

# CHURCH-STATE ISSUES IN AMERICA TODAY

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Volume 1: Religion and Government

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Edited by  
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PRAEGER PERSPECTIVES

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# Introduction: Church and State in Context

*Barbara A. McGraw*

Today, there is a battle over the hearts and minds of the American people about the meaning and purpose of the nation and its legacy of the past for America's future. As a consequence, contemporary debates about society's issues abound with arguments about the relevance of the founding era, in particular the founders' original intentions for the nation. Debates about the meaning and reach of the "religion clauses" of the First Amendment to the Constitution (that is, church and state issues) often take center stage: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." <sup>1</sup> One might frame the issue this way: to what degree has or should religion inform the underlying values, symbols, structures, laws and public policies of the nation? Hence the question: is our nation a nation under God? One side in the debate, the religious right, answers "yes." The other side, the secular left, answers "no." And confusingly both sides claim the mantle of the American founders.

It is no wonder, then, that there is a "culture war" involving debates about history as foundational to the meaning of the American founding for its own time as for our time. In fact, the stories we tell ourselves about our history are imparted in court briefs and opinions from the U.S. Supreme Court on down, where various historical narratives are repeated as support for one argument or another, <sup>2</sup> and in the public schools, from which future generations gain their understanding of what it means to be an American.

Those stories also are recounted in public policy debates and election politics, on television and radio talk shows, in films and other media, and even at the “kitchen table” and the “water cooler.”

On one hand, the Christian right, which often includes other religious people on the right, claims that the nation was founded on Christian or Judeo-Christian principles. The argument is that although there is no specific reference to Christianity in the nation’s founding documents, it was the founders’ understanding and assumed context that the nation’s moral referent for its basic political framework and laws was Christianity. Any conception of a “separation” of the state from the church was meant to protect the church from the intrusions of government, not the government from the church. Those on this side of the debate often support this point by quoting the founder of Rhode Island, Roger Williams (c.1603–1684), who wrote in 1644:

When they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the Candlestick, etc., and made His Garden a wilderness as it is this day. And that therefore if He will ever please to restore His garden and Paradise again, it must of necessity be walled in peculiarly unto Himself from the world, and all that be saved out of the world are to be transplanted out of the wilderness of the World.<sup>3</sup>

Accordingly, the Christian right contends that the “garden” of the church is to remain unspoiled by the “wilderness” of the world. But nevertheless the world is in the purview of Christians and their religion.

Those holding this view point to the Declaration of Independence, which credits our “Creator” with having “endowed” human beings with their “unalienable rights,” and refers to “Nature’s God”—all religious tenets derived from Christianity, they claim. In addition, they note that the words “separation of church and state” do not appear in the religion clauses or anywhere else in the Constitution. They conclude, therefore, that religion, in particular Christianity, is the ultimate foundation of our nation. This “side” of the debate has its heroes, for example, John Adams, who said, “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”<sup>4</sup> They conclude that not only does Christianity serve as the nation’s foundation, but it is also the bulwark against the exercise of ever-increasing state power. That is, Christians and their churches can be better trusted with the preservation of our liberties than can the state.

On the other hand, the secular left, which includes religious people who believe that a secular nation is conducive to liberty, claims that the founders

distrusted religion and therefore established the nation on “secular,” meaning non-religious, foundations.<sup>5</sup> They point to historical events involving abuses on account of religion combined with state power, including the Catholic Spanish Inquisition and the abuses of Protestant John Calvin’s Geneva city-state (where, in both cases, burning heretics at the stake was the order of the day); the age of religious wars in Europe from 1559 to 1715; and similar abuses and conflicts in colonial America as reasons for keeping religion and government separate so as to ensure the freedom of the people.

Consequently, those holding this view conclude that the founders sought to separate church and state not only to protect the church from the state, but also to protect the state, and therefore the liberty of people it represents, from the church. They point to the U.S. Constitution, noting that it contains no references to God. Accordingly, the religion clauses mean, as Thomas Jefferson (1743–1826) said in 1802, that there is a “wall of separation between church and state,”<sup>6</sup> regardless of the fact that the phrase itself is not in the Constitution. This “side” also has its heroes. For example, James Madison expressed considerable reservations about religion when he said

The conduct of every popular Assembly, acting on oath, the strongest of religious ties, shews that individuals join without remorse in acts agst. which their consciences would revolt, if proposed to them separately in their closets. When Indeed Religion is kindled into enthusiasm, its force—like that of other passions—is increased by the sympathy of a multitude.<sup>7</sup>

They quote Jefferson, as well, who rejected the notion that any civil or ecclesiastical “legislators and rulers” have any legitimate authority over “the faith of others.” He stated that the imposition of “their own opinions and modes of thinking” has “established and maintained false religions over the greatest part of the world and through all time . . .”<sup>8</sup> This side believes that secular sources serve as the foundation of our nation and that the state’s legal and political procedures are the bulwark against the potential for state encroachments on individual liberty and against creeping ecclesiastical power aligned with the state. That is, the state, as established by the founders, can be better trusted with the preservation of our liberties, than can the church.

Still others hold a third view: the founders’ original intent is not particularly relevant today. According to this view, looking back more than 200 years to a time very different from our own in order to surmise the founders’ original intent is an exercise in futility. New times require us to solve

today's problems with new ideas. Among those with this view are those who contend that all morally foundational claims, whether on the left-progressive liberal side or right-conservative traditional side, threaten the existence of the plurality of views we now enjoy, many of which arise out of the various multicultural perspectives that thrive in the nation today.<sup>9</sup> I submit, in response to this argument, that the failure to take account of our place today in the overall historical context that led America to its founding can only lead to the potential for history to repeat itself—and it is not a history we are likely to wish to repeat.

It very well may be that we all have a lot to argue about. Perhaps we always have. However, while we are not likely to settle the debate once and for all here, there is no doubt that it is helpful to take a broader view than perhaps has any particular “side” in the contentious culture war debates. Accordingly, let us take a brief look at the historical context for the founding of America, specifically as it relates to ideas about the relationship of state and religion, that is, the contested concept of the “separation of church and state” and religious liberty, including the role of religion in public life. But let us not begin with a favored resolution of a particular issue as our goal and then read back into history what would support that resolution. Instead, let us take into account the evidences of history that various “sides” in the debate have proffered and consider them as a whole in an effort to gain guidance for what should be the context of the discussion today. That is, rather than tracking through history and choosing a secular or religious narrative as a lens through which to consider church and state issues today, let us consider them together as they appear in history: a complex combined narrative that both includes and transcends polarized views. Then we can answer the fundamental question—What grounds the American system?—so that the various arguments and debates about church/state issues can take place without undermining what makes all of the conversations possible in the first place.

## SEPARATION OF CHURCH AND STATE AND RELIGIOUS LIBERTY IN CONTEXT

The idea of a boundary between church and state did not begin in the founding era. It did not begin with Thomas Jefferson's Danbury Letter reference to the “wall of separation between church and state.” It did not even begin with Roger Williams's reference to the need for a wall to protect “the garden of the church” from “the wilderness of the world.” In fact, many supporters and detractors of the concept embodied in the much

aligned and praised phrase “separation of church and state,” if not the “wall” metaphor itself, might be surprised that it has a long history that predates the colonial period and the founding of the United States and the states by centuries—and can be found in both theological and secular sources. One could reasonably conclude, in fact, that it was the convergence of theology and secular philosophy in the thinking of the founding generation that made founding a nation on the principles of “life, liberty and the pursuit of happiness” possible, and that to attempt to separate them today obscures the foundations of the nation, distorts its purpose, and undermines the promise of the nation for its own future and its legacy for the world.

For most of human history there was no conception of religion being something that could even be thought of as separate from culture as a whole and, therefore in turn, from the governing authorities and structures of a particular society. We even see this today in tribal communities around the world. That which appeals to the spiritual in society—the “other world” and its transcendent or immanent being or beings—is all of one piece with daily rituals, work, community life, life passages, and so on.<sup>10</sup> When agriculture was discovered and the great civilizations of Egypt and China arose, the state and religion functioned as one entity with the emperor or pharaoh as the head of governing authorities *and* as either a god or as the gods’ representative on earth. The idea was one of a grand hierarchy with the ruler at the top as a god with inherent authority or with the gods at the top, providing the sanction of divine authority to the ruler. In either case, the ruler would then wield state power in exercise of divine authority over the people.<sup>11</sup> Thus “church” and state not only were joined, they were not even thought of as two things combined; they were one.

As Christendom developed in Europe, however, the idea of religion and state as one was challenged. During the medieval period, the Catholic Church, growing in power, opposed the sovereignty of the rulers, who previously had claimed the mantle of authority over matters temporal and religious.<sup>12</sup> The Church, in the person of the pope, claimed universal supremacy over the weak states of the period as “divine right” to absolute sovereignty vested in the pope by God, and asserted that canon law superceded secular law and that the authority of the emperor or king derived from the Church.<sup>13</sup> This political theology held, consequently, that God’s law is the higher law over even the king.<sup>14</sup> That is, the king’s actions could be adjudged in error by reference to the divine law of God, as interpreted by the pope.<sup>15</sup> As a result, the king’s law and divine law were no longer understood as being one and the same, but separate—with God’s law as the ultimate sovereign referent. Thus, resistance against such supreme spiritual power is resistance against God and therefore was prohibited as a mortal sin.<sup>16</sup>



In response, temporal rulers also claimed “divine right.” This counterclaim took shape as “the Divine Right of the Emperors” in the fourteenth century<sup>17</sup> and emerged in the seventeenth century as the “Divine Right of Kings.”<sup>18</sup> There the idea was that the emperor or king has divine sanction to come into power and therefore derives his authority directly from God. Moreover, it was held that sovereignty, which cannot be divided between secular and religious authorities, must be unified in the king.<sup>19</sup>

Hence, the church stood apart from the state and interpreted state authority according to the church’s interpretation of God’s law, while the state claimed authority directly from God according to the state’s own interpretations, thus standing apart from the church. Of course the application of the authority of church or state was uneven in practice, as power struggles persisted and various entities (monarchy, parliament, barons/nobles, and various ecclesiastical authorities after the Protestant Reformation) pressed their claims. Still, although in one sense church and state were separated, they were joined in one thing: regardless of who is sovereign over earthly realms, such sovereignty derives from God and divine law reigns over all.<sup>20</sup> Each, then, in its own view stood as a “check” on the power of the other. Nevertheless, they worked together, particularly in England after the Protestant Reformation there made the king the head of the Anglican Church.

Christian political theory combined the two in a joint effort to create a uniform moral order in society, using state authority to enforce church doctrine, while the state used church doctrine to justify its punishments.<sup>21</sup> This justification for the exercise of absolute power over the people was based on the doctrine of original sin, which holds that human beings are inherently sinful.<sup>22</sup> Consequently, this reasoning continues, the state must enforce the moral order on the people as a whole to prevent them from straying from accepted religious doctrine—all in an effort to create a uniform society based on religious moral precepts. That is, government’s role is to restrain the sinful nature of human beings to help ensure their salvation for the eternal realm and for an orderly society in the world. Moreover, it was believed that because state and church would not tolerate deviance from established norms, discord would be stifled and peace would prevail.

However, the seeds of the concept of the separation of religious authority and state authority had previously been planted, which would prove to have far-reaching implications. As a consequence, further theological developments came to the fore that stood at odds with the prevailing arrangement between church and state and their claims for absolute authority. These involved the nature of human beings and their relationship to God and society. First was the belief that human beings have inherent dignity and worth because they are made in the image of God and they are God’s

children. Consequently, there is something inviolable in every human being's nature, and that inviolability is at the very center of what it means to be a human being. Because this is equally so in all human beings, human beings have equal dignity; ultimately, no one is more worthy than another—not even the king. Some people may put on vestments or gain the power of armies, but in the beginning and in the end, they all are of equal dignity before God. Second was the belief that God created human beings with free will. Consequently, human beings are free to conduct their lives as they will. There also developed a great faith in human beings' capacity for knowledge and reason, potential for understanding, and a consequent ability to improve themselves and their world.<sup>23</sup>

Moreover, because of human beings' freedom and equal inherent dignity and the accountability of everyone to the law of God, a strain in Christian theology held that the people can legitimately resist the state when the state strays from a right course and fails to adhere to God's law.<sup>24</sup> In other words, no longer were the people bound by the laws of the state by virtue of its absolute authority. Instead, it was deemed to be the people's prerogative, even duty, to hold the state accountable, if the state violated the law of God. In other words, the conscience of the people was separated from the authority of state and church.

Still, the notion of a grand hierarchy that ruled over the masses persisted in most quarters. Now, however, another view emerged to challenge that hierarchical order. Liberty and inherent dignity and all that implied gave rise to what were viewed as legitimate claims—that is, rights—superior to state *and* church authority.<sup>25</sup> But questions remained: Should the ultimate protector of these rights be an all-powerful autocratic ruler charged with the obligation, as Hobbes (1588–1679) advocated? Should the “general will” of the people as gleaned by those in power serve to accomplish the goal, as Rousseau (1712–1778) believed? These questions were much debated at the time of the founding and during its immediately preceding history. The American founders found their answer primarily in the writings of John Locke (1632–1704). Through Locke, the idea of God's law as the ultimate authority persisted and was very influential in the political philosophy that eventually would make its way into the ideas that formed the basis for the American founding and beyond. Now, however, the sovereignty derived from God would be vested not in the king or any church but in the people.

## LOCKE'S “ENLIGHTENMENT” POLITICAL THEOLOGY

Locke is known as a pivotal Enlightenment Era (c.1650–1800) philosopher. Enlightenment philosophers eschewed tradition and custom (thought

to be based on superstition and ignorance) in favor of the use of human reason in each individual's "search and study"<sup>26</sup> and "argument and debate"<sup>27</sup> to discover the true and the good in all areas of human endeavor, including religion, law, and politics. Often enlightenment philosophers are characterized as secular philosophers because they eschewed religious dogma, in particular its bases for government. However, as we shall soon see, Locke's writings can be seen as a clear articulation of the line of thinking outlined briefly in the previous section, but taken further. That is, Locke did not leave religion behind. Rather, the ground that began with religion and governing authorities as one and then shifted to place God's law over state and church had shifted once again in Locke's works.

Locke began his political philosophy by returning, metaphorically, to the "state of nature," a state prior to the formation of societies. Locke asserted that in the state of nature the people are free and equal as created by God; that is they inherently have free will and equal dignity as human beings. For Locke, the liberty and equal dignity of the people constitute, then, the fundamental natural law—the law of the state of nature. And Locke concluded that, because freedom and equality are the natural state of human beings in the state of nature, freedom and equality are legitimate claims against the state. Consequently, those claims should be secured as civil rights when societies are formed—so as not to thwart the essential nature of human beings as God intended.<sup>28</sup>

However, Locke noted that there is a significant problem in the state of nature that must be solved when societies are formed so as to preserve the natural rights of the people: in the state of nature there is no impartial judge of disputes between various people. As a result, when violations of the natural law occur or there are other disputes, there is no one to arrive at an unbiased resolution.<sup>29</sup> Without a way to provide unbiased resolutions of disputes, there is only the "state of war"—battles among those making various claims.<sup>30</sup> Locke concluded that the eventual result of this is either an anarchistic and violent chaos or, more likely, a powerful ruler rises to the top—the winner of the battles.<sup>31</sup>

Locke challenged the monarchy on this basis, concluding that the king was merely the descendent of the brute who rose to power in the battles of the "state of war" in the state of nature. In other words, there was no "divine right" of kings—only the assertion of power. And that power was not likely to be exercised in an unbiased way to preserve the natural rights of the people, as history had shown. Europe's own history was filled with battles for power and religious wars, as well as the torture, hanging, and burning at the stake of those deemed to be heretics by the dictates of whomever came to power at any particular time. Thus, Locke rejected out-

right the state's and ecclesiastical authorities' claims that using the coercions of the state to impose a church dictated uniform moral order on the people as a whole would produce a good and peaceful society.<sup>32</sup> Locke concluded that a different approach was needed. Government must be established on laws that affirm the natural rights of the people and provide an unbiased legal and political system—the impartial judge.<sup>33</sup> That is, God's law—the natural law—should be over the state *and* the churches and be preserved and interpreted through an unbiased political and legal system established by and for the benefit of the people.<sup>34</sup> No longer was the ultimate authority the king or any church. Now the people would ensure that God's natural law would rule.

Central to Locke's approach to government was the need to secure the people's civil right to tolerance of their religious beliefs, which he believed requires “just bounds” between the state and religion.<sup>35</sup> One reason was practical and secular. Locke saw religious tolerance as the means to creating a more peaceful society than had been the case when uniformity was imposed on the people from the top down through the sanction of the church and the power of the state. However, another reason rested on Locke's adoption of a line of thought that opposed on theological grounds top-down governing authority. That is, it was not a rejection of religion that led Locke to religious toleration, as some have concluded. Instead, Locke shifted to a different religious idea. Consequently, Locke rejected traditional political theory based on the doctrine of original sin and the whole idea of uniformity derived from it.<sup>36</sup> He held instead that a moral and peaceful society is not more likely to come from the top down through religious doctrine enforced by the state over the people. Rather, it is more likely to come through the people, whose good will is not corrupted by power and who therefore are more likely to hear the voice of God.<sup>37</sup>

Locke's approach to government and religious toleration was based on a simple theology: there is God and God communicates with the people. Hence, God's relationship is not with the elites of religious institutions and the state who then tell everyone what to do and persecute those who do not follow their attempts at uniformity. Instead, God's relationship is with each individual human being through conscience informed by revelation, spiritual or other insight, nature and reason.<sup>38</sup> Thus, freedom of conscience was fundamental to Locke's approach to government. The people must be free to listen for the voice of God, however they understand that, and answer that call. Locke said, in effect, that the only way that it is even possible for a good society to be realized is to trust the people.<sup>39</sup>

Accordingly, Locke concluded that government should be a “social contract.”<sup>40</sup> Under the social contract the people would consent to a govern-

ment to which they would give up their right to punish violators of the natural law in exchange for an impartial legal and political system that would secure their natural rights (freedom, especially freedom of conscience and its expression, and equal dignity, which requires equal justice) and would ensure their safety and general welfare. The purpose of this form of government is not only to secure the people's best chance for a just and peaceful society. Locke held that his proposed legal/political system, his social contract, also is central to the search for the true and the good, which he reasoned could never be attained through the auspices of the powerful, be they state or ecclesiastical authorities. As Locke said

For truth certainly would do well enough, if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known, and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succours, but if truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.<sup>41</sup>

Thus, Locke put his trust in the people over the powerful, believing that history had shown that the powerful are prone to corruption and therefore violate the natural rights of the people. While there is no guarantee, Locke said, the only way it is even *possible* for a good society to be realized is to limit the power of the state and eliminate the power of the churches. A free people of inherent dignity, equal to that of kings and popes, would be able to be and do good in society because the "social contract" would provide a secure framework within which freedom could be exercised.

But while Locke sought to limit the power of the state and eliminate the power of any church over the people, he did not argue against religion *per se*. In fact, he believed that his approach would strengthen religion, curtail the potential for religion to be corrupted by power, and make it possible for true faith to flourish.<sup>42</sup> To accomplish this, Locke turned the old hierarchical order (God → church/state → the people) on its head. Locke did not abandon the idea that God's law should prevail, but now it would be given effect in society by the people who would build the good society not via a top-down hierarchy, as had been the previous approach, but from the ground up (God → the people → the social contract → limited government by the people and for the people by their consent → creating an open space for the freedom to be and do good).

It follows, then, that Locke never intended religion to be relegated to a

private sphere in the sense that it is irrelevant to common concerns and therefore should remain out of sight. Rather, it was to take part, through the people—through their own individual activities and through the voluntary societies that the people formed and joined. Moreover, religion was to be welcomed as a contributor to discussions about law and public policy, but the resulting law and public policy could go only as far as the limited authority of the unbiased political/legal system extended and only so far as those contributions were consistent with all of the people's natural rights. And those natural rights had a very far reach in Locke's political thought.<sup>43</sup>

Asserting that toleration is “the chief characteristic mark of the true church,”<sup>44</sup> Locke claimed the right to toleration for those in all of the most controversial Protestant sects of his day, as well as Catholics,<sup>45</sup> Jews,<sup>46</sup> Muslims (Mahometans),<sup>47</sup> Native Americans,<sup>48</sup> and pagans,<sup>49</sup> and consequently said,

[I]f solemn assemblies, observations of festivals, public worship be permitted to any one sort of professors [i.e., religious people], all these things ought to be permitted to the Presbyterians, Independents, Anabaptists, Arminians, Quakers, and others, with the same liberty. Nay, if we may openly speak the truth, and as becomes one man to another, neither pagan, nor Mahometan, nor Jew ought to be excluded from the civil rights of the commonwealth because of his religion.<sup>50</sup>

Locke even concluded that true toleration requires that those practicing “idolatry, superstition, and heresy” and “heathens” should be given their civil right to freedom of conscience.<sup>51</sup> Unlike those who came before him, Locke eschewed any sort of enforced conformity, holding instead that toleration reflects the natural law, that is, the religious values that form the foundations for a political system based on the liberty and equal dignity of the people.

Thus, the “just bounds” between church and state would be achieved. God, including reason (which, according to Locke, is “natural revelation”<sup>52</sup>), would inform the people's consciences directly, rather than through the dictates of the state armed with the sanction of church authority, and the people would be free to answer that call. As a result, there would be an open space where the people could pursue the good society from the perspective conscience gives them. The people would form and join voluntary associations (including churches)<sup>53</sup> to pursue their individual, group, and common ends beyond governmental interference, not only in their effort to find way to live together in society in peace, considering their differences, but also in their ultimate search for the true and the good.

## FOUNDING A NATION BY THE PEOPLE AND FOR THE PEOPLE

In the founding era, developments within Christianity rose to meet Lockean fundamentals and merged religious faith with political aspirations to inspire a nation. Because of this, it was no longer “church” that stood as a check on the state. The people, persuaded by Locke’s arguments and principles and motivated by faith, joined fundamental religious ideas about the nature of man and man’s relationship with God to ideas about how to constrain power so that its potential for corruption would be severely limited, if not eliminated altogether.<sup>54</sup> The ultimate purpose: a free people of equal inherent dignity who could bring the good into the world through their participation in a government by and for the people and in their daily lives.

Mid-eighteenth century America was in the grip of a profound religious revival. Traveling preachers such as George Whitefield (1714–1770) galvanized large segments of the population through emotional sermons, which called the people to “new birth” in Christ.<sup>55</sup> Those involved in this “great awakening” believed that authentic religion was exhibited not through church membership, but through one’s own profound conversion experience.<sup>56</sup> Status and power were leveled as Christ-centered converts gathered in revival meetings that inspired these members of the founding generation. They rejected ecclesiastical authorities and their doctrines and discovered a faith, not grounded in unconfirmed belief, but in the experience of being embraced by God. At the same time, Locke’s much quoted phrase “life, liberty, and property,” as well as the “laws of nature,” the “state of nature,” and the “social compact,” inspired church sermons that awakened the people to their natural rights and galvanized them to take up the political cause against oppressive arbitrary government.<sup>57</sup>

This great awakening had a counterpart that shared its antiauthoritarianism and its focus on individual religion, though this was a movement that came from a significantly different direction—“rational religion.” Contrary to the usual narrative, the founders who believed in rational religion were not adherents of a kind of “deism” that held that God was a divine Creator who then absented the world, leaving it to run like a finely tuned clock.<sup>58</sup> Instead, rational religion involved real faith. (Even Jefferson, often thought of as one of the most “deist” of the founders, was known to practice regular private devotions.<sup>59</sup>) Here, however, the emotionalism of “new birth” evangelical revivals was eschewed in favor of reasoned reflection. The light of reason was believed to be more authentic than emotions, which might be flamed into a passion that could irrationally spur a “mob” to infringe the

inalienable natural rights of others.<sup>60</sup> That is, rational religion was deemed by its adherents to be a more reliable source of inspiration consistent with “Nature’s God” and therefore God’s natural law<sup>61</sup> than the emotional religion of revivals.

Nevertheless, despite differences, the two religious impulses were closer cousins than one might think at first blush. The reason is that both eschewed authority that sought to limit human beings’ ability to find happiness and godliness in their own way. Thus both espoused limitations on governmental power and eschewed church authorities aligned with government in state establishments.<sup>62</sup> Consequently, although they were strange bedfellows in some respects, they were bedfellows nevertheless in the struggle for liberty as the revolutionary period was upon them. Locke’s influence was pervasive in both, and therefore clearly he was not merely the most influential political philosopher of the age; he was “the head and heart of the Revolution.”<sup>63</sup>

As a consequence, the founders adopted Locke’s approach to the basic foundations of government and formed a nation by the people and for the people to secure their natural “unalienable rights.”<sup>64</sup> They established a legal and political system designed to provide the greatest chance for securing the people’s “safety and happiness.”<sup>65</sup> This was a nation founded not on the dictates of any particular religious sect, but on God’s law—“nature and nature’s God”<sup>66</sup>—and all that that implied: the inherent equal dignity and liberty of the people and their potential to bring their best forward, to be and do good as they understood it. They could build a good society from the ground up. Therefore, this was not a wholly “secular” endeavor, as some argue. Rather, it built upon centuries of political philosophy and theology, both of which found their expression in the political theology of John Locke and were given effect by the American founders in the political/legal system of the new nation. The Declaration of Independence, which begins by referencing “the Laws of Nature and of Nature’s God,” is based on that political theology:

We hold these truths to be self-evident, that all men are created equal that they are endowed by their Creator with certain unalienable rights Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.



The U.S. Constitution and the constitutions of the states established a political/legal system that was to be unbiased—to provide the “impartial judge” of which Locke had spoken, a system where, as Thomas Paine famously declared, “the law is king.”<sup>67</sup> That is, the governments were designed to be, in the words of John Adams (1735–1826), “government of laws and not men.”<sup>68</sup> The law, then, became the ultimate ruler; hence the oft-cited phrase “the rule of law.” Embodied in that phrase is the whole notion that the ultimate law is the law of nature—God’s law, which requires liberty of the people and respect for the inherent equal dignity of every human being. That is, no matter how revered or powerful any persons or groups may be, their decisions may not be substituted legitimately in place of the law. Moreover, the unbiased legal/political system is based on equal justice. Hence, no one, no matter how exemplary she or he is thought to be, is exempt from—that is, “above”—the law.

To best ensure that the law, and not men, shall be and remain the ruler, Locke had advocated the idea of the consent of the governed through a social contract. However, his approach did not necessarily require democratic processes. The founders, on the other hand, took Locke’s social contract a step further. Looking back into history and discovering there the concepts of democracy and republicanism, the founders combined the two to form what can be termed a “democratic republic.” That is, they established a government whereby the people elect representatives through a democratic process that makes those representatives beholden to the people.

Further, to provide the best chance for the political/legal system to be unbiased, it was deemed necessary to check power because, as history had shown, it has great potential to corrupt. Consequently, the founders, following Locke and others,<sup>69</sup> decided that the government of the new nation should provide for the separation of powers: legislative, judicial, and executive. The separation of powers also included the separation of ecclesiastical—that is, church—authority from the government, as well.

Second, the founders established national and state governments that were limited in their authority and thus acknowledged and secured the people’s liberties. The “first liberty” is the right to religious liberty, and that liberty was understood to be far-reaching, where “everyone,” as George Washington said, “shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid.”<sup>70</sup> Thus, following Locke, the founders understood religious liberty to extend far beyond the various sects of Protestant Christianity. As Samuel Adams’s “The Rights of Colonists and a List of Infringements and Violations of Rights” (1772) stated:

In regard to Religion, mutual toleration in the different professions thereof, is what all good and candid minds in all ages have ever practiced; and both by precept and

example inculcated on mankind: And it is now generally agreed among christians that this spirit of toleration in the fullest extend consistent with the being of civil society “is the chief characteristic mark of the true church” & In so much that Mr. Lock [sic] has asserted, and proved beyond the possibility of contradiction on any solid ground, that such toleration ought to be extended to all whose doctrines are now subversive of society.<sup>71</sup>

In this regard, Richard Henry Lee was even more explicit when he said: “I fully agree with the Presbyterians, that true freedom embraces the Mahomitan [Muslim] and the Gentoo [Hindu] as well as the Christian religion.”<sup>72</sup> Thomas Jefferson’s “Notes on Religion” stated: “Shall we suffer a Pagan to deal with us and not suffer him to pray to his god? . . . It is the refusing toleration to those of different opinion which has produced all the bustles and wars on account of religion.”<sup>73</sup> And regarding the debate about the Virginia Act for Religious Freedom, Jefferson said: “The insertion [of Jesus Christ in the preamble] was rejected by the great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohammedan, the Hindoo and the Infidel of every denomination.”<sup>74</sup> In fact, the founders went further than Locke to provide liberty of conscience rights to atheists and even to the intolerant. For example, Jefferson said:

Locke denies tolerance to those who entertain opinions contrary to those moral rules necessary for the preservation of society; as for instance . . . [those] who will not own and teach the duty of tolerating all men in matters of religion; or who deny the existence of god (it was a great thing to go so far—as he himself says of the parliament which framed the act of toleration but where he stopped short we may go on. . . .)<sup>75</sup>

But perhaps Richard Henry Lee put it best when he said in 1787: “It is true, we are not disposed to differ much, at present, about religion; but when we are making a constitution, it is to be hoped, for ages and millions yet unborn . . .”<sup>76</sup> Thus, Lee contemplated a nation for “ages and millions” that would be more diverse, perhaps even much more diverse, than the nation for whom he and others were “making a constitution.”

These are but a few of the many statements in the founding era that proclaimed religious liberty for all. Clearly, the founders intended the widest possible freedom of conscience.

The founders’ political/legal system was designed to create a space for the exercise of liberty, in particular liberty of conscience and its expression. And it was understood that liberty of conscience would serve in large part as the means to building the good society. How would a government that ensured freedom of conscience and its expression foster a society that is

good? The people would listen for the voice of God, however understood (including the voice of reason) and would answer that call. They would then participate in argument and debate, not only in the search for the best ways to live together considering their differences, but also in the search for the true and the good. As Thomas Jefferson said, echoing Locke:

[S]he [truth] is the proper and sufficient antagonist to error, and has nothing to fear from conflict unless by human interposition [she is] disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.<sup>77</sup>

In other words, there was to be a public forum in which a great conversation would take place, where the people and their elected representatives and those appointed by them would deliberate from all of their various perspectives about the issues of the day.

However, as perhaps is now clear, that great conversation was never meant to exclude religious voices. As a matter of fact, religion continued to be a participant in public debate from the founding era and forward because the “separation of church and state” did not mean that all religious principles were abandoned. It meant that certain general principles—those on which the natural law of freedom and equal dignity, and in turn the rule of law, were based—would prevail over the various sectarian doctrines of the religions of the new nation. Some held that those natural law foundations of the nation are based on the general principles of Christianity. Others held that those principles followed the political philosophy of the Enlightenment Era secular thinkers. Clearly, however, it was both.<sup>78</sup> As John Dickenson (1732–1808) wrote in 1788:

[A] constitution is the organization of the contributed rights in society. Government is the exercise of them. It is intended for the benefit of the governed; of course [it] can have no just powers but what conduce to that end: and the awfulness of the trust is demonstrated in this—that it is founded on the nature of man, that is, on the will of his Maker, and is therefore sacred. It is an offence against Heaven, to violate that trust.<sup>79</sup>

On these bases, the American founders formed a nation by the people and for the people to secure their natural rights, provide an impartial legal and political system, and ensure the safety and general welfare of the people. This was given effect in the U.S. Constitution and its Bill of Rights, and in the constitutions and declarations of rights of the states, all of which made freedom of conscience and its expression central tenets for the new

nation, and all of which recognized that there were bounds between church and state.

## RELIGION AND TRADITION: WORKING OUT THE MEANING AND EXTENT OF ESTABLISHMENT AND LIBERTY

The religion clauses and their counterparts in state constitutions have been at the center of debates about American identity from the beginning. The reason is that while there was a general consensus about the foundations of our first freedom in the founding era, there was not agreement about the implications of those foundations for American law and culture.<sup>80</sup> It was clear that the founders sought to secure the rights of those in a vast diversity of Christian sects, as well as those in myriad minority religions at the time. At the same time, however, there was an understanding among many generally that society must be based on shared values. Debates about what is or should be the source of those values ensued early on.

The antiauthoritarianism of rational religion and evangelical awakenings prevailed in both, as each saw tyranny from state or church authority as the antithesis of a government by and for the people. After all, the founders and those who followed were well aware of the dangers involved in the exercise of power by either. However, deciding which governmental prerogatives encroach on liberties or risk religious establishments was not as easily accomplished in practice, as the general principles suggested. Consequently, the salient question of the time was: what is the meaning of liberty and establishment in a society framed by laws that derive from culturally “established” customs and traditions? After the founding and since, the courts and legislatures have been charged with determining the answer to this question.

As we have seen, debates about natural rights and the demise of tyranny did not begin with the founding generation. That conversation began long before and was reflected in the English common law tradition, which had given early voice to the concept of natural rights and liberties.<sup>81</sup> The founding generation had appealed to English common law tradition as providing the “rights of Englishmen,”<sup>82</sup> and then extended those rights based in large part on the political philosophy of John Locke.

As we all know, however, the founders did not extend them far enough. Clearly, America did not live up to its ideal at the founding: those without property were denied the right to vote; slavery was promoted by the south and tolerated by the north; women did not gain full rights as free human beings; and Native Americans were robbed of their land and liberty. As a consequence, while the founding generation broke with customs and tradi-

tions in some respects, it continued them in others. That is, while the new nation held out the promise of liberty, it also was steeped in a traditional culture influenced by preexisting law and public policy, which predated the new nation and which, consequently, often was at odds with the general principles enunciated in the Declaration of Independence and the constitutions, bills of rights, and declarations of rights of the nation and the states.

### Boundaries of Liberty: The Blasphemy Cases and State Constitutions

The traditional culture of the founding generation was reflected in the English common law, on which state and federal courts continued to rely well after the founding, and was persuasive to jurists and others regarding challenges to prior law on constitutional grounds. Blasphemy cases are illustrative. While a detailed account and analysis of blasphemy jurisprudence is well beyond the scope of this introductory chapter,<sup>83</sup> the issue nevertheless reveals an early attempt to mediate between traditional culture reflected in the common law and the new constitutional regime of the United States and the states, the language of which, of course, provides broad liberty protections.<sup>84</sup>

William Blackstone's *Commentaries on the Laws of England*<sup>85</sup> remained authoritative for those making and interpreting state and federal law in the new nation. "Blasphemy," Blackstone wrote, "against the Almighty is denying his being or providence, or uttering contumelious reproaches on our Savior Christ. It is punished, at common law by fine and imprisonment, for Christianity is part of the laws of the land."<sup>86</sup> Relying on Blackstone and the English common law, the states continued to prosecute offenders, who claimed, in a failed attempt to avert punishment, that liberty rights granted under U.S. and state constitutions in effect repealed blasphemy laws.

The liberty issue at stake in the blasphemy cases was, of course, freedom of speech, but the cases also raised the issue of religious establishment—the joining of church and state—because of the reasoning adopted by the courts. For example, in *Updegraph v. The Commonwealth of Pennsylvania* (1824), Abner Updegraph sought to have his conviction for blasphemy overturned on the grounds that the blasphemy law under which he had been indicted was no longer valid because it contravened the clear prohibition against freedom of speech in both the state and federal constitutions. Updegraph's misconduct had been

not having the fear of God before his eyes . . . contriving and intending to scandalize, and bring into disrepute, and vilify the Christian religion and the scriptures of

truth, in the presence and hearing of several persons . . . did unlawfully, wickedly and premeditatively, despitefully and blasphemously say . . . : “That the Holy Scriptures were a mere fable: that they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies.” To the great dishonor of Almighty God, to the great scandal of the profession of the Christian religion.<sup>87</sup>

Interestingly, Updegraph was a member of a debating association and claimed that his statement was made in the context of a debate on a religion question. Nevertheless, the Pennsylvania Supreme Court rejected Updegraph’s claim that reliance on Christianity to legitimize blasphemy laws violates the U.S. Constitution and the Pennsylvania constitution. The court upheld Updegraph’s conviction and sentence, which included a fine of \$500 and a two year prison sentence, stating that “Christianity is part of the common law; the act against blasphemy is neither obsolete nor virtually repealed; nor is Christianity inconsistent with our free governments or the genius of the people.”<sup>88</sup>

The *Updegraph* court was correct: Christianity was a part of the common law. After all, the common law against blaspheming Christianity traced back to England’s established church. Neither the U.S. nor Pennsylvania constitutions invoked by blasphemers had established Christianity, Pennsylvania being one of the states that never had a religious establishment. Yet the Pennsylvania Supreme Court based its holding on common law foundations in England’s established Christianity. Hence the court reasoned that Christianity provided the basis for civil law, and therefore to blaspheme Christianity was to blaspheme the nation’s foundations.

We will first dispose of what is considered the grand objection—the constitutionality of Christianity—for, in effect that is the question. Christianity, general Christianity, is and always has been a part of the common law . . . not Christianity founded on any particular religious tenets; not Christianity with an established church . . . but Christianity with liberty of conscience to all men . . . In this the constitution of the United States has made no alteration, nor in the great body of the laws which was an incorporation of the common-law doctrine of Christianity . . . without which no free government can long exist.<sup>89</sup>

This line of reasoning, rather than being an aberration, was consistent with much of the thinking at the time. The idea was that Christianity provided the foundation of the nation and the states.

Similarly, founding era constitutions and declarations of rights, while providing broad liberty rights, including of course freedom of religion, contained references to Christianity, Christian virtues, or belief in God as foun-

dational, as well. For example, the Delaware Declaration of Rights (1776) provided:

[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship . . . [A]ll persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless under colour of religion, any man disturb the peace, the happiness or safety of society.<sup>90</sup>

Clearly, many in the founding generation believed that the liberties they revered and secured derived in large part from their long-held traditions—including their Christian tradition. The natural law tradition had developed in large part from a genus of Christian theology, many believed, and therefore its preservation as the foundation of the country's culture and tradition was wise. Consequently, while the general principle of liberty, especially religious liberty, was included in every state constitution, several permitted state funding of their nominally established churches<sup>91</sup> and had religious tests for office,<sup>92</sup> requiring an oath in the belief in Christianity or at least God. It was Christianity, many felt, that had inspired them to travel the path of resistance and liberty in the first place; Christianity had been Locke's own religious ground.

What did all this mean, however, in the face of an immediate history that reflected some of the most severe abuses that had been the consequence of the combination of religion and government—even Christianity and government? The answer was that it was not the authoritarian version of Christianity to which they appealed. It was not even all of anyone's *particular* Christianity to which they appealed. It was the "general principles" or "first precepts" of a "true" or "genuine" Christianity, which informed the foundations of the new nation.<sup>93</sup> The general principles of that true and genuine Christianity were understood to be the font of liberty on which the nation was founded. In other words, the true and genuine general principles of Christianity were those that were consistent with the natural law tradition of inalienable rights that Locke had advocated. As the *Updegraph* court said, it was "Christianity with liberty of conscience to all men" that prevailed. Not Christianity opposed to liberty.

Thus, many in the founding generation relied on the religiously grounded conception of human beings and their relationship with God, the roots of which in large part were in the Christian theology discussed earlier. Accord-

ingly, it was understood that the governments of the states and the United States did not *grant* the people their civil rights. Rather, those rights were endowed by the Creator and merely *secured* in the founding documents; those rights were understood to be a part of what it is to be a human being. That is why those rights are “natural” and “inalienable.” In other words, what often is thought to be the “secular” foundations of the nation involve a “religious” imperative for equal liberty as well, and together they constitute what can be termed the nation’s “sacred ground.” As Noah Webster said of the founding:

[T]he religion which has introduced civil liberty, is the religion of Christ and his apostles, which enjoins humility, piety and benevolence; which acknowledges in every person a brother, or a sister, and a citizen with equal rights. This is *genuine Christianity*, and to this we owe our free constitutions of government.<sup>94</sup>

Similarly, John Adams famously stated:

The *general principles*, on which the fathers achieved independence, were the only principles in which that beautiful Assembly of young men could unite, and these principles only could be intended by them in their address, or by me in my answer. And what were these general principles? I answer, the general principles of Christianity, in which all those sects were united: and the general principles of English and American Liberty, in which all those young men united, and which had united all parties in America, in majorities sufficient to assert and maintain her Independence.<sup>95</sup>

Likewise, John Quincy Adams said a generation later:

[T]he Declaration of Independence first organized the social compact [i.e., Locke’s social contract] on the foundation of the Redeemer’s mission on earth [and] laid the corner stone of human government upon the *first precepts* of Christianity.<sup>96</sup>

In other words, the privileged place for Christianity in the language of the era was *because* the general principles and first precepts of genuine Christianity were believed to support liberty.

In this regard, it is important to note that, even in those states with “establishments” and “tests,” the role of church authority over the government institutions of those states was essentially nil, as the enforcement of orthodoxy had been abandoned by the end of the revolutionary period, and religious toleration was the norm.<sup>97</sup> That is, whatever pronouncements in the founding era regarding the importance of Christianity to the foundations of the nation, they did not imply an authority role for churches and



their doctrines; just bounds between church and state prevailed. Furthermore, the existing weak state religious “establishments” were abolished for the most part by the end of the founding era. The Connecticut, New Hampshire, and Massachusetts establishments were abolished by 1818, 1819, and 1833, respectively. Religious tests for office were abandoned in more than a majority by 1800 and several states expressly prohibited them.<sup>98</sup>

Still, laws that later would be found to violate constitutional principles, such as blasphemy laws, and some states’ religious tests for office continued to be upheld until much later.<sup>99</sup> That does not mean, however, that today we should consider returning to the ways of the past in its entirety in order to regain a former cultural hegemony, as some have argued.<sup>100</sup> Nor does it mean that references to Christianity from the past should dictate what should be the law of the land today. Rather, the founding generation set in motion a conversation about the meaning and extent of America’s sacred ground: what customs and traditions from English common law and Christianity embedded in federal and state law are consistent with constitutional essentials and which are not? The institution of slavery provides an instructive case.<sup>101</sup>

### **Abolition: Christianity at the Crossroads of Liberty and Equal Dignity**

Remnants of an old order prevailed in the new nation. Top-down authoritarian theologies that were inconsistent with the sacred ground of the nation justified oppression in some parts. Consequently, traditional religion and culture steeped in an ideology of hierarchical societal roles in a state enforced social order ran headlong into ideals enunciated in the founding era over the issue of slavery. However, the debate about slavery that took place in America before and during the founding era, and which was only resolved finally with a civil war, did not occur at the divide between secular and religious camps. Rather, religious arguments based on Christianity were made for and against the institution of slavery.

On one hand, abolitionists argued that slavery was contrary to fundamental laws of justice that originally derived from the belief in the liberty and equal dignity of every human person. Therefore, the enslavement of one man by another, making the former the “property” of the latter to be bought and sold, was thought to violate not only the legal principle of equal justice, but the moral tenets of Christianity, as well. For example, at their General Assembly in 1818, Presbyterians declared unanimously:

We consider the voluntary enslaving of one part of the human race by another as a gross violation of the most precious and sacred rights of human nature; as utterly

inconsistent with the law of God . . . and as totally irreconcilable with the spirit and principles of the Gospel of Christ.<sup>102</sup>

On the other hand, an authoritarian Christianity bolstered the argument for slavery. The Bible was cited as evidence that slavery is legitimate. George D. Armstrong wrote in *The Christian Doctrine of Slavery* only a few years before the Civil War in 1857 that although wrongdoing may be found in the practice of slavery, the institution itself is not sinful because arguing otherwise would require “mak[ing] the Bible declare that slave-holding is a sin, when it plainly teaches just the contrary.”<sup>103</sup> The continuance of the institution of slavery was consistent with the appropriate ordering of society, others argued. In a well-ordered society, when each plays his or her proper role, all are blessed. As Thomas Bacon said in a sermon to slaves in Maryland in 1749:

God hath appointed several offices and degrees in his family, as they are dispersed and scattered all over the face of the earth. Some he hath made masters and mistresses, for taking care of their children, and others that belong to them. . . . Some he hath made servants and slaves to assist and work for the masters and mistresses that provide for them; and others he hath made ministers and teachers to instruct. . . . [A]s Almighty God hath sent each of us into the world for some or other of these purposes, so, from the King, who is his head servant in a country, to the poorest slave, we are all obliged to do the business he hath set us about . . . And while you, whom he hath made slaves, are honestly and quietly doing your business, and living as poor Christians ought to do, you are serving God, in your low station, as much as the greatest prince alive, and will be as much favor shown you at the last day.<sup>104</sup>

Echoing this sentiment, Presbyterian James H. Thornwell (1812–1862) called abolitionists “Atheists, Socialists, Communists, Red Republicans, [and] Jacobins,” while arguing that those who support the institution of slavery are “friends of order and regulated freedom . . . [who understand] the principles upon which the security of the social order and the development of humanity depend” because “the spirit of true obedience is universally the same.”<sup>105</sup>

Slavery proponents even asserted that the separation of church and state should preserve the right to hold slaves. Because there were varying religious views, the state could not legitimately “impose” one view, that is abolition, on others, they argued. For example, Armstrong argued:

We object to the course proposed by [abolitionists], for dealing with slavery, because it requires the Church to obtrude herself into the province of the State, and

this, in direct violation of the ordinance of God. . . . [Is it] right for the preacher, in the pulpit on the Sabbath, to discuss the claims of rival candidates, and the Church, in her councils to direct her members how to vote? The Church and State has each its own appropriate sphere of operation assigned it of God, and neither can innocently intrude herself into the province of the other.<sup>106</sup>

Yet what was at issue in this debate was not the state's authority to legislate on moral issues that also are in the purview of religion. Such a limitation was never the meaning of "just bounds" between, or "separation of," church and state. Most laws necessarily have moral dimensions that tread on religious territory. As we have seen, the foundational legal principles of the nation are religiously grounded, while serving secular, that is, "this worldly," purposes. These always were intended to be "imposed" on the people. What was at stake were the nation's sacred ground itself and the degree to which authoritarian claims on the basis of Christian precedent would be allowed to continue to supersede it.

Arriving at the answer tore the nation apart. But through speech, debate, and eventually war, the nation rejected all bases for enslavement and relied instead on the core principles of equal inherent dignity and liberty enunciated in the Declaration of Independence. An understanding of what the founders had set in motion reached a new consensus, however uneasy it was at first.

That understanding was not new, of course, and a similar story could be told regarding the rights of other minorities and the rights of women—and other stories are being written still. We have continued to refer back to the beginning and trace the development of our understanding from then to now as we have found our way through all of the crucibles, where America's sacred ground has been challenged and survived, and finds us where we are today: not devoid of all values as some would argue, and not full of all the Christian values of a particular authoritarian Christian ideology. Changing times and evolving policies have clarified the principled foundations of the nation. Those principles have not been rejected in favor of a conception of an authoritarian social order that trumps natural rights. Rather, it has been the appeal to those principles that has led America to "a more perfect union." By reaching back to the past, we have continued to forge the future on our sacred ground.

## UNDERSTANDING THE FRAMEWORK, PRINCIPLES, AND PURPOSE OF OUR SACRED GROUND

It is often said that the U.S. Constitution does not provide any positive values on which to build the common good. Those holding this view note,

for example, that the Bill of Rights, including the religion clauses, merely states what the government may *not* do—not what the people *should* do. However, based on what has been written here, it is not difficult to see that those holding that view really have missed the point: the religious ground of a system secured by “negative rights” is also a moral ground that serves the good.

Ours is not a nation with God at the top of a grand hierarchy speaking through ecclesiastical authorities aligned with the state to impose the law on the people from the top down. Ours is a nation with a sacred ground derived from the enlightened and religious conception of the relationship of the people to the ultimate. That is, God’s relationship is not with society as a whole or with any particular organization in it. Rather, the idea and belief that stand behind the founding documents of the nation are that God and reason speak to individual people through conscience, and accordingly the people must be free to answer that call. Then, as individuals of conscience freely express themselves from the perspective conscience gives them, they participate in dialogue and debate—a great conversation—in the search for the true and the good. They find a way to work together to create the good society from the ground up.

To give effect to this, the American founders formed a social contract, which established a government by the people and for the people. Founded on the rule of law—the “higher law” from which the liberty and equal inherent dignity of the people derive, such government necessarily must be limited in its reach; absolute government is its antithesis. As a consequence, the intent and effect of such a government was the establishment of an open and free public space—a “public forum.” To ensure that the public forum does not devolve into a Lockean “state of war—a “free-for-all” of competing interests where the powerful rise to the top and use their “freedom” to oppress and therefore limit the freedom of others—the public forum has a framework and principles. The people must honor these, if the system is to remain free for *all*. It is this framework and these principles to which we should turn in order to account for and mediate our differences if the system is going to fulfill its intended purpose: to make a better world.

As I have written in more detail elsewhere,<sup>107</sup> the public forum established by the founders has a framework that, in effect, consists of two tiers, each of which has certain basic moral precepts. Each tier creates a space for public participation of different scopes, and together the two tiers of the public forum make possible the people’s pursuit of a good society as they continually strive toward a “more perfect union.”<sup>108</sup>

The first tier of the public forum involves matters that are appropriate for law and public policy incorporated as fundamental through America’s

founding documents. These are matters appropriate for governmental action and, therefore, involve not only discussion about and promulgation of public policy, laws and regulations, but also adjudication of disputes and enforcement of the law. This tier, which I refer to as the “civic public forum,” gives effect to John Locke’s “impartial judge” of disputes. That is, it is the basis for the unbiased legal and political system that secures the people’s natural rights and provides for the safety and general welfare of the people in a way that is consistent with their natural rights.

The civic public forum has, in effect, two foundational principles, which are grounded in liberty and equal inherent dignity. Because they are principles of the civic public forum, they can be thought of as being fundamental “laws.” First is the law of no harm, which is derived from the overall principles of liberty and inherent dignity. That is, there is something inviolable about human beings that cannot legitimately be infringed, not even for the benefit of the commons. Consequently, the first law of the civic public forum is that no one may harm another in his or her life, liberty, or property. Now, of course, there may be differing views of the meaning of “harm,” but the principle remains as an anchor for debates about law and public policy in the civic public forum. The non-harming law has a companion principle: the law of consistency/no hypocrisy. That is, do not do unto others what you would not want done unto you.” This is Locke’s reversed statement of the golden rule.<sup>109</sup> Law and public policy, their enforcement, and the adjudication of disputes involving them should strive for consistency in their application to everyone. In other words, they should recognize the equal inherent dignity of every human being and therefore serve equal justice.

The second tier of the public forum does not involve the authority and power of the state. It is the open and free space for persuasion and voluntary actions and acceptance regarding matters that do not involve law or public policy, or enforcement by the state. Nevertheless, matters for this forum are “public” in that they involve speech, debates, and actions that very much are, and were always intended to be, in the public eye.<sup>110</sup> That said, because they do not involve law or public policy, or enforcement by the state, they belong to an arena of persuasion and the voluntary activities of the people. This tier, which I refer to as the “conscientious public forum,” creates the space for the exercise of the people’s liberty of conscience beyond the purview of the state, and because government is limited, this is the greater of the two tiers of the public forum.

This conscientious public forum also has two fundamental principles. They are “duties” because they are not enforced by the state. That is, they are moral principles that must be adhered to voluntarily if the system is

going to work the way it was intended and fulfill its purpose. First is the duty to raise conscience beyond one's own wants and desires to that higher someone or something—to God, to Universal Compassion, or Universal Reason, the Divine (however understood)—in a sincere effort to glean what conscience directs, not only for oneself, but for the betterment of one's society and even the world. Second, there is a duty to participate. After all, the system is based on trusting the people. Consequently, participation is central to the whole process conceived by Locke and the founders. But that participation should be accomplished not only by one's own speech and activity, but also by listening to the views of others, all with honesty and respect.

Moreover, as we have seen, religious voices were never meant to be suppressed in the great conversations of a legal/political system based on liberty and equal inherent dignity. The idea that society is divided into two spheres, one public and one private, with religion delegated to the private sphere where it is in effect hidden, is a wholly erroneous way to think about the participation of religion in the lives of the people. On the contrary, religious and non-religious voices alike were always meant to be welcomed in the two tiers of the public forum, and historically they have been. However, in both cases, to be legitimate, the participation must be consistent with the framework and principles of the legal/political system. That is, neither religious nor secular participants may legitimately invade the rights of others. Yet there is much room in the conscientious public forum for individuals and the communities they form and join—"communities of conscience"—to set what they believe are even higher standards than what mere law requires.<sup>111</sup>

We can see, then, that even though the founders created a limited government and, as a consequence, the Bill of Rights was framed in negative terms (i.e., what the government cannot do legitimately), when the founders framed the Constitution, they nevertheless grounded it in a framework and set of principles, which have a purpose: to make it possible for the people to build a good society. It is, then, a values-based constitution.

Accordingly, the founders' legal/political system, following Locke, does not produce a state that consists of an absolute authority. Locke and the founders well knew that authoritative governments never produce a society that in any way could be thought of as good. First of all, absolute government breeds corruption because absolute power tends to corrupt. Second, it results in discord because the oppressed always rise up in an effort to right the harms against them. As Jefferson said, "[It is] no wonder the oppressed should rebel, and they will continue to rebel and raise disturbance until their civil rights are full[y] restored to them and all partial

distinctions, exclusions and incapacitations removed.”<sup>112</sup> This had been Locke’s thinking as well when he said, “[W]hat else can be expected but that these men, growing weary of the evils under which they labour, should in the end think it lawful for them to resist with force, and to defend their natural rights . . . with arms as well as they can?” In other words, absolute authority and its exercise of power often are the direct cause of unrest. Third, when absolute authority is based on religion, it necessarily involves a usurpation of God’s authority, which, Locke and the American founders believed, is much more likely to be known by individuals through conscience than by authorities who often are corrupted by power.<sup>113</sup>

Still, government is not to be so limited that it provides no structure or values at all. Rather, there is what has been described here as the sacred ground, which is what creates the space for liberty and thereby becomes the framework of the two-tiers of the public forum and their corresponding principles. That is, the view that currently permeates large segments of American culture today that *no* values should be “imposed” on anyone in our multicultural society is misplaced. This is, of course, the idea that all morals are relative and that everyone is entitled to a morality unto himself. Instead, what has been shown here is that while it is true that the American legal/political system was designed to promote liberty and embrace diversity, it was never meant to promote an absolute moral relativity. Rather, it was meant to create the space where the exercise of virtue would be possible. Such a system has grounding principles, as we have seen. It is not a comprehensive moral order imposed on the people *in toto*. Yet, nevertheless, it has a moral framework that creates the public forum for debate about the moral good. Consequently, the system does not involve a complete free-floating moral relativism, on one hand, nor does it involve an absolute freedom-limiting moral absolutism, on the other hand. This system, with its values-based constitution, is a middle way.

In effect, then, what the founders wrought was a compromise between those who believed in the essential good nature of humankind and those suspicious of human beings’ potential to be led astray by the intoxication of power. Consequently, no longer was trust placed in the rule of an absolute king through the auspices of the state; no longer was trust placed in the hands of ecclesiastical authorities. Now a government by the people and for the people would place its trust in the people engaged in the great conversations of the civic and conscientious public forums, anchored in the framework, principles, and purpose of the nation, not only about how to live together in peace considering their differences, but also in the ultimate search for the true and the good.

Hence, beyond its own values, the constitution and the legal/political

system it established anticipate that a free people will use their freedom well. Released from the fetters of an authoritarian government, the people no longer are forced by the government into societal patterns at odds with conscience. The people are free to live a full life according to the “true faith,” whatever that may be, and answer its call; the people can be and do all that they believe reflects the true and the good, so long as they do not violate the sacred ground of the nation. That is, the founders’ legal/political system places the virtue of a free people at the heart of a nation that makes the pursuit of virtue possible. As James Madison said, “To suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea.”<sup>114</sup> That is, it is *an illusion*. And John Adams said, “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.” In other words, it is *because* the government is limited—not dictating a unified conception of the true and the good—that the true and the good must come from the people. Otherwise, as I have said elsewhere:

If enough of us do not [fulfill] the conscientious moral principles, then we will end up proving our founders wrong: a society of free individuals does not promote the good—not even as separately conceived by society’s various constituents; it promotes a licentious society where individuals have no regard for their nation and its future, only themselves. When that happens—when we have lost sight of what freedom was for—we will surely be in danger of losing the liberties that the founders and all of our forbears fought so hard to give to “ages and millions yet unborn.”<sup>115</sup>

Unless the people are raising their minds and hearts to something greater than themselves—to God or Universal Reason or Universal Compassion or the Divine (however they each understand that)—and discerning what conscience wants of them and bringing that to the public forum, the system cannot fulfill its intended purpose: to make a better world. In other words, freedom is not for our own happiness; it is for the happiness of everyone.

## CONCLUSION

Clearly, America did not live up to its ideal at the founding. Yet it is an ideal worth keeping, because it has not been the rejection of the original sacred ground of the nation that has led us through the trials of our nation. The abolition of slavery, gaining women’s rights, the civil rights movement and its resulting historic legislation, and more have been accomplished by *appealing* to our sacred ground. Accordingly, today the issue regarding the founders’ original intentions and American identity is not: how do we re-



turn to the way things were or were understood to be at the time of the founding? Surely, we do not want to return to the days of oppressive laws that supported slavery and subjugated women and others. The issue is: how do we identify and keep what is essential to our sacred ground—the framework, principles, and purpose of our nation—while taking account of new insights and new or newly understood circumstances?

Unfortunately, however, rather than having a conversation about this question, the debate itself has been framed in other terms, terms that undermine the foundations of the legal/political system the founders bequeathed to the nation. On one hand, many argue that the U.S. Constitution is a Christian document and that ours is a Christian nation. On the other hand, others argue that it is wholly secular. Yet it is a mistake to think that references to Christianity at the time of the founding mean that there were no bounds between church and state; it is also a mistake to appeal to an absolutist secular authority that eschews and marginalizes religion and therefore undermines religious liberty. Both tend toward the top-down absolute authority that the American founders repudiated.

Rather, the way we should understand the debate today is that we are continuing to have the conversation we always have had in America—a debate about the line between governing authority, on the one hand, and the authority of conscience, on the other hand. But what grounds those authorities should not be in dispute: it is our sacred ground founded by the people and for the people. Consequently, rather than arguing about whether or not the nation is based on Christianity or secular Enlightenment Era sources, we ought to understand that it is both, but at the same time neither in absolute terms. In other words, the debate is really about the line between the civic and conscientious public forums. And we can only negotiate that line legitimately by reference to our fundamental values: liberty, equal inherent dignity, non-harming, consistency/no hypocrisy (i.e., impartiality and equal justice), raising conscience, and participation with honesty and respect. Surely, debates on the line are difficult, but not more difficult today than they always have been.

Is our nation a nation under God? Perhaps so, if by that we mean that historically our nation is grounded in certain principles that derive from religion as well as secular ideas. Perhaps not, if we mean that God is at the top of a grand hierarchy with a Christian president as the nation's interpreter of God's will. Should the Ten Commandments be posted on public property? Perhaps so, if we mean that there are general moral principles on which the nation stands. Perhaps not, if we mean that the law of the land includes the injunction that "you shall have no other gods before me" or that the law must be based on the Bible. Should minority religions' prac-

tices receive exceptions to laws that are generally applicable to everyone? Perhaps not, when those “laws of general applicability” are truly neutral and are necessary to secure the natural rights of the people and to ensure their safety and general welfare. Perhaps so, if those laws involve traditions and customs that stem from majoritarian religious beliefs. Should homosexuals be permitted to become legally married? Should abortion be legal? Should political leaders use religious language and metaphor to make their points? Should religious schools receive public funds?

Whatever the issue facing us today, as the conversations proceed we have a responsibility to refer back again and again to our touchstone, our sacred ground, whether we think of it as being religious or not. Then when we have our continuing conversations and debates about the reach of government and the authority of conscience, we will not abandon all tradition for progress or all progress for tradition. Instead, we will remember to understand church and state in context as we keep the ship of state anchored in what makes all of the conversations possible in the first place, always remembering that the dichotomy that counts is not religious vs. secular or absolute vs. relative—but is liberty and equal dignity vs. dominance. If we always return to our sacred ground, we can apply its principles to the shifting circumstances of our own time and of the future without unmooring the whole project from what gives us our core identity. This is what we largely have accomplished over time. We should do no less today.

## NOTES

1. U.S. Const., Amend. 1.

2. See, e.g., *Church of Holy Trinity v. U.S.*, 143 U.S. 457 (1892); *Everson v. Board of Education* (1947); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (J. Rehnquist, dissenting).

3. Roger Williams, “Mr. Cotton’s Letter Lately Printed, Examined and Answered,” *The Complete Writings of Roger Williams*, vol. 1, p. 108 (1644).

4. John Adams, “To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts,” 11 October 1789, *The Works of John Adams, Second President of the United States with a life of the author, notes and illustrations*, compiled by Charles Francis Adams, 10 vols., vol. 9 (Boston: Charles C. Little & James Brown, 1850–1856), 228–229. (Hereafter *Adams Works*.)

5. At the time of the founding the word “secular” did not have the meaning it has today in common usage: non-religious. Instead, secular referenced “this-worldly” matters. Having been derived from Latin word “*saeculum*,” which means literally “time” or “age,” the word “secular” means “of this time,” in other words of this world, as distinguished from matters of eternity. Consequently, it would have been possible to speak of religious matters that are secular, that is, focused on

this world in the here and now. Furthermore, the word “religion” also did not have the meaning it has today, which includes the institutions of religion, that is “objective systematic entities,” for example, churches. Rather, “religion” meant personal piety and relationship with God or, at most, a system of beliefs, practices, and values. For more on this, see Barbara A. McGraw, *Rediscovering America’s Sacred Ground* (Albany: State University of New York Press, 2003), 185–188, discussing Wilfred Cantwell Smith’s classic work *The Meaning and End of Religion* (1962; Minneapolis: Fortress Press, 1991).

6. Thomas Jefferson, *The Writings of Thomas Jefferson*, Albert E. Bergh, ed. (Washington, D.C.: The Thomas Jefferson Memorial Association of the United States, 1904), vol. 16, pp. 281–282.

7. James Madison, “To Thomas Jefferson,” 24 October 1787, *The Writings of James Madison*, ed. Gaillard Hunt, 9 vols., vol. 5 (New York, London: G.P. Putnam’s Sons, 1900–1903), 30–31.

8. Thomas Jefferson, “A Bill for Establishing Religious Freedom,” submitted to the Virginia General Assembly 1779, enacted in an edited form in 1789, *The Complete Jefferson: Containing His Major Writings, Published and Unpublished, Except His Letters*, ed. Saul K. Padover (New York: Duell, Sloan & Pearce, 1943), 946. [Hereafter *The Complete Jefferson*.]

9. See generally, Pauline Marie Rosenau, *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions* (Princeton: Princeton University Press, 1992).

10. Robert S. Ellwood and Barbara A. McGraw, *Many Peoples, Many Faiths: Women and Men in the World Religions*, 8th ed. (Upper Saddle River, NJ: Prentice-Hall, 2005), 31, 44–50.

11. *Ibid.*, 17.

12. Gregory VII, in what has been called the “Gregorian Reform” (1075–1122), asserted ultimate authority over church and state. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA and London: Harvard University Press, 1983), 87. This understanding has roots in early Christianity, however. Christianity began as one of the many religions practiced in ancient Rome. However, Christians believed that their God was not of place or state, but stood above as God of the whole world, the universe. As a consequence, Christians refused to place the emperor—who Rome held to be the divine head of Rome—above their God. This is a main reason they came to be persecuted there. Consequently, one could argue that the idea of a religion being separate from the state actually evolved out of early Christian religious beliefs. See John Dominic Crossan and Jonathan L. Reed, *In Search of Paul: How Jesus’ Apostle Opposed Rome’s Empire with God’s Kingdom* (New York: HarperCollins Publishers, Inc., 2004).

13. John Neville Figgis, *The Divine Right of Kings* (1896; Cambridge, UK: Cambridge University Press, 1922), 45–49.

14. Berman, *Law and Revolution*, 145, quoting Gratian, *A Concordance of Discordant Canons* (1140): “[T]he law of princes ought not to prevail over natural law.” Even the pope’s power “was limited . . . by natural and positive divine law [that is,

divine law laid down in the Bible and in similar documents of revelation].” Ibid., 99. See also *ibid.*, 214.

15. Figgis, *Divine Right of Kings*, 58.

16. *Ibid.*, 50–51, 65.

17. *Ibid.*, 45.

18. The “divine right of kings” involved a “widespread” belief, which consisted of “the following propositions: (1) Monarchy is a divinely ordained institution. (2) Hereditary right is indefeasible . . . The right acquired by birth cannot be forfeited . . . (3) Kings are accountable to God alone . . . (4) Non-resistance and passive obedience are enjoined by God.” Figgis, *The Divine Right of Kings*, 5–6. Furthermore, European emperors and kings generally claimed authority over popes and bishops. As Harold J. Berman has said, “The emperor [e.g., Charlemagne or Henry IV] claimed to be the supreme spiritual leader of Christendom, whom no man could judge, but who himself judged all men . . .” Berman, *Law and Revolution*, 89.

19. *Ibid.*, 60, 65.

20. Gratian, an immensely influential Bolognese monk, divided the canon laws into a hierarchy of categories, each lower category being subject to the categories above: divine law (“the will of God reflected in revelation, especially the revelation of Holy Scripture”); natural law (found in “divine revelation and in human reason and conscience”); ecclesiastical laws and enactments; the laws and enactment of princes (secular authorities); and customs. Berman, *Law and Revolution*, 143, citing Gratian, *A Concordance of Discordant Canons* (1140). From this hierarchical division the idea that temporal laws could be “unjust laws” emerged. Cf. Anton C. Pegis, ed., *Introduction to St. Thomas Aquinas* (New York: Modern Library, 1848), 530, 542, 622.

21. David Wootton, “Introduction,” in *Political Writings of John Locke* (New York: Mentor, 1993), 65.

22. *Ibid.*

23. This conception of human beings was evidenced in the work of St. Anselm and memorialized by Gratian (see note 20 *supra*), later espoused by Aquinas, and further developed in the modern period as liberalism took hold. See Berman, *Law and Revolution*, 159; Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York, London: Continuum, 2005), 70–72.

24. “[T]he canon lawyers laid a legal foundation for . . . resistance.” Berman, *Law and Revolution*, 214. “[W]hen he who is chosen to defend the good and hold the evil in check himself begins to cherish wickedness, to stand out against good men, to exercise most cruelly over his subjects the tyranny which he was bound to combat; is it not clear that he justly forfeits the dignity conceded to him and the people stand free of his rule and subjection, since it is evident that he was the first to violate the compact on account of which he was made the ruler?” McIlwain, *Growth of Political Thought*, 209–210, quoting Manegold of Lautenbach (died c. 1103).

25. See, e.g., *Magna Carta* (1215); *Petition of Right* (1628); *Bill of Rights* (1689).

26. John Locke, *A Letter Concerning Toleration*, trans. William Popple (1685,

published 1689), *Political Writings of John Locke*, ed. David Wootton (London: Mentor, 1993), 397. [Hereafter *Letter Concerning Toleration*.]

27. “[S]he [truth] is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition [she is] disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.” Thomas Jefferson, “A Bill for Establishing Religious Freedom,” 1779, *The Complete Jefferson*, 947.

28. John Locke, *Of Civil Government, Two Treatises of Government, The Works of John Locke*, 9 vols. vol. 4, Ch. II, ¶ 6, p. 341; Ch. XIII, ¶¶ 151–152, pp. 427–428 [Hereafter *Second Treatise*]; Locke, *Reasonableness of Christianity*, ed. George W. Ewing (Washington, D.C.: Regnery Gateway, 1965), ¶ 252, p. 192–193.

29. Locke, *Second Treatise*, Ch. II, ¶ 13, p. 345–346; Ch. III, ¶¶ 20–21, pp. 349–350.

30. Locke, *Second Treatise*, Ch. III, ¶ 16, p. 347.

31. *Ibid.*

32. Locke, *Letter Concerning Toleration*, 390.

33. Locke, *Second Treatise*, Ch. II, ¶ 13, p. 345–346; Ch. III, ¶¶ 20–21, pp. 349–350.

34. Locke, *Second Treatise*, Ch. VIII, ¶¶ 95–122, p. 394–411; Ch. XIV, ¶ 168, pp. 438–439.

35. Locke, *Letter Concerning Toleration*, 393.

36. “[E]veryone’s sin is charged upon himself only.” Locke, *Reasonableness of Christianity*, ¶ 4, p. 4; Locke, *Second Treatise*, generally.

37. Locke, *Of Government, Two Treatises of Government, The Works of John Locke*, 9 vols, vol. 4, Ch. IX, ¶ 86, p. 279. [Hereafter *First Treatise* and *Works*.]

38. Barbara A. McGraw, *Rediscovering America’s Sacred Ground* (Albany: State University of New York Press, 2003), 26, citing Locke, *A Second Vindication of the Reasonableness of Christianity, Works*, 357; Locke *Reasonableness of Christianity*, ¶ 155, p. 114; Locke, *Essay on Human Understanding, Works*, Book IV. Ch. XIX, ¶ 4, vol. II, p. 273; Locke *First Treatise*, ¶ 86, p. 279; Locke, ¶¶ 39–40, pp. 24–26. See also Locke, *Reasonableness of Christianity*, ¶ 238, pp. 165–166; ¶ 241, pp. 169–172; ¶ 243, pp. 178, 180.

39. Locke, *Letter Concerning Toleration*, 431.

40. Locke, *Second Treatise*, generally.

41. Locke, *Letter Concerning Toleration*, 420–421.

42. *Ibid.*, 401, 409, 417. “True religion consists in the inward persuasion of the mind.” *Ibid.*, 394. “[Tolerance is] the chief characteristic mark of the true church.” *Ibid.*, 390.

43. However, Locke’s toleration did not extend to atheists nor to those who are intolerant. Locke, *Letter Concerning Toleration*, 426.

44. *Ibid.*, 390.

45. *Ibid.*, 420.

46. *Ibid.*, 412, 420, 431.

47. *Ibid.*, 431.

48. *Ibid.*, 416.

49. *Ibid.*, 400, 417, 431.

50. *Ibid.*, 431.

51. *Ibid.*, 402, 420.

52. Locke, *Essay on Human Understanding, Works*, vol. 2, Book IV, Ch. XIX, ¶ 4, p. 273.

53. Locke, *Letter Concerning Toleration*, 401.

54. Thomas Jefferson “copied long passages from Locke’s *Letter Concerning Toleration* in his commonplace notebook, and used many of Locke’s ideas and phrases in his own writing on the need for religious freedom.” Charles B. Sanford, *Thomas Jefferson and His Library: A Study of His Literary Interests and of the Religious Attitudes Revealed by Relevant Titles in His Library* (Hamden, CT: Archon Books, 1977), 121. “[The colonists] thought themselves at full liberty . . . to establish such sort of government as they thought proper, and to form a new state as full to all intents and purposes as if they had been in a state of nature, and were making their first entrance into civil society. Bernard Schwartz, “Commentary” in *The Bill of Rights: A Documentary History*, ed. Bernard Schwartz (New York, Toronto, London, Sydney: Chelsea House Publishers, 1971) [hereafter *Documentary History*], 179, quoting a 1764 statement by Thomas Hutchinson (then Lieutenant Governor of Massachusetts). The colonists’ writings clearly showed a debt to the writings of John Locke. See also, e.g., Samuel Adams, “The Rights of the Colonists and a List of Infringements and Violations of Rights” in *Documentary History*, 200–211.

55. See Harry S. Stout, “George Whitefield in Three Countries,” *Evangelicalism: Comparative Studies of Popular Protestantism . . . 1700–1900*, eds. Mark A. Noll, et al. (New York, Oxford: Oxford University Press, 1994), generally. See also John Boles, *The Great Revival, 1787–1805: The Origins of the Southern Evangelical Mind* (Lexington: University Press of Kentucky, 1972), 40.

56. *Ibid.*, 63, 69.

57. James H. Hutson, *Religion and the Founding of the American Republic* (Washington, D.C.: Library of Congress, 1998), 39–42.

58. See, e.g., John Toland, *Christianity Not Mysterious* (London, 1696). Instead, those founders generally thought to be deists believed that God has a hand in history. McGraw, *Rediscovering America’s Sacred Ground*, 70–71, quoting various founders.

59. Sanford, *Thomas Jefferson and His Library*, 150, citing Henry Stephens Randall, *The Life of Thomas Jefferson*, 3 vols., vol. 3 (New York: Derby & Jackson, 1858), 407–410, quoting Jefferson’s grandson. Benjamin Franklin indicated that he had a belief in God and that God plays a role in human affairs when he said: “I have lived, Sir, a long time; and the longer I live, the more convincing proofs I see of this Truth—that God governs in the Affairs of Men. And if a Sparrow cannot fall to the Ground without his Notice, is it probable that an Empire can rise with his Aid?” Benjamin Franklin, “Motion for Prayers in the Convention,” 28 June 1787, *Benjamin Franklin Writings*, ed. J.A. Leo Lemay (New York: The Library of

America, 1987), 1138–1139 (emphasis in original). Similarly, John Adams declared his belief in the intervention of God into human affairs when, in his proclamation for a national day of fasting, he stated: “[There is] the governing providence of a Supreme Being and of the accountableness of men to Him as the searcher of hearts and the righteous distributor of rewards and punishments . . .” eds. Paul H. Smith, et al., *Letters of Delegates to Congress 1774–1789*, 25 vols. (Washington, D.C.: Government Printing Offices, 1876–1998), 311–312.

60. See, e.g., James Winthrop, “Letter of Agrippa,” 1788, *Documentary History*, 517; Thomas Jefferson, “A Bill for Establishing Religious Freedom,” 1779, *The Complete Jefferson*, 947.

61. *Declaration of Independence* (1776).

62. Nathon O. Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England* (New Haven & London: Yale University Press, 1977), 11–13, 16–17. See also Hutson, *Religion and the Founding of the American Republic*, 39–42.

63. McGraw, *Rediscovering America’s Sacred Ground*, 65.

64. *Declaration of Independence* (1776).

65. U.S. Const., Preamble.

66. *Declaration of Independence* (1776).

67. Thomas Paine, *Common Sense* (1776).

68. John Adams, *Adams Works*, vol. 4, p. 230; Massachusetts Constitution (1780), art. 30.

69. See, e.g., Montesquieu, *The Spirit of the Laws* (1748).

70. George Washington, “To the Hebrew Congregation,” 18 August 1790, *The Papers of George Washington*, Presidential Series, ed. Dorothy Twohig, et al. 7 vols., vol. 6 (Charlottesville, VA: University Press of Virginia, 1987–2000), 284–285.

71. *Documentary History*, 201.

72. Richard Henry Lee, “To James Madison,” 26 November 1784, eds. Robert A. Rutland, et al. *The Papers of James Madison*, 17 vols., vol. 8 (Chicago and London: University of Chicago Press; Charlottesville: University Press of Virginia, 1961–1999), 149.

73. Thomas Jefferson, “Notes on Religion,” October 1776, *The Complete Jefferson*, 945.

74. Thomas Jefferson, Autobiography, *The Complete Jefferson*, 1147.

75. Thomas Jefferson, “Notes on Religion,” October 1776, *The Complete Jefferson*, 945.

76. Richard Henry Lee, “Observations Leading to a Fair Examination of the System of Government,” Letter IV, 12 October 1787, *Letters from a Federal Farmer*, 28.

77. Thomas Jefferson, “A Bill for Establishing Religious Freedom,” *The Complete Jefferson*, 947.

78. John Adams, “To Thomas Jefferson,” 28 June 1813, *Adams Works*, vol. 10, pp. 45–46.

79. John Dickenson, *Letters of Fabius*, 1788, *Documentary History*, 546.

80. See Mark Douglas McGarvie, *One Nation Under Law: America's Early National Struggles to Separate Church and State* (DeKalb: Northern Illinois Press, 2004).

81. "The constitutional amendments proposed by Madison were the logical culmination of what had gone before in both English and American constitutional history. In particular, the federal Bill of Rights was based directly on upon the great Charters of English liberty, which begin with the *Magna Carta* [1215]." Bernard Schwartz, "Commentary," in *Documentary History*, 3.

82. See, e.g., "The Declaration of Rights of the Stamp Act Congress" (1765): "[I]t is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their consent . . ." See also, e.g., Samuel Adams, "The Rights of the Colonists and a List of Infringements and Violations of Rights" in *Documentary History*, 202: "The absolute rights of Englishmen and all freemen, in or out of civil society, are principally personal security, personal liberty, and private property."

83. See generally, Alain Cabantous, *Blasphemy: Impious Speech in the West from the Seventeenth to the Nineteenth Century*, trans. Eric Rauth (New York: Columbia University Press, 2002); George Nokes, *A History of the Crime of Blasphemy* (London: Sweet & Maxwell, 1928); David Lawton, *Blasphemy* (Hemel Hempstead: Harvester, 1993), Leonard Levy, *Blasphemy: Verbal Offence Against the Sacred, from Moses to Salman Rushdie* (Chapel Hill: University of North Carolina Press, 1995).

84. There were many challenges to blasphemy laws on constitutional grounds well into the nineteenth century and even a few into the twentieth century. See, e.g., *The People v. Ruggles* (1811). It has been reported that the last blasphemy case resulting in jailing the defendant was in *Commonwealth of Massachusetts v. Kneeland* (1838). Leonard Levy, *Blasphemy in Massachusetts: Freedom of Conscience and the Abner Kneeland Case—a Documentary Record* (New York: Da Capo, 1973). In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the U.S. Supreme Court held that a New York State statute "authoriz[ing] denial of a license on a censor's conclusion that a film is 'sacrilegious'" was held to be "void as a prior restraint on freedom speech and of the press under the First Amendment." Nearly two decades later, in *State v. West* (1970), the Maryland Court of Appeals overturned the defendant's 1968 blasphemy conviction on the basis that the law violated the First Amendment, 263 A.2d 602 (Md. App., 1970). That case involved the last conviction for blasphemy in the United States. See Leonard W. Levy, *Blasphemy: Verbal Offense*. Interestingly, blasphemy codes remain on the law books in some states to this day, even though they no longer are enforced. See, e.g., Massachusetts General Law, Chapter 272, Section 36; <http://mass.gov/legis/laws/mgl/272-36.htm> (accessed July 20, 2007).

85. William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769).

86. Blackstone, vol. 4, p. 59.

87. *Updegraph v. The Commonwealth*, 11 Serg. & R. 393, 394 (1824), quoted



in David Barton, *The Myth of Separation: What is the Correct Relationship between Church and State?* (Aledo, TX: WallBuilder Press, 1992), 50.

88. *Updegraph v. The Commonwealth*, 11 Serg. & R. 393, 406–407, quoted in Barton, *Myth of Separation*, 55.

89. *Ibid.*, 54.

90. *Documentary History*, 277.

91. Nine of the thirteen original colonies gave tax aid to their “established” churches prior to and at the time of the founding. John K. Wilson, “Religion Under the State Constitutions, 1776–1800,” *Journal of Church and State* 32, no. 4 (1990): 754.

92. For example, Pennsylvania required the following oath before one could serve in that state’s house of representatives: “I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testaments to be given by Divine inspiration.” *Documentary History*, 273. Similarly, the South Carolina Constitution (1778), which expressly established the Protestant Christian religion, required members of the state senate and house of representatives to be “all of the Protestant religion.” *Ibid.*, 326. The only states that did not have religious tests at the time of the founding were Virginia and New York. However, by 1792, religious tests were prohibited in Georgia, Delaware, Vermont, Tennessee. Wilson, “Religion Under State Constitutions,” 765.

93. See, e.g., notes 94–96 *infra* and accompanying text.

94. Noah Webster, *History of the United States* (New Haven: Durrie & Peck, 1832), 300, ¶ 578, quoted in Barton, *Myth of Separation*, 125 (emphasis added).

95. John Adams, “To Thomas Jefferson,” 28 June 1813, *Adams Works*, vol. 10, pp. 45–46 (emphasis added).

96. John Quincy Adams, *The Writings of John Quincy Adams*, ed. Worthington C. Ford (New York: The Macmillan Company, 1914), vol. 4, p. 215, quoted in Barton, *Myth of Separation*, 125 (emphasis added).

97. Edwin S. Gaustad and Leigh E. Schmidt, *The Religious History of America: The Heart of the American Story from Colonial Times to Today* revised ed. (San Francisco: HarperSanFrancisco), 123; Leonard W. Levy, *The Establishment Clause, Religion and the First Amendment*, 2nd ed. (Chapel Hill and London: The University of North Carolina Press, 1994), 146–147.

98. Wilson, “Religion Under State Constitutions,” 753–763.

99. See note 84 *supra* and accompanying text.

100. Baron, *Myth of Separation*, *passim*.

101. The resolution of the issue of slavery and efforts after the Civil War to provide equal protection of the laws and due process rights to everyone regardless of race, among other things, resulted in the Fourteenth Amendment to the U.S. Constitution. Later, the U.S. Supreme Court held that the First Amendment and the other rights of the Bill of Rights were applicable to the states through the Fourteenth Amendment via the “incorporation doctrine.” See e.g. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Everson v. Board of Education*, 330 U.S. 1 (1947).

102. Quoted in Gaustad and Schmidt, *Religious History of America*, 184.

103. George D. Armstrong, *The Christian Doctrine of Slavery* (New York: Scribner, 1857), 131–148. In *Religion in American History: A Reader*, ed. Jon Butler and Harry S. Stout (New York, Oxford: Oxford University Press, 1998), 236.

104. Thomas Bacon, *Two Sermons, Preached to a Congregation of Black Slaves, at the Parish Church of S[aint] P[eter's], in the Province of Maryland* (London, 1749), 7–38. In *Religion in American History*, ed. Jon Butler and Harry S. Stout (New York: Oxford University Press, 1998), 74–87. [Edited to modernize punctuation, capitalization, and spelling.]

105. Quoted in Gaustad and Schmidt, *Religious History of America*, 191.

106. Armstrong, *Christian Doctrine of Slavery*. In Butler and Stout, *Religion in American History*, 236.

107. McGraw, *Rediscovering America's Sacred Ground*, 91–105.

108. Declaration of Independence (1776).

109. McGraw, *Rediscovering America's Sacred Ground*, 55.

110. The commonly referred to public/private divide obscures the “public” function of the conscientious public forum. See *ibid.*, 50–54.

111. *Ibid.*, 125.

112. Thomas Jefferson, “Notes on Religion,” October 1776, *The Complete Jefferson*, 946.

113. Locke, *Letter Concerning Toleration*, 409, 417; Jefferson, “A Bill for Establishing Religious Freedom.” In *The Complete Jefferson*, 946. See also McGraw, *Rediscovering America's Sacred Ground*, 31–32.

114. James Madison, “Speech in the Virginia Ratifying Convention,” 20 June 1788. *The Papers of James Madison*, edited by Robert A. Rutland et al., 17 vols., vol. 11, p. 163.

115. McGraw, *Rediscovering America's Sacred Ground*, 98.

## FURTHER READING

For more on this author's views on the ideological grounding of the United States and the states, including church-state relations and the role of religion in public life, see Barbara A. McGraw, *Rediscovering America's Sacred Ground: Public Religion and Pursuit of the Good in a Pluralistic America* (Albany: State University of New York Press, 2003). For an interesting polemic that presents a view that opposes the one in this introductory chapter and this author's other work, see David Barton's *The Myth of Separation: What is the Correct Relationship between Church and State?* (Aledo, TX: WallBuilder Press, 1992). To explore further some of the historical themes presented in the beginning of this introductory chapter, study Harold J. Berman's historical analysis of the West's legal tradition in his highly-regarded *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge and London: Harvard University Press, 1983), which locates that legal tradition's roots in the papal revolution, as well as the revolution of jurisprudence arising out of feudal and royal systems. For a challenging account of the develop-

ment of the political philosophy of John Locke, see John Marshall's *John Locke: Resistance, Religion, and Responsibility* (Cambridge: Cambridge University Press, 1994). For thorough accounts of the ideological origins of the United States, see Bernard Bailyn's *The Ideological Origins of the American Revolution*, enlarged ed. (1967 Cambridge, MA and London: The Belknap Press of Harvard University Press, 1992), which argues that republicanism was the most significant influence, and Huyler, Jerome's *Locke in America: The Moral Philosophy of the Founding Era* (Lawrence: University of Kansas Press, 1995), which argues that the nation's ideological origins, including republicanism, are found in the fundamentals of John Locke's liberalism. For an explanation and critique of the current debate between philosophers of democratic liberalism and theological traditionalism, see Jeffrey Stout's *Democracy and Tradition* (Princeton: Princeton University Press, 2004), which argues that democracy is not opposed to tradition, but is itself a tradition, which when understood as such makes possible finding common ground. For a thorough analysis of U.S. Supreme Court jurisprudence on issues involving the role of religion in public life and the degree to which church-state separation has evolved since the nation's founding, see James Hitchcock's *The Supreme Court and Religion in American Life: Volume II From "Higher Law" to "Sectarian Scruples"* (Princeton and Oxford: Princeton University Press, 2004), the second in a two volume series. For an interesting study of Revolutionary Era political thought at the state level, see Mark W. Kruman's *Between Authority and Liberty: State Constitution Making in Revolutionary America* (Chapel Hill and London: The University of North Carolina Press, 1997), which argues that power, even in the hands of elected state legislative representatives, was distrusted and therefore limited. For a worthy discussion of how Contracts Clause, Art. I, U.S. Constitution jurisprudence illuminates U.S. church-state jurisprudence generally, see Mark Douglas McGarvie, *One Nation Under Law: America's Early National Struggles to Separate Church and State* (DeKalb: Northern Illinois University Press, 2004).