schmidt, *supra* note 9, at 75, 77 ("Virginia has received the lion's share of [the] attention . . ."); cf. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 89–90, 106–11 (1994) (discussing U.S. Constitutional ratification debates in Virginia). Levy fairly notes that part of the reason for discussing ratification in Virginia as opposed to other states is that there is a dearth of historical materials for other states. *Id.*

<sup>20</sup> See 8 THE PAPERS OF JAMES MADISON 298–304 (Robert A. Rutland & William M.E. Rachal eds., 1973).

<sup>21</sup> Proposed 1779, passed 1786. See 2 THE PAPERS OF THOMAS JEFFERSON 545–47 (Julian P. Boyd ed., 1997) (1950).

<sup>22</sup> See WITTE, *supra* note 2, at 29–33 (discussing "Enlightenment" understanding of relationship between church and state).

<sup>23</sup> See, e.g., John Witte, Jr., "A Most Mild and Equitable Establishment of Religion": *John Adams and the Massachusetts Experiment*, 41 J. CHURCH & ST. 213 (1999) (discussing Adams' model of religious liberty and its adoption in Massachusetts); see also WITTE, *supra* note 2, at 114–16 (discussing changes in Massachusetts Constitution regarding establishment).

inception in 1636, and other New England states have also attracted some attention.<sup>24</sup>

The literature is scarce, however, about the states south of Virginia. While there has been some writing about the South that is synoptic in nature, such treatment tends either to be too generalized or focuses on Virginia (and occasionally South Carolina) to the exclusion of the other colonies.<sup>25</sup> To date, there is scant treatment of Georgia's experience,<sup>26</sup> and there is a particular dearth of information in the law review literature.<sup>27</sup>

Even when Georgia's history of religious liberty is (infrequently) mentioned in the secondary literature, it is given little attention and relegated second-class status. This may stem, in part, from the self-effacing conclusion in the sole book on Georgia's religious liberty, in which Reba Carolyn Strickland concludes, "In general, Georgia

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<sup>24</sup> See, e.g., EDMUND S. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* (1967) (discussing Roger William's work in Rhode Island); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455 (1991) (same); David Little, *Roger Williams and the Separation of Church and State*, in *RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER* (James E. Wood, Jr., ed., 1985) (same). For other states, see, for example, Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81 (2001), which notes that the Pennsylvania Constitution provides strong protections for minority religious practices, and Paula G. Shakelton, *Remembering What Cannot Be Forgotten: Using History as a Source of Law in Interpreting the Religion Clauses of the Connecticut Constitution*, 52 EMORY L.J. 997 (2003), which argues that history must be employed to understand the religion clause of the Connecticut Constitution.

<sup>25</sup> But see Gary R. Govert, *Something There Is that Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office*, 64 N.C. L. REV. 1071 (1986) (employing North Carolina history to argue that total separation of church and state is futile); James Lowell Underwood, *The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right*, 54 S.C. L. REV. 111 (2002) (tracing expansion of religious tolerance in South Carolina).

<sup>26</sup> There is, however, one fine book on the topic, which examines the connection between religion and government in the founding of Georgia, REBA CAROLYN STRICKLAND, *RELIGION AND THE STATE IN GEORGIA IN THE EIGHTEENTH CENTURY* (1939), and one hearty chapter on religion in colonial Georgia in HAROLD E. DAVIS, *THE FLEDGLING PROVINCE: SOCIAL AND CULTURAL LIFE IN COLONIAL GEORGIA, 1733-76*, at 193-232 (1976), which discusses the effect of religion on the development of Georgia and its inhabitants. See also Wallace Elden Miller, *Relations of Church and State in Georgia, 1732-76* (August, 1937) [hereinafter Miller, Relations] (unpublished Ph.D. dissertation, Northwestern Univ.) (on file with the *New York University Law Review*) (discussing effect of religion on development of Georgia and its institutions). The only other works available treat isolated events or individuals such as the Salzburger community, John J. Zubly, or George Whitefield. See, e.g., GEORGE FENWICK JONES, *THE SALZBURGER SAGA: RELIGIOUS EXILES AND OTHER GERMANS ALONG THE SAVANNAH* (1984); RANDALL M. MILLER, "A WARM & ZEALOUS SPIRIT": JOHN J. ZUBLY AND THE AMERICAN REVOLUTION, A SELECTION OF HIS WRITINGS (1982) [hereinafter MILLER, WARM & ZEALOUS]; Theda Perdue, *George Whitefield in Georgia: Evangelism*, 22 ATLANTA HIST. Q. 43 (1978) (discussing Reverend George Whitefield's "profound" effect in Georgia).

<sup>27</sup> See *infra* note 32.

appears to have contributed little that was original to the development of church-state relations, although practices of other colonies and states were much modified by peculiar local conditions.”<sup>28</sup> Strickland’s tone is echoed by the well-known historian Sanford Cobb in his classic synoptic overview of religious liberty in America: “The history of colonial Georgia is, however, so short, and its beginnings were so near to the time of the Revolution, with the crucial questions of liberty already decided, that its religious story is without much importance in the development of our present theme.”<sup>29</sup> Edwin Gaustad provides slightly more coverage (just over 7 pages out of 411), although the attention is shared between Georgia and both Carolinas.<sup>30</sup> But Gaustad overlooks significant features of Georgia’s religious and legal history in other work, as he fails to mention the Congregationalist congregation(s) at Midway and Sunbury—from which two signers of the Declaration of Independence arose and which served as the seat of Georgia’s revolutionary fervor.<sup>31</sup> One thinks such a significant place and movement would at least deserve passing mention, given that the battle over Georgia was so seminal in the Revolutionary War.<sup>32</sup>

Despite this somewhat dismissive treatment by scholars, this Article shows both that Georgia *did* have unique elements in its history, especially regarding religious pluralism, and that a careful exegesis of the relevant legal texts yields interesting insights into the development of the law and practices respecting religious liberty. Further, given that there was not a singular understanding of the proper relationship between the government and religion, the understandings of the various early states are quite important. This Article seeks to add the depth of experience in Georgia to the larger discussion

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<sup>28</sup> STRICKLAND, *supra* note 26, at 185.

<sup>29</sup> SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY* 301 (1902). Cobb thereafter devoted only 3 of his 528 pages of text to developments in Georgia.

<sup>30</sup> EDWIN S. GAUSTAD, *A RELIGIOUS HISTORY OF AMERICA 100–10* (1966). Anson Phelps Stokes provides slightly better synoptic and anecdotal treatment in his classic three-volume set, but only devotes about one page to single-minded treatment of Georgia’s laws on religious liberty. ANSON P. STOKES, *1 CHURCH AND STATE IN THE UNITED STATES* 439–40 (1st ed. 1950).

<sup>31</sup> See EDWIN SCOTT GAUSTAD, *HISTORICAL ATLAS OF RELIGION IN AMERICA* 13–16, 59–63 (1962) (discussing “Congregationalists” but omitting any mention of Georgia group).

<sup>32</sup> Recent treatment in law reviews has been similarly sparse. Professor Esbeck turns his attention very briefly to Georgia, but does so in a more robust line-up of other states. Esbeck, *Dissent and Disestablishment*, *supra* note 8, at 1495–97. Judge McConnell’s work provides a bit more treatment, but again the context is as a small part of a larger whole. See McConnell, *Free Exercise*, *supra* note 2, at 1489.

regarding the status of religious liberty in the various colonies and states in the eighteenth century.<sup>33</sup>

To accomplish this task, Part I assesses the governing legal documents of eighteenth-century Georgia in chronological order. This analysis reveals an overall pattern in the law of an increasing modicum of religious liberty (although there is a notable but not overriding digression in the brief establishment of the Church of England for eighteen years). Part II then reviews the same time period of eighteenth-century Georgia, but this time uses a comparative theological approach—beginning the chronology anew and recounting the history of the variety of religious groups in early Georgia. This short religious history underscores that a high level (for that time period) of religious pluralism was a fact, and not merely an aspiration, from the earliest years in the colony. And the religious pluralism itself served as an ameliorating feature helping to render “reality milder than the law”<sup>34</sup> with respect to church-state relations. Part III then attempts to take up the task of investigating the “reality” of the intersection of law and religion in early Georgia by briefly describing salient features of the law in action. Finally, the Conclusion offers a few modest and brief remarks regarding the themes adduced by the review of Georgia’s history of religious liberty, and suggests some possible contemporary jurisprudential applications.

## I

### CHURCH-STATE RELATIONS AT LAW IN EIGHTEENTH-CENTURY GEORGIA: A TREND TOWARD INCREASINGLY “MODERN” CONCEPTIONS

The colony of Georgia—as the last of the thirteen colonies—existed a relatively short period of time before the American Revolution. During and after the Revolution, however, the young state of Georgia quickly joined the new Republic and drafted its own constitution—three times over, in fact. A review of the controlling legal documents reveals an early commitment to religious exercise and liberty of conscience in Georgia—with a clear progression toward increasing this religious freedom in both individual and corporate belief and practice, especially in the early days of statehood. This commitment was tempered, however, with mixed feelings at law

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<sup>33</sup> Cf. THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986) (describing status of religious liberty in colonies prior to Revolution).

<sup>34</sup> Hugh Trevor-Roper, *Toleration and Religion after 1688*, in *FROM PERSECUTION TO TOLERATION* 389, 400 (1991).

regarding an established church—and even more conflicted feelings about governmental financial support of religion generally.<sup>35</sup>

### A. Georgia's Colonial Period (1732–1776)

#### 1. Beginnings: A Haven for Dissenting Groups

After years of urging by South Carolinians, the English relented in deciding to establish a series of settlements to the south of South Carolina for protection against the Spanish and the Indians.<sup>36</sup> The Crown eventually acceded to requests to establish a colony—the first since the founding of Pennsylvania some fifty years earlier. Spearheaded by John Lord Viscount Percival and General James Oglethorpe, the initial (and currently still well-known) impetus for settling Georgia in the late 1720's was to provide a haven of relief for debtors languishing in English jails.<sup>37</sup> But by the time the Crown granted the charter in 1732, the underlying goals for colonial establishment had expanded from debt relief to include “all unfortunates, [with the result that] probably not a dozen people who had been in jail for debt ever went to Georgia.”<sup>38</sup> Instead, colonial Georgia quickly became a haven for European groups that had been persecuted because of their religion,<sup>39</sup> including “Lutherans fleeing persecution in

<sup>35</sup> For direct government support of religion, see *infra* Part III.A.

<sup>36</sup> The threats from the Spanish to the south were quite real, as England did not obtain complete legal control of the territory of Georgia until 1763. In the 1500s, the Spaniards, led by Ponce de Leon and Hernando de Soto, ventured into the New World and explored Florida and the southern regions of modern Georgia. Within a few decades, French explorers followed. See E. MERTON COULTER, *GEORGIA: A SHORT HISTORY* 5–6 (1960). These initial explorations, largely thought to be in “Florida,” evidenced both European colonialism and a genuine desire to win converts for Catholicism. The establishment of Jesuit missions in Georgia as early as 1566 supports the latter proposition. Spanish missions along the coastline remained until 1702, when raiding Indians (often supplied and supported by English traders) and pirates finally wore them down. See generally DAVID ARIAS, *SPANISH CROSS IN GEORGIA* (1994) (discussing history of Spanish presence in early Georgia); JOHN TATE LANNING, *THE SPANISH MISSIONS OF GEORGIA* (1935). Although the presence of Catholic missions was thus eliminated, the residual animosity toward these papists remained a steady factor in Georgia's constitutional history.

<sup>37</sup> COULTER, *supra* note 36, at 16. Oglethorpe, Percival, and nineteen other men petitioned the King on July 30, 1730, for a tract of land “on the south-west of Carolina for settling poor persons of London.” *Id.*

<sup>38</sup> *Id.* at 16.

<sup>39</sup> Between 1732 and 1741 the Trustees sent 1810 persons at corporation expense—including many English as well as 800 foreign Protestants, mostly of German, Swiss, or Austrian background, but also some Scots and two Italians. A LIST OF THE EARLY SETTLERS OF GEORGIA X (E. Merton Coulter & Albert B. Saye eds., 1949). And during that same period, another 1021 persons (including Georgia's early Jewish population) emigrated to Georgia at their own expense. *Id.* Although nearly as many left Georgia as entered in the early years, see DAVIS, *supra* note 26, at 31–32, by 1751 the population may firmly be set at 2300 (including 1900 Caucasian inhabitants and 400 inhabitants of African descent). See STRICKLAND, *supra* note 26, at 115. By the time of the American Revolu-

Salzburg, Moravians leaving the protection of Saxony, [and] Scottish Presbyterians escaping political and economic distress . . . .”<sup>40</sup> This religious pluralism (discussed below in Part II) provided the impetus for the explicit guarantees of religious liberty in Georgia’s initial charter.<sup>41</sup>

King George II finally issued a Charter to the Trustees of Georgia on June 9, 1732.<sup>42</sup> The Charter of Georgia explicitly provided for religious liberty for the new colony:

And for the greater ease and encouragement of our loving subjects and such others as shall come to inhabit in our said colony, we do by these presents, for us, our heirs and successors, grant, establish and ordain, that forever hereafter, there shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said province, and that all such persons, except papists, shall have a free exercise of their religion, so they be contented with the quiet and peaceable enjoyment of the same, not giving offence or scandal to the government.<sup>43</sup>

Several items therein bear particular mention. First, the initial charter makes explicit the “liberty of conscience” for *all* persons, including Catholics. Second, “free exercise” of religion is granted to all persons *except* Catholics.<sup>44</sup> Third, while there is no disestablish-

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tion, Georgia’s citizens (of various religious persuasions) numbered about 33,000—which included about 15,000 persons of African descent, as the slave trade had become legal in Georgia in 1750. *See* 38 C.R. GA., *supra* note 1, at 120 (letter of Governor James Wright, Dec. 20, 1773); 3 COLLECTIONS OF THE GEORGIA HISTORICAL SOCIETY 167 (Savannah, Morning News Office 1873).

<sup>40</sup> GAUSTAD, *supra* note 30, at 104.

<sup>41</sup> CHARTER OF GEORGIA (1732), *reprinted in* 2 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 773 (1909) [hereinafter CHARTER].

<sup>42</sup> 2 THORPE, *supra* note 41, at 765. Thorpe notes:

Georgia was included in a proprietary charter granted to the lords proprietors of Carolina in 1662–63, for which a provincial charter was substituted in 1719. The charter of Georgia, as an independent Colony, was granted to a company organized by James Oglethorpe, esq., who desired to provide in the New World homes for indigent persons. This charter was surrendered June 20, 1752, and a provincial government, with a governor and council, was substituted, on the recommendation of the lords commissioners for trade and plantations.

*Id.* at 765.

<sup>43</sup> *Id.* at 773.

<sup>44</sup> Although Catholics were particularly marked for disfavored treatment, it is difficult to weigh how much the rationale was political rather than purely religious. For example, the charter expressed consistent concern with “defence and trade” and the “defence and safety” of the province. And, in fact, part of the reason for establishing the colony was to provide a buffer for South Carolina against Indian attacks and against incursions by the neighboring Spanish and French settlers—who were Catholic. *See supra* note 36. English

ment clause in the charter, neither is there an establishment of the Church of England in Georgia.<sup>45</sup> Fourth, the charter makes no mention at all of the need to spread Christianity through evangelism—a concept that was standard in previous American colonial charters.<sup>46</sup> In fact, the only invocation of the divine in Georgia’s charter is a statement that the success of the colony will depend upon the blessing of God.<sup>47</sup> Fifth, there is an implicit acknowledgement of the religious pluralism that would soon exist in the colony, as the charter makes allowance for the possibility of affirmation in lieu of oath-swearing for the “persons commonly called quakers.”<sup>48</sup>

The concept of conscientious objection to military service is not mentioned in the charter, because one of the founding purposes of the colony was to provide a defensive buffer for South Carolina against the Spanish and French, and therefore military endeavors were important to the fledgling colony. Colonial officials had to call upon all inhabitants to take up arms against potential invaders. This compulsory military service—and lack of a conscientious objector provision—eventually led the pietist Moravians to move out of the colony in the early years.<sup>49</sup>

Finally, the text of the charter is truly only the starting point for religious liberty in Georgia, inasmuch as it provides that “said corporation assembled for that purpose, shall and may form and prepare, laws, statutes and ordinances, fit and necessary for and concerning the government of the said colony, and not repugnant to the laws and statutes of England.”<sup>50</sup> A plausible reading of this clause is that dissenters were required to have at least the minimum level of religious liberty accorded non-Anglicans in England at the time—and presumably could be granted additional liberties regarding the practice of

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concerns about the Spanish and French, expressed through this misnamed fear of “papists,” did not prove to be wholly groundless, as the only instance of capture of a spy for the Spanish involved an individual who, upon interrogation, admitted his Catholicism. See *infra* note 335 and accompanying text.

<sup>45</sup> This stems from the fact that Georgia was initially a private grant rather than a royal colony. The Trustees intentionally chose *not* to have an established religion from the beginning. See *infra* note 74 and accompanying text.

<sup>46</sup> See, e.g., 7 THORPE, *supra* note 41, at 3784 (1606 charter of Virginia, advocating “propagating of *Christian Religion*” as founding purpose).

<sup>47</sup> CHARTER, *supra* note 41, at 772 (“And forasmuch as the good and prosperous success of the said colony cannot but chiefly depend, next under the blessing of God, and the support of our royal authority, upon the providence and good direction of the whole enterprise . . .”).

<sup>48</sup> *Id.* at 774.

<sup>49</sup> STRICKLAND, *supra* note 26, at 76–79; see 4 C.R. GA., *supra* note 1, at 22–23; 21 C.R. GA., *supra* note 1, at 364–65, 404–05, 503–05; DAVIS, *supra* note 26, at 18; *infra* note 266 and accompanying text.

<sup>50</sup> CHARTER, *supra* note 41, at 772.

their faith, so long as those did not directly contravene the laws of England. Consonant with this understanding, the founders operated against a background of English laws respecting religious liberty. While a full exposition of that background is beyond the scope here, a brief review of salient features may be useful.

In England, the Church of England was established by law as the official state religion after a famous feud between King Henry VIII and the Catholic Church—over what began as a refusal by the Pope to annul Henry's marriage to Catherine of Aragon and eventually escalated into a severance of the Church of England from the Catholic Church.<sup>51</sup> This resulted in, among other things, the Supremacy Act of 1534, in which Henry was declared the titular head in England of both state *and* church (displacing the Pope as spiritual leader).<sup>52</sup> After a brief interlude and repeal by the Catholic Queen Mary I, the act was reinstated during the reign of Henry's daughter, Queen Elizabeth I, as the Act of Supremacy (1559).<sup>53</sup> In recognition of the leadership of the monarch—and as an intentional impediment to those who wished to remain Catholic—the state required all persons seeking public or church office (and later members of Parliament and persons seeking to attend university) to swear allegiance to the monarch as the supreme religious authority.<sup>54</sup> In 1661, the Corporation Act placed an additional requirement (on top of swearing the Oath of Supremacy) on all persons who sought to be members of corporations: They must take communion in the Church of England within one year of their

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<sup>51</sup> ROLAND H. BAINTON, *THE REFORMATION OF THE SIXTEENTH CENTURY, 185–91* (1952).

<sup>52</sup> 1534, 26 Hen. 8, c. 1. See BAINTON, *supra* note 51, at 191.

<sup>53</sup> 1559, 1 Eliz., c. 1.

<sup>54</sup> The Oath of Supremacy read:

I, A. B., do utterly testify and declare in my Conscience that the Queen's Highness is the only Supreme Governor of this Realm, and of all other her Highness Dominions and Countries, as well in all Spiritual or Ecclesiastical Things or Causes, as Temporal; and that no foreign Prince, Person, Prelate, State or Potentate hath or ought to have any Jurisdiction, Power, Superiority, Preheminence, or Authority Ecclesiastical or Spiritual, within this Realm; and therefore I do utterly renounce and forsake all foreign Jurisdctions, Powers, Superiorities, and Authorities, and do promise, that from henceforth I shall bear Faith and true Allegiance to the Queen's Highness, her Heirs and lawful Successors, and to my Power shall assist and defend all Jurisdctions, Preheminences, Privileges and Authorities granted or belonging to the Queen's Highness, her Heirs and Successors, or united and annexed to the Imperial Crown of this Realm. So help me God, and by the Contents of this Book.

*Id.* § 19. It was plainly an insuperable obstacle for Catholics to forswear their allegiance to any foreign jurisdiction or power if they considered the Pope to hold ultimate sway over matters of faith.

election.<sup>55</sup> The effect of that act was to bar all but Anglicans from holding local political office. Finally, in 1673 Parliament passed the Test Act, which incorporated the earlier provisions (although shortening the time to receive the sacrament to within three months) and added yet one more hurdle for persons seeking to hold civil or military office:<sup>56</sup> They would have to take the Oath against Transubstantiation.<sup>57</sup> (Because Catholics firmly believed in transubstantiation, while Anglicans rejected it in favor of a theology that Christ was only symbolically present in the elements, the Test Act filtered out Catholics but not Anglicans.)<sup>58</sup> Persons refusing these oaths were not allowed to hold office as guardians or administrators of estates, nor were they allowed to make legacies or deed of gift or sue in courts of equity.<sup>59</sup>

James II, the first openly Catholic monarch in nearly 150 years, ascended to the throne in 1685 but wore out his welcome in a very few short years.<sup>60</sup> In 1689 William and Mary ascended to the throne in the Glorious Revolution—which came about for a variety of political and religious motivations.<sup>61</sup> Significant for our present purposes is that in 1689 Parliament passed the Toleration Act<sup>62</sup>—which was a way to secure support of dissenting Protestants for the events of the day while trying to retain the support of the dominant Anglican Church.<sup>63</sup>

<sup>55</sup> 1661, 13 Car. 2, c. 1.

<sup>56</sup> See LUIGI STURZO, *CHURCH AND STATE* 282 (1962).

<sup>57</sup> 1651, 25 Car. 2, c. 2. The act itself was titled “An act for preventing dangers which may happen from popish recusants.” The oath reads: “I, A.B., do declare, That I do believe that there is not any transubstantiation in the sacrament of the Lord’s Supper, or in the elements of the bread and wine, at or after the consecration thereof by any person whatsoever.” *Id.* § 9. Transubstantiation is the theological belief that the body and blood of Christ are actually (and not just symbolically) present in the elements of the Eucharist.

<sup>58</sup> See Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1064 (1996) (noting that Test Act prevented non-Anglicans from serving in public office, while separate policy imprisoned many Quakers for non-conforming worship assemblies).

<sup>59</sup> 1651, 25 Car. 2, c. 2. *But see* STRICKLAND, *supra* note 26, at 23 (“[M]any dissenters were willing to and did take these tests in order to hold office, and eventually the law was not enforced against them, although it continued to bar Catholics from office.”).

<sup>60</sup> See Laycock, *supra* note 58, at 1064–65.

<sup>61</sup> See Laura Zwicker, *The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined*, 66 IND. L.J. 773, 775 (1991) (“The Glorious Revolution was spun from a web of political and religious motives, and these motives are difficult to separate from the religious claims and reasons which were often used to cover political and economic goals.”); *see generally* GEORGE CLARK, *THE LATER STUARTS 1660–1714*, at 130–43 (2d ed. 1965) (describing William’s political and military tactics in deposing James).

<sup>62</sup> 1688, 1 W. & M., c. 18 (“An act for exempting their Majesties protestant subjects, differing from the church of England, from the penalties of certain laws.”).

<sup>63</sup> See Trevor-Roper, *supra* note 34, at 390–91 (stating that limited toleration embodied in Act was “the most that the patrons of Dissent could obtain, [and] the most that the champions of the Established Church would concede”).

The Act of Toleration suspended the penalties of certain laws regarding freedom of worship against Protestant dissenters, but only if the dissenters took oaths subscribing to most of the doctrinal formulations of the Church of England and assented to certification by a local Anglican cleric.<sup>64</sup> The Act of Toleration did not remove the obligations of the Test and Corporation Acts—and so those benefiting from the laws granting leniency on worship were still unable to hold political or municipal office or some status within universities.<sup>65</sup> And Catholics<sup>66</sup> and any others who denied the doctrine of the Trinity (such as Unitarians and Socinians) were denied the benefits of the Act of Toleration entirely.<sup>67</sup> (It appears, however, that the emphasis on the Trinitarian declaration was relaxed in the case of Jews in England.<sup>68</sup>)

Foreign-born Protestants were still considered suspect after the Toleration Act (largely for political reasons) and were prohibited from serving in Parliament, from holding office, or from receiving land from the Crown.<sup>69</sup> But the naturalization laws of England did not apply to the colonies until a 1740 statute; until that time each colony made what laws it liked.<sup>70</sup> This led to the granting of the full rights of Englishmen to some foreign Protestants in Georgia, including the Salzburgers. By the Act of 1740, all aliens who had resided in a British colony in America for seven years (without an absence of more than two months at one time) were to be considered natural-born citizens. All were required to take the usual oaths and, with the exception of Jews and Quakers, were required to receive the sacrament in a Protestant or Reformed congregation within three months. Although Jews were allowed to omit the words “on the true faith of a Christian” from the oaths, Catholics were still excluded from even this leniency.<sup>71</sup>

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<sup>64</sup> 1688, 1 W. & M., c. 18.

<sup>65</sup> Trevor-Roper, *supra* note 34, at 391.

<sup>66</sup> Strickland particularly emphasizes the disabilities imposed upon Catholics after the Act. STRICKLAND, *supra* note 26, at 24–25 (and sources cited therein).

<sup>67</sup> *Id.*; HENRY KAMEN, *THE RISE OF TOLERATION* 211 (1967) (commenting that Catholics and Unitarians “received no benefit whatsoever” from Act); STURZO, *supra* note 56, at 287 (“By this Act, they were allowed the public practice of their form of religion; Presbyterians, Independents, Baptists and Quakers benefited by it, while Unitarians or Socinians and ‘Papists’ were excepted.”); Laycock, *supra* note 58, at 1065 (noting that Trinitarian requirement was aimed at Unitarians).

<sup>68</sup> Laycock, *supra* note 58, at 1065–66 (and sources cited therein).

<sup>69</sup> 2 HERBERT L. OSGOOD, *THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY* 524 (1924).

<sup>70</sup> 1740, 13 Geo. 2, c. 7 (“An Act for naturalizing such foreign Protestants, and others therein mentioned, as are settled, or shall settle, in any of his Majesty’s Colonies in America.”); see OSGOOD, *supra* note 69, at 523–29.

<sup>71</sup> OSGOOD, *supra* note 69, at 529.

It was against this background of Georgia's Charter and this historical background of England that the colony of Georgia arose. Given this background, the relative toleration for dissenters in Georgia over the ensuing years is quite remarkable, while the early restrictions on and exclusion of Catholics is rather unremarkable—for "America . . . also inherited England's fear of Catholicism."<sup>72</sup> And it was against this background that the colony began to expand the range and meaning of religious liberty for its own inhabitants.

## 2. *Royal Colony Status: Retaining "Space" for Dissenters*

During its birth and early years as a proprietary colony, the Trustees were largely in control of matters of church-state relations in Georgia. As described above, they exercised a degree of liberality (including a high level of toleration accompanied by non-establishment) for the early years. But it was not clear what would happen at the end of the twenty-one year proprietary period, when the colony was supposed to revert to the Crown.<sup>73</sup> The answer would come even sooner, as the Trustees found themselves in financial straits and decided to turn the colony over to royal control sooner than required. They bargained with the Crown to ensure the integrity of the colony as an independent province (that is, separate from South Carolina) and made arrangements for immediate surrender of the governance and other rights under the initial charter.<sup>74</sup> On April 29, 1752, the Trustees surrendered their trusts to the King, paid their final bills, cleared their accounts, and handed over the governance of Georgia to the King.<sup>75</sup> This marked the transition to the beginning of the royal period, which would hold an increased amount of self-governance for the colonists. But whereas the Trustees had been openly solicitous and supportive of a plurality of religions, the Crown and its supporters would soon show clear favoritism toward the Church of England.

On June 25, 1752, the King decreed that all officers in Georgia who were "duly and lawfully possessed of or invested in any office or trust ecclesiastical, civil or military" should remain in that office until further decree.<sup>76</sup> This meant that the government remained basically unchanged until October 1754, when the president and his assistants

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<sup>72</sup> Laycock, *supra* note 58, at 1067.

<sup>73</sup> The official date was to be June 9, 1753.

<sup>74</sup> 2 C.R. GA., *supra* note 1, at 521–22.

<sup>75</sup> *Id.* at 523–25.

<sup>76</sup> TRANSFER OF THE GOVERNMENT OF GEORGIA FROM A PRESIDENT AND ASSISTANTS TO A ROYAL GOVERNOR AND COUNCIL, OCTOBER 13, 1754, *reprinted in* 3 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1835, 1839 (W. Keith Kavenagh ed., 1973) [hereinafter TRANSFER OF THE GOVERNMENT].

received a commission from the King to transfer power to a royal governor and a council.<sup>77</sup> This transfer of power was almost purely governmental and scarcely touched matters of religion. It is important to note, though, that not all of the members of the new Royal Council in 1754 (appointed by the King) were Anglicans.<sup>78</sup>

All those sworn in took “all the state oaths appointed by law and declared and subscribed the test.”<sup>79</sup> The oaths included allegiance to the King, and likely to England and to the Church of England—even though no mention of the Church is specifically listed in the document. The “test” given was against transubstantiation, thus excluding Catholics from office.<sup>80</sup> Other than the oaths, ending in “so help me God,”<sup>81</sup> and a perfunctory “God save the King” at the conclusion of the document, it is devoid of any mention of religion. Underscoring the primacy of military and strategic concerns for the new government, the councilors swore to “defend this province from all foreign invasions and intestine insurrections.”<sup>82</sup>

The royal governors were ordered “to permit a Liberty of Conscience to all Persons (except Papists) so they be contented with a quiet & peaceable Enjoyment of the same, not giving offence or

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<sup>77</sup> The structure of the royal government is set forth in a prefatory note in the Colonial Records as follows:

The Commons House of Assembly . . . was elected by the qualified voters of the province. The Upper House was composed of counselors appointed by the crown. This House was made to conform as nearly as possible to the British House of Lords. No bill could originate in the Upper House. They had power, after the Lower House had inaugurated measures, to review them and to suggest such amendments as in their judgment would improve the proposed laws, but they could not amend a bill at all. All they could do was suggest. Thus the two Houses of the Legislature were constituted, and when a bill had met the approval of both Houses it was transmitted to the Governor, who represented the King, for his approval or disapproval. If he approved the measure, it was put into effect at once; if he vetoed it, that was the end of it; but even after the Governor had approved a bill and it had been put into effect, it was sent to London to be passed upon by the King and his Council there. If approved by the King and Council, it stood as a permanent law.

18 C.R. GA., *supra* note 1, at 4. Strickland further details the functioning of government:

The Commons House of Assembly was elected by the people who owned fifty acres of land. Members must own five hundred acres. The Council appointed by the King served not only as a sort of cabinet for the governor, which controlled the granting of land, but also as the Upper House of Assembly and served with the governor as a court of appeals.

STRICKLAND, *supra* note 26, at 102.

<sup>78</sup> See 7 C.R. GA., *supra* note 1, at 183 (listing Bryan as one of proposed Trustees for dissenting church in Savannah in 1755); TRANSFER OF THE GOVERNMENT, *supra* note 76, at 1836 (Jonathan Bryan named among members of royal Council swearing an oath).

<sup>79</sup> TRANSFER OF THE GOVERNMENT, *supra* note 76, at 1838.

<sup>80</sup> See *supra* notes 57–58 and accompanying text.

<sup>81</sup> TRANSFER OF THE GOVERNMENT, *supra* note 76, at 1835–40.

<sup>82</sup> *Id.* at 1838.

Scandal to the Government.”<sup>83</sup> This was seemingly a regression in religious liberty, for while the initial charter had denied Catholics the “free exercise” of their religion, it had allowed the liberty of conscience to all. Under this new royal instruction, Catholics were not even permitted to live in the colony. Despite this harsh instruction, however, there is some evidence that the instruction was not strictly enforced.<sup>84</sup>

The British government also enacted other restrictions touching upon religion. Like colonial officials in the other colonies, the governor, members of the Council, members of the Commons House of Assembly, and all other colonial officials in Georgia were to take the oaths included in an act for securing the Protestant succession passed at George I’s accession.<sup>85</sup> They were also to subscribe to the declaration against transubstantiation of the Test Act of 1763.<sup>86</sup> This meant, in effect, that no Catholic could vote for members of, nor be a member of, the Assembly. A 1761 Georgia law that regulated elections, however, did not impose a denominational requirement for voting or office-holding, but it did require that naturalized candidates be Christians.<sup>87</sup> This seemed to be a looser requirement of religious adherence than that spelled out in the gubernatorial instructions. But it appears that those instructions governed, for subsequent elected officials “took the Oaths and made and subscribed the declaration and took and subscribed the Oath of Abjuration, and proved themselves” as representatives.<sup>88</sup>

Nonetheless, Georgia’s policies were much more lax than her eighteenth-century neighbors: South Carolina limited suffrage to white Christians in 1716 and to Protestants only in 1759; North Carolina specifically required by colonial law that elected officials were to take all oaths required of members of Parliament; and

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<sup>83</sup> See, e.g., 34 C.R. GA., *supra* note 1, at 66, 295.

<sup>84</sup> See *infra* note 344 (describing estate of Lucretia Triboudite).

<sup>85</sup> 1714, 1 Geo. 2, c. 13 (“An Act for the further Security of his Majesty’s Person and Government, and the Succession of the Crown in the Heirs of the late Princess Sophia, being Protestants; and for extinguishing the Hopes of the pretended Prince of Wales, and his open and secret Abettors.”).

<sup>86</sup> See 34 C.R. GA., *supra* note 1, at 3, 25, 393, 424; see also ROYAL INSTRUCTIONS TO THE BRITISH COLONIAL GOVERNORS, 1670–1776, at 33–45 (Leonard Woods Labaree ed., 1935) (describing oaths of colonial royal governors more generally).

<sup>87</sup> 18 C.R. GA., *supra* note 1, at 464–72 (“AN ACT to ascertain the manner and form of electing Members to represent the Inhabitants of this Province in the Commons House of Assembly” passed on June 9, 1761 required oath from prospective members and voters regarding their qualifications arising from land-holding status but not involving their religious beliefs).

<sup>88</sup> 14 C.R. GA., *supra* note 1, at 139, 590 (oaths taken in 1764 and 1768); 15 C.R. GA., *supra* note 1, at 7, 335–36 (oaths taken in 1769 and 1772).

Maryland, founded as a refuge for Catholics, demanded oaths and the declaration against transubstantiation in 1716 and denied suffrage altogether to Catholics in 1718.<sup>89</sup>

It appears that the only dissenters (other than Catholics) who suffered in political life in Georgia were those opposed to oath-taking. This was not such a substantial burden on the population that it kept all dissenters from serving; indeed, upwards of one-third of the Assembly in 1773 were dissenters.<sup>90</sup> Dissenters in the Council apparently met these requirements without taking exception.<sup>91</sup> And in 1756, the Georgia legislature tried further to liberalize its policies regarding oaths by relieving dissenting Protestants of the necessity of taking an oath, instead allowing for swearing without taking an “oath on the Holy Evangelists,” when serving on juries or giving evidence in cases at law.<sup>92</sup> However, this attempt was overturned by the Privy Council in 1759 because dissenters in England did not enjoy a similar exemption from oaths.<sup>93</sup>

### 3. A “Soft” Establishment of the Church of England

The formal establishment of the Anglican Church in Georgia came about through a slow and sporadic process, marked at the end by approval by a seeming majority of dissenters. While the full reasons for the establishment are unclear, it appears that the dissenters were comfortable that their rights would remain intact even under an Anglican establishment. There seems to have been a further feeling that any establishment would be weak, in that enforcement of the dictates of the Anglican church (and payments to support the same) would be lax. Indeed, considering that only two of eight (and later

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<sup>89</sup> STRICKLAND, *supra* note 26, at 121 (and sources cited therein). Strickland interprets this to mean that the people of Georgia were probably not any more tolerant than their neighbors even though they passed no additional discriminatory laws, but rather believed the governor’s instructions were sufficient to deal with religious regulation of suffrage and officials. *Id.* It is quite feasible to interpret this differently, though, in light of the legal and religious history presented in this Article. It seems likely that Georgians *were* overall more tolerant of religious diversity because of their colonial experience of shared life together. To be sure, the exclusion of Catholics was still restrictive, but was due in part to legitimate safety and border concerns regarding the French and Spanish (until after the French and Indian War). *See infra* note 335 and accompanying text.

<sup>90</sup> *See* Letter of Rev. John J. Zubly, of Savannah, Ga. (July 11, 1773), in 8 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 214, 216 (1865) [hereinafter Zubly Letter].

<sup>91</sup> *See, e.g.,* 7 C.R. GA., *supra* note 1, at 12–13; 15 C.R. GA., *supra* note 1, 335–36.

<sup>92</sup> 18 C.R. GA., *supra* note 1, 158–59; 16 C.R. GA., *supra* note 1, 111, 126.

<sup>93</sup> 4 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES 407–08 (William L. Grant & James Munro eds., 1908–12).

twelve) Anglican parishes were even supplied with ministers, these early presuppositions proved to be true.<sup>94</sup>

The first bill seeking to establish the Church of England was presented to the new legislative body in February 1755.<sup>95</sup> The bill, which proposed to divide the province into parishes, was passed by the Assembly,<sup>96</sup> but the text of the bill apparently has not survived. After passage by the Assembly, the bill was sent to the Council (a body appointed by the King). For unknown reasons, “the Council failed to approve the bill,” despite the urgings of Rev. Bartholomew Zouberbuhler, the Anglican rector of Savannah.<sup>97</sup> One historian reports that one of the ten members of the Council was a dissenter and at least one was an Anglican with a high level of tolerance for dissenters, possibly gained through his acquaintance with Rev. George Whitefield.<sup>98</sup> She surmises that the Council members were likely anxious for the future well-being and growth of the colony and did not want to pass a law changing Georgia’s heretofore liberal policies regarding the reception of dissenters from Europe, which had boded well for its prosperity and growth.<sup>99</sup>

Two years later, in February 1757, the Assembly again passed a “Bill for the Establishment of Religious Worship in this Province according to the Church of England and for Erecting of Churches for the Publick Worship of God.”<sup>100</sup> Again, the text of this bill has not survived. And again, the Council allowed its session to end without passing the bill.<sup>101</sup>

Nevertheless, the Assembly tried once more the following year. Led by Joseph Ottolenghe, Edward Barnard, and Henry Yonge—all Anglicans—the Assembly succeeded in overcoming the opposition of two prominent dissenting groups and passing a bill to which the Council finally agreed.<sup>102</sup> The pastor of the Salzburger (German

<sup>94</sup> See *infra* notes 115–17 and accompanying text.

<sup>95</sup> 13 C.R. GA., *supra* note 1, at 55, 60–64.

<sup>96</sup> *Id.* at 66.

<sup>97</sup> See 16 C.R. GA., *supra* note 1, at 55, 62, 65 (recording multiple readings of bill and its eventual non-adoption).

<sup>98</sup> George Whitefield was the foremost preacher of his day, “the catalyst par excellence of religious passions in mid-eighteenth-century America.” His preaching and revivals formed the basis for the Great Awakening on the early American seaboard. A DOCUMENTARY HISTORY OF RELIGION IN AMERICA TO 1877, at 160 (Edwin S. Gaustad & Mark A. Noll eds., 3d ed. 2003); see also *infra* Part III.E (discussing Whitefield’s establishment of college and his prominence generally).

<sup>99</sup> STRICKLAND, *supra* note 26, at 103.

<sup>100</sup> 13 C.R. GA., *supra* note 1, at 156–57, 159.

<sup>101</sup> See *id.*; 16 C.R. GA., *supra* note 1, at 180–81 (recording House’s hearing and postponed consideration of bill).

<sup>102</sup> 13 C.R. GA., *supra* note 1, at 248, 260–61, 265–66, 270, 274, 277–78, 291–95, 298, 305; 16 C.R. GA., *supra* note 1, at 266–68, 272–73, 277–79, 282–84, 287–88, 297; see also

Lutheran) community, Johann Martin Bolzcius, directed a long protest to the Assembly against the bill. He urged them:

[R]emember, that the Province of Georgia was intended by His Majesty for an Asylum for all sorts of Protestants to enjoy full Liberty of Conscience Preferable [sic] to any other American Colonies in order to Invite Numbers of Oppressed or persecuted People to Strengthen this Barrier Colony by their coming over . . . .<sup>103</sup>

Bolzcius reminded the Assembly that the Trustees had initially promised the Salzburger community that it would enjoy all the privileges of public worship agreeable to the Confession of Augsburg, and would not be charged taxes except for rent.<sup>104</sup> He then asserted that this proposed bill would deter future countrymen from settling there, and insinuated that the bill should at least be altered to exclude his fellow Salzburgers from the parish system even if all other inhabitants had to abide by it.<sup>105</sup> Other than these German Lutherans, the Congregationalist community at Midway also vocally opposed the law.<sup>106</sup> A prominent group of Presbyterians in Savannah would likely also have opposed the measure, but they did not have effective leadership until the arrival of John J. Zubly some two years later in 1760.<sup>107</sup> The overall debate was quite rancorous, and Ottolenghe states that the opposition contended “that an Established Church is destructive to the Constitution, & the providing for the poor, highly hurtful to Society.”<sup>108</sup> Nevertheless, the bill passed the Lower House within fourteen days of its introduction.<sup>109</sup>

When the bill went to the Council—which was composed of all but two dissenters—it stalled before finally receiving numerous

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Unsigned Letter in Favor of Ottolenghe, Without Date, Read in Committee (Jan. 15, 1759) [hereinafter Ottolenghe Letter], in SPG ARCHIVES, SERIES C, AM.8, #1 (MISC. DOCS. GA., 1758–84), microformed on SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN FOREIGN PARTS, AMERICAN MATERIAL IN THE ARCHIVES OF THE UNITED SOCIETY FOR THE PROPAGATION OF THE GOSPEL (Micro Methods, 1964), at Reel C2 [hereinafter SPG AMERICAN MATERIAL] (discussing process of bill’s passage). This letter quotes extensively (8 of 9 pages) from a letter to the author from Ottolenghe. Ottolenghe’s letter omits mention of the other three members from the Assembly—DeVeaux, Ewen, and Elliott—involved in passing the bill, according to the account in the Colonial Records. *Id.*

<sup>103</sup> 13 C.R. GA., *supra* note 1, at 257–58.

<sup>104</sup> *Id.* at 258.

<sup>105</sup> *Id.* at 258–59. For more on the Salzburgers’ experience in Georgia, see JONES, *supra* note 26. See also *infra* notes 252–61, 380–94 and accompanying text.

<sup>106</sup> Ottolenghe Letter, *supra* note 102, at 2. For more on the Midway community, see *infra* notes 292–302 and accompanying text.

<sup>107</sup> See generally Joel A. Nichols, *A Man True to His Principles: John Joachim Zubly and Calvinism*, 43 J. CHURCH & ST. 297 (2001) (analyzing relationship between Zubly’s theological and political convictions).

<sup>108</sup> Ottolenghe Letter, *supra* note 102, at 3.

<sup>109</sup> *Id.*

amendments. The most significant amendment was the striking of the words “Church of England” and seeking instead “to establish the Worship of God in the Province of Georgia.”<sup>110</sup> Ottolenghe feared that such a rendering of the bill would establish “every whimsical Sectary in Georgia.”<sup>111</sup> The Assembly was quite displeased and met in conference with the Council. Led by Ottolenghe and two dissenters (whom Ottolenghe had wisely appointed, because they were to serve the interests of the Assembly rather than their own interests), the Assembly prevailed in passing an amended version of the law and the Church of England was established in Georgia.<sup>112</sup>

The final law was titled:

An Act for constituting and dividing the several Districts and Divisions of this Province into Parishes, and for establishing of Religious Worship therein according to the Rites and Ceremonies of the Church of England; and also for empowering the Church Wardens and Vestrymen of the Respective Parishes to assess Rates for the Repair of Churches, the Relief of the Poor, and other Parochial Services.<sup>113</sup>

Strikingly, though, the law omits any mention that the Church of England was “established” or the “official religion” of the colony. In fact, the phrase “Church of England” is mentioned only twice in the entire bill—once in the title and once in the preamble.<sup>114</sup> On this

<sup>110</sup> *Id.* at 4. For example, the title of the bill was to be changed from “an Act for establishing religious Worship in the Province of Georgia, according to the Church of England, and for erecting Parishes, and for repairing the Churches of Savannah and Augusta” to “an Act for constituting and dividing the several Districts and Divisions of the Province into Parishes and for empowering the Church Wardens and Vestry Men of the respective Parishes to assess Rates for the Repair of Churches the Relief of the Poor and other parochial Services.” 16 C.R. GA., *supra* note 1, at 279. The Council again altered the title after it came out of conference committee, emphasizing the division of the colony into parishes and the duties of the church wardens and vestrymen rather than focusing on the establishment of worship according to the Church of England. *Id.* at 288.

<sup>111</sup> 16 C.R. GA., *supra* note 1, at 288.

<sup>112</sup> Ottolenghe Letter, *supra* note 102, at 4–5. The Colonial Records say that the Assembly portion of the conference committee consisted of six members and not three (contrary to the report of Ottolenghe’s letter). The Records list Ottolenghe, DeVeaux, Yonge, Milledge, Jones, and Francis [sic]. 13 C.R. GA., *supra* note 1, at 294; *cf.* Ottolenghe Letter, *supra* note 102, at 4–5. The Records name “Knox” as the only member of the Council who was a conference member. 16 C.R. GA., *supra* note 1, at 287.

<sup>113</sup> 18 C.R. GA., *supra* note 1, at 258–72, *reprinted in* 3 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 2308 (W. Keith Kavenagh ed., 1973) [hereinafter 1758 Act].

<sup>114</sup> The preamble claims:

Whereas nothing can have a greater tendency to promote the honor of God, the propagation of the true christian religion, and the spiritual welfare of your Majesty’s subjects inhabiting this province than the regular performance of divine service according to the rites and ceremonies of the Church of England,

count, then, it appears that the Council won a small (arguably hollow) victory.

The law itself divided Georgia into eight parishes, of which only two had existing churches.<sup>115</sup> Of these two, Bartholomew Zouberbuhler, the Anglican minister of Savannah, was named rector of Christ Church parish in Savannah.<sup>116</sup> The town of Augusta, in the parish of Saint Paul, had an existing church, but the law did not name a rector for it. And while the other six parishes had neither churches nor rectors, the act provided a method for their future establishment.<sup>117</sup> (In reality, they would remain without official churches or rectors throughout Georgia's remaining colonial years.) The ministers/rectors were authorized to sue and be sued in the church's name in the courts, were endowed with the cure of souls in their parish, and were given possession of all the church property in the parish—including church, cemetery, glebe lands,<sup>118</sup> and any other church lands.<sup>119</sup> The law made no provision regarding the selection of ministers.

The 1758 law not only discussed rectors, but also established a system for election of church wardens and vestrymen. These persons were to “tak[e] care of the several churches already built and those that shall hereafter be built and [shall] transact[ ] the business of the respective parishes and the well-ordering and good government thereof . . . .”<sup>120</sup> Curiously, the law did not stipulate that only Anglicans could vote for vestrymen and church wardens, nor even that only Anglicans could be elected vestrymen. Instead, all freeholders or taxpayers in the parish were entitled to vote, and the only requirement for serving as a vestryman or church warden was to be an inhabitant of the parish (and a freeholder, in the case of church wardens).<sup>121</sup> A person elected church warden had to pay a penalty of forty shillings if he failed to serve, but no person could be forced to serve more than once every five years (or seven years, in Christ Church parish).<sup>122</sup>

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on Sundays and other days in the several districts thereof, by ministers duly authorized and appointed thereto . . . .

1758 Act, *supra* note 113, at 2308.

<sup>115</sup> A later law created four additional parishes, but failed to provide ministers for those additional parishes. *See infra* note 237 and accompanying text.

<sup>116</sup> 1758 Act, *supra* note 113, at 2309.

<sup>117</sup> *Id.* at 2309–10.

<sup>118</sup> *See supra* note 4 (defining glebe lands).

<sup>119</sup> 1758 Act, *supra* note 113, at 2309.

<sup>120</sup> *Id.* at 2311.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2311–12.

The rector, church wardens, and vestrymen were empowered to raise money in their parishes—provided it not exceed thirty pounds total in Christ Church parish or St. Paul’s parish, and provided it not exceed ten pounds in the other parishes.<sup>123</sup> Such money was to be raised “by an equal tax . . . on the estate, real and personal, of all and every the [sic] inhabitants, owners, and occupiers of lands, tenements, and hereditaments within each parish, respectively.”<sup>124</sup> The purpose of raising this money was important, as it covered not just church expenses, but also the well-being of the community. The money was “for repairing of the several churches . . . and also for providing bread and wine for the Holy Eucharist, the payment of the salaries to the clerk and sexton, and the making provision for imputent poor persons of the several parishes respectively.”<sup>125</sup> The rector, church wardens, and vestrymen were also empowered to appoint and set the salaries of a sexton and clerk, who would carry out the work of the parish. This work included the typical duties of a sexton (upkeep of church property, grave-digging, ringing of church bells) and the duties of the clerk—to register “the times of the births, christenings, marriages, and burials of all and every person or persons . . . within the said parish.”<sup>126</sup> Penalties were to be levied against all persons who failed to register properly with the clerk.

Finally, an important limitation on church and ministerial power was written into the bill, probably to assuage the fears of dissenters. Ministers and rectors were forbidden to exercise “any ecclesiastical law or jurisdiction whatsoever.”<sup>127</sup> This was an important jurisdictional separation for non-Anglicans, who feared the presence and power of church courts that continued to operate in England and other English colonies within America.

Viewed as a whole, the text of the 1758 law seems to be a very “soft” establishment.<sup>128</sup> The bill was probably favored by the dis-

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<sup>123</sup> *Id.* at 2312.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 2313.

<sup>127</sup> *Id.* at 2314.

<sup>128</sup> This is true despite the contemporaneous claims to the contrary by Joseph Ottolenghe. His letter, when read in context, reveals an obvious tilt toward the vantage point of the author and toward ascribing a great role to him. The context of the letter is that Ottolenghe is seeking (through this anonymous friend writing to the Archbishop of Canterbury) to have his salary reinstated. It had been taken away because he had not been reporting to England via letter; he claims that he faithfully sent letters (at least once a year) but ships out of Georgia were too infrequent or were captured by enemy ships. Thus, he likely overplays his own importance in the passage of the 1758 bill and in education of “negroes” in the area, which was his commission. Understandably, he emphasizes the establishment aspects of this bill without giving much credence to why the dissenters would

senters more as a method of social welfare for the poor, a method of civil governance, and a general support of religion than as an establishment of the Church of England. This explanation is supported by the dissenters' minor victory in having "Church of England" stricken from most of the bill, and by the fact that it appears that only the inhabitants of Christ Church parish were ever subject to the special taxes permitted under the 1758 law.<sup>129</sup> Remarkably, the law did not interfere with dissenting congregations and did not provide for ecclesiastical courts or jurisdictions.

It is important to note, however, that part of the general tax dollars of Georgians did go to support Anglican ministers after the 1758 law. The ministers' income came from individual land grants, glebes, appropriations by Parliament, the Society for the Propagation of the Gospel in Foreign Parts (SPG)<sup>130</sup> and the provincial legislature. Ironically, most of the ministerial salary paid by the colonists came from taxes on alcohol, according to an act of the provincial legislature.<sup>131</sup>

The lack of religious requirements on vestrymen and church wardens in the 1758 law was a clear victory for dissenters. Historical records, though scarce, seem to indicate that at least some non-Anglicans were elected vestryman and church wardens due to the lack of religious qualifications in the law. For example, James Edward Powell and Archibald Bulloch were apparently dissenters who served as church wardens or vestrymen in Savannah, in Christ Church parish.<sup>132</sup> Also, the Presbyterian John Rae was a vestryman of St. Paul's parish in Augusta.<sup>133</sup> And the Salzburgers apparently gained

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have allowed it. Ottolenghe Letter, *supra* note 102, at 1. Thus, it seems reliable historically more for an account of the facts of the bill's passage than for its motivations.

<sup>129</sup> See, e.g., GA. GAZETTE, Apr. 28, 1763; May 3, 1764; Apr. 25, 1765; Apr. 29, May 6, May 13, 1767; Apr. 27, 1768 (giving notice of tax collection and rates).

In 1763 three pence was levied on every slave, three pence on every hundred acres of land, six pence on every hundred pounds at interest or stock-in-trade, and one-eighth of the general tax paid on the value of town lots in Savannah.

The rates were increased in the following years and an additional tax of two shillings six pence on every free Negro, mulatto or mustee was added.

STRICKLAND, *supra* note 26, at 110.

<sup>130</sup> The Society for the Propagation of the Gospel in Foreign Parts (SPG) was a missionary society founded in England in 1701. "The chief purpose of the Society was to bring Christianity to those who did not already have it: Indians, blacks, unchurched colonists, etc." Gaustad & Noll, *supra* note 98, at 106. But the SPG did not limit its mission efforts to the unchurched; it also sent missionaries to New England, among other places. *Id.*

<sup>131</sup> STRICKLAND, *supra* note 26, at 112–13 and sources cited therein.

<sup>132</sup> 7 C.R. GA., *supra* note 1, at 183 (mentioning Powell as a Scottish Presbyterian); STRICKLAND, *supra* note 26, at 110.

<sup>133</sup> See Letter from Churchwardens & Vestrymen (Mar. 20, 1763), in SPG ARCHIVES, SERIES C, AM.8, #24 (MISC. DOCS. GA., 1758–84), *microformed on* SPG AMERICAN MATERIAL, *supra* note 102, at Reel C2 (listing John Rae as vestryman); GA. GAZETTE, July 12, 1769 (same).

what they had desired from Ottolenghe in concessions, as they elected their own deacons and elders to be the vestry of St. Matthew's parish.<sup>134</sup> They were thus able to continue (in fact, if not in name) the form of local governance they had had since their original settlement and yet still comply with the 1758 law.

That the 1758 law was largely viewed and utilized as a method of civil governance is seen in the subsequent empowering of the church wardens and vestrymen of Christ Church parish to care for even more of community life than was provided for in the 1758 law.<sup>135</sup> They were made superintendents of the watch,<sup>136</sup> charged with protecting the town against fire,<sup>137</sup> and required to assess property for the expenses of the watch and fire-fighting equipment.<sup>138</sup> They were to appoint a quasi-civil official (a "beadle") to prevent the dumping of various forms of refuse into lanes and common places of Savannah.<sup>139</sup> Church wardens and vestry were to care for sick sailors stranded in Savannah.<sup>140</sup> And the vestry and church wardens of Christ Church parish were empowered to enlarge and enclose the cemetery.<sup>141</sup> While special commissions were also appointed by the General Assembly to execute specific laws, the vestry and church wardens performed most of the duties of local civil government as well as their religious duties.

The royal instructions to the governors of Georgia provide additional insight into governmental control over religion in this period. Governors were instructed to see that God was worshiped in accordance with the Church of England, that ministers were assigned, and that churches were built and glebes maintained. The governor was to grant licenses for marriages and probate wills, and he was required to see that vice was punished. Further, the governor was given the right to "collate" (appoint a minister to a benefice) when a parish became open.<sup>142</sup> In practice, however, the appointing of ministers was largely done by the colonists' appeal to the SPG in England. Because ministers were loathe to come to the sparsely populated Georgia frontier, there was little cause for disagreement between the governor and the

<sup>134</sup> 2 THE JOURNALS OF HENRY MELCHIOR MUHLENBERG 625, 630, 644 (Theodore G. Tappert & John W. Doberstein eds., 1945) [hereinafter MUHLENBERG JOURNALS].

<sup>135</sup> Very little evidence remains of the activity of any vestry except that of Christ Church.

<sup>136</sup> 8 C.R. GA., *supra* note 1, at 541; 18 C.R. GA., *supra* note 1, at 290–95.

<sup>137</sup> 18 C.R. GA., *supra* note 1, at 313–19.

<sup>138</sup> *Id.*; 14 C.R. GA., *supra* note 1, at 231.

<sup>139</sup> 18 C.R. GA., *supra* note 1, at 753–59.

<sup>140</sup> *Id.*, at 549–51.

<sup>141</sup> *Id.*, at 568–69; 14 C.R. GA., *supra* note 1, at 499, 540.

<sup>142</sup> See 34 C.R. GA., *supra* note 1, at 3ff (1754), 245ff (1758), 390ff (1761), 424ff (1761).

laity regarding the selection of new ministers in Georgia. In fact, only two of the parishes were occupied by ministers as late as 1773.<sup>143</sup>

Immediately after the passage of the 1758 establishment law, the Georgia legislature passed a bill regarding constables that empowered them to begin enforcing the peace in Savannah on Sunday.<sup>144</sup> Ministers of the Church of England and of “the dissenting congregations tolerated by the laws of England,” as well as a host of other professions, were exempted from the random selection to serve as constables, which was akin to jury duty.<sup>145</sup> However, if a person was not exempted and failed to serve as constable, he was required to pay ten pounds sterling

for the use of the poor of the parish where such offense shall be committed, to be paid to the church wardens of the said parish and in case such parish have no church warden, to be paid to any justice of the peace for the said district for the use aforesaid.<sup>146</sup>

If a man did serve as a constable in Savannah (and only Savannah, it appears), he was obliged to assist the church wardens in maintaining “order” throughout the town during Sunday worship.<sup>147</sup> The constable was to “attend, aid, and assist the church wardens” in preventing “tumults from Negroes and other disorderly people.”<sup>148</sup> Even more striking is the language requiring constables to “take up and apprehend all such persons who shall be found loitering or walking about the streets and compel them to go to *some place* of divine worship.”<sup>149</sup> This directive to compel attendance at some church service, and not specifically at the Anglican service, underscores the strength of competing religious groups—at least Christian groups—even after establishment.

Four years later, in 1762, the Georgia legislature passed a “blue law”: an “Act for Preventing and Publishing Vice, Profaneness, and Immorality, and for Keeping the Lord’s Day, Commonly Called Sunday.”<sup>150</sup> This law fails to mention the Church of England by name, saying only that every person “shall resort to their parish church or some meeting or assembly of religious worship tolerated

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<sup>143</sup> DAVIS, *supra* note 26, at 204.

<sup>144</sup> See Act of March 27, 1759, in 3 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY, *supra* note 76, at 2062–66 (establishing appointment, job qualifications, and duties of constables).

<sup>145</sup> *Id.* at 2064 (§ V).

<sup>146</sup> *Id.* at 2063 (§ I).

<sup>147</sup> *Id.* at 2065 (§ XI).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (emphasis added).

<sup>150</sup> Act of March 4, 1762, in 3 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY, *supra* note 76, at 2314–17.

and allowed by the laws of England” on pain of a fine.<sup>151</sup> Again, this evidences a solicitude for religion and morality in general rather than specific support only for the Church of England. Like all blue laws, it outlawed the sale of most goods and performance of most labor on “the Lord’s Day.”<sup>152</sup> The church wardens and constables of each parish were authorized to roam the streets twice each Sunday, during worship assembly time, to ensure that all were in compliance with the law; all who breached the law were subject to a fine.<sup>153</sup> There are no records that indicate that this law was ever enforced.<sup>154</sup>

Also worth mentioning is that in 1770, in the midst of the Frink/Zubly quarrel over burial fees,<sup>155</sup> the Commons House proposed “an Act to explain and Amend” the 1758 establishment law. The bill received two readings in the Assembly, but apparently nothing more.<sup>156</sup>

One historian has stated that, as the Revolution approached, “There [were] signs that the Anglican church was starting to come into its own a bit more as Revolutionary tensions heightened. Dissenters were also showing an increasingly lively interest in religion.”<sup>157</sup> It seems slightly more accurate, however, to assert that the true interest in this realm was an increase in discussion among religious groups about the proper role of government in relation to religion. The Revolution cut short this discussion as it pertained to an established church. It did not, however, provide full resolution to the difficult questions of church-state relations, including the proper role of the government in promoting morality, the tolerance accorded unpopular faiths, and the rights of clergy and laity alike to practice their

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<sup>151</sup> *Id.* at 2314 (§ I).

<sup>152</sup> *Id.* at 2314–15 (§ II).

<sup>153</sup> *See id.* at 2315. The law further stated that violators must be prosecuted within ten days after committing the offense and that a person was entitled to treble damages if he was prosecuted and acquitted. *See id.* at 2316–17.

<sup>154</sup> In fact, the most notorious mention of this law may be not in historical records, but in Gustavus Myers’s seminal work on bigotry in the United States. This “blue law” provides the occasion for his only mention (one sentence) of Georgia. *See GUSTAVUS MYERS, HISTORY OF BIGOTRY IN THE UNITED STATES* 19–20, 499 (1943) (describing Georgia law’s command to frequent some place of worship in context of other states’ blue laws restricting Sunday activities).

<sup>155</sup> *See infra* notes 395–423 and accompanying text.

<sup>156</sup> 15 C.R. GA., *supra* note 1 at 178, 180.

<sup>157</sup> DAVIS, *supra* note 26, at 232. Strickland claims, “If the Revolution had not intervened, it seems that the Church of England would have expanded considerably, for new ministers were sent to Georgia just about the time the war started, and some of these were intended for parishes which had never had a rector.” STRICKLAND, *supra* note 26, at 113. In fact, these claims that the Church of England was gaining steam seem to be overstated from a review of the sources in this Article. *Cf.* Zubly Letter, *supra* note 90, at 218–19 (decrying “low Estate of vital Religion everywhere” in Georgia in 1773).

beliefs while holding public office. It would take several years and multiple legal formulations for Georgia to work out a more nuanced position on these issues.

*B. Three Constitutions: Revolution and Beyond (1777–1798)*

*1. A Short Term Solution (Soon Coupled with General Government Support for Religion)*

Revolutionary feelings took hold only slowly in Georgia—evidenced partly by the fact that Georgia sent no delegates to the First Continental Congress in 1774; this notably irritated the other colonies.<sup>158</sup> But the following year Georgia did send five delegates to the Second Continental Congress.<sup>159</sup> Only a few months later, in February 1776, the colonists conclusively wrested control of the government from the royal governor James Wright, who had previously been under house arrest for a few months.<sup>160</sup> Because the royal government was at an end, the Provincial Congress met and promulgated a primitive document on April 15, 1776, which was to serve as a temporary constitution.<sup>161</sup> This was the “first written fundamental document ever made by Georgians” and was not so much a constitution as a “short text of eight rules and regulations” which was designed to be temporary, contingent upon developments of the Continental Congress and the exigencies of the time.<sup>162</sup> This temporary governing document made no mention of religion, but merely established rules for keeping the peace until such time as a fuller form of governance was to be constructed.

<sup>158</sup> For example, Ezra Stiles, President of Yale College, expressed his disapproval of the happenings in his diary. See 1 *THE LITERARY DIARY OF EZRA STILES, D.D., L.L.D. PRESIDENT OF YALE COLLEGE* 544–46 (Franklin Bowditch Dexter ed., 1901).

<sup>159</sup> See COULTER, *supra* note 36, at 118–24 (noting series of events, including news of battle of Lexington, leading to greater interest in sending delegates to Second Continental Congress). The five delegates were Archibald Bulloch, Lyman Hall, John Houston, Noble W. Jones, and John J. Zubly. *Id.* at 124. Zubly was the minister of the Independent Presbyterian Church in Savannah. He strongly opposed separation from England even though he was aggrieved at many of the wrongs listed by other colonists. See Nichols, *supra* note 107, at 301–02; see also *THE JOURNAL OF THE REVEREND JOHN JOACHIM ZUBLY A.M., D.D. MAR. 5, 1770 THROUGH JUNE 22, 1781*, at 43 (Lilla Mills Hawes ed., 1989) (Oct. 24, 1775) [hereinafter *ZUBLY JOURNAL*] (“A Separation from the Parent State I w[oul]d dread as one of the greatest evils & should it ever be propos[e]d will pray & fight against it.”); MILLER, *WARM & ZEALOUS*, *supra* note 26, at 16–21 (describing tension Zubly faced between this desire for continued allegiance to England and his interest in preserving American constitutional rights, and Zubly’s hope that the two could be reconciled).

<sup>160</sup> See COULTER, *supra* note 36, at 124–26.

<sup>161</sup> This document is reproduced in 1 *THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA* 274–77 (Allen D. Candler ed., 1908) [hereinafter *REV. REC. GA.*].

<sup>162</sup> COULTER, *supra* note 36, at 129.

Upon receipt of the Declaration of Independence on August 10, 1776, Archibald Bulloch (then “President and Commander-in-Chief” of Georgia) convened the Provincial Assembly to read the document and begin the process of a full constitutional convention. The first constitutional convention met in Savannah from October 1, 1776 to February 5, 1777, but no official records are extant; all that remains is the finished product of the first state constitution in Georgia.<sup>163</sup> The bulk of the new 1777 constitution addressed structural governmental concerns, resulting in the establishment of a legislature and an executive branch (consisting of both a council and a weak governor).<sup>164</sup> The 1777 constitution addressed religion specifically in Article 56: “All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession.”<sup>165</sup>

This provision echoed and seemed to revert to some of the more tolerant sentiments of Georgia’s 1732 royal charter. It apparently subsumed the phrase “liberty of conscience” into the phrase “free exercise” and it began to disestablish religion—although there was neither a formal statement of disestablishment nor an apparent level of religious agitation in Georgia. Governmental financial support for religion in general persisted, but persons were not forced to give money to a religion not their own. A laudable feature is the omission of a

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<sup>163</sup> See CYNTHIA E. BROWNE, *STATE CONSTITUTIONAL CONVENTIONS FROM INDEPENDENCE TO THE COMPLETION OF THE PRESENT UNION, 1776–1959, A BIBLIOGRAPHY* viii, 43 (1973). Georgia was the ninth of the colonies to frame and formally adopt a written constitution to serve as the basis of its civil governance. WALTER McELREATH, *A TREATISE ON THE CONSTITUTION OF GEORGIA* 68 (1912) (“New Hampshire, South Carolina, Virginia, New Jersey, Delaware and Pennsylvania had already adopted constitutions when the Georgia Convention met and, before it adjourned, Maryland and North Carolina had done likewise . . .”); see also FLETCHER M. GREEN, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776–1860: A STUDY IN THE EVOLUTION OF DEMOCRACY* 73 (1966) (“No journal or record of the [first constitutional convention] now exists, so nothing of its members, or its method and work is known except the constitution it adopted, February 5, 1777.”). It is not entirely true that *nothing* remains, for there are two pages of procedural history in the 1785 printing of the 1777 constitution. See GA. CONST. OF 1777, art. LVI (1785), reprinted in 2 THORPE, *supra* note 41 (listing Button Gwinnett, William Belcher, Joseph Wood, Josiah Lewis, John Adam Treutlen, Henry Jones, and George Wells as members elected by House to “Committee to reconsider and revise the Form of a Constitution”).

<sup>164</sup> The governorship was weak as a reaction to frequent proroguing of the colonial assembly by the former royal executive (Gov. Wright). See McELREATH, *supra* note 163, at 71–73; see also COULTER, *supra* note 36, at 149 (“Remembering their experiences with Governor Wright, these constitution-makers divided the executive authority. . . . His power was further weakened by the prohibition against his vetoing bills, granting pardons, or remitting fines.”).

<sup>165</sup> GA. CONST. OF 1777, art. LVI, reprinted in 2 THORPE, *supra* note 41, at 784.

Catholic exclusion phrase (compare the initial charter, which read “except papists”).<sup>166</sup> The 1777 constitution did retain the “peace and safety of the State” provision, which could possibly give government arbitrary and substantial control over religious actions.<sup>167</sup> Such provisos are a common feature regarding religious liberty today; human rights efforts regularly come into conflict with the use (and abuse) of such “peace and safety” clauses.<sup>168</sup>

While Catholics were allowed free exercise of religion,<sup>169</sup> they were excluded from serving as Representatives to the State Assembly; only persons “of the Protestant religion” were eligible to serve in that capacity.<sup>170</sup> While such a restriction is still repugnant by modern standards, it was an advance for the historical time period<sup>171</sup>—especially when coupled with the lack of a religious test for voters.<sup>172</sup> The other explicit mention of religion in the constitution regarded the exclusion of clergy of all denominations from holding a seat in the legislature.<sup>173</sup> Such an exclusion was very common in state constitutions for many years.<sup>174</sup>

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<sup>166</sup> CHARTER, *supra* note 41.

<sup>167</sup> *See id.*

<sup>168</sup> *See, e.g.,* T. Jeremy Gunn, *Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations*, 12 EMORY INT'L L. REV. 43, 50–80 (1998) (discussing interaction of 1997 Russian law on religion with international human rights instruments and difficulties with “limitations” upon religion imposed by Russian law).

<sup>169</sup> *See* discussion *supra* notes 101–02.

<sup>170</sup> GA. CONST. of 1777, art. VI (1785), *reprinted in* 2 THORPE, *supra* note 41, at 779 (art. VI).

<sup>171</sup> *Cf.* N.C. CONST. of 1776, art. XXXII, *reprinted in* 5 THORPE, *supra* note 41, at 2787 (“That no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding . . . office. . . .”). For a modern prohibition on mandatory beliefs for public offices, see *Torcaso v. Watkins*, 367 U.S. 488, 489, 495–96 (1961) (holding unconstitutional a state prerequisite for holding office that required affirming “belief in the existence of God”). *See also* Joel A. Nichols, *Torcaso v. Watkins*, in *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* (Paul Finkelman ed., forthcoming 2006).

<sup>172</sup> GA. CONST. of 1777, art. IX, *reprinted in* 2 THORPE, *supra* note 41, at 779 (“All male white inhabitants, of the age of twenty-one years, and possessed in his own right of ten pounds value, and liable to pay tax in this State, or being of any mechanic trade . . . shall have a right to vote at all elections for representatives.”).

<sup>173</sup> *Id.* art. LXII. John Adams would have been pleased if such a clause had existed to exclude John Zubly from the Second Continental Congress. “However, as [Zubly] is the first gentleman of the cloth who has appeared in Congress, I cannot but wish he may be the last. Mixing the sacred character with that of the statesman, as it is quite unnecessary . . ., is not attended with any good effects.” Letter from John Adams to Abigail Adams (Sept. 17, 1775), in *FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE ABIGAIL ADAMS, DURING THE REVOLUTION* 99 (Charles Francis Adams ed., 1875).

<sup>174</sup> *See, e.g.,* STOKES, *supra* note 30, at 622–28. In fact, the Supreme Court did not hold that such a practice was unconstitutional until 1978. *See* *McDaniel v. Paty*, 435 U.S. 618,

Despite containing the religion clause of Article 56, there is no mention of “God” or “Almighty” anywhere in the 1777 constitution—not even in the preamble. This omission stands in contrast to a number of other constitutions at the time.<sup>175</sup> Neither is there any mention of religion in the provision for education, which simply reads: “Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out.”<sup>176</sup> Finally, the 1777 constitution made some allowance for religionists whose beliefs did not allow them to swear oaths at all.<sup>177</sup> Such individuals were allowed to make an affirmation instead of swearing an oath in denoting their allegiance to the state of Georgia.<sup>178</sup> The document failed to make such allowance for affirmation rather than oath-taking for persons being sworn into state offices.<sup>179</sup>

The 1777 constitution, similar to its progeny, made no mention of conscientious objection for pacifism—despite the fact that a town of Quakers had settled in Wrightsborough.<sup>180</sup> Rather than a constitutional right to conscientious objection from military service, Georgia—like other states and even the national government—chose to accord the right by legislative grace rather than constitutional mandate.<sup>181</sup> Georgia did, in fact, excuse persons from military service for reasons of conscience, but in 1778 it imposed double taxation for such a choice.<sup>182</sup> From 1784 to 1792, clerics were unconditionally exempted.<sup>183</sup> The exemption was lifted for three years,<sup>184</sup> then rein-

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621–22, 629 (1978) (finding state constitutional prohibition against clergy holding political office unconstitutional); Joel A. Nichols, *McDaniel v. Paty*, in *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES*, *supra* note 171. *See also* HAMBURGER, *supra* note 7, at 79–81 (arguing that clergy exclusion clauses were not a “nascent separation of Church and State,” but rather protection of clergy members’ “higher obligations”).

<sup>175</sup> Cf. WITTE, *supra* note 2, app. at 2 (showing use of “God” or similar language in preambles of numerous state constitutions prior to 1945).

<sup>176</sup> GA. CONST. of 1777, art. LIV, *reprinted in* 2 THORPE, *supra* note 41, at 784.

<sup>177</sup> *See id.* art. XIV (“Every person entitled to vote shall take the following oath or affirmation, if required, viz . . .”).

<sup>178</sup> *Id.*

<sup>179</sup> *See id.* art. XXIV.

<sup>180</sup> *See infra* notes 303–06 and accompanying text.

<sup>181</sup> *See, e.g.*, WITTE, *supra* note 2, at 73, 99, and sources therein (regarding discussion on exclusion and possible inclusion of conscientious objection clause as part of First Amendment of U.S. Constitution); *id.* app. at 2 (regarding state constitutional provisions on pacifism as of 1945).

<sup>182</sup> *See* 19 C.R. GA., *supra* note 1, at 96 (“A[nd whereas] it is but reasonable . . . in a time of war that persons who on account of their religious scruples are exempted . . . from rendering their personal military services should pay a larger rate . . . B[e] it therefore enacted; That all such . . . persons aforesaid . . . shall pay double the rate . . .”).

<sup>183</sup> *See id.* at 359 (exempting “Clergymen, in orders”).

<sup>184</sup> *See* DIGEST OF THE LAWS OF THE STATE OF GEORGIA 356 (Horatio Marbury & William H. Crawford eds., Savannah, Seymour Woolhopter & Stebbins 1802).

stated in 1795.<sup>185</sup> During this interim time Quakers were allowed to pay an additional twenty-five percent tax for conscientious objection.<sup>186</sup>

One other action in the 1777 constitution directly touches upon religion—that of the renaming of the parishes. Now designated “counties,” the representative areas received new appellations in place of their old titles, which had been based upon saints and were closely related to the 1758 establishment of the Church of England. Instead of St. Paul, St. George, St. Matthew, St. Philip, Christ Church, St. John, St. Andrew, St. James, St. David, St. Patrick, St. Thomas, and St. Mary, there arose Wilkes, Richmond, Burke, Effingham, Chatham, Liberty, Glyn, and Camden.<sup>187</sup> In this way, one more symbolic connection between the church and the state was removed.

Finally, two provisions of the 1777 constitution bear mention as to their effects. The first is the exclusion of Catholics from the assembly. It appears from historical records that this was not vigorously enforced as at least one member from Chatham County in 1777 was said to be a Catholic, and no action was taken against him.<sup>188</sup> The second is the fact that the 1777 constitution left open the possibility of a state tax for the support of one’s own religion, though not for the support of a singular state religion. Indeed, in 1785 the Assembly passed a law requiring taxes be paid to support religion in each county.

In 1785—the same year that the assessment bill was being famously defeated in Virginia<sup>189</sup>—the Georgia legislature passed a bill “[f]or the regular establishment and support of the public duties of Religion.”<sup>190</sup> Three years earlier a bill had been introduced in the Assembly providing for the establishment of churches and schools, but nothing came of it.<sup>191</sup> In 1784, another unsuccessful attempt was made to pass a bill to promote religion and piety by providing certain rights and material aid to religious societies and schoolhouses.<sup>192</sup> In 1785, however, a similar measure found success. And contrary to the

<sup>185</sup> *Id.* at 359–60 (exempting “ministers in orders”).

<sup>186</sup> *See id.* at 356 (1792 law exempting “all ministers in orders” from military service; also exempting Quakers, if producing bona fide certificate from Quaker Meeting concerning their adherence to faith, but imposing extra twenty-five percent tax).

<sup>187</sup> *See* GA. CONST. of 1777, art. IV, reprinted in 2 THORPE, *supra* note 41.

<sup>188</sup> *See* STRICKLAND, *supra* note 26, at 164.

<sup>189</sup> *See* THE PAPERS OF JAMES MADISON, *supra* note 20, at 298–304.

<sup>190</sup> 19 C.R. GA., *supra* note 1, at 395–98; JOURNAL OF THE GENERAL ASSEMBLY, HOUSE (Jan. 21, 1784–Aug. 15, 1786), 161, 167, 227, 233, 248, 266 [hereinafter HOUSE JOURNAL].

<sup>191</sup> *See* 3 REV. REC. GA., *supra* note 161, at 141 (“[A] Bill, for establishing Churches and Schools in this State . . . was read the first time.”).

<sup>192</sup> *See id.* at 465; HOUSE JOURNAL, *supra* note 190, at 9, 11, 19, 53–54.

Virginia experience, the remonstrance by the Baptist Association was tabled and came to naught.<sup>193</sup>

The 1785 law proclaimed that “regular establishment and support [of the Christian Religion] is among the most important objects of Legislature [sic] determination.”<sup>194</sup> Each county that contained thirty heads of families was to select a minister of their choosing to whom state tax dollars would flow. The tax rate was set at four pence on every hundred pounds’ valuation of property owned by the church members, which would be paid from the state’s coffers directly to the chosen minister. When the population grew sufficiently to warrant another minister, twenty heads of families could branch off and petition to be recognized as a separate parish and receive an attendant proportionate share of tax dollars for their ministers. The law guaranteed “all the different sects and denominations of the Christian religion . . . free and equal liberty and Toleration in the exercise of their [r]eligion” and confirmed all the “usages[,] rights, [i]mmunities and privileges . . . usually . . . held or enjoyed” by religious societies.<sup>195</sup> The only known evidence of the application of this law is an advertisement in the *Gazette of the State of Georgia* on January 26, 1786, which urged all Episcopalians in Chatham County to register with their church wardens so that their numbers might be determined for collecting the public tax from the treasury.<sup>196</sup> There is no known application other than this, and the law was subsequently superseded by the provision for religious freedom in the 1798 constitution.<sup>197</sup>

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<sup>193</sup> HOUSE JOURNAL, *supra* note 190, at 291, 298–99. The Georgia Baptist Association sent a lengthy Remonstrance (probably authored by Silas Mercer) to the legislature decrying the 1785 act and protesting the intervention of government in religious affairs: “[R]eligion does not need such carnal weapons as acts of assembly and civil sanctions, nor can they be applied to it without destroying it.” HISTORY OF THE BAPTIST DENOMINATION IN GEORGIA 262 (Atlanta, Jas P. Harrison & Co. 1881). The Baptist Association was also worried that the passage of one such law might lead to others of an even more intrusive nature—including laws that lead “to the establishment of a particular denomination in preference and at the expense of the rest.” *Id.* The state’s role was, rather than passing laws supporting religion, to support morality generally and to ensure that “all are left free to worship God according to the dictates of their own consciences, unbribed and unmolested.” *Id.* at 263.

<sup>194</sup> 19 C.R. GA., *supra* note 1, at 395.

<sup>195</sup> *Id.* at 397–98.

<sup>196</sup> GA. GAZETTE, Jan. 26, 1786.

<sup>197</sup> See GA. CONST. of 1798, art. IV, § 10, reprinted in 2 THORPE, *supra* note 41, at 791.

## 2. *A New Constitution with Few Significant Changes Regarding Religion*

Following the ratification of the United States Constitution,<sup>198</sup> Georgians saw the need to revisit their state constitution. The 1777 state constitution had been a document primarily constructed with the short-term war in mind; it read like an elementary first attempt at constitution-making. And just as the United States Constitutional Convention disregarded the prescribed terms for amending the Articles of Confederation, so Georgians largely bypassed the prescribed constitutional method for amending and emending their constitution.<sup>199</sup> Although clamorings for revision of the state constitution

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<sup>198</sup> Little is known about the role of the Georgia delegates to the national constitutional convention in 1787, and even less is known about any role they may have played regarding religion and the state. When the Constitution was completed, it was signed by members of the convention, including William Few and Abraham Baldwin for Georgia. After it was sent to Congress, Congress resolved to transmit the document to the several states for ratification. Congress sent out the document on September 29, 1787, and it reached Augusta in the middle of October and was published in the *Georgia Gazette*. Because the legislature was in session at the time, it resolved (on October 25) that members of a ratifying convention should be chosen at the next election day. After selection, the delegates met on December 28, 1787, to consider ratification. “After considering the several articles and provisions of the constitution, the convention, without proposing any amendments, on the 29th of January, 1788, did ‘fully and entirely assent to, ratify and adopt the proposed constitution.’” MCELREATH, *supra* note 163, at 85.

Georgia was the fourth state to ratify the Constitution and the first southern state. Georgia was also one of only three states to ratify it unanimously. In light of Georgia’s staunch “States’ Rights” stance this unanimity seems odd, but there were prevailing conditions in Georgia lending themselves toward a stronger federal government. The Georgia representatives to the Constitutional Convention had obtained all they had sought—“independence in domestic government, the integrity of her domain, non-interference in the matter of slavery and of the slave trade, equal representation with the other states in the upper House of Congress and satisfactory representation in the lower.” *Id.* at 85–86. Georgia was bounded by Indians and by the Spanish and in need of assistance for her own defense. Further, Georgia was behind the other states in population, commerce, wealth, and trade, and thus sought a more level playing field—created in this case by a stronger central government.

Little in Georgia’s ratification of the Constitution sheds any light on the religious liberty situation at the time—except that Georgia was apparently content with the enumerated powers of the Congress in the Constitution and did not see the need to attach a separate bill of rights onto the Constitution.

<sup>199</sup> *Cf.* GA. CONST. of 1777, art. LXVIII. The Georgia Constitution of 1777 noted specifically that:

No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid.

*Id.* But see John N. Shaeffer, *Georgia’s 1789 Constitution: Was It Adopted in Defiance of the Constitutional Amending Process?*, 61 GA. HIST. Q. 329, 340 (1977) (concluding that

began in earnest by 1784, it was January 1788 before the legislature named three “fit and discreet” persons from each county to meet in Augusta to make necessary changes.<sup>200</sup> The new constitution was drafted from November 4 through 24, 1788, after which time copies were circulated around the state.<sup>201</sup> The people then elected delegates who were to accept or reject the new document. But the delegates met in January, 1789 and made so many alterations as to necessitate yet another convention. So, in April, 1789, “Georgia voters elected their third convention in a year and a half. During that time they had also chosen two assemblies, a federal ratification convention, and representatives to the United States Congress.”<sup>202</sup> The state constitutional convention was finally completed and the new state constitution was ratified on May 6, 1789.<sup>203</sup> Again, unfortunately, there are no extant official records or journals of the convention(s).<sup>204</sup>

This 1789 constitution, about half the length of its predecessor, provided for a bicameral legislature and a stronger executive than before.<sup>205</sup> The major clause on religion was shortened to read: “All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.”<sup>206</sup> The “peace and safety” provision happily dropped out of this version, possibly due in part to James Madison’s prominent fight in Virginia to remove similar language from the Virginia Declaration of Rights. There was no “establishment” of religion, but citizens were presumably still obligated to support their own religion through state enforcement of the 1785 law. The meaning of free exercise was not expounded, though it presumably encompassed liberty of conscience as well as the freedoms to preach, practice, and proselytize.

Some other changes regarding religious relations in the state found their way into the new constitution in more subtle ways. For example, the requirement of professing the Protestant faith as a prerequisite for holding political office dropped out.<sup>207</sup> But the exclusion of clergy members “of any denomination” from membership in the general assembly was retained.<sup>208</sup> As a further acknowledgment of

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1777 constitutional amendment mechanism was followed, albeit through twisted series of machinations).

<sup>200</sup> McELREATH, *supra* note 163, at 86.

<sup>201</sup> *Id.* at 87.

<sup>202</sup> Shaeffer, *supra* note 199, at 339.

<sup>203</sup> See COULTER, *supra* note 36, at 173; GREEN, *supra* note 163, at 127–28.

<sup>204</sup> See BROWNE, *supra* note 163, at 43; GREEN, *supra* note 163.

<sup>205</sup> GA. CONST. of 1789, art. I, § 1, art. II, reprinted in 2 THORPE, *supra* note 41, at 785.

<sup>206</sup> *Id.* art. IV, § 5.

<sup>207</sup> See *id.* art. I, § 3, § 7.

<sup>208</sup> *Id.* § 18.

the religious diversity of the state, the possibility of affirming rather than oath-swearing was constitutionally extended to members of the senate and house of representatives as well as to the governor.<sup>209</sup> (Previously affirmance had been allowed to take the place of oath-swearing only with respect to voting, and not office-holding.) Although that concession was specifically an accommodation to the Quakers, the right of conscientious objection was still omitted from the 1789 constitution; it continued to be a legislative privilege rather than a constitutional right.<sup>210</sup> Another notable omission was the removal of any mention of education from the constitution, whether public or parochial. Finally, the 1789 constitution still failed to mention God or “the Almighty” in its preamble or in its text. This continued to run counter to many other states and evidenced a certain solicitude toward religious liberty.

A non-religious issue of great importance in the 1789 constitution was the specific provision for amendment in 1794, only five years later.<sup>211</sup> Apparently the drafters thought that the constitution would need the ability to change with the times—especially with regard to representation and the quickly growing population. So in 1795, delegates met and made several amendments to the constitution—but no mention was made of religious issues. The amending delegates then provided for another similar constitutional convention to be held three years later.<sup>212</sup>

The journal from this 1795 convention shows that a delegate moved that “Rev. Mr. Mercer be requested to offer up a Prayer to the Supreme Being.” Rev. Mr. Mercer complied with the request.<sup>213</sup> Other than this, the 1795 Journal reveals no discussion of religion.

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<sup>209</sup> See *id.* § 15, art. II, § 5. The 1777 Constitution permitted only oath-swearing for these elected positions. See *supra* notes 177–79 and accompanying text.

<sup>210</sup> See *supra* notes 180–86 and accompanying text for more on conscientious objector status.

<sup>211</sup> See GA. CONST. of 1789, art. IV, § 8. In fact, delegates were elected in late 1794 and the delegates actually convened in 1795.

<sup>212</sup> See generally JOURNAL OF THE CONVENTION OF THE STATE OF GEORGIA, CONVENED AT LOUISVILLE, ON MONDAY, MAY 3D, 1795, FOR THE PURPOSE OF TAKING INTO CONSIDERATION, THE ALTERATIONS NECESSARY TO BE MADE IN THE EXISTING CONSTITUTION OF THIS STATE. TO WHICH ARE ADDED, THEIR AMENDMENTS TO THE CONSTITUTION (Augusta, A. M’Millan 1795) [hereinafter 1795 JOURNAL]. The Amendments are reprinted in THORPE, *supra* note 41, at 790, and they touch on such matters as length of service for a senator, method of gubernatorial election, date of meeting of the assembly, reapportionment of representation in the lower house, and place of the capital of the state (moved to Louisville).

<sup>213</sup> 1795 JOURNAL, *supra* note 212, at 4. This appears likely to have been Silas Mercer, a Baptist preacher who was present at this 1795 convention as well as the 1798 convention. See *id.* at 3. Silas Mercer’s son, Jesse Mercer, was also a Baptist minister reputedly at this convention, though his name does not appear in the Journal. A “James Mercer” is men-

### 3. *Disestablishment, Rights of Conscience, Non-Preferential Treatment, and More*

The amending convention contemplated by the 1795 amendments came to pass in 1798. The 1798 convention met amidst increasing tensions between the growing upcountry and the coastal cities regarding representation. Because the constitution named the counties and fixed their representation, the convention was needed sooner rather than later.<sup>214</sup> The new constitution retained the fundamental structure of the old constitution but allowed for more flexibility in designating new counties and allowing for representation in order to meet the crisis at hand. The 1798 constitution proved stable enough to last Georgia until the eve of the Civil War, albeit with twenty-three subsequent amendments.

The Journal of the 1798 Convention reveals only hints into the mindset and rationale of the state constitutional framers at the time. The first mention of religion is the first day of the convention, when the delegates resolved that “the Convention will attend divine service tomorrow [Wednesday, May 9, 1798] at 11 o’clock, in conformity to the proclamation of the President of the United States.”<sup>215</sup> There is no mention in the record of the service attended, nor the presider of the service, nor the theology espoused at the service.

The process of drafting and amending seems to have followed a procedure by which a section from the 1789 constitution was read aloud and then agreed upon or amended by those present. In this way, the earlier constitution served as a template.

The 1798 constitution lengthened the religion clause substantially and provided for a fuller range of free exercise and disestablishment:

No person within this State shall, upon any pretence, be deprived of the inestimable privilege of worshipping God in a manner agreeable to his own conscience, nor be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tiths [sic], taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath

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tioned in the Journal, but the relation of these men is unclear. *See id.* at 4. James Mercer may have been Jesse Mercer’s uncle, though about his same age. *See* C.D. MALLARY, MEMOIRS OF ELDER JESSE MERCER 18 (New York, John Gray 1844). Another source proclaims that three Baptist ministers were present at this 1795 convention. *See* 1 SAMUEL BOYKIN, HISTORY OF THE BAPTIST DENOMINATION IN GEORGIA 263 (Atlanta, Jas P. Harrison & Co. 1881) (listing Silas Mercer, Benjamin Davis, and Thomas Polhill as Baptists).

<sup>214</sup> *See* COULTER, *supra* note 36, at 176.

<sup>215</sup> JOURNAL OF THE CONVENTION OF THE STATE OF GEORGIA 2 (Louisville 1798) [hereinafter 1798 JOURNAL].

voluntarily engaged to do. No one religious society shall ever be established in this State, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles.<sup>216</sup>

This version is clearly the most exhaustive and comprehensive, and the first to contain an explicit, thorough disestablishment clause. It eliminated specific invocation of the terms “free exercise” and “liberty of conscience,” and only provided for disestablishment in a comparative context. The drafters chose to elaborate in some detail their intentions regarding religion rather than invoking the commonly used terms of art. Thus, an individual’s freedom to worship, and to worship according to his or her conscience, was made sacrosanct. The priority of conscience was highlighted regarding place and manner of worship and support for a church or ministry, even though the phrase “liberty of conscience” was never invoked. Non-compulsion in matters of religion was constitutionally mandated. Disestablishment took the form of a guarantee that an individual would not be required to pay monetary support for a place of worship, minister, or ministry contrary to an individual’s beliefs. The standard of non-preferential treatment of religions was constitutionalized and was inseparably linked to governmental non-establishment of one religious group. And the range of free exercise was enhanced by the inclusion of the final phrase prohibiting the denial of civil rights on account of religious principles.

The 1798 Journal sheds little light on the origin of the amended section. It appears that the previous religion clause was read (by an unnamed person) and then “it was moved to amend the same by Mr. [Jesse] Mercer as follows . . . . On the question thereupon, it was agreed to.”<sup>217</sup> Other than this one paragraph, no mention is made of the religion clause. Although the 1798 Journal gives no additional information to indicate authorship of the religion clause, it has long been speculated that Rev. Jesse Mercer, a prominent Baptist minister, was responsible for it.<sup>218</sup> There is no textual support for this specula-

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<sup>216</sup> GA. CONST. of 1798, art. IV, § 10.

<sup>217</sup> 1798 JOURNAL, *supra* note 215, at 21.

<sup>218</sup> See 2 WILLIAM BACON STEVENS, A HISTORY OF GEORGIA, FROM ITS FIRST DISCOVERY BY EUROPEANS TO THE ADOPTION OF THE PRESENT CONSTITUTION IN MDCCXCVII, at 501 (Philadelphia, E.H. Butler & Co. 1859) (claiming that section of Constitution “securing religious liberty of conscience, in matters of religion, was written by the Rev. Jesse Mercer”); see also 1798 JOURNAL, *supra* note 215, at 28.

Jesse Mercer was a delegate from Wilkes County who was a young but well-known Baptist minister. He was the son of Silas Mercer, a fellow Baptist minister who had been a delegate to the 1789 and 1795 conventions. Jesse Mercer would have been twenty-nine years old at the time of the convention and was obviously held in high esteem, as he was one of three men appointed to have the great seal of the state affixed to the constitution

tion other than the singular statement from the 1798 Journal above—and the fact that the completed clause moved Georgia closer to Baptist understandings of the relationship between church and state (with an emphasis on liberty of conscience and disestablishment). Further, it appears that seven or more Baptists, including Mercer, attended the convention, which would have meant that seven of 68 delegates were Baptists.<sup>219</sup> Such a heavy Baptist presence lends credence to the plausibility of Baptist influence on the final religious liberty clause, even if no direct authorship can be attributed to Mercer or any other Baptist.

The 1798 Constitution contained other provisions touching upon religion. First, the option of affirmance instead of oath-swearing was retained for the offices of governor, senator, and representative.<sup>220</sup> Second, and of greater importance, the ban on clergy holding seats in the legislature was discontinued.<sup>221</sup> Finally, the 1798 Constitution

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and to deposit it with the Secretary of State. Only once would he be involved in politics again—when he unsuccessfully ran for the state senate in 1816. It seems that was Mercer's only lack of success in life, though, as he is revered in Georgia Baptist history as one of the premier ministers of the day, a great revivalist, and the namesake of Mercer College. 2 BOYKIN, *supra* note 213, at 384–89; MALLARY, *supra* note 213, *passim*.

<sup>219</sup> See BOYKIN, *supra* note 213, at 263; Spencer B. King, Jr., *Baptist Leaders in Early Georgia Politics*, 5 VIEWPOINTS: GA. BAPTIST HIST. 45 (1976). This would have meant that Baptists comprised 10% of the convention, or four times the percentage of Baptists in the overall state population at the time.

<sup>220</sup> See GA. CONST. OF 1798, art. I, § 18–19, art. II, § V. The Journal indicates that an amendment was made to the 1789 provision regarding the governor, but lists no reasons why. The difference involved the omission of a phrase mandating the compensation of the governor and the attendant ban on the governor's receipt of "any other emolument from the United States, or either of them, or from any foreign power." The Journal reveals no history behind this change, noting only that "an amendment was proposed" and that the amendment passed in the affirmative. See 1798 JOURNAL, *supra* note 215, at 17.

<sup>221</sup> When the section that excluded ministers of all denominations from the legislature came up for discussion, it was initially retained with no discussion in the Journal. However, the following day "Mr. [James] Simms" from Columbia County proposed to amend the exclusion by including practicing attorneys in the exclusion; the amendment passed 36–28. See 1798 JOURNAL, *supra* note 215, at 12 (stating vote was 36–33, but yeas and nays by name indicate vote was actually 36–28). No further move was made on the offending section until the following day, when the convention struck the entire section from the constitution (39–28). *Id.* at 16. The section was probably ultimately defeated because attorneys as well as ministers opposed the section as amended. Some historians have surmised that Rev. Mercer, who voted for the amendment, was behind the measure even though he did not propose it on the floor. See MALLARY, *supra* note 213, at 100; STRICKLAND, *supra* note 26, at 164–65. However, this is not necessarily supported by the record. For if the amendment had been proposed only so that the entire clause would be struck, those who favored the amendment would also likely favor striking the entire clause. But the record indicates that only five men voted along those lines, and Simms was not among them. The other votes to strike the amended clause came from twenty-seven men who opposed the amendment as well as from six who only voted on the second day (and voted to strike the amended clause). Mercer apparently did not vote at all regarding the motion to strike the amended clause. See 1798 JOURNAL, *supra* note 215, at 12, 16. There was one other vote

retained some notable omissions from its predecessors: There was no mention of education (let alone religious education); no reference to God or a deity in the preamble or elsewhere; and no mention of conscientious objection to military service.

With the adoption of the 1798 Constitution, Georgia set in place the elements of modern religious liberty: Free exercise was guaranteed to all; the state was to have no single established church and no preference among religions; clergy were not excluded from public political life; either oaths or affirmations were allowed for discharging public duties or holding public office; there was no religious test for holding public office; civil rights were not allowed to be contingent upon religious convictions; liberty of conscience was assured to all persons; and no one would be forced to support a minister or church unless they agreed to its tenets. Thus, Georgia entered the nineteenth century with constitutional provisions in which a relatively modern and advanced notion of religious liberty was ensconced at law.

## II

### THE OVERLAY OF GEORGIA'S DIVERSE RELIGIOUS HISTORY

The legal history of Georgia outlined above tells only a part of the relevant historical story forming the background of religious liberty. An equally—and maybe more important—piece is the religious history of early Georgia. The impetus and impact of laws on the books can be seen by looking to the make-up of the population generally (e.g., whether there was religious agitation, whether there were harmonious relations among people, etc.). Thus, it is important to take a leap back in time chronologically to look at the state of religious belief and religious groups in Georgia in the eighteenth century. In doing so, we see that the history of religious belief in Georgia is one of pluralism.<sup>222</sup>

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(the 39th vote) to strike the amended clause, but it is unclear who cast the vote. The Journal lists “Barnett” as voting both for and against the measure. This is clearly incorrect, for there was only one Barnett and one Burnett at the Convention (Burnett voted against striking the amended clause). It appears that the 39th vote to strike may have come rather from “Bird” than Barnett, because this would follow the typical voting patterns of either voting with Simms both times or against Simms both times, and Bird is not listed anywhere on the second vote. *See id.* Thus, it appears unlikely that Mercer had Simms propose the clause so that it would ultimately be defeated, unless there was much back-room political maneuvering that is unknown to us.

<sup>222</sup> To be sure, the religious pluralism present in colonial and early national Georgia (consisting of a variety of Protestant denominations, Jews, and a very few marginalized Catholics) bears little resemblance to the religious pluralism present in modern America. But when compared to the religious constituency of other colonies and states at the time,

While the Church of England was preferred from the outset, and was established in 1758, other religious groups took root and grew throughout the colonial and early national periods. This pluralism was so accepted in Georgia that it was seen as unremarkable at the time. Relations between the various religious groups were relatively harmonious, with only minor exception. And dissenters from the established church played a prominent role in colonial life even during establishment, holding one-third of the seats in the legislature in 1773 despite the presence of “the oath.”<sup>223</sup> Seen together, the plurality of religious faiths in Georgia from the beginning, coupled with the “soft” establishment of the Church of England, laid the groundwork for a fairly robust exercise of religious liberty from the earliest times.<sup>224</sup>

#### A. *England’s Preferred Religion—Anglicanism*

At Georgia’s founding, the Trustees decided, after some debate, that the Anglican Church would not be the “established” religion of Georgia.<sup>225</sup> Nonetheless, they did not want to ignore the religious needs of the early settlers of the colony, so they sent the Rev. Dr. Henry Herbert on the ship with the first group of colonists in November 1732. Rev. Herbert conducted various services and funerals on the ship on the way to the new colony for the settlers (who numbered between 114 and 125), but he stayed in the colony only three weeks.<sup>226</sup> He tried to return to England, but died en-route due to illness.<sup>227</sup> His short tenure in Georgia presaged the difficulties the Church of England would face in finding long-term ministers for the colony. After the brief tenure of Rev. Herbert, the Trustees appointed no less than eight ministers in the next eleven years—including the later-famous John Wesley<sup>228</sup> (with his brother Charles)

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Georgia’s population was plural to a degree that necessitated a varied and arguably more flexible approach to regulating religion.

<sup>223</sup> See Zubly Letter, *supra* note 90, at 216.

<sup>224</sup> One could make a cogent argument that the religious pluralism in Georgia contributed to the rise of modern conceptions of religious liberty. Cf. SIDNEY E. MEAD, *THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA* 19 (1963) (contending that religious liberty generally in America arose more from practical necessity than from ideological commitment); see also Witte, *supra* note 2, at 110 (“[R]eligious pluralism was more a sociological fact than a constitutional condition of religious liberty.”).

<sup>225</sup> See HENRY THOMPSON MALONE, *THE EPISCOPAL CHURCH IN GEORGIA, 1733–1957*, at 5–6 (1960).

<sup>226</sup> See *id.* at 6–7; COULTER, *supra* note 36, at 24.

<sup>227</sup> See generally Junius J. Martin, *Georgia’s First Minister: The Reverend Dr. Henry Herbert*, 66 GA. HIST. Q. 113 (1982). Rev. Herbert was the son of the well-known English Deist, Lord Herbert of Chisbury. See Miller, Relations, *supra* note 26, at 110.

<sup>228</sup> There is much literature on John Wesley, including discussion of his travails in Georgia. See, e.g., William R. Cannon, *John Wesley’s Years in Georgia*, 1 METHODIST HIST. 1 (1963) (tracing early development of Methodism in Georgia and recounting

and George Whitefield.<sup>229</sup> It was not until 1745 that Bartholomew Zouberbuhler, Georgia's longest tenured Anglican minister, was appointed; Zouberbuhler remained in his appointment in Georgia until his death in 1766.<sup>230</sup> After Zouberbuhler's passing, Christ Church in Savannah had another three ministers in the nine years before the Revolution.<sup>231</sup> And of these, Rev. Samuel Frink is the most infamous; he caused several difficulties in the realm of church-state relations (as described below),<sup>232</sup> but did not live long enough to cause lasting problems. Of the ten ministers who had served Savannah up until the Revolution,<sup>233</sup> a number of the rectors had been unqualified and/or contentious in personality.<sup>234</sup> Thus, although the 1758 law established the Church of England as the recognized church of the colony,<sup>235</sup> the consistent turnover and general ineffectiveness of ministers undermined much of the purpose of that law. Unfortunately for the Anglican Church, this trend of rapid succession of ministers in Georgia continued even after the Revolution (notwith-

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Wesley's activities in Georgia); Richard P. Heitzenrater, *The Second Rise of Methodism: Georgia*, 28 *METHODIST HIST.* 117 (1990) (describing growth of Methodist organization in Georgia under Wesley); see also David T. Morgan, *John Wesley's Sojourn in Georgia Revisited*, 64 *GA. HIST. Q.* 253 (1980) (arguing that Wesley's time in Georgia was inconsequential and has been overemphasized by other authors); DAVIS, *supra* note 26, at 214–15; THE RT. HONBLE. JOHN, EARL OF EGMONT, VISCOUNT PERCEVAL, *A JOURNAL OF THE TRANSACTIONS OF THE TRUSTEES FOR ESTABLISHING THE COLONY OF GEORGIA IN AMERICA* 30–31 (Wormsloe, 1886) [hereinafter *EGMONT JOURNAL*].

<sup>229</sup> For more on Whitefield, see *infra* notes 447–80 and accompanying text.

<sup>230</sup> See generally MALONE, *supra* note 225, at 24–36.

<sup>231</sup> See generally *id.* at 37–42.

<sup>232</sup> See, e.g., *infra* notes 395–423 and accompanying text.

<sup>233</sup> The other parishes in Georgia had similar or worse trouble retaining ministers. At Augusta (St. Paul's parish), there were five ministers within a twenty-one year period—and for at least some of those years there was no rector at all in the parish. See STRICKLAND, *supra* note 26, at 27–34, 52–53. The church at Frederica fared even worse, as it did not have a full-time minister at all after Charles Wesley in the mid-1730's. Although George Whitefield served there on occasion and Rev. Zouberbuhler filled the pulpit on a somewhat regular basis while he served in Savannah, there are no other records of a minister even visiting the church until 1800. See *id.* at 15–34. By the time of the Revolution, only Augusta and Savannah could be said to have fully functional churches and parishes within the Anglican Church. Further, an Anglican missionary was appointed to St. George's parish in 1773, but this engendered opposition from the local populace—half of whom were Presbyterian. They feared increased taxes to support a religion to which they did not adhere. Their letter to the Assembly was tabled, and then ultimately dropped, because of the intervening revolution. See 15 C.R. GA., *supra* note 1, at 473.

<sup>234</sup> “Ministers were few, and of those few many were profane, intemperate, and licentious. Moreover, those priests who were virtuous were often contentious . . . .” Wayne Mixon, *Georgia*, in *ENCYCLOPEDIA OF RELIGION IN THE SOUTH* 289 (Samuel S. Hill ed., 1984).

<sup>235</sup> See *supra* notes 94–114 and accompanying text.

standing a name change to “The Protestant Episcopal Church of the United States of America”).<sup>236</sup>

Despite the increase in geographic reach of the Anglican Church in the years before the Revolution,<sup>237</sup> its actual numerical strength remained quite low throughout the entire eighteenth century. For example, in 1748 Rev. Zouberbuhler reported to the Trustees that in Savannah there were 388 dissenters and only 63 Anglicans.<sup>238</sup> Two years later he reported an increase in real religion in his parish, while simultaneously bemoaning the fact that he was unable to serve a wider population in Georgia,<sup>239</sup> but it is unclear to what exactly Zouberbuhler was referring. By the end of the colonial period, it appears that there may have been as few as 200 practicing Anglicans in the whole of Georgia (at a time when Georgia had over 33,000 inhabitants).<sup>240</sup> While this number seems almost implausibly low, even in light of the evidence adduced above regarding turnover and lack of general religious fealty to the established church, there are no other reliable estimates. Whatever the actual number of adherents, it is plain that the Church of England, even though “established” by law, was not the strong force that established churches were in other colonies. By the turn of the century, the now-Episcopal Church had gone from the preferred religion of the colonial founders, to the “established” religion, to merely a footnote<sup>241</sup> among diverse religious groups—some of whom now vastly outnumbered Anglicanism in terms of sheer numbers of adherents. It is to those other groups that we now turn.

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<sup>236</sup> See MALONE, *supra* note 225, at 44–49.

<sup>237</sup> Although the government had continual problems retaining ministers for the established church, the Royal Legislature created four new parishes in 1765, owing to the geographical expansion of the territory of Georgia. This brought the total number of parishes to twelve. See 18 C.R. GA., *supra* note 1, at 690.

<sup>238</sup> See MALONE, *supra* note 225, at 25.

<sup>239</sup> See Letter from Bartholomew Zouberbuhler to the Rev. Dr. Philip Bearcroft (Dec. 20, 1750), in SPG ARCHIVES, SERIES B (PAPERS) 18: 197, *microformed on SPG AMERICAN MATERIAL*, *supra* note 102, at Reel B10.

<sup>240</sup> See GAUSTAD, *supra* note 31, at 8 (citing GEORGE WHITE, STATISTICS OF THE STATE OF GEORGIA 95 (Savannah, W. Thorne Williams 1849)).

<sup>241</sup> After the Revolution, the state succeeded to the rights of land that had been reserved for glebe lands but had not ever been assigned. *Cf.* Town of Pawlet v. Clark, 13 U.S. 292 (1815) (approving practice). This had the consequence of confiscating land of the Church of England in every former parish except Christ Church in Savannah, and exacerbating the woes of the formerly established church. See DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 184, at 144, 160–61; GA. GAZETTE, May 20, 1784; GA. GAZETTE, Mar. 15, 1792.

## B. *The Dissenting Groups*

### 1. *Jews*

Jews were present in Georgia from the very inception of the colony,<sup>242</sup> as a band of forty-two Jewish settlers arrived at Savannah from London in July 1733. This was the largest group of Jewish settlers in the New World, and only the third Jewish settlement of any kind in America.<sup>243</sup> Although the Trustees were opposed to the Jews settling in Georgia, General Oglethorpe allowed them to stay in Savannah (after a conversation with lawyers in Charleston, who advised him that the Jews could legally stay).<sup>244</sup> Oglethorpe's decision to allow the Jews to stay was aided by the fact that most of the Jews were young, able-bodied men who could help defend the new colony—and one of the Jewish settlers was a doctor.<sup>245</sup> Oglethorpe issued plots of land to fourteen of the twenty-six male Jews, probably limiting distribution to those who could pay for the land.<sup>246</sup> The community's acceptance of the Jews meant that one-fourth or one-fifth of Savannah's citizens were Jewish at the end of the first year.

The Jewish community continued throughout the period up to the Revolution, during which time one of its members, Mordecai Sheftall,

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<sup>242</sup> There is a fair amount of literature on the arrival and early history of Jews in Georgia. See, e.g., SAUL JACOB RUBIN, *THIRD TO NONE: THE SAGA OF SAVANNAH JEWRY, 1733–1983* (1983) (highlighting unique experience of Jews in Savannah compared to experience of Jews in other Colonies or other Georgia cities); B.H. Levy, *The Early History of Georgia's Jews*, in *FORTY YEARS OF DIVERSITY: ESSAYS ON COLONIAL GEORGIA* 163 (Harvey H. Jackson & Phinizy Spalding eds., 1984) (describing Jewish experience in Georgia from arrival in 1733 to Revolution); David T. Morgan, *Judaism in Eighteenth-Century Georgia*, 58 GA. HIST. Q. 41 (1974) (describing Jewish experience in Colonial Georgia, with emphasis on exodus of Jews shortly after arrival); John McKay Sheftall, *The Sheftalls of Savannah: Colonial Leaders and Founding Fathers of Georgia Judaism*, in *JEWS OF THE SOUTH* 65 (Samuel Proctor & Louis Schmier eds., 1984) (focusing on Sheftall family's experience in Colonial Georgia).

<sup>243</sup> See GAUSTAD, *supra* note 31, at 144. A total of five Jewish communities were founded by the end of the colonial period: New York (1654), Newport, RI (c. 1674), Savannah (1734), Charleston (1741), and Philadelphia (1745). The first federal census (1790) counted only 1243 Jews out of a total population of 2,810,248—which was less than 1/20th of one percent. See *id.*

<sup>244</sup> See STRICKLAND, *supra* note 26, at 41. This probably derived from an exegesis of the original charter, which granted “liberty of conscience allowed in the worship of God, to all persons . . . except Papists.” CHARTER, *supra* note 41, at 773.

<sup>245</sup> See HARRY GOLDEN, *OUR SOUTHERN LANDSMAN* 38–39 (1974) (“Savannah needed men to build a town.”); RUBIN, *supra* note 242, at 2–3 (Jewish doctor “may be considered Georgia's first public hero”); Levy, *supra* note 242, at 166–68 (noting that military needs may have been more important than medical needs). Interestingly, the Trustees were interested in conversion of the Jews to Christianity, a task which was at least attempted by John Wesley while serving Georgia. See generally John C. English, *John Wesley and His “Jewish Parishioners”: Jewish-Christian Relationships in Savannah, Georgia, 1736–1737*, 36 *METHODIST HIST.* 220 (1998).

<sup>246</sup> Levy, *supra* note 242, at 168.

became famously known for his revolutionary zeal.<sup>247</sup> After the war, the Jewish community reconstituted itself and formed a synagogue in July 1786.<sup>248</sup> In 1790, the new state granted the synagogue a charter of incorporation, in the same manner as charters were granted to various Christian denominations.<sup>249</sup> Finally, in 1829, the city of Savannah granted the community land for a new synagogue.<sup>250</sup> Support for the building came from Jews, as well as people of “different sects,” thus underscoring how fully the Jews had been incorporated and accepted into community life over a one hundred year period.<sup>251</sup>

## 2. *Salzburgers*

Another early group to settle in Georgia was an assemblage of pietistic Lutherans known as “Salzburgers.”<sup>252</sup> Hearing of the plight of the Salzburgers, who suffered persecution at the hands of the ruling Catholics in their Austrian homeland, the Trustees of Georgia affirmatively sought them out as settlers for the new colony, and resolved to fund the migration of the Salzburgers to Georgia.<sup>253</sup> Accordingly, they agreed to a series of articles that provided the Salzburgers with financial assistance for the passage to Georgia, tools, seed provisions, land, and—importantly—the legal protection of “the free Exercise of their Religion, and [of] the full enjoyment of all the Civil and Religious Rights of the Free Subjects of Great Britain.”<sup>254</sup> With this enticement, the first group of German-speaking Lutherans (some fifty-seven settlers, including two Lutheran pastors) arrived in Savannah on March 12, 1734.<sup>255</sup>

The Salzburgers settled in their own community (“Ebenezer”) some twenty-five miles northwest of Savannah.<sup>256</sup> Additional ships with Lutheran settlers arrived in December 1734, February 1736, and

<sup>247</sup> See generally B.H. LEVY, MORDECAI SHEFTALL: JEWISH REVOLUTIONARY PATRIOT 45–93 (1999).

<sup>248</sup> Levy, *supra* note 242, at 171–74.

<sup>249</sup> RUBIN, *supra* note 242, at 39. The charters were authorized by “[a]n Act to incorporate the Episcopal Church in Savannah . . . and to authorize the governor to grant charters of incorporation to other religious societies.” DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 184, at 144–45; RUBIN, *supra* note 242, at 410–12.

<sup>250</sup> Morgan, *supra* note 228, at 51.

<sup>251</sup> *Id.*

<sup>252</sup> These settlers were so named because they generally emigrated from Salzburg (in modern Austria). GEORGE FENWICK JONES, THE GEORGIA DUTCH 13–14, 18–20 (1992) [hereinafter JONES, THE GEORGIA DUTCH].

<sup>253</sup> See JONES, *supra* note 26, at 4, 9; see also JONES, THE GEORGIA DUTCH, *supra* note 252, at 14.

<sup>254</sup> 1 C.R. GA., *supra* note 1, at 77–79.

<sup>255</sup> JONES, THE GEORGIA DUTCH, *supra* note 252, at 21. For an abbreviated account of the trip across the sea, see Gaustad & Noll, *supra* note 98, at 127–32.

<sup>256</sup> DAVIS, *supra* note 26, at 16; JONES, THE GEORGIA DUTCH, *supra* note 252, at 35–36.

December 1741.<sup>257</sup> By 1742 the Salzburgers had established their community (now “New Ebenezer”) at a better location.<sup>258</sup> Their community numbered at least 256 by 1742.<sup>259</sup>

The Salzburgers factored prominently into at least two important incidents involving church-state relations in Georgia: the passage of the 1758 establishment law, and an issue regarding a land grant for the church.<sup>260</sup> These incidents reveal the visibility and influence of the Salzburger community (or at least the German-speaking community) in early Georgia, and their numbers continued to rise, reaching as many as 1200 by the early 1770s.<sup>261</sup>

### 3. *Moravians*

Another group of German pietists, known as the United Brethren (or Moravians, because of the place from which they were refugees), petitioned the Trustees for a land grant in 1735.<sup>262</sup> The Moravians’ patron, Nikolaus Ludwig von Zinzendorf, received a 500-acre land grant for the émigrés.<sup>263</sup> Two groups of Moravians, totaling no more than thirty, soon arrived in Georgia, but never took possession of the land grant, choosing instead to work as tradesmen in Savannah.<sup>264</sup>

The tenure of the Moravians in Georgia was very short, for in 1737 trouble from the Spanish in Florida threatened the Georgia colonists, presenting a dilemma for the pacifist Moravians.<sup>265</sup> After a series of discussions with the Trustees regarding how to respect their conscientious objector status (with the Trustees insisting that they at least pay men to serve in their places), the Moravians apparently

<sup>257</sup> DAVIS, *supra* note 26, at 16; JONES, *THE GEORGIA DUTCH*, *supra* note 252, at 38–39, 48.

<sup>258</sup> DAVIS, *supra* note 26, at 16.

<sup>259</sup> 5 C.R. GA., *supra* note 1, at 674 (reporting “77 men, 70 women, 60 girls, 42 boys, and 7 maidservants; in all 256” persons).

<sup>260</sup> For the 1758 establishment law, see *supra* notes 110–14 and accompanying text. For the dispute over church property, see *infra* notes 380–91 and accompanying text.

<sup>261</sup> See DAVIS, *supra* note 26, at 17. One source claims the figure of more than 1000 by 1741 rather than 1770. GAUSTAD, *supra* note 31, at 18; see also THEODORE G. AHRENDT, *THE LUTHERANS IN GEORGIA* 14 (1979) (describing Georgia in 1740 as “more German than English”) (internal quotation marks omitted). While it is known that other German speakers lived in Georgia at “Savannah, Darien, White Bluff on the Vernon River, on St. Simons Island, at Hampstead, and in” other little hamlets around Ebenezer, including Zion and Goshen, see DAVIS, *supra* note 26, at 16–17, it seems more logical to assign the later date to the larger number of German speakers.

<sup>262</sup> Miller, *Relations*, *supra* note 26, at 184–88.

<sup>263</sup> See *id.*; 2 C.R. GA., *supra* note 1, at 81; 29 C.R. GA., *supra* note 1, at 143.

<sup>264</sup> See JONES, *THE GEORGIA DUTCH*, *supra* note 252, at 49–51; Miller, *Relations*, *supra* note 26, at 188–90.

<sup>265</sup> See STRICKLAND, *supra* note 26, at 76.

ceased coming to Georgia and, by 1740, those already in Georgia moved to Pennsylvania—thus ending the Moravian period as quickly as it had begun.<sup>266</sup>

#### 4. Presbyterians

The first of the Presbyterians arrived in Georgia in early 1736.<sup>267</sup> This first group of 180, the Highland Scots, arrived more to receive land than to escape religious persecution.<sup>268</sup> With funding from the Society for Propagating Christian Knowledge (SPCK), the Scottish Highlanders and their minister settled on the southern frontier of Georgia, founding the town of New Inverness (later called Darien).<sup>269</sup> This community continued up until the revolution and beyond, with Darien becoming a hotbed of revolutionary zeal and fervor.

Other Presbyterians came to Georgia, again primarily from Scotland, and settled in the larger towns. Savannah had a population of “dissenters” sufficient to found the Independent Presbyterian Church in 1755.<sup>270</sup> A brick church building was built by 1758 (after a land grant by the governor and town council)<sup>271</sup> and the congregation invited John J. Zubly to serve as minister.<sup>272</sup> Zubly joined the congregation in 1760 and quickly became the leading Georgia pamphleteer on revolutionary issues while maintaining a highly visible and respected pastorate in Savannah.<sup>273</sup> In addition to his ministry there (with about seventy communicants in 1773), Zubly ministered to seventy German Calvinists outside Savannah, and he also visited pulpits at Congregational and Lutheran churches in both Georgia and South Carolina.<sup>274</sup>

<sup>266</sup> See DAVIS, *supra* note 26, at 18; JONES, THE GEORGIA DUTCH, *supra* note 252, at 52–53; STRICKLAND, *supra* note 26, at 76–78. On the Moravians leaving Georgia, see 21 C.R. GA., *supra* note 1, at 364–65, 404–05, 503–05; 4 C.R. GA., *supra* note 1, at 22–23.

<sup>267</sup> See Miller, Relations, *supra* note 26, at 194.

<sup>268</sup> See *id.* at 195.

<sup>269</sup> See *id.* at 194, 196–97; STRICKLAND, *supra* note 26, at 36, 70. For a more detailed accounting of the history of Georgia’s Scottish population, see generally Orville A. Park, *The Georgia Scotch-Irish*, 12 GA. HIST. Q. 115 (1928).

<sup>270</sup> 1 ERNEST TRICE THOMPSON, PRESBYTERIANS IN THE SOUTH 37 (1963). There was at least some Protestant influence in Savannah prior to this time, as a Protestant minister came from South Carolina in the early 1740’s to pastor a group of dissenters. See *infra* note 373.

<sup>271</sup> 13 C.R. GA., *supra* note 1, at 183.

<sup>272</sup> Roger A. Martin, *John J. Zubly Comes to America*, 61 GA. HIST. Q. 125, 137 (1977).

<sup>273</sup> For more on Zubly, see especially Nichols, *supra* note 107. For biographical data, see the note by Zubly’s daughter, Ann Zubly Seagrove, reprinted in ZUBLY JOURNAL, *supra* note 159. See also sources and discussion in *id.* at ix–xv (overview of Zubly’s life); *id.* at 106 (biographical data); THOMPSON, *supra* note 270, at 92.

<sup>274</sup> See DAVIS, *supra* note 26, at 203; Martin, *supra* note 272, at 136.

During his lifetime, Zubly was involved in a significant church-state dispute regarding payment of the Anglican rector and sexton in Savannah.<sup>275</sup> Zubly and the Savannah Presbyterians would likely have opposed the 1758 establishment law had they been organized at the time, but this was not possible, as Zubly did not join the Savannah congregation until 1760. Zubly himself later became quite involved in state affairs, serving as a delegate to the Georgia Provincial Congress and 1775 Continental Congress before infamously refusing to support a separation from England.<sup>276</sup>

Two other Presbyterian groups in Georgia merit mention. First, many Presbyterians from the older colonies settled in the frontier regions of Georgia and petitioned the legislature for land grants, although they did not form any churches that we know of. Two Presbyterian congregations from North Carolina petitioned for land on the basis of 360 signatures by males, mostly heads of households. In addition, there were upwards of 600 families on the north side of the Savannah River waiting for a land grant.<sup>277</sup> Presumably, many of these frontier Presbyterians were early converts to Baptist or Methodist theology due to itinerant preaching along the frontier.

Second, there was a substantial group of Irish Presbyterians that settled at Queensborough. This group began in 1765 when three local Presbyterians petitioned the governor and council to grant 50,000 acres for people to come over from Ireland.<sup>278</sup> The land was reserved for this purpose, and money was granted to aid the travel expenses of the new Irish settlers, although the money was limited to Protestants.<sup>279</sup> While there were some complications, including a spat with the Privy Council, a small group of farmers arrived from Belfast in 1769 and were granted land and funds by the Georgia Council.<sup>280</sup> They settled at Queensborough and Briar Creek, which became Presbyterian settlements.<sup>281</sup>

The Irish Presbyterian group at Queensborough in St. George's parish opposed the appointment of an Anglican missionary to their area in 1773.<sup>282</sup> Even though Presbyterians comprised half the population of the parish, a vestry and church wardens had been elected

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<sup>275</sup> See *infra* Part III.C.

<sup>276</sup> See sources and discussion in Nichols, *supra* note 107, at 301–02.

<sup>277</sup> 12 C.R. GA., *supra* note 1, at 143, 373–75; Letter from the Honorable James Habersham to Governor James Wright (June 13, 1772), in 6 COLLECTIONS OF THE GEORGIA HISTORICAL SOCIETY, *supra* note 39, at 184–85.

<sup>278</sup> STRICKLAND, *supra* note 26, at 117.

<sup>279</sup> *Id.* at 117–18.

<sup>280</sup> *Id.* at 118.

<sup>281</sup> *Id.*

<sup>282</sup> 15 C.R. GA., *supra* note 1, at 473.

there and a church had been built (but not yet a parsonage).<sup>283</sup> The inhabitants apparently feared that their taxes would be increased (under the 1758 law) to pay the “teacher’s” salary.<sup>284</sup> They thus pleaded for the division of the parish into two separate entities according to religious persuasion so that they would not have to support a minister of another denomination.<sup>285</sup> This petition was tabled by the Assembly.<sup>286</sup>

Like all other religions in Georgia, Presbyterianism suffered a decline in church membership and attendance during the war, and suffered from apathy after the war—in addition to a turn toward Baptist and Methodist beliefs.<sup>287</sup> To reestablish Presbyterianism, the presbytery of South Carolina sent two missionaries to Georgia shortly after the Revolution.<sup>288</sup> By 1796 there were enough Presbyterians to start the Presbytery of Hopewell, which encompassed the entire state of Georgia.<sup>289</sup> However, only about fourteen Presbyterian churches existed by 1796, in addition to several preaching places.<sup>290</sup> There was another slight downturn in membership from this period until the start of the Great Revival just after the turn of the century.<sup>291</sup>

##### 5. Congregationalists

The Congregationalists were a bit later in arriving in the colony, but they would have a lasting impact on it, particularly during the struggle with England. They arrived in St. John’s parish, south of Savannah, in 1752.<sup>292</sup> Their ancestors were from Massachusetts, by way of South Carolina, and they had come to Georgia because of the availability of land (but only after owning slaves in Georgia became an option).<sup>293</sup> The original settlers from South Carolina were joined by others from New England, including Dr. Lyman Hall, who would

<sup>283</sup> Letter from James Seymour (Aug. 24, 1772) [hereinafter Seymour Letter], in SPG ARCHIVES, SERIES C, AM.8 #84 (MISC. DOCS. GA., 1758–84), *microformed on* SPG AMERICAN MATERIAL, *supra* note 102, at Reel C3; Letter from John Holmes (Feb. 1, 1774), in SPG ARCHIVES, SERIES C, AM.8 #104 (MISC. DOCS. GA., 1758–84), *microformed on* SPG AMERICAN MATERIAL, *supra* note 102, at Reel C3.

<sup>284</sup> 15 C.R. GA., *supra* note 1, at 473.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> See THOMPSON, *supra* note 270, at 122–23.

<sup>288</sup> *See id.*

<sup>289</sup> *Id.* at 123.

<sup>290</sup> *Id.*

<sup>291</sup> See Ronald W. Long, Religious Revivalism in the Carolinas and Georgia from 1740–1805, at 128–30, 151 (1968) (unpublished Ph.D. dissertation University of Georgia) (on file with the *New York University Law Review*).

<sup>292</sup> Allen P. Tankersley, *Midway District: A Study of Puritanism in Colonial Georgia*, 32 GA. HIST. Q. 149, 149 (1948).

<sup>293</sup> STRICKLAND, *supra* note 26, at 115.

later play a significant role in Georgia's union with the other colonies.<sup>294</sup> Their steady and consistent minister, the Reverend John Osgood, joined the venture in the first wave of settlement.<sup>295</sup> Osgood led this group at Midway and Sunbury from 1752 until his death in 1773, and he was well-respected throughout the colony.<sup>296</sup>

Even though they received land from the state,<sup>297</sup> the Midway group was opposed to too much state involvement in affairs of religion. Thus, they openly opposed the Establishment Act of 1758.<sup>298</sup>

By 1771, the area surrounding Midway boasted about 350 white inhabitants and 1500 slaves; probably 150 of these persons attended the Midway Congregation.<sup>299</sup> The town was quickly increasing in stature as well, controlling about one-third of Georgia's wealth.<sup>300</sup>

During the Revolutionary War, the church at Midway served as a focal point of rebellion. It was burned down in late 1778 and the pastor of the church was drowned, which rendered services impossible until the end of the war.<sup>301</sup> After the war, the church reconstituted itself and became strong enough to incorporate under the 1789 incorporation law.<sup>302</sup>

## 6. *Quakers*

Although the settlement of Quakers in Georgia was explicitly contemplated by the 1732 charter,<sup>303</sup> members of that religious persuasion were slow to arrive in the colony. A group of Quaker families first petitioned for land in 1750 or 1751, but that request fell through because few families actually arrived in Georgia.<sup>304</sup> In 1767 another

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<sup>294</sup> *Id.* at 116.

<sup>295</sup> DAVIS, *supra* note 26, at 201; Martin, *supra* note 272, at 136.

<sup>296</sup> DAVIS, *supra* note 26, at 201–02; *see also* John J. Zubly, The Faithful Minister's Course Finished: A Funeral Sermon, Preached August the 4th, 1773, in the Meeting at Midway in Georgia, the Internment of the Rev. John Osgood, A.M. Minister of that Congregation (Savannah, James Johnston 1773), at 14–23.

<sup>297</sup> *See infra* note 377 and accompanying text.

<sup>298</sup> *See supra* note 106 and accompanying text.

<sup>299</sup> *See* DAVIS, *supra* note 26, at 22, 201.

<sup>300</sup> *See id.* at 22.

<sup>301</sup> JAMES STACY, HISTORY AND PUBLISHED RECORDS OF THE MIDWAY CONGREGATIONAL CHURCH: LIBERTY COUNTY, GEORGIA 45 (1979) (describing devastation of church and community, and subsequent drowning of pastor, as result of 1778 British invasion).

<sup>302</sup> *See* DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 184, at 144–45 (incorporating Independent Congregational Church of Midway in 1789).

<sup>303</sup> The Charter provided for administration of “the solemn affirmation to any of the people commonly called quakers.” CHARTER, *supra* note 41, at 774.

<sup>304</sup> *See* Alex M. Hitz, *The Wrightsborough Quaker Town and Township in Georgia*, THE BULL. OF FRIENDS HIST. ASS'N 10–12 (1957), *reprinted in* QUAKER RECORDS IN GEORGIA: WRIGHTSBOROUGH 1772–1793, FRIENDSBOROUGH 1776–1777, at 2–4 (Robert Scott Davis, Jr. ed., 1986).

group of Quakers from Pennsylvania (by way of North Carolina) petitioned the governor and Council for land for a settlement, and they were given land grants in an area that would come to be known as “Wrightsborough.” The town reached its zenith in March 1775, with approximately 600 residents. Of these 600, between 150 and 200 were members of the Quaker Meeting.<sup>305</sup> After the Revolution, the Quaker community suffered from internal strife, coupled with a strong theological revulsion against the slavery in Georgia, and eventually the community of Wrightsborough migrated to Ohio in the early 1800s, leaving Georgia without a continuing Quaker presence.<sup>306</sup>

### 7. Baptists

Baptists were relatively late in arriving to Georgia, although by the turn of the nineteenth century their impact was deep and wide across Georgia as they gained large numbers of adherents through revivalism. While most Baptist histories of Georgia begin with the year 1757 when a few individuals were baptized,<sup>307</sup> sustained growth and the presence of a Baptist church did not take hold until the early years of the revolutionary period.<sup>308</sup>

After the conclusion of the war, the Baptists rapidly began gaining converts, especially in the backwoods and frontier regions. In terms of sheer numbers, Baptist membership increased from 137 in

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<sup>305</sup> See Hitz, *supra* note 304, at 4–5; see also DAVIS, *supra* note 26, at 5, 150 (debunking notion that all of Wrightsborough was Quaker and asserting that records indicate that some thirty-four or thirty-five families—about 200 persons—were Quakers).

<sup>306</sup> See Hitz, *supra* note 304, at 159. One other purported Quaker community existed in Georgia for a brief time, but there is much doubt whether any in the community were actually Quakers except the founder, Captain William Manson, who was at least nominally committed. For the history of “Friendsborough,” see QUAKER RECORDS IN GEORGIA: WRIGHTSBOROUGH 1772–1793, FRIENDSBOROUGH 1776–1777, *supra* note 304, at 174–203.

<sup>307</sup> In reality Baptists were present from the beginning. One or two Baptists were on the boat with Oglethorpe, and a short list of others came to the colony in the proprietary period. It is clear that they organized no Baptist churches, though. See ROBERT G. GARDNER ET AL., A HISTORY OF THE GEORGIA BAPTIST ASSOCIATION, 1784–1984, at 10 (1988); see also 1 THE JOURNAL OF THE REV. JOHN WESLEY, A.M. 383 (Nehemiah Curnock ed., 1909) (claiming that of forty-four jurors in his case in 1737 there was “a Frenchman, who did not understand English, one a Papist, one a professed infidel, three Baptists, sixteen or seventeen other Dissenters; and several who had personal quarrels against me, and had openly vowed revenge”). James Seymour openly complained to the SPG that “irregular Baptists” were having some success in “draw[ing] off many weak people from the established Church” as early as 1772. Seymour Letter, *supra* note 283.

<sup>308</sup> See J.H. CAMPBELL, GEORGIA BAPTISTS: HISTORICAL AND BIOGRAPHICAL 1–2 (J.W. Burke & Co. 1874); JESSE MERCER, HISTORY OF THE GEORGIA BAPTIST ASSOCIATION, COMPILED AT THE REQUEST OF THAT BODY 13–18 (2d prtg. 1979) (1838) (describing efforts at organization during period).

1770, to 261 in 1780, to 3340 in 1790, to 5315 in 1801.<sup>309</sup> By 1793, Baptists were the most numerous denomination in the state, at least according to one of their ministers.<sup>310</sup> The Baptists began to form a host of new churches and new “associations.” The number of churches increased from seven in 1780 to fifty-four in 1790,<sup>311</sup> and the Georgia Baptist Association was founded in 1784–85 and quickly grew in size and scope.<sup>312</sup>

The Baptists grew in influence as well as numbers. While converts came primarily from the frontier regions and among people of lower social status, a few Baptists obtained more prominent positions in society. Baptists were “politically active as a bailiff, commissioner of the peace, representative in the state General Assembly, and candidate for county surveyor.”<sup>313</sup> Baptists were not present at the 1777 Constitutional Convention,<sup>314</sup> but they participated in increasing numbers at the 1789, 1795, and 1798 conventions. By 1798, eight or more Baptists participated in the Convention, and the minister Jesse Mercer is widely attributed with contributing heavily to the section regarding liberty of conscience in matters of religion.<sup>315</sup>

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<sup>309</sup> See GARDNER, *supra* note 307, at 12. Baptists actually declined proportionately in Georgia during the 1790s, despite marked gains in membership. In 1790 there was one Baptist for every twenty-five inhabitants, and by 1801 there was only one for every thirty-two. See *id.*

<sup>310</sup> See DAVID BENEDICT, A GENERAL HISTORY OF THE BAPTIST DENOMINATION IN AMERICA, AND OTHER PARTS OF THE WORLD 726 (Boston, Manning & Loring 1813) (referring to claim by Abraham Marshall, who also noted that Baptists and Methodists were growing very rapidly while other denominations were not).

<sup>311</sup> GARDNER, *supra* note 307, at 41.

<sup>312</sup> See generally *id.* at 41–57 (describing development of Georgia Baptist Association from 1784–1801); MERCER, *supra* note 308, at 20–28, 34–39 (describing growth and development of Georgia Baptist Association from 1784 through 1800).

<sup>313</sup> GARDNER, *supra* note 307, at 28. Ministers were not paid for their services, other than the salaried minister at the Savannah church. Usually ministers had farms or other means of supporting themselves, which was sometimes supplemented by in-kind gifts from congregants on an irregular basis. See *id.* at 22.

<sup>314</sup> Gardner claims that the disestablishment of the Anglican Church in 1777 was led by Edward Barnard, “an Anglican strongly influenced by Baptists.” *Id.* at 29. This would be very strange if Gardner is correct, because Barnard was one of the three men primarily responsible for the enactment of the 1758 law to begin with. See *supra* note 102 and accompanying text.

<sup>315</sup> See BOYKIN, *supra* note 213, at 263 (crediting Jesse Mercer with large role in 1798 convention); GARDNER, *supra* note 307, at 29. Sources indicate that at the 1789 convention there were two Baptists (Abraham Marshall and Jeremiah Walker) and one who would become a Baptist in 1803 (Joseph Clay). At the 1795 convention, there were three Baptist ministers (Silas Mercer, Benjamin Davis, and Thomas Polhill). And at the 1798 convention there were at least eight Baptists (Jesse Mercer, Benjamin Moseley, Joseph Clay (not a Baptist until 1803), Benjamin Davis, Thomas Polhill, Matthew Rabun, George Franklin, Thomas Gilbert, and maybe others). This means that in 1798, eight of the sixty-eight delegates were Baptists—a very high percentage considering Baptists were only

Further, the newly formed Georgia Baptist Association twice prevailed upon the legislature concerning religious liberty issues. The first is the Baptist response to the 1785 law which provided for payment of ministers by governmental funds.<sup>316</sup> Second, in October 1793, the Baptist Association requested that the legislature ban the future importation of slaves. This request—which purported “not [to] voice Baptist opposition to slavery as such”<sup>317</sup>—was not immediately successful, but may have influenced the decision of the 1798 constitutional drafters to end the slave trade in Georgia in that year—ten years earlier than mandated by federal law.<sup>318</sup>

Finally, we would be remiss to overlook the prevalence of black Baptist churches in Georgia. For example, the largest Baptist church after the war (and one of the largest churches of any denomination in Georgia at that time) was the black Baptist church of Savannah.<sup>319</sup> The congregation constructed their own congregational meeting place in 1792, and by 1794 the membership figures were recorded in the annals of the Georgia Baptist Association, showing an overall membership of 381 members.<sup>320</sup> The church left the Georgia Association in 1797 and helped found the Savannah Association in 1802.<sup>321</sup> Its membership had climbed to around 700 by 1800.<sup>322</sup>

## 8. Methodists

Methodism, which began as a reform movement within Anglicanism, originated with John Wesley, a former Anglican minister to Savannah.<sup>323</sup> But while Wesley and his colleagues (including Whitefield) were being called “methodists” as early as the 1730s when

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about three percent of the population of Georgia at large at that time. See BOYKIN, *supra* note 213, at 263; King, *supra* note 219, at 46–47.

<sup>316</sup> See *supra* notes 135–41 and accompanying text.

<sup>317</sup> GARDNER, *supra* note 307, at 52.

<sup>318</sup> GA. CONST. of 1798, art. IV, § 11. Cf. 2 Stat. 426 (1807) (enacted) (“An Act to prohibit the importation of Slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight.”).

<sup>319</sup> Andrew Bryan, a slave, exhorted his fellow slaves to Christianity after his conversion. After initial struggles against the other slave owners, who feared rebellion in the guise of religion, Bryan’s owner interceded with the other owners and a regular meeting began in the barn of Bryan’s owner. In 1788 Abraham Marshall, minister of the Kiokee Baptist Church, visited the congregation, baptizing forty-five converts and ordaining Bryan as the minister of this now-organized church. See Long, *supra* note 291, at 117.

<sup>320</sup> *Id.*

<sup>321</sup> See GARDNER, *supra* note 307, at 17.

<sup>322</sup> See *id.*

<sup>323</sup> See, e.g., Miller, Relations, *supra* note 26, at 109–10, 112–28 (describing Wesley’s relationships with political leaders in Savannah).

Wesley came to Georgia, it was not until Wesley's return to England from Georgia that what is known as modern Methodism began.<sup>324</sup>

Methodism was slower to come to the Carolinas and Georgia than to other parts of the United States,<sup>325</sup> and the first Methodist minister probably did not visit Georgia until 1773.<sup>326</sup> Methodism in America—and in Georgia—stagnated and suffered during the war, both because several of the prominent preachers were Englishmen and because John Wesley himself was opposed to the American independence movement.<sup>327</sup>

Although two itinerant Methodist ministers came to Georgia briefly immediately after the war, the first Methodist societies were not established until 1786 by John Major and Thomas Humphries, who had been appointed as itinerate preachers in Georgia.<sup>328</sup> At that time, the Methodists enlisted 70 members in Georgia.<sup>329</sup> By the late 1780s, the ranks of Methodism in Georgia had quickly grown to over 1100 members.<sup>330</sup> This expansion continued, though at a slightly slower pace, during the 1790s and beyond—until the time of the Second Great Awakening.<sup>331</sup>

## 9. Catholics

Catholics bear a special mention, for although they were always extremely few in number, the very prospect of Catholics in Georgia lay behind many legal and ecclesiastical decisions.<sup>332</sup> Catholics were excluded from the colony from the beginning—both by the charter and by the continuing use of oaths (including the oath of abjuration

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<sup>324</sup> The original name “methodists” was a derogatory term used to describe Wesley and others who methodically studied the Bible and prayed and regularly visited jails and homes of the poor. See Long, *supra* note 291, at 67.

<sup>325</sup> For an overview of the growth of Methodism in America generally, see GAUSTAD, *supra* note 31, at 74–82.

<sup>326</sup> See THE JOURNAL OF JOSEPH PILMORE, METHODIST ITINERANT, FOR THE YEARS AUGUST 1, 1769 TO JANUARY 2, 1774, at 180–81 (Frederick E. Maser & Howard T. Maag eds., 1969); see also WARREN THOMAS SMITH, PRELUDES: GEORGIA, METHODISM, THE AMERICAN REVOLUTION 18 (1976) (detailing Pilmore's 1773 excursion into Georgia).

<sup>327</sup> ALFRED M. PIERCE, A HISTORY OF METHODISM IN GEORGIA, FEBRUARY 5, 1736–JUNE 24, 1955, at 27 (1956) (describing Methodism's struggles during Revolutionary War).

<sup>328</sup> See GEORGE G. SMITH, THE HISTORY OF GEORGIA METHODISM FROM 1786 TO 1866, at 26–29 (1913) (describing early activities of Major and Humphries in Georgia).

<sup>329</sup> PIERCE, *supra* note 327, at 34–35 (noting growth of Methodist Church in 1785).

<sup>330</sup> See *id.* at 37–38 (detailing attendance at 1787 Annual Conference).

<sup>331</sup> See WARREN THOMAS SMITH, *supra* note 326, at 22–27 (describing missionary efforts by Francis Asbury and Thomas Coke between 1787 and 1814); see also PIERCE, *supra* note 327, at 56–57, 59 (noting Methodism's 168% increase between 1800 and 1810).

<sup>332</sup> For example, public officials were sometimes accused of being “secret papists.” See DAVIS, *supra* note 26, at 195.

and the oath against transubstantiation).<sup>333</sup> It appears that, at least during the proprietary period, the prohibition on Catholics was generally effective, as the largest number reported in Georgia over the first twenty years was four, in 1747.<sup>334</sup>

The background of the exclusion of Catholics derived from English policies at the time, as well as a fear of military conflict with the Catholic French or Spanish. Because of an incident in 1738,<sup>335</sup> an Anglican minister who had formerly been an Italian Franciscan friar, was disallowed from going to serve in Savannah in 1741.<sup>336</sup> Further, the Trustees instructed their agent in Germany to engage only Protestants; they tried to prevent Catholics from obtaining land and canceled grants when the grantees were found to be Catholic; and they prevented any Catholic from inheriting land through will, deed, or trust.<sup>337</sup> By 1741, the Trustees relaxed their policies slightly, forbidding the President of Savannah to make “any Inquisition on the private Opinions of anyone.”<sup>338</sup> This was a change from earlier instruction that instructed officials and ministers to spy on individuals to ascertain if any were “papists.”<sup>339</sup>

The royal governors—after the Trustees’ time—were instructed to deny liberty of conscience to Catholics.<sup>340</sup> This was a step back from the charter, which had granted liberty of conscience to all and denied Catholics only the free exercise of their faith. It is unclear how

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<sup>333</sup> See, e.g., 26 C.R. GA., *supra* note 1, at 324–28 (1751 letter defending citizen accused of being Roman Catholic); GEORGE WHITE, HISTORICAL COLLECTIONS OF GEORGIA 38–41 (Pudney & Russell, 1854) (describing oath-taking and setting forth oath of allegiance, oath of supremacy, and oath of abjuration; detailing persons in Georgia who took these oaths between December 15, 1766, and June 4, 1774).

<sup>334</sup> STRICKLAND, *supra* note 26, at 43.

<sup>335</sup> This incident at least illustrates why the Trustees were quick to use Catholicism as a short-hand identifier for military enemies (primarily from Spain, which was interested in Georgia because of its proximity to Spanish Florida). In 1738, a mutiny occurred among Oglethorpe’s regiment at Frederica and the instigators were apprehended—and the instigators were found to have been on the payroll of the Spanish. Three of the instigating soldiers were from London and one was from Gibraltar. Of these, “[o]ne of them . . . owned that he is a Roman Catholic.” *Extracts of Private Letters: Frederica in Georgia*, Oct. 8, 1738, 9 THE GENTLEMAN’S MAGAZINE 22 (Jan. 1739); see EGMONT JOURNAL, *supra* note 228, at 29 (noting that Oglethorpe wrote of mutiny at which “3 shots were made at him”); cf. STRICKLAND, *supra* note 26, at 81 (claiming that there were only two instigators, one of whom was Catholic and other who proclaimed himself Irish).

<sup>336</sup> See 5 C.R. GA., *supra* note 1, at 512 (describing decision to disallow former friar from going to Savannah).

<sup>337</sup> See 1 C.R. GA., *supra* note 1, at 319, 550 (describing land grant procedures for Protestant males); 2 C.R. GA., *supra* note 1, at 230, 271 (prohibiting succession to Catholics); STRICKLAND, *supra* note 26, at 81.

<sup>338</sup> 13 C.R. GA., *supra* note 1, 33.

<sup>339</sup> *Id.* at 81.

<sup>340</sup> See, e.g., 34 C.R. GA., *supra* note 1, at 66, 295.

strictly, if at all, the governors' instruction was enforced. But from 1754 to 1764, Georgia temporarily became the home of some French-speaking Catholics. British policy required that about 6000 Acadians be moved from Nova Scotia to the southern colonies, and Georgia received a number of these Acadians.<sup>341</sup> The Assembly passed a measure regarding them; they were generally not welcomed in Georgia and were gone by January 1764.<sup>342</sup>

Catholics had continuing difficulties obtaining legal equality in Georgia even under the state constitutions. However, one of the first members of the Assembly in 1777 was reportedly a Catholic, even though this ran counter to the constitutional requirement that Assembly members must be Protestant.<sup>343</sup> There is also evidence that at least one prominent shopkeeper in Savannah in 1770 was Catholic, due to items inventoried at her estate.<sup>344</sup> Little is known about the actual numbers of Catholics in Georgia at most relevant times, but it is certain that their presence (or even the threat of their presence) provided a rationale for some of the more discriminatory statements and actions in early Georgia. That said, there is no known evidence of blatant persecution (although this is certainly a lesser standard than full religious liberty) against Catholics, even where their religious affiliation was apparently known.

### C. Summary

The place of dissenters alongside the Anglican Church—established from 1758 to 1775—can be seen as quite congenial. Dissenters played a prominent role in Georgia throughout the entire eighteenth century, even during the period of establishment. In fact, as reported by Zubly in 1773, “[I]n the present house of Representatives, a third or upwards are dissenters, & most of the churchmen [are] of moderate principles.”<sup>345</sup> However, Zubly did note that those wishing to serve in public office had to be willing to take “the oath”—which not all dis-

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<sup>341</sup> See DAVIS, *supra* note 26, at 19 (reporting that as many as 400 Acadians came to Georgia); see also 18 C.R. GA., *supra* note 1, at 188–91 (describing Act for disposing of Acadians in Georgia but making no mention of number present in colony).

<sup>342</sup> See *id.*; GA. GAZETTE, Jan. 12, 1764 (noting that “[t]he Acadians have entirely left this place”).

<sup>343</sup> See Correspondence of Henry Laurens, of South Carolina, *microformed on MATERIALS FOR HISTORY PRINTED FROM ORIGINAL MANUSCRIPTS* 39–45 (Frank Moore ed. 1861) (1777 letter noting existence of Roman Catholic member of Georgia Assembly); GA. CONST. of 1777, art. VI (1785), *reprinted in* 2 THORPE, *supra* note 41.

<sup>344</sup> See *Estate of Lucretia Triboudite, Feb. 27, 1770*, in Inventories of Estates Book F, Reel 40/33, 448–50 (Ga. Dept. of Archives and History) (listing crucifix, cross, beads, and parcel of French books among her estate); *Advertisement of Lucretia Triboudet*, GA. GAZETTE, Feb. 21, 1765, at 2 (listing herself as shop-owner).

<sup>345</sup> Zubly letter, *supra* note 90, at 216.

senters were willing to do. With so much clout remaining in the hands of dissenters, it seems that we may believe Zubly when he reports that “[t]here has been little or no altercation between the church & dissenters, except in [one incident] in Christ Church Parish.”<sup>346</sup> Relations between and among the religious groups were generally cordial and harmonious, to the point that one commentator has asserted that “the rights of dissenters were never seriously threatened in Georgia.”<sup>347</sup> One can surmise that this owed, in large part, to the religious plurality evident in the colony from the beginning, which continued and increased throughout the eighteenth century.<sup>348</sup>

### III

#### THE INTERSECTION OF LAW AND RELIGION

Reading the legal history of church-state relations in tandem with the religious history of Georgia shows that liberty of conscience, free exercise, non-preferential governmental support for religion, and non-discrimination on the basis of religion were largely assumed in Georgia, even during the few years of establishment. While the laws on the books were advanced but not the *most* liberal of the day, the law in action was even more advanced. “In practice, few colonies were more liberal in their official views of religion than Georgia. Aside from the prohibition against Roman Catholics, which was largely self-enforcing, one searches in vain for signs of persecution of

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<sup>346</sup> *Id.* The incident to which Zubly refers is a dispute over rector and sexton’s fees, discussed *infra* Part III.C.1.

<sup>347</sup> Roger A. Martin & John J. Zubly: Preacher, Planter, and Politician 80 (1976) (unpublished Ph.D. dissertation, University of Georgia) (on file with the *New York University Law Review*).

<sup>348</sup> For example, consider the description of the state of religion in Georgia in 1790, as described by Jedidiah Morse:

In regard to religion, politics and literature, this state is yet in its infancy. In Savannah is an Episcopal church, a Presbyterian church, a Synagogue, where the Jews pay their weekly worship, and a German Lutheran church, supplied occasionally by a German minister from Ebenezer, where there is a large convenient stone church, and a settlement of sober industrious Germans of the Lutheran religion. In Augusta they have an Episcopal church. In Midway is a society of Christians, established on the [C]ongregational plan. . . . Their ancestors emigrated in a colony from Dorchester, near Boston, about the year 1700. . . . They, as a people, retain, in a great measure, that simplicity of manners, that unaffected piety and brotherly love which characterized their ancestors, the first settlers of New England. The upper counties are supplied, pretty generally, by Baptist and Methodist ministers. But the greater part of the state, is not supplied by ministers of any denomination.

JEDIDIAH MORSE, THE AMERICAN GEOGRAPHY 451 (Charles Gregg ed., Arno Press 1970) (1792).

dissenters for religious reasons . . . .”<sup>349</sup> The following examples of laws touching upon religion help to illustrate that the de facto application of the law was generally a bit more progressive than the law de jure—although relations between religious groups and the state were not completely free from conflict.

### A. *Direct Governmental Support for Religion*

From its inception, the governing body in Georgia provided direct material support to religion generally, thinking it beneficial to the well-being of the colony. This support was not necessarily restricted to the Church of England, but rather evinced a non-preferential element from the outset (at least for those of the Christian faith). And the support came from several quarters—most notably the Trustees, but also Parliament, the SPG, the Colonial Assembly, and the colonists themselves.

#### 1. *The Church of England*

The salaries for the Anglican ministers came primarily from the SPG.<sup>350</sup> The SPG insisted, however, that their appropriations would cease as soon as it was economically possible for the colony to pay its own ministers. The Trustees tried to effectuate these wishes by setting aside glebe lands, from which the proceeds would go to support the church and the ministry.<sup>351</sup> There were several problems with glebe grants during the proprietary period, including dissension among the ranks of the Trustees themselves and threats (and, for two years, action) from the SPG to withhold funds for ministers based on inadequacy of the glebes.<sup>352</sup> By the end of the early period, though, the Trustees had awarded outright grants of 300 acres each for the towns of Savannah, Frederica, and Augusta.<sup>353</sup> (Quite notably, these grants of glebe land were *not* specifically designated for the Church of

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<sup>349</sup> DAVIS, *supra* note 26, at 196. Davis details one exception to the above assertion: “Toward the close of colonial times, the Reverend Daniel Marshall, a Baptist, was arrested while conducting services in St. Paul Parish, an arrest probably made on someone’s whim and justifiable under no religious statute of the province.” *Id.* See *infra* notes 440–47 and accompanying text.

<sup>350</sup> This was due, in part, to the inability of the inhabitants of Georgia to pay for a minister, inasmuch as the colonists had almost all arrived “on the charity” themselves and were therefore unable to support a minister’s salary. STRICKLAND, *supra* note 26, at 45.

<sup>351</sup> See *id.*, at 45–54 (describing glebe lands and attendant problems during proprietary period).

<sup>352</sup> See *id.* at 51.

<sup>353</sup> See 2 C.R. GA., *supra* note 1, at 148–49 (Savannah glebe land); *id.* at 200–02 (Frederica glebe land); *id.* at 509–10 (Augusta glebe land). Strickland reports that glebes had been granted for the Church of England in all the parishes except St. James before the Revolution. STRICKLAND, *supra* note 26, at 112. But it appears that these glebes had only

England only, even though they were so used in fact.<sup>354</sup>) The Trustees also provided indentured servants to work these glebe lands.<sup>355</sup>

Aside from the glebes and moneys from the SPG, Anglican ministers were also paid out of the general grant by Parliament, from donations by individuals to Georgia designated for “religious uses,” and by a twenty pound stipend the British government made payable to every Anglican minister who went to the colonies.<sup>356</sup> Moreover, the Trustees themselves directly paid the salary of Rev. Zouberbuhler when funds were low because they felt it so essential to keep him in Savannah.<sup>357</sup> This direct payment was in addition to several other actions the Trustees took to support religion in the colony, to wit: providing clothing and supplies for George Whitefield, funding the building of parsonages and churches, and arranging for a catechist in Savannah to educate the children in religious matters.<sup>358</sup>

When the SPG discontinued paying the salary of the rector of Christ Church parish in 1771 on the grounds that the people could now support their own rector, Parliament continued to provide seventy pounds to the rector each year, as well as providing funds for two schoolmasters.<sup>359</sup> Additionally, the Georgia legislature provided money for ministers through a tax on liquor, which was indiscriminately applied to liquor purchases by Anglicans and dissenters alike.<sup>360</sup>

In addition to funding ministers, the Trustees also provided funds for houses of worship. Worship in Savannah was initially held in a hut (before moving to a townhouse, a courthouse, and, finally, a church building); work on a church building was not begun until March 1744—more than ten years and eight ministers after the colony’s founding. The building was completed some six years later—and then was expanded in 1765. The Trustees funded the construction of a

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been designated, and not necessarily used as glebes, since all but the Savannah glebe reverted to the state after the Revolution. See *supra* note 241.

<sup>354</sup> See, e.g., STRICKLAND, *supra* note 26, at 47–48, 53 (grant given for religious purposes “in general only”); 2 C.R. GA., *supra* note 1, at 148–49 (for “Religious uses”).

<sup>355</sup> STRICKLAND, *supra* note 26, at 53.

<sup>356</sup> See 3 C.R. GA., *supra* note 1, *passim* (over £2000 received and spent); STRICKLAND, *supra* note 26, at 45, 51 (discussing general parliamentary funding as well as twenty pounds per minister payment and individual donations).

<sup>357</sup> 1 C.R. GA., *supra* note 1, at 532; 2 C.R. GA., *supra* note 1, at 493–94; 25 C.R. GA., *supra* note 1, at 308; 31 C.R. GA., *supra* note 1, at 120–21, 139–40, 215–16.

<sup>358</sup> 19 C.R. GA., *supra* note 1, at 394–96; 29 C.R. GA., *supra* note 1, at 200; 31 C.R. GA., *supra* note 1, at 25, 27; 3 C.R. GA., *supra* note 1, at 51, 135, 141, 165 (discussing church building and catechist).

<sup>359</sup> See 34 C.R. GA., *supra* note 1, at 124, 161–62, 218.

<sup>360</sup> See STRICKLAND, *supra* note 26, at 112–13; 28 C.R. GA., *supra* note 1, at 24, 26 and sources cited therein.

small chapel at Frederica, which was constructed by May 1740. And the people of Augusta built a church (apparently at their own expense) in 1749, although the Trustees granted them the land and furnishings for the interior.<sup>361</sup>

## 2. *Other Religious Groups*

Direct governmental support for religion was by no means limited only to the Church of England. The Salzburger community dealt with the issue of land grants from the governing authority on more than one occasion.<sup>362</sup> The Salzburgers initially petitioned the Trustees for additional grants of glebe land in 1741, when their first church began to rot and needed replacement. The Trustees generously went above their normal allocation of land for glebes (which was 300 acres) and instead decreed 500 acres set aside for charitable and religious purposes at New Ebenezer in 1746.<sup>363</sup> In 1749, the Salzburgers asked the President and Assistants for grants of 300 acres for each of their three ministers, but only 300 acres was granted to Rev. Bolzius (their most prominent minister) as a glebe, with the other 600 acres reserved subject to the Trustees' approval. There is no indication that the Trustees approved these other glebes.<sup>364</sup> And it appears that the grant of 300 acres was not acted upon until the construction of the second church, if at all.<sup>365</sup>

The Presbyterian Scottish Highlanders' minister, John MacLeod, asked the Trustees to have his personal fifty acre lot converted into a grant of glebe land for him and his successors so long as the SPCK was paying the minister's salary.<sup>366</sup> The Trustees agreed, provided they were allowed to approve the minister.<sup>367</sup> But before any action was taken, the SPCK in Scotland requested a grant of 300 acres for their missionary in Georgia and promised money to pay for servants to cul-

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<sup>361</sup> See STRICKLAND, *supra* note 26, at 89–92.

<sup>362</sup> Notably, it appears that the Salzburger community also received other direct support for their church from the Trustees, including paint and oil for building churches; an altar cloth, vestments, a chalice, and other articles for use in services; and even money to help build houses for their ministers. See STRICKLAND, *supra* note 26, at 76; 2 C.R. GA., *supra* note 1, at 379, 481, 507; 22 C.R. GA., *supra* note 1, at 299. A well-documented conflict over the title status of later grants is detailed below, *infra* Part III.B.

<sup>363</sup> Although Strickland reports that this was never carried out, the Salzburger pastor Johann Martin Bolzius mentioned in a 1750 letter that he had named the 500 acres that the Trustees had granted to him. Compare STRICKLAND, *supra* note 26, at 70, with 26 C.R. GA., *supra* note 1, at 164.

<sup>364</sup> 26 C.R. GA., *supra* note 1, at 164; 6 C.R. GA., *supra* note 1, at 255; STRICKLAND, *supra* note 26, at 70–71.

<sup>365</sup> See DAVIS, *supra* note 26, at 207–12; STRICKLAND, *supra* note 26, at 124–26.

<sup>366</sup> See 2 C.R. GA., *supra* note 1, at 252–53.

<sup>367</sup> See 5 C.R. GA., *supra* note 1, at 44.

tivate the land.<sup>368</sup> The Trustees finally agreed to grant the land for a missionary, who was to be nominated by the Society but licensed and removed, if necessary, by the Trustees.<sup>369</sup> The Society agreed, in turn, to pay his salary until two-thirds of the land had been cleared and cultivated.<sup>370</sup>

While “[t]he Trustees gave the Presbyterian Highlanders a glebe,” they did not give them money to build a church.<sup>371</sup> Oglethorpe, however, ordered a church built for them and left money for it in 1736.<sup>372</sup> Whether the money was Oglethorpe’s personal funds or the Trustees’ money is unclear, but it was spent for other purposes.<sup>373</sup> In 1738, MacLeod alerted Oglethorpe that no church had yet been built at Darien, and Oglethorpe promised to fund the endeavor personally until a fund could be established for the church.<sup>374</sup> Nothing ever came of this and MacLeod never pursued it further, for he deserted his congregation and Georgia in 1741 and the Society in Scotland sent no one to take his place. The Darien community survived without a minister apparently until the Revolution.<sup>375</sup>

Even after the time of the Trustees, the Georgia Governor and Council continued to be generous with dissenters—especially regarding land grants for churches and glebes. For example, in 1755 forty-three Savannah dissenters petitioned for property upon which to build a church, and the land was granted.<sup>376</sup> The following year, the Congregationalists at Midway obtained a grant of 300 acres of glebe land from the provincial legislature.<sup>377</sup> And land was also granted for the use of a minister for Vernonburgh and Acton (whose populations were mainly the German Reformed Christians).<sup>378</sup> Finally, 700 acres

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<sup>368</sup> See 2 C.R. GA., *supra* note 1, at 296–97.

<sup>369</sup> STRICKLAND, *supra* note 26, at 70.

<sup>370</sup> See 2 C.R. GA., *supra* note 1, at 350; 5 C.R. GA., *supra* note 1, at 207, 336–37.

<sup>371</sup> STRICKLAND, *supra* note 26, at 71.

<sup>372</sup> See *id.*

<sup>373</sup> This was not the only time that Oglethorpe supported (or recommended that the Trustees support) religion on a non-preferential basis. In the early 1740s, Oglethorpe recommended that the Trustees pay Rev. Henri Chifelle twenty-one pounds for five years’ service. Rev. Chifelle had come to Savannah from South Carolina to minister to the needs of the French-speaking Protestants, most of whom were originally from Switzerland. Chifelle also preached in German when necessary. See 3 COLLECTIONS OF THE GEORGIA HISTORICAL SOCIETY, *supra* note 39, at 154.

<sup>374</sup> See 22 C.R. GA., *supra* note 1, at 13–14.

<sup>375</sup> See 5 C.R. GA., *supra* note 1, at 589, 600.

<sup>376</sup> 7 C.R. GA., *supra* note 1, at 183.

<sup>377</sup> *Id.* at 388.

<sup>378</sup> 7 C.R. GA., *supra* note 1, at 749; 8 C.R. GA., *supra* note 1, at 111; STRICKLAND, *supra* note 26, at 124.

were also granted by the Council for the use of the Presbyterian congregation in St. Andrew's parish.<sup>379</sup>

### B. *The Salzburgers' Problems with Land Grants*

One area of conflict between the state and a religious group involved a dispute between the government and the Salzburgers regarding their deeds to their lands. The validity of these deeds was called into question more than once—both because of specific language in the deeds and because of the 1758 establishment law. The first event that started a controversy occurred in 1767, when eight prominent Lutherans applied to join the Anglican Church.<sup>380</sup> (They claimed to represent 213 other like-minded Germans in and around Savannah, although there is no independent support for their claim.<sup>381</sup>) They petitioned the Church of England to recognize their change in denominational affiliation and, accordingly, transfer the usage of a Savannah church to them—as communicants in the Church of England.<sup>382</sup> The church at issue had been granted in 1761 (perfected in 1764) by Joseph Gibbons, a Presbyterian, “for the Love and good Will [borne] to Religion in General.”<sup>383</sup> Gibbons granted the German Protestants of the Savannah area a tract in the suburb of Yamacraw on which to build a church, and the deed conveyed the property for “the use and benefit” of “the said German Protestants” and their successors.<sup>384</sup> Because there was no reference restricting usage to Lutherans, the deed was open to the interpretation that German Protestants adhering to the Church of England might possess the property. And because the Church of England was the established religion, this seemed a natural result to the eight Lutherans petitioning England. Fortunately for the Salzburger community, the SPG offices denied the petition—in part because they had obtained information that the petition really arose from an internal dispute within the Lutheran community over succession to the pastorate for-

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<sup>379</sup> 7 C.R. GA., *supra* note 1, at 293, 588; STRICKLAND, *supra* note 26, at 124.

<sup>380</sup> See *Petition of German Protestants to the Rector, Churchwardens, and Vestry of Christ Church, Savannah* (1767), in SPG ARCHIVES, SERIES C (MISC. DOCS. GA., 1758–84), AM.8 #40, microformed on SPG AMERICAN MATERIAL, *supra* note 102, at Reel C2; *Letter of the Rector, Churchwardens, and Vestry of Christ Church to the Rev. Dr. Burton, February 23, 1767*, in SPG ARCHIVES, SERIES C (MISC. DOCS. GA., 1758–84), AM.8 #39, microformed on SPG AMERICAN MATERIAL, *supra* note 102, at Reel C2.

<sup>381</sup> See sources cited in *supra* note 380.

<sup>382</sup> *Id.*

<sup>383</sup> See Conveyances Book C-2, Reel 40/19, 805–06 (Ga. Dept. of Archives and History); Zubly Letter, *supra* note 90, at 216.

<sup>384</sup> See sources cited in *supra* note 383.

merly held by Rev. Bolzius.<sup>385</sup> Nonetheless, this incident put the Salzburger on notice that although they used the 1758 establishment law to their own benefit by electing their own members as “vestrymen” and “churchwardens,”<sup>386</sup> the law could quickly turn against them.

Later in 1767, a second set of events began with the building of a new brick church building at Ebenezer. This “New Jerusalem Church” was completed within two years, and the congregation sought to register the property on which it sat.<sup>387</sup> In 1768 the colony’s surveyor general surveyed the land, and a grant was given in 1771.<sup>388</sup> This grant was the underlying cause of a host of problems. When Rev. Henry Muhlenberg arrived in Georgia on an itinerant visit in 1774, he stepped into the middle of a controversy regarding this grant—and ultimately other land grants as well. The 1771 grant for the New Jerusalem Church (which Muhlenberg had obtained with Zubly’s aid) granted the church lots to Trustees for church use.<sup>389</sup> But within the grant was the explicit requirement “that the said two Lots of Land ‘shall be [restricted to ministers] Using and exercising divine Service’ according to the Rites and Ceremonies of the Church of England.”<sup>390</sup> This limitation in the grant ensured that the Anglican Church could reclaim and appropriate the land (and probably the church built on the land!) for itself, particularly in light of the 1758 establishment law. It appears that the instigator of that 1758 law, Joseph Ottolenghe, was himself behind the wording of the grant, along with one other individual—possibly the colony’s surveyor general.<sup>391</sup>

Even worse than the revelation about the grant of the land for the New Jerusalem Church was the fact that the Lutherans reevaluated their previous land grants from the state and found them wanting as well. To be sure, none were as egregious as the 1771 grant, but there seemed a very real possibility that other grants could revert to the Church of England due to questionable wording. The threatened properties included the church, schoolhouse, and land at Bethany (grant of 1761); the church and land at Goshen (grant of 1760); and the mill system of Ebenezer, which maintained the entire economy of

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<sup>385</sup> See DAVIS, *supra* note 26, at 207–09.

<sup>386</sup> See *supra* note 113 and accompanying text.

<sup>387</sup> 2 MUHLENBERG JOURNALS, *supra* note 134, at 605–06, 626–30.

<sup>388</sup> *Id.* at 605–06.

<sup>389</sup> *Id.* (reprinting grant).

<sup>390</sup> *Id.*

<sup>391</sup> See *id.* at 681–82. Davis proposes, quite plausibly, that the other individual was Henry Yonge, the surveyor general. DAVIS, *supra* note 26, at 208. Yonge also sponsored the 1758 establishment act. See *supra* notes 113–19 and accompanying text (discussing the 1758 act).

the community (grant of 1757).<sup>392</sup> Muhlenberg interceded for the community with the governor and council, among others, and received a “word of honor” from Governor Wright that the situation would be resolved.<sup>393</sup> The records do not indicate what became of the grants, except that the property was not taken from the Lutherans. Muhlenberg apparently pursued the issue in 1777 with Governor Treutlen, suggesting that if the necessary change had not been made that it should be done<sup>394</sup>—but we have no further historical evidence on the matter, probably because the intervention of the Revolution likely rendered it moot.

### C. *Required Payments to the Established Church*

While the establishment of the Anglican Church was typically not particularly onerous for dissenters, disputes did occasionally arise. The tension between dissenters and the establishment came to a head regarding two rites central to religion—death and marriage. Interestingly (and maybe tellingly), both of these conflicts involved the same Anglican minister—Rev. Samuel Frink—who developed a reputation in the colony for being difficult.

#### 1. *Death: Burial and Bell-Ringing*

The most prominent clash regarding religious liberty in early Georgia centered upon whether dissenters would have to pay fees to the Anglican rector and sexton when they buried their dead.<sup>395</sup>

Rev. Frink was a convert to Anglicanism after growing up the son of a Congregational minister in New England and graduating from Harvard in 1758.<sup>396</sup> He was initially appointed rector of Augusta (St. Paul’s parish) and then moved downriver to Savannah (Christ Church parish) in January 1767, where he took the pulpit vacated by the death

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<sup>392</sup> DAVIS, *supra* note 26, at 210–11.

<sup>393</sup> See 2 MUHLENBERG JOURNALS, *supra* note 134, at 675–81, 684.

His Excellency promised on his word of honor that [the New Jerusalem Church grant] would be amended and brought into the proper channel; but that it would require some time and patience; that the Salzburgers had not been treated fairly from the very beginning because they had received too little and too poor land.

*Id.* at 681.

<sup>394</sup> See Letter to Treutlen (Oct. 14, 1777), in 3 MUHLENBERG JOURNALS, *supra* note 134, at 85–86.

<sup>395</sup> To some extent, though, the disagreements were mostly a personal squabble between the two leading ministers of Savannah. See Martin & Zubly, *supra* note 347, at 76 (“Although some fundamental issues of American life were involved, the struggle in retrospect appears to have been largely personal, local, and of short duration.”).

<sup>396</sup> DAVIS, *supra* note 26, at 224.

of the highly esteemed Rev. Zouberbuhler.<sup>397</sup> Frink soon complained that he had earned more money in Augusta, and so he devised a plan to increase his income. Frink took a stand on the side of the Church of England as the established church and sought to incorporate rights and privileges he deemed appropriate to that status—as well as to his own pocket. His theory was that since he was the rector of the only established church in the parish, he was the “official” minister.<sup>398</sup> Therefore, any fees paid for religious use should be paid to the Church of England and its minister—none other than himself.<sup>399</sup>

Frink tried to use an inconspicuous route to collect more money. The Anglican sexton of Christ Church parish was authorized to ring the bell at funerals and arrange for the digging of graves in the only cemetery in Savannah.<sup>400</sup> The assembly (and later the church wardens and vestry) had designated an appropriate fee schedule for the performance of these tasks.<sup>401</sup> Frink sought to enforce payment of the fees even when the sexton did not perform the duties—for the Anglican church bells would not toll when the funeral was for a dissenter. To enforce payment, Frink brought a lawsuit in 1769 against Joseph Gibbons, a leading Presbyterian dissenter (and presumably a member of Zubly’s congregation in Savannah).<sup>402</sup> Gibbons had, as an act of charity, arranged for a funeral for a pauper. No services were performed by the Anglican rector and the Presbyterian sexton rang the Presbyterian funeral bells.<sup>403</sup>

Frink filed a lawsuit against Gibbons seeking payment of the fees: three shillings and six pence for digging the grave and the same amount again for ringing the funeral bell. Gibbons did not contest the payment of the grave-digging, presumably because the Anglican sexton had arranged for the digging or had done it personally—for there was only one cemetery in Savannah at the time.<sup>404</sup> He did protest, however, paying the fee for tolling the funeral bell, because the Anglican bell had not been rung at all and because the Anglican

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<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> Davis notes that, at times, Anglican clerics in North Carolina collected fees for marriage licenses over which they did not preside. And in Georgia, Governor Wright even encouraged the utilization of Anglican ministers at marriages. When possible, the governor made out wedding licenses to Anglican clergymen, “who sometimes endorsed them over to dissenters in exchange for half the fee.” But since there were too few Anglican ministers, this practice was never widespread. *See id.* at 224–25.

<sup>400</sup> *See id.* at 225.

<sup>401</sup> *Id.*

<sup>402</sup> Frink also brought a lawsuit against the captain of a ship for having his Presbyterian mate buried in Savannah according to the same protocol. *See id.* at 225 n.77.

<sup>403</sup> *See id.* at 225.

<sup>404</sup> *Id.*

sexton was not responsible for ringing the Presbyterians' bell.<sup>405</sup> At the trial in the Court of Conscience, Joseph Ottolenghe—the person largely responsible for the passage of the 1758 establishment law—presided over the case. The jury consisted of William Ewen (a faithful Anglican and vestryman of the parish), Thomas Lee (the clerk of the Anglican church), and Jonathan Peat (a local taverner).<sup>406</sup> The jury voted two to one in favor of Frink. Judge Ottolenghe quickly affirmed the precedential value of the decision, claiming that the sexton had a right to fees for burials anywhere in the parish whether he attended or not (even if they were on private lands).<sup>407</sup> Ottolenghe further asserted that the dissenters had no right to a bell of their own and pronounced Frink at fault for failing to pull the dissenters' bell to the ground already.<sup>408</sup>

This outcome infuriated both Rev. John Zubly, minister of the Independent Presbyterian Church in Savannah, and the editor of the *Georgia Gazette* (James Johnston, who was probably one of Zubly's parishioners). The *Georgia Gazette* reported the case in editorial fashion, decrying the ruling as biased.<sup>409</sup> It protested the ruling as counter to the "FREE exercise" of religion guaranteed by "the charter of this province."<sup>410</sup> Zubly, too, was outraged about the decision. He and Frink had not been on friendly terms to begin with, which was a marked change from his relationship with the former rector of Christ Church parish.<sup>411</sup> Zubly protested the decision in

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<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 225–26.

<sup>407</sup> *Id.* at 226.

<sup>408</sup> See GA. GAZETTE, May 10, 1769:

The Judge, who had declared his opinion upon the merits of the cause long before the trial, upon the trial observed, that the sexton had a legal right to a fee for any burial within the parish whether he was desired to attend or no, and though in a private plantation. He also with his usual good manners declared, that the Dissenters had no right to the use of a bell at all, and that the Rector of the parish was to blame that he had it not pulled down.

<sup>409</sup> Strickland reports that the account of the trial in the *Georgia Gazette* was written by Zubly. See STRICKLAND, *supra* note 26, at 126. However, there is no record of this nor any reason to attribute it to him rather than the editor, so far as I have been able to discern. Cf. DAVIS, *supra* note 26, at 226 (claiming that printer James Johnston was likely responsible for article).

<sup>410</sup> GA. GAZETTE, May 10, 1769. This was a historical error by the editor, as the provincial charter had been superseded by royal charter and only liberty of conscience was protected—not free exercise.

<sup>411</sup> See, e.g., John J. Zubly, A Letter to the Reverend Samuel Frink, in MILLER, WARM & ZEALOUS, *supra* note 26, at 86 ("Your worthy predecessor [Rev. Zouberbuhler] sometimes did not think it beneath him to accept of my services, and what his opinion was of me and my conduct on his dying-bed (which often makes us view things in a truer light) some worthy gentlemen still living may possibly remember."). Zubly had apparently paid a social call to Frink when Frink was first appointed to Savannah, but the visit had not been

publicly published letters to Rev. Frink, to which Frink responded.<sup>412</sup> Zubly boldly decried the injustice of paying fees to a sexton and rector for work that was never performed:

Is it not strange, Sir, that in a free Protestant country the ringing of a bell should prove a bone of contention. I do not know which would be the greatest hardship, the depriving us of the conveniency of a bell, which it seems is the strong inclination of the Justice that gave his charge to the jury, or the making us pay for a bell we do not desire to make any use of, and which formerly we were denied to have the use of when we would have been glad to pay for it. When we had no bell, nor place of worship, of our own, we sometimes could hardly obtain the use of the parish bell for love or money, and now we have one of our own, it seems we are not to make use of it unless we pay a fine of three shillings and sixpence for the non-usage of yours; on what principle of reason, justice, or natural equity, this can be grounded, I am entirely ignorant . . . [N]one but a young Star-Chamber would fix such an imposition on Protestants, and no Court of Justice ever could decree a man a reward for doing nothing.<sup>413</sup>

Part of Zubly's concern was for the precedential value of the case—that it was to be used to assess fees against dissenters all across Georgia.<sup>414</sup> The first two cases alone led the provincial legislature to introduce a bill to establish a separate cemetery in Savannah for dissenters and another for Jews. Such a bill would have removed the grounds for the lawsuits because it would have removed dissenters and Jews from the legal jurisdiction of the rector. The bill was passed by the Commons House of Assembly upon the testimony of Zubly and over the protestations of Frink.<sup>415</sup> The upper house altered the bill by allowing all (except Catholics) to be buried in the Anglican cemetery, but provided for a reduced fee to the Anglican rector when he did not need to preside at the funeral. The lower house countered this development by scheduling the matter for a hearing that it knew would never come to pass.<sup>416</sup>

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returned. Further, Zubly had tried to visit Frink when Frink was ill, and was turned away at the door by a servant. *See id.*

<sup>412</sup> MILLER, WARM & ZEALOUS, *supra* note 26, at 86–88.

<sup>413</sup> *Id.* at 87–88.

<sup>414</sup> Indeed, Frink proceeded with at least one other suit against a recently widowed female dissenter. *See id.* at 90. The outcome of this case is unclear, as the historical records do not indicate a court appearance on the matter.

<sup>415</sup> *See* 17 C.R. GA., *supra* note 1, at 559–63 (Zubly argued dissenters were entitled to bury their own dead under liberty of conscience provided in Georgia's founding charter, while Frink maintained such rights would infringe on those of established church and would have to be extended to other faiths).

<sup>416</sup> *See* 15 C.R. GA., *supra* note 1, at 95–96, 100, 115, 137, 142, 151 (passage of act establishing dissenters' burial ground following petition filed by Trustees of Savannah's

The bickering about cemeteries was interrupted by the pro-roguing of the Assembly on May 10, 1770, before any final action was taken, but it did not entirely die. Noble Wimberly Jones, who had been Speaker, indicated that if the Assembly were called again after July 1771 (they had met in the interim but had been concerned with colonial legislative and constitutional powers), the members would probably act on the issue of sexton's fees.<sup>417</sup> In a letter to Benjamin Franklin (then agent for Georgia in England),<sup>418</sup> Zubly intimated that Frink had not backed down but was rather continuing to try to collect on behalf of his sexton.<sup>419</sup> However, the Assembly never sat again while Frink was alive; Frink died in October 1774 at the age of thirty-six.<sup>420</sup>

Apparently, this was the end of the controversy in Georgia regarding fees to the rector and sexton for use of the cemetery, as the interests of the colony became increasingly consumed by relations with England. The controversy had sufficiently subsided by 1773 that Zubly could write, "We now bury in the same Ground unmolested, & pay no fees except to the sexton, which I have consented to pay whenever his attendance should be required, & not otherwise."<sup>421</sup> Zubly believed part of the dissenters' success in this area was due to the intervention of Benjamin Franklin. In July 1771, Zubly had written to Franklin on the subject of dissenters' rights in Georgia.<sup>422</sup> Franklin had subsequently written to Speaker Noble Wimberly Jones, possibly at Zubly's request—though we do not know if this had any real impact on developments.<sup>423</sup>

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meeting house); *id.* at 145–46, 149, 151–54, 165–66, 168, 172 (passage of act establishing Jewish burial ground on plot previously allotted to them); 17 C.R. GA., *supra* note 1, at 568, 572–75 (bill establishing Jewish burial ground on previously allotted plot amended at committee stage).

<sup>417</sup> See Letter from Noble Wimberly Jones to Benjamin Franklin (July 8, 1771), in 18 THE PAPERS OF BENJAMIN FRANKLIN 167–68 (William B. Willcox ed., 1974) [hereinafter FRANKLIN PAPERS].

<sup>418</sup> See 15 C.R. GA., *supra* note 1, at 76. Franklin was reappointed as Provincial Agent in January 1773. *Id.* at 363.

<sup>419</sup> Letter from John J. Zubly to Benjamin Franklin (July 9, 1771), in 18 FRANKLIN PAPERS, *supra* note 417, at 170–72.

<sup>420</sup> See DAVIS, *supra* note 26, at 228.

<sup>421</sup> See Zubly Letter, *supra* note 90, at 217.

<sup>422</sup> See Letter from John J. Zubly to Benjamin Franklin (July 9, 1771), *supra* note 419.

<sup>423</sup> *Id.* at 171 (referring to Letter from Benjamin Franklin to Noble Wimberly Jones (London, Mar. 5, 1771), in 18 FRANKLIN PAPERS, *supra* note 417, at 52–55).

## 2. *Marriage Licenses*

Jurisdiction over marriage is a peculiarly troubling area, for marriage is seen as partaking of both the spiritual and secular realms.<sup>424</sup> In the history of Georgia, both realms asserted their jurisdiction over entrance into marriage, with a few tensions arising between the two.

In 1741, during the proprietary period, the Trustees directed that marriages must be performed according to the canons of the Church of England.<sup>425</sup> However, the German Salzburger were exempted from this requirement provided that they obtained licenses from the magistrates.<sup>426</sup> And the Salzburger ministers were not allowed to marry Englishmen without permission from the civil officials, unless there was no English minister available.<sup>427</sup> In the royal period, the governors were given power to grant marriage licenses and charged with ensuring that marriages conformed to the Church of England, securing a colonial law if possible.<sup>428</sup> Such a law was never passed.<sup>429</sup>

During the administration of Governor Ellis, the governor had altered marriage licenses upon request so that Zubly (instead of an Anglican rector) could perform the wedding.<sup>430</sup> Governor Wright, however, would not perform this courtesy, apparently not believing it within his power. Rev. Frink therefore allowed Zubly to perform ceremonies on licenses made out to Frink, but Zubly declined any fee from the couples. Frink soon tired of endorsing licenses to Zubly with no benefit, save Frink's continued ability to boast that he was the only official minister in the parish. So Frink changed the relationship such that Zubly must charge a fee and give half of the money to Frink. Zubly at first complied, but then Frink began demanding the whole fee. This provoked Zubly to abandon the procedure altogether and cease to seek endorsements from Frink. This was likely the impetus for Frink's provocative remark that those married by Zubly "lived in fornication," although the marriages apparently were never so chal-

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<sup>424</sup> See also Joel A. Nichols, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929 (1998) (arguing religious groups with established procedures for regulating marriage relationships should have primary authority over marriage formation and dissolution for parties who voluntarily submit to its rules). See generally JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997) (analyzing historical interrelationship of law, theology, and marriage in Western Europe and the U.S.).

<sup>425</sup> See STRICKLAND, *supra* note 26, at 69.

<sup>426</sup> See *id.*

<sup>427</sup> See *id.*

<sup>428</sup> See *id.* at 123.

<sup>429</sup> See, e.g., 34 C.R. GA., *supra* note 1, at 296.

<sup>430</sup> See Zubly Letter, *supra* note 90, at 218 ("[A] Person applied to him so to alter the Direction of a Licence, that I might mary him by it; the Govr, therefore, after the Rector's name added 'or any other qualified minister.'").

lenged at law. Zubly stubbornly continued to perform marriage ceremonies even though he lacked official governmental sanction.<sup>431</sup> Zubly's stubbornness coupled with Frink's declining health forced Frink to allow the issue to drop.<sup>432</sup> Meanwhile, the Lutheran Salzburger ministers at Ebenezer continued to perform marriages among their own by their own requirements, and marriages among Englishmen by the ceremony of the Anglican Church.<sup>433</sup>

During the Revolution, the Executive Council passed a resolution declaring the old marriage law still in effect, which required the posting of banns or a license from the governor.<sup>434</sup> Soon after the war, a legislative committee was appointed to draft a law permitting marriages by justices of the peace, and an act of 1785 permitted just this. Marriages were then legal after public notice had been given for eight days or a license had been obtained from the governor or register of probates.<sup>435</sup> A 1789 law said that "any minister of the gospel or justice of the peace" could (and must) post banns three times in

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<sup>431</sup> See *id.* Zubly said that he married dissenters "without Book" and that he married others by leaving out what he thought exceptionable. *Id.*

<sup>432</sup> Martin notes that this struggle once again was a personal one between Frink and Zubly:

In the Savannah area Frink himself was the motivating force for arousing dissenter fears of an American bishopric and Anglican tyranny. After Frink's death in 1771 dissenters in Georgia had little to fear from Anglicans in general. Other Anglican priests apparently did not make the kinds of demands Frink [did].

Martin, *supra* note 227, at 83. Zubly had long suspected Frink of desiring an American bishop. In 1768 Zubly had written to his friend Ezra Stiles that, "Our Reverend Rector [Frink], . . . who declaims lustily against Shismatics" desired to have a bishop. But Zubly added: "I do not know a Man in this Province & I doubt whether a dozen be in South Carolina who are desirous of being blessd with any such Establishment, tho I am acquainted with no inconsiderable number of episcopalsians that would rather join against than for it." Letter from John J. Zubly to Ezra Stiles (Oct. 10, 1768), in *EXTRACTS FROM THE ITINERARIES AND OTHER MISCELLANIES OF EZRA STILES, D.D., LL.D., 1755-1794*, at 597, 598 (Franklin Bowditch Dexter ed., 1916) [hereinafter *EXTRACTS*]. Zubly's suspicions about Frink's desire for an American episcopate were not groundless, as evidenced by a letter Frink wrote in 1769. In which, Frink admitted that he had not been able to convince people of his way of thinking on the issue of the need for a bishop in America. See Letter from Frink to Burton (1769), SPG ARCHIVES, SERIES C, AM.8 (MISC. DOCS. GA., 1758-1784), #46, *microformed on SPG AMERICAN MATERIALS, supra* note 102, at Reel C2. In his letter against Frink over the sexton's fees, Zubly voiced the fear of the colonists generally that if an "American Bishop" were appointed, he would come to collect fees "with equal rigour as his inferior Clergy." John J. Zubly, A Letter to the Reverend Samuel Frink, in *MILLER, WARM & ZEALOUS, supra* note 26, at 88.

<sup>433</sup> See *STRICKLAND, supra* note 26, at 123.

<sup>434</sup> See 2 *REV. REC. GA., supra* 161, at 88-89. Apparently there had been some variance from this in practice, which the revolutionary government was trying to curb.

<sup>435</sup> See 19 *C.R. GA., supra* note 1, at 455-58A; *DIGEST OF THE LAWS OF THE STATE OF GEORGIA* 314 (Robert Watkins & George Watkins eds., 1800) [hereinafter *Watkins & Watkins*]; *HOUSE JOURNAL, supra* note 190, at 59-60.

“some public place of worship” to make a valid marriage.<sup>436</sup> The 1798 constitution permitted clerks of inferior courts to grant marriage licenses, and in 1799 a clerk of a “court of ordinary”<sup>437</sup> was allowed to grant licenses for marriages to be performed by any judge, justice of the peace, or minister.<sup>438</sup> Marriage by publication of banns was also continued.<sup>439</sup>

#### D. Persecution of Minority Religious Groups: Itinerant Preachers

There is virtually no record of blatant discrimination or persecution of individuals or groups on the basis of their religious beliefs—aside from the previously discussed prohibition against Catholics, which “was largely self-enforcing.”<sup>440</sup> Otherwise, in the admittedly scant historical record, there is only one recorded incident of persecution of dissenters for religious reasons. This exception is the arrest of Daniel Marshall, a Baptist minister, in about 1770. Marshall was arrested while conducting services in St. Paul’s Parish, probably in a revival-style backwoods meeting.<sup>441</sup> Nothing in the 1758 establishment law forbade such itinerant preaching, nor did the Act of Toleration (which required the licensing of preachers) prohibit this, for it had never been applied to Georgia by the provincial legislature.<sup>442</sup> One historian has thus concluded that Marshall’s arrest was “probably made on someone’s whim and justifiable under no religious statute of the province.”<sup>443</sup> It appears that Marshall, who was inspired by George Whitefield, was ordered to cease preaching in Georgia.<sup>444</sup> He refused to do so, citing the obligation to obey God rather than humans, and he continued his preaching unmolested.<sup>445</sup> Marshall later moved to Georgia with his family and founded the first Baptist

<sup>436</sup> Watkins & Watkins, *supra* note 435, at 414–15.

<sup>437</sup> GA. CONST. of 1798, art. IV, § 10; DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 184, at 220.

<sup>438</sup> DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra* note 184, at 220.

<sup>439</sup> *Id.*

<sup>440</sup> DAVIS, *supra* note 26, at 196.

<sup>441</sup> *See id.*; STRICKLAND, *supra* note 26, at 108–09.

<sup>442</sup> *Id.*

<sup>443</sup> DAVIS, *supra* note 26, at 196. Davis notes that “Marshall was regarded by some persons, including Zubly, as an irritating individual who created commotions. It is likely that he was accused of disturbing the peace or some similar infraction.” *Id.* at 196 n.1; *see also* STRICKLAND, *supra* note 26, at 108–09 (“No law of Georgia or of Great Britain would justify such a proceeding.”).

<sup>444</sup> *See* Waldo P. Harris III, *Daniel Marshall: Lone Georgia Baptist Revolutionary Pastor*, 5 VIEWPOINTS: GA. BAPTIST HIST. 51, 51–53 (1976). Apparently the Anglican rectors complained about Marshall to the SPG. *See* Letter from James Seymour (1772), in SPG ARCHIVES, SERIES C, AM.8 #84 (MISC. DOCS. GA., 1758–1784), *microformed on* SPG AMERICAN MATERIAL, *supra* note 102, at Reel C3.

<sup>445</sup> *See* Harris, *supra* note 444, at 51–53.

church in Georgia, the Kiokee Church, ministering there until his death in 1784.<sup>446</sup>

Aside from the arrest of Marshall, it appears that itinerant preachers were welcomed in Georgia, especially after the Revolution in the frontier regions. George Whitefield was probably the earliest itinerant preacher, although his ministry was mostly confined to areas that were more populated. After the Revolution, itinerant Baptist and Methodist preachers achieved a significant following among the inhabitants of the frontier—and they preached apparently undisturbed by the government or other religions.

*E. Education: George Whitefield's Proposed College*

Education in Georgia was somewhat haphazard, and occurred under the auspices of the government, the churches, and sometimes a combination of the two.<sup>447</sup> An exhaustive treatment is beyond the scope of this Article, but some passing examples are worthy of mention—mostly to emphasize that early Georgians were uninterested in separating religion from education. For example, the Anglican Church maintained a direct role in the education of children in Savannah—even though the schools were officially run by the civil government.<sup>448</sup> In addition, the Salzburgers provided education for the young of their community, and religion played a role in the curriculum and instruction.<sup>449</sup>

One piece of the story about education needs to be told in more detail, however, for it sheds light on the relationship between church and state (and the attendant issue of how much sway the established church would hold in public life). The story centers on the famous early American evangelist George Whitefield, later known as the fore-

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<sup>446</sup> See DAVID BENEDICT, *A GENERAL HISTORY OF THE BAPTIST DENOMINATION IN AMERICA, AND OTHER PARTS OF THE WORLD* 724–26 (New York, Sheldon, Lamport & Blakeman 1855).

<sup>447</sup> See STRICKLAND, *supra* note 26, at 92–99, 176–79 (describing interaction of religion and public education and claiming that there was little thought of attempting to separate them); see generally DAVIS, *supra* note 26, at 233–50 (surveying available formal and informal education in colonial Georgia and noting that “[m]ost education in provincial Georgia adhered to no formal structure”).

<sup>448</sup> See DAVIS, *supra* note 26, at 236; 34 C.R. GA., *supra* note 1, at 69–70, 298–99, 483 (containing instructions to royal governors to teach white children reading and religion); B.H. Levy, *Joseph Solomon Ottolenghi: Kosher Butcher in Italy—Christian Missionary in Georgia*, 66 GA. HIST. Q. 119, 128–30, 132–33 (1982) (describing hiring of Joseph Ottolenghi by the Trustees to provide schooling for slaves in Georgia and describing his subsequent experience as teacher).

<sup>449</sup> See DAVIS, *supra* note 26, at 239–40 (describing schools run by Lutheran pastors); 2 MUHLENBERG JOURNALS, *supra* note 134, at 669 (proposing school “where boys can be grounded in Christianity and at least learn to write a good hand, arithmetic, grammar, the elements of geography, history, etc.”).

most revivalist of his day.<sup>450</sup> Whitefield first came to Georgia in 1738 at the urging of his friends from Oxford, John and Charles Wesley (before those two soured on their experience in the colony).<sup>451</sup> Whitefield was, at that time, merely a deacon in the Church of England,<sup>452</sup> but he quickly impressed the inhabitants of Savannah with “his great Abilities in the Ministry” such that people overflowed the courthouse, where services were held in 1738.<sup>453</sup> He returned to England for ordination in August 1738 with the intention of returning to serve the Savannah congregation, but he did not come back as quickly as planned because his preaching was so well-received in England.<sup>454</sup>

Upon his return to Georgia, Whitefield’s parish ministry quickly became overshadowed by his dream of creating an orphanage at Bethesda, which was about ten miles from Savannah.<sup>455</sup> When Whitefield was in England in 1738–39, he broached the subject with the Trustees, who did not see any conflict between the proposed orphanage (which would benefit them financially by relieving them of the burden of orphans) and Whitefield’s parish ministry.<sup>456</sup> So when Whitefield returned to Georgia in May 1739, he established the orphanage with some funds that he had raised, coupled with a grant from the Trustees of five hundred acres for his orphanage.<sup>457</sup> The orphanage at Bethesda “was already functioning in Savannah, in a limited way, under the direction of Habersham,” by the time Whitefield returned to Georgia.<sup>458</sup>

Whitefield only served as pastor of Savannah for a year and a half, because he quickly stepped down to serve at Bethesda full-time. He was firmly dedicated to his orphanage and continued to collect

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<sup>450</sup> See generally THE WORKS OF THE REVEREND GEORGE WHITEFIELD (London, Edward & Charles Dilly, 1771) [hereinafter WORKS OF WHITEFIELD] (containing sermons, tracts, and letters of George Whitefield, as well as account of his life).

<sup>451</sup> See Perdue, *supra* note 26, at 43, 44, 46.

<sup>452</sup> This meant he could not celebrate Holy Communion (though he could perform other pastoral functions).

<sup>453</sup> 4 C.R. GA., *supra* note 1, at 148, 150 (Journal of Col. William Stephens, 1737–40). Whitefield’s later work in Georgia was not universally accepted, nor was he uncontroversial. See, e.g., David T. Morgan, Jr., *The Consequences of George Whitefield’s Ministry in the Carolinas and Georgia, 1739–1740*, 55 GA. HIST. Q. 62, 76–77, 79 (1971) (claiming that Whitefield and Bethesda Orphanage were controversial).

<sup>454</sup> See DAVIS, *supra* note 26, at 216–17; Miller, *Relations*, *supra* note 26, at 134.

<sup>455</sup> See Perdue, *supra* note 26, at 44, 46.

<sup>456</sup> Whitefield’s short stay in the pastorate proved the Trustees wrong in their assumption that there would be no conflict between the proposed orphanage and the Savannah pulpit ministry.

<sup>457</sup> 5 C.R. GA., *supra* note 1, at 445.

<sup>458</sup> 33 C.R. GA., *supra* note 1, at 21–30; DAVIS, *supra* note 26, at 217.

funds for it throughout his life.<sup>459</sup> Whitefield's preaching stressed conversion and personal experience over creed and theology, thereby lending itself to more receptivity toward dissenters. This same spirit imbued his orphanage, which eventually gained favor among the authorities after initial skepticism.<sup>460</sup>

Whitefield soon became concerned that William and Mary College was the only institution of higher learning in the South, and he sought to remedy that situation by converting the Bethesda orphanage into a college. As early as 1739, he intimated to a friend his intentions to establish a college for the education of ministers for the southern colonies.<sup>461</sup> And by 1755 Whitefield had confided in Rev. Bolzius, the pastor of the Salzburgers at Ebenezer, his desire to transform Bethesda into a college.<sup>462</sup> By 1757 the project had matured sufficiently that Whitefield drafted a tentative college charter, and finally in 1764, he petitioned the Georgia Council and governor, requesting two thousand acres on which to build his college.<sup>463</sup> The request was granted by the governor after the legislature announced support for the plan.<sup>464</sup> The Anglican rector at Savannah, Rev. Zouberbuhler, willed an additional one thousand acres to the proposed college, but conditioned the gift upon the college being founded upon "the principles of the Church of England as by Law Established."<sup>465</sup> If the college welcomed dissenters or separatists, the land reverted to other purposes.<sup>466</sup>

Whitefield relied upon these bequests when he presented the proposed sources of income of the college to the Archbishop of Canterbury;<sup>467</sup> it is unclear if Whitefield was aware of the stipulation on Zouberbuhler's bequest. In England, Whitefield was eagerly seeking a charter from the King. He soon realized that his hopes for a

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<sup>459</sup> Whitefield provided rigid theological education for the children at the orphanage. See STRICKLAND, *supra* note 26, at 95–96 (and sources cited therein).

<sup>460</sup> See 1 C.R. GA., *supra* note 1, at 348–49 (describing that magistrates became convinced of value of orphanage); 5 C.R. GA., *supra* note 1, at 290–92, 331–35 (same); 26 C.R. GA., *supra* note 1, at 116 (same); DAVIS, *supra* note 26, at 220 (same); STRICKLAND, *supra* note 26, at 95–96 (same).

<sup>461</sup> See Mollie C. Davis, *Whitefield's Attempt to Establish a College in Georgia*, 55 GA. HIST. Q. 459, 459 (1971).

<sup>462</sup> See STRICKLAND, *supra* note 26, at 133–34; 3 WORKS OF WHITEFIELD, *supra* note 450, at 203, 216 (discussing possibility of founding college in 1757 correspondence).

<sup>463</sup> See 3 WORKS OF WHITEFIELD, *supra* note 450, at 469–73; 9 C.R. GA., *supra* note 1, at 259–61.

<sup>464</sup> See 9 C.R. GA., *supra* note 1, at 259–61, 398; 3 WORKS OF WHITEFIELD, *supra* note 450, at 469–73; GA. GAZETTE, Jan. 17, 1765; Long, *supra* note 291, at 205–06.

<sup>465</sup> Colonial Wills, Book A, 1733–77, *microformed on* Reel 231/44, 407:2 (Ga. Dept. of Archives and Hist., Atlanta).

<sup>466</sup> *Id.*

<sup>467</sup> See 3 WORKS OF WHITEFIELD, *supra* note 450, at 478–79.

quick resolution and grant of a charter were ill-founded, as a number of critics arose.<sup>468</sup> Soon, the criticism turned into a clash with the authorities regarding the structure of the college. By late 1767 the Archbishop, Thomas Secker, would not consent to the college charter unless the head of the college was always a member of the Church of England and the liturgy used at the college was always that of the Church of England.<sup>469</sup> Because Whitefield had raised most of the support for the college from dissenters and given them assurances that the college would rest upon “a broad bottom, and no other,” he was unable to accept a charter that required the head of the college to be a member of the Church of England and that the liturgy used at the college always be that of the Church of England.<sup>470</sup> He was thus forced to withdraw his application for the charter.<sup>471</sup>

Two prominent ministers in Savannah—Frink and Zubly—were also both opposed to the college; Frink was glad to hear of its demise at the hands of the Archbishop.<sup>472</sup> Frink opposed the project because of his allegiance to the established church. He denounced Whitefield personally, claiming in a letter that Whitefield “has sat upon a broad bottom too long—And done more Mischief . . . than he himself could undo. . . . He has been a Destroyer of Order, & Peace, and of the Church of England where ever he came.”<sup>473</sup> Frink added with vitriol that Whitefield was “An Encourager of every Sectary; a publick Condemner of the Church of England Clergy.”<sup>474</sup> Frink believed that Bethesda had always been “a Nest for the Enemies of the Church,” and he was thus glad to see the proposed college fail.<sup>475</sup>

Zubly opposed Whitefield’s plan for different reasons. Zubly, who had formerly raised funds for the orphanage in his younger years, suspected Whitefield of desiring to appropriate power and prestige for himself, maybe to the point of becoming an American bishop. Zubly wrote to his friend Ezra Stiles, “I am convinced the whole is designd [sic] as a Seminary for Methodists [then part of the Church of England] & that Mr. Whitefield in truth loves church power & is not

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<sup>468</sup> See Davis, *supra* note 461, at 463–64.

<sup>469</sup> See 3 WORKS OF WHITEFIELD, *supra* note 450, at 475–79.

<sup>470</sup> *Id.* at 481–82.

<sup>471</sup> See Davis, *supra* note 461, at 464. See generally Letter from George Whitefield, Reverend, to Wright, Governor of Georgia (London, Edward & Charles Dilly 1768).

<sup>472</sup> See STRICKLAND, *supra* note 26, at 136–37.

<sup>473</sup> Letter from Samuel Frink to Dr. Burton (Aug. 4, 1768), in SPG ARCHIVES, SERIES C (MISC. DOCS. GA., 1758–84), AM.8 #44, *microformed on SPG AMERICAN MATERIAL*, *supra* note 102, at Reel C2.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

that open friend to dissenters that he would be thought.”<sup>476</sup> Zubly further objected to appropriating funds and land that had been raised for orphans and converting it to use for a college.<sup>477</sup>

Despite this ministerial opposition from both the established church and dissenters, Whitefield did not surrender his dreams of a college. He continued to contemplate securing a college charter through the Georgia legislature. He also dreamed of having a large group of “wardens” oversee the college, and such wardens would represent not only Georgia, but also Charleston, Philadelphia, New York, Boston, Glasgow, Edinburgh, and London.<sup>478</sup> He met in early 1770 with some prominent and influential Georgians to discuss his newly-conceived project, but Whitefield died before any plans could be made or consummated by the Assembly.<sup>479</sup> Unfortunately, the orphanage at Bethesda was so heavily dependent on Whitefield’s person that it could not long survive without him (especially in light of a large fire in 1773);<sup>480</sup> it quickly declined before the Revolution.

#### CONCLUSION

One of the virtues of history is that there are multiple possible readings of the same set of facts and circumstances, and multiple interpretations possible from a singular presentation of an historical record. This general principle is surely as true with regard to the above story of religious liberty in eighteenth-century Georgia as it is with regard to other historical stories. That said, including the historical record of Georgia’s experience in the larger discussion of religious liberty adds depth to our understanding of the relationship between religion and the state in early America. And while the full import of adding Georgia’s experience to the discussion will only become clear

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<sup>476</sup> Letter from John J. Zubly to Ezra Stiles (undated), in *EXTRACTS*, *supra* note 432, at 600–01.

<sup>477</sup> *See id.*; *see also* Letter from John J. Zubly to Ezra Stiles, October 10, 1768, in *EXTRACTS*, *supra* note 432, at 597–99. Despite Zubly’s opposition to the college, he admired Whitefield even unto his death. *See, e.g.*, John J. Zubly, *The Wise Shining as the Brightness of the Firmament, and They That Turn Many unto Righteousness as Stars For Ever: A Funeral Sermon, Preached at Savannah in Georgia on the Much Lamented Death of the Rev. George Whitefield, A.M. Chaplain to the Right Honourable the Countess of Huntingdon, Who Departed This Life, September 30, 1770, at Newbury-Port, in New-England, in the 56th Year of His Age 2* (Nov. 11, 1770) (Savannah, James Johnston 1770).

<sup>478</sup> 3 *WORKS OF WHITEFIELD*, *supra* note 450, at 413.

<sup>479</sup> *See* Long, *supra* note 291, at 206–07; *GA. GAZETTE*, Jan. 31, 1770.

<sup>480</sup> *See* COULTER, *supra* note 36, at 70–71; Letter from the Honorable James Habersham to the Countess of Huntingdon (June 3, 1773), in 6 *COLLECTIONS OF THE GEORGIA HISTORICAL SOCIETY (THE LETTERS OF HONORABLE JAMES HABERSHAM, 1756–1775)* at 228–31 (1904).

with further scholarship, it is nonetheless useful to highlight again the salient features of early Georgia's experience.

Georgia was explicitly founded as a (Protestant) Christian colony, but its founders and legal documents alike readily accorded all its new inhabitants a goodly measure of religious liberty. Liberty of conscience was promised to all, and free exercise to all except Catholics. These seminal principles seem to have held sway throughout the eighteenth century in Georgia, and citizens were free to enjoy their own religious beliefs and practices relatively unmolested—even after an established church was formed. The principles of liberty of conscience and free exercise later evolved into more modern legal formulations as the new state progressed through three constitutions.

As a factual matter, religious pluralism was the norm in Georgia, as dissenters and persecuted groups came to the new colony, often lured by the promise of land and tranquility.<sup>481</sup> As evidenced by its policies regarding glebes and education, the Georgia government did not show significant favoritism among religious groups (at least for those Protestant faiths with sufficient adherents).<sup>482</sup> Even when the government established the Church of England in 1758, the relationship between religion and the state did not change markedly.<sup>483</sup> Georgia's ecclesiastical establishment was surely a soft establishment, as the laws relating to establishment were weakly enforced<sup>484</sup> and were, in practice, more for the maintenance of the public welfare than for the promulgation of the Christian gospel. Because religion and morality were seen as important in society, the authorities were willing to foster and aid religion whenever possible. This continued even after the Revolution, with the passage of a rather striking act in 1785 that proclaimed that "regular establishment and Support [of the Christian Religion] is among the most important objects of

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<sup>481</sup> To be sure, this religious pluralism was primarily limited to Protestant Christianity (with some room for Catholics and Jews). While this does not mirror religious pluralism by twenty-first century standards, it was nonetheless pluralistic for the time period.

<sup>482</sup> The colony (and then young state) also acknowledged its religious pluralism by increasingly ensuring the possibility of affirmance for those persons unable to swear an oath—a group that clearly would have been in the religious minority. The government also tried to accommodate religious conscientious objections to fighting, but it was unwilling and unable to make categorical exceptions for such an important issue as the defense of the young colony.

<sup>483</sup> Just before the Revolution, there began to be disputes and increasing discomfort about privileges granted to the established church, but these never reached the level of difficulty and conflict in other early American colonies (possibly, in part, because the conflicts did not have time to mature).

<sup>484</sup> Strickland believes there were two reasons for the dissenters' lack of agitation against the proposed establishment of the Church of England: (1) any historical sources noting opposition (such as diaries, letters, and the like) did not survive over time, and (2) the establishment itself was "not very burdensome." STRICKLAND, *supra* note 26, at 139.

Legislature [sic] determination.”<sup>485</sup> This 1785 act provided for direct governmental support of religion (quasi-establishment, one might say) through collection and redistribution of tax dollars. While there is little record of the enforcement of this law, its text did not suggest that it applied to only one denomination.

Viewed collectively, the history of early Georgia does not support a conclusion that early Georgians thought there should be a wall of separation between church and state; indeed, they often thought there should be little separation at all. Instead, the history shows that early Georgia was a place with respect for religion and religious differences; a place that experimented with a soft establishment, only to move away from the idea after less than twenty years; and a place that believed the government had a direct role to play in fostering religion and morality generally.

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<sup>485</sup> 19 C.R. GA., *supra* note 1, at 395.