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## America's Founders, Religious Liberty, and the Common Good

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## ARTICLE

# AMERICA'S FOUNDERS, RELIGIOUS LIBERTY, AND THE COMMON GOOD

MARK DAVID HALL\*

### INTRODUCTION

America's founders supported a robust conception of religious liberty for theological, philosophical, and prudential reasons. This article explores their conviction that protecting "the sacred rights of conscience" causes religion to flourish, and this promotes the common good. Most civic leaders in the era agreed that the State should not attempt to require or prohibit religious activities, and many of them supported the creation of exemptions to neutral, generally applicable laws to protect religious minorities. Some founders believed that governments should promote and encourage religion, but many had come to conclude that doing so causes religion to atrophy rather than flourish.

When America's founders spoke or wrote about "religion," virtually all of them—even those most influenced by the Enlightenment—meant Christianity.<sup>1</sup> Indeed, with the exception of a few thousand Jews, almost every white American in the era would have identified himself or herself as a Christian, and the vast majority of them would have insisted that Protestantism is the purest form of Christianity.<sup>2</sup> Throughout this essay I use the words "religion" and "Christianity" interchangeably, as the founders regu-

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1. Scholars routinely assert that the founders were deists, but there is virtually no evidence to support this claim. See Mark David Hall, *Were Any of the Founders Deists?*, in *THE WILEY BLACKWELL COMPANION TO RELIGION AND POLITICS IN THE U.S.* 51, 51–63 (Barbara A. McGraw ed., 2016); see *generally* FAITH AND THE FOUNDERS OF THE AMERICAN REPUBLIC (Daniel L. Dreisbach & Mark David Hall eds., 2014); *THE FORGOTTEN FOUNDERS ON RELIGION AND PUBLIC LIFE* (Daniel L. Dreisbach et al. eds., 2009); *THE FOUNDERS ON GOD AND GOVERNMENT* (Daniel L. Dreisbach et al. eds., 2004).

2. BARRY A. KOSMIN & SEYMOUR LACHMAN, *ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY* 28–29 (1st ed. 1993); MARK DAVID HALL, ROGER SHERMAN AND

larly did (unless they were discussing non-Christian religions). In our more secular age, it is important to recognize that many founders actually believed that God exists and is active in history. (Even today, approximately 70 percent of Americans identify themselves as Christians, 6 percent as members of other faiths, and only 7 percent as atheists or agnostics.)<sup>3</sup> For instance, many thought that God literally rewards nations that honor Him and punishes those that did not.<sup>4</sup> But they also believed that faith produces social benefits—benefits that even those few founders who were not conventionally religious continued to value.<sup>5</sup>

## I. SOCIAL BENEFITS OF RELIGION

America’s founders agreed that religion promotes the common good.<sup>6</sup> Faith serves as a necessary support for morality, and religion and morality are necessary if individuals and societies are to be happy and prosperous. With respect to law and politics, republican forms of government require a virtuous people, and most people will not be virtuous without religion. Religion and morality make civic liberty possible, and they underlie effective judicial and political systems. The various ways in which religion promotes the common good overlap, but for present purposes they may be divided into three major categories.

### A. Religion Leads to Societal Happiness

America’s founders believed that religion increases societal happiness. In 1788, Thomas Reese, a Presbyterian minister in South Carolina, published *An Essay on the Influence of Religion in Civil Society*.<sup>7</sup> In it, he detailed the various ways Christianity “promote[s] the peace and happiness of men in a state of society.”<sup>8</sup> Among other arguments, he contended that God rewards virtuous nations and punishes vicious ones.<sup>9</sup> Like many foun-

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THE CREATION OF THE AMERICAN REPUBLIC 27–32 (2013) (responding to the assertion that the founding generation was “unchurched”).

3. The remaining 17 percent are vaguely religious but choose not to affiliate with a specific denomination or religion. PEW RESEARCH CENTER, RELIGIOUS LANDSCAPE STUDY (2017), <http://www.pewforum.org/religious-landscape-study/> (last visited Jan. 15, 2018).

4. See *infra* Section II.A.

5. A few founders may have valued Christianity primarily for utilitarian reasons, but many embraced and encouraged it as the one, true faith. See MARK DAVID HALL, DID AMERICA HAVE A CHRISTIAN FOUNDING?: SEPARATING MODERN MYTH FROM HISTORICAL TRUTH (forthcoming).

6. Of course, they recognized that some manifestations of religion were unhelpful or even dangerous. Madison, for instance, observed that religion could be a source of faction. THE FEDERALIST NOS. 10, 51 (James Madison). But there was a widespread consensus that true religion benefits society.

7. Thomas Reese, *An Essay on the Influence of Religion in Civil Society (1788)*, in THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 316, 316–35 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

8. *Id.* at 321.

9. *Id.* at 335.

ders, he supported this proposition by quoting Proverbs 14:34: “[r]ighteousness exalteth a nation: but sin is a reproach to any people.”<sup>10</sup> Similarly, in April of 1776, Samuel Adams observed that

Revelation assures us that “righteousness exalteth a nation”—communities are dealt with in this world by the wise and just Ruler of the universe. He rewards or punishes them according to their general character. The diminution of public virtue is usually attended with that of public happiness, and public liberty will not long survive the total extinction of morals.<sup>11</sup>

Public virtue results in societal happiness, and, as will be discussed in detail below, it is also necessary if a people are to be free. Far from being an isolated statement, Gary Scott Smith documents that Adams made such claims throughout his long and influential, although too often neglected, life of public service.<sup>12</sup>

Like his cousin, John Adams thought that Christianity leads to societal happiness. As a young man, he speculated in his diary about what would happen if:

[A] nation in some distant region should take the Bible for their only law-book, and every member should regulate his conduct by the precepts there exhibited! Every member would be obliged to regulate his conduct by the precepts there exhibited! Every member would be obligated, in conscience, to temperance and frugality and industry; to justice and kindness and charity towards his fellow men; and to piety, love, and reverence, towards Almighty God . . . What a utopia; what a paradise would this region be!<sup>13</sup>

Later in life, Adams embraced heterodox ideas and came to question some of the Bible’s teachings.<sup>14</sup> Yet he never abandoned his conviction that the Holy Scriptures provided excellent moral guidance and that God rewards nations that act according to its precepts.<sup>15</sup>

Individuals may be rewarded or punished by God in the afterlife, but as George Mason observed in the Constitutional Convention, “[a]s nations cannot be rewarded or punished in the next world they must be in this. By an inevitable chain of causes and effects providence punishes national sins,

10. *Id.* at 328; DANIEL L. DREIBACH, *READING THE BIBLE WITH THE FOUNDING FATHERS* 145–58 (2017).

11. Samuel Adams to John Scollay, (April 30, 1776), DREIBACH, *supra* note 10, at 146. I have altered this and other quotations to conform to contemporary conventions regarding spelling and capitalization.

12. See Gary Scott Smith, *Samuel Adams: America’s Puritan Revolutionary*, in *THE FORGOTTEN FOUNDERS ON RELIGION AND PUBLIC LIFE*, *supra* note 1, at 40–64.

13. Diary entry of John Adams (Feb. 22, 1756), in *THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS* 5 (Adrienne Koch & William Peden eds., 1946).

14. John Witte, Jr., *One Public Religion, Many Private Religions: John Adams and the 1780 Massachusetts Constitution*, in *THE FOUNDERS ON GOD AND GOVERNMENT*, *supra* note 1, at 23–52.

15. *Id.*

by national calamities.”<sup>16</sup> As such, he warned his fellow delegates that they must address the evils of slavery if the nation is to escape God’s wrath.<sup>17</sup> Thomas Jefferson made a similar claim with respect to slavery in his *Notes on the State of Virginia*: “I tremble for my country when I reflect that God is just: that his justice cannot sleep forever.”<sup>18</sup> The idea that God holds nations accountable for sins that could reasonably be attributed to a relatively few individuals within a country (i.e., only a small percentage of Americans actually owned slaves) may seem unjust, but to a people steeped in scriptures such as Proverbs 14:34, it was largely uncontroversial.

In addition to God’s direct rewarding or punishing individuals and nations, the founders believed that faith promotes virtuous behavior, which in turn leads to happiness. Thomas Reese, for instance, thought that it encourages citizens to be charitable, moderate, and chaste.<sup>19</sup> Yale President Timothy Dwight noted in 1794 that “moral and religious instruction . . . establishes, perhaps more than any single thing, good order, good morals and happiness public and private. It makes good men and good men must be good citizens.”<sup>20</sup> In a like manner, George Washington concluded his 1783 “circular to the states” with an “earnest prayer” that God

would most graciously be pleased to dispose us all, to do justice, to love mercy, and to demean ourselves with that charity, humility, and pacific temper of mind, which were the characteristics of the Divine Author of our blessed religion, and without a humble imitation of whose example in these things, we can never hope to be a happy nation.<sup>21</sup>

Note Washington’s strong claim that America can “*never* hope to be a happy nation (emphasis added)” unless it imitates the “characteristics” of Jesus Christ (“the Divine Author of our blessed religion”) such as “charity, humility, and pacific temper of mind.” National happiness is intimately connected with these virtues.<sup>22</sup>

Assertions regarding the social benefits of religion also appear in public documents. For instance, the Massachusetts Constitution of 1780 proclaims that “the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and moral-

16. 2 Max Farrand, *The Records of the Federal Convention of 1787*, 370 (1911).

17. *Id.*

18. Thomas Jefferson, *Notes on the State of Virginia, Query XVII and Query XVIII* (1782), in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 294; see also Thomas E. Buckley, *The Religious Rhetoric of Thomas Jefferson*, in THE FOUNDERS ON GOD AND GOVERNMENT, *supra* note 1, at 53–82.

19. Thomas Reese, *An Essay on the Influence of Religion in Civil Society* (1788), in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 322, 328.

20. JAMES T. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 62 (1998).

21. George Washington, *Circular to the States* (1783), in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 298.

22. *Id.*

ity.”<sup>23</sup> Similarly, in 1782 the Confederation Congress implored all Americans to beseech God to “diffuse a spirit of universal reformation among all ranks and degrees of our citizens; and make us a holy, that we may be a happy people.”<sup>24</sup> As a final example, and many more could be given, the Northwest Ordinance, initially passed by the Confederation Congress and reaffirmed by the first federal Congress, states that “religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>25</sup>

### B. *Religion Guarantees Oaths*

Washington’s circular letter to the states, quoted in the preceding section, is often called his first farewell address. When he left the presidency in 1796, he delivered what is commonly known as his “Farewell Address,” which has since come to be regarded as one of the most important speeches in American political history.<sup>26</sup> In it, he returned to the importance of religion and morality for the nation, noting that:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indisputable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duty of men and citizens. . . . A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.<sup>27</sup>

In addition to being necessary for personal and public happiness, Washington emphasized that religion and morality are necessary to ensure the sanctity of oaths. Like many founders, he thought that belief in God and an afterlife, where one’s deeds would be punished or rewarded, was necessary to ensure that people tell, in the words of a representative oath, “the

23. *Massachusetts Constitution (1780)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 246.

24. 3 *JOURNALS OF AMERICAN CONGRESS* 736 (1823).

25. *An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio [Northwest Ordinance] (July 1787)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 238.

26. See MATTHEW SPALDING & PATRICK J. GARRITY, *A SACRED UNION OF CITIZENS: GEORGE WASHINGTON’S FAREWELL ADDRESS AND THE AMERICAN CHARACTER* (1998).

27. *George Washington’s Farewell Address (September 19, 1796)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 468.

truth, the whole truth, and nothing but the truth, *so help me God.*”<sup>28</sup> With the exception of Pennsylvania, every state required witnesses to swear or affirm oaths invoking God as a witness, and most also required civic officials to swear or affirm oaths of office in the same manner.<sup>29</sup> Lest Pennsylvania seem too far out of step, it should be noted that its 1776 constitution required members of the legislature to swear or affirm that “I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked.”<sup>30</sup> Even in tolerant Quaker Pennsylvania, civic officials agreed that individuals who did not fear God’s justice could not be trusted to hold public office.<sup>31</sup>

The U.S. Constitution, it is true, prescribes oaths that do not mention God or the afterlife, but many officials have, in practice, added the traditional words “so help me God” when they take them.<sup>32</sup> For the founders, oaths were inherently religious acts.<sup>33</sup> In the North Carolina Ratifying Convention, future Supreme Court Justice James Iredell observed that an oath

is considered a solemn appeal to a Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments, according to that form which will bind his conscience.<sup>34</sup>

Similarly, Thomas Reese contended that if one takes “away the belief of a deity, a providence and future state . . . there is an end of all oaths at once.”<sup>35</sup>

In 1785, an essay appeared in the *Virginia Gazette* entitled “On the Importance and Necessity of Religion to Civil Society.”<sup>36</sup> It contended that religion is important for a variety of reasons, including its support for an effective and just judicial system:

Now what security can they have of the veracity of such testimony, but upon a presumption that the person who gives it is under the awe of a being, from whom no secrets are hid? Without this presumption, Courts of Judicature cannot take one step with

28. FIRST LAWS OF THE STATE OF CONNECTICUT 182–87 (John D. Cushing ed., 1982).

29. FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 62–63 (John D. Cushing ed., 1984).

30. *Pennsylvania Constitution of 1776*, in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 242.

31. *Id.*

32. Some scholars and activists contend that George Washington did not include these words when he took the oath of office, but I offer reasons to believe that he did in Mark David Hall, *Madison’s Memorial and Remonstrance, Jefferson’s Statute for Religious Liberty, and the Creation of the First Amendment*, in 3 AM. POL. THOUGHT 32, 54–55 (2014).

33. DREISBACH, *supra* note 10, at 46–47, 259.

34. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 196–98 (Jonathan Elliot ed., 2d ed.1948).

35. Thomas Reese, *An Essay on the Influence of Religion in Civil Society (1788)*, in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 320.

36. “On the Importance and Necessity of Religion to Civil Society,” *Virginia Gazette* (Richmond: Nicholson) (August 6, 1785).

any satisfaction or assurance. An oath can give no security, can have no sense in it: And all judicial processes must become idle pomp, and trifling solemnity.<sup>37</sup>

Without the threat of divine sanction, the author believed, witnesses simply cannot be trusted to tell the truth.

In his Farewell Address, Washington acknowledged that a few individuals could be moral without being religious, but he clearly thought these were exceptions to the general rule. “National morality” requires religion, and Washington went so far as to question the patriotism of those who “labor to subvert these great pillars of human happiness.”<sup>38</sup> This view may seem old-fashioned to many readers, but even today 45 percent of Americans continue to affirm the proposition that “belief in God is necessary to have good values.”<sup>39</sup> For the founders, religion was absolutely essential to ensure that people tell the truth.

### C. *Religion is Necessary for Republicanism*

James H. Hutson has called the proposition that “virtue and morality are necessary for free, republican government; religion is necessary for virtue and morality; religion is, therefore, necessary for republican government” the “founding generation’s syllogism.”<sup>40</sup> Shortly before America declared independence, John Adams wrote that “religion and morality alone . . . can establish the principles upon which freedom can securely stand.”<sup>41</sup> He regularly reiterated this conviction, noting for instance in 1811 that “religion and virtue are the only foundations, not only of republicanism and of all free government, but of social felicity under all governments and in all combinations of human society.”<sup>42</sup> Among other benefits, religion and virtue help unify society. In the words of Elizur Goodrich, “religion and virtue are the strongest bond of human society, and lay the best foundation of peace and happiness in the civil state.”<sup>43</sup> Similarly, in 1776 the Massachusetts General Court issued a proclamation noting that “piety and virtue. . . alone can secure the freedom of any people.”<sup>44</sup>

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37. *Id.*

38. *George Washington’s Farewell Address (September 19, 1796)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 468.

39. Michael Lipka, *Ten Facts About Atheists*, PEW RES. CTR. (June 1, 2016), <http://www.pewresearch.org/fact-tank/2016/06/01/10-facts-about-atheists/>.

40. HUTSON, *supra* note 20, at 81.

41. Letter from John Adams to Abigail Adams, *quoted in id.*

42. Letter from John Adams to Benjamin Rush (August 28, 1811), in *THE FOUNDERS ON RELIGION: A BOOK OF QUOTATIONS* 191 (James H. Hutson ed., 2005).

43. Elizur Goodrich, *The Principles of Civil Union and Happiness Considered and Recommended*, in *1 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805* (Ellis Sandoz ed., 1998).

44. *3 Papers of John Adams* 386 (Robert J. Taylor, Gregg L. Lint & Celeste Walker eds., 1979).



America's founders distinguished between liberty and licentiousness.<sup>45</sup> If the power of the State was to be carefully limited, as most founders desired, the people would be relatively free to act in a licentious manner. They were convinced that widespread vice would undermine society. Their solution was not to strengthen the State, but to rely on religion to produce a virtuous people. In his famous sermon, "The Dominion of Providence Over the Passions of Men," Presbyterian minister and president of the College of New Jersey (now Princeton), John Witherspoon, observed that "he is the best friend of liberty, who is most sincere and active in promoting true and undefiled religion . . ." <sup>46</sup> Two years later, the Continental Congress passed a resolution noting that "true religion and good morals are the only foundations of public liberty and happiness."<sup>47</sup> Witherspoon may have helped pen the resolution as he served in Congress from 1776–1782.<sup>48</sup>

In 1796, future Supreme Court Justice Samuel Chase wrote in a Maryland General Court opinion that "[r]eligion is of general and public concern, and on its support depend, in great measure, the peace and good order of government, the safety and happiness of the people."<sup>49</sup> Similarly, Jedidiah Morse, a Congregationalist minister, preached an election sermon in 1799, where he asserted that it is to

the kindly influence of Christianity we owe that degree of civil freedom, and political and social happiness which mankind now enjoys . . . [A]ll efforts to destroy the foundations of our holy religion, ultimately tend to the subversion also of our political freedom and happiness. Whenever the pillars of Christianity shall be overthrown, our present republican forms of government, and all the blessings which flow from them, must fall with them.<sup>50</sup>

Such sentiments were not limited to Protestants. Charles Carroll of Maryland, a Roman Catholic signer of the Declaration of Independence,

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45. See, e.g., Moses Mather, *America's Appeal to the Impartial World*, in *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA*, *supra* note 43, at 486; James Wilson, 1 *COLLECTED WORKS OF JAMES WILSON* 196 (Kermit Hall & Mark David Hall eds., 2007).

46. John Witherspoon, *The Dominion of Providence Over the Passions of Men*, in *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA*, *supra* note 43, at 554. As Jeffrey Morrison demonstrates in "John Witherspoon's Revolutionary Religion," such statements were quite common for President Witherspoon. As Jeffrey Morrison demonstrates in "John Witherspoon's Revolutionary Religion," such statements were quite common for President Witherspoon. Jeffrey H. Morrison, *John Witherspoon's Revolutionary Religion*, in *THE FOUNDERS ON GOD AND GOVERNMENT*, *supra* note 1, at 117–46.

47. *Congressional Resolution Recommending the Promotion of Morals* (Oct. 1778), in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 225.

48. Jeffrey H. Morrison, *John Witherspoon's Revolutionary Religion*, in *THE FOUNDERS ON GOD AND GOVERNMENT*, *supra* note 1, at 119.

49. *Runkel v. Winemiller*, 4 H. & McH. 429, 450 (Md. 1799). Chase's lower court opinion was issued in 1796, but the Maryland Supreme Court decision in which his opinion was quoted was published in 1799.

50. Quoted in *THE FEAR OF CONSPIRACY: IMAGES OF UN-AMERICAN SUBVERSION FROM THE REVOLUTION TO THE PRESENT* 46 (David Brion Davis ed., 1971).

observed that “without morals a republic cannot subsist any length of time; they therefore who are decrying the Christian religion, whose morality is so sublime & pure . . . are undermining the solid foundation of morals, the best security for the duration of free governments.”<sup>51</sup>

In 1833, Jasper Adams, scion of the famous Massachusetts family and president of the College of Charleston, preached a sermon entitled “The Relation of Christianity to Civil Government in the United States.”<sup>52</sup> In it, he expounded on the many ways Christianity supports republican government. Adams sent published versions of the sermon to a plethora of American leaders and asked for their thoughts. Among those who responded was Chief Justice John Marshall, who remarked that in America “Christianity and religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity.”<sup>53</sup> Likewise, Chief Justice Joseph Story agreed that “Christianity is indispensable to the true interests and solid foundations of all free governments.”<sup>54</sup>

Examples of founders insisting that religion is necessary for morality, and that both are necessary for personal and societal happiness, republican government, and well-functioning political and legal institutions could be multiplied almost indefinitely. Indeed, James Hutson provides dozens of additional examples in his fine essay “‘A Future State of Rewards and Punishments’: The Founders’ Formula for the Social and Political Utility of Religion.”<sup>55</sup> It may be the case that some founders publicly voiced such sentiments but privately disbelieved them, but there is every reason to conclude that most of them embraced the ideas that religion is necessary for morality, and that both are necessary for personal and societal happiness, republican government, and well-functioning political and legal institutions.

## II. THE FOUNDERS EMBRACED RELIGIOUS LIBERTY BECAUSE IT CAUSES RELIGION TO FLOURISH

In the traditional telling of the tale, America was founded by Puritans seeking religious liberty. But this is true only in the sense that the Puritans sought the freedom to worship God as they thought best and to create politi-

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51. Quoted in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at xxvii; James R. Stoner, *Catholic Politics and Religious Liberty in America: The Carrolls of Maryland*, in *THE FOUNDERS ON GOD AND GOVERNMENT*, *supra* note 1, at 251–71.

52. Jasper Adams, *The Relation of Christianity to Civil Government in the United States* (1833), reprinted in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 597–610.

53. Letter from John Marshall to Jasper Adams (May 9, 1833), in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 611.

54. Letter from Joseph Story to Jasper Adams (May 14, 1833), in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 611.

55. JAMES H. HUTSON, *FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC 1–44* (2003). Other scholars have noted this connection. See, e.g., PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE 67–78* (2002); GERARD V. BRADLEY, *RELIGIOUS LIBERTY IN THE AMERICAN REPUBLIC 23–36* (2008).

cal and social institutions that they believed were demanded by the Bible.<sup>56</sup> The mid-Atlantic colonies, notably the Quaker commonwealth of Pennsylvania, were noticeably more generous with respect to their treatment of religious dissenters.<sup>57</sup> The southern colonies are often described as commercial ventures, but the Anglican Church was established in each of them, and religious dissenters were sometimes treated as poorly as in New England.<sup>58</sup>

The lot of religious minorities in America improved markedly in the late seventeenth and eighteenth centuries. These advances were aided by Parliamentary legislation, pragmatic attempts to deal with religious diversity, and biblical, practical, and theoretical arguments for the liberty of conscience made by Roger Williams, William Penn, Elisha Williams, Samuel Davies, Isaac Backus, John Leland, and others. These men advocated religious liberty for a variety of reasons, but they shared common convictions: persecution simply does not work, and liberty of conscience causes true religion to flourish—and this flourishing is good for society.<sup>59</sup>

William Penn, for instance, contended in his 1675 essay, “England’s Present Interest Considered,” that “force makes hypocrites, ‘tis persuasion only that makes converts.”<sup>60</sup> He reiterated this conviction a dozen years later, noting that persecution “converts no body; it may breed *hypocrisy*, but that is quite another thing than *salvation*.”<sup>61</sup> When religious minorities gain political power, they sometimes forget their commitment to religious liberty, but when Penn had the opportunity to craft laws for Pennsylvania, he protected

all persons living in this province, who confess and acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the world; and that hold themselves obliged in conscience to live peaceably and justly in civil society, shall, in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship, nor shall they be com-

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56. THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 1–28 (1986).

57. *Id.* at 72–77.

58. This treatment of religious liberty in early America is drawn from the introduction to, and the primary source documents in, the first three chapters of *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at xxi–212; *see also* CURRY, *supra* note 56.

59. ANDREW R. MURPHY, *CONSCIENCE AND COMMUNITY: REVISITING TOLERATION AND RELIGIOUS DISSENT IN EARLY MODERN ENGLAND AND AMERICA* (2001); ANTHONY GILL, *THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY* (2008); NICHOLAS MILLER, *THE RELIGIOUS ROOTS OF THE FIRST AMENDMENT: DISSENTING PROTESTANTS AND THE SEPARATION OF CHURCH AND STATE* (2012).

60. WILLIAM PENN, *THE POLITICAL WRITINGS OF WILLIAM PENN* 57 (Andrew R. Murphy ed., 2002).

61. *Id.* at 340.

pelled, at any time, to frequent or maintain any religious worship, place or ministry whatever.<sup>62</sup>

Penn may fairly be criticized for guaranteeing religious liberty only for monotheists, but in his defense, there is no record of any citizen of Pennsylvania being anything other than a monotheist until well after he died. Although some Native Americans in the region may be accurately characterized as polytheists, no colony dealt more fairly with, and used less force against, indigenous peoples than did Pennsylvania.<sup>63</sup> Penn thought that religious liberty helped Christianity flourish, but he was also convinced that it promoted virtue, stability, and trade.<sup>64</sup>

Arguments similar to Penn's were adopted by others in late eighteenth century America. For instance, the Baptist minister Isaac Backus contended in 1773 that:

where each person, and each society, are equally protected from being injured by others, all enjoying equal liberty, to attend and support the worship which they believe is right, having no more striving for mastery or superiority than *little children* (which we must all come to, or not *enter into the kingdom of heaven*) it's[sic] how happy are it's [sic] effects in civil society?<sup>65</sup>

As an evangelist, Backus cared more about the eternal state of souls than worldly happiness, but it is telling that he openly recognized, in a 1778 newspaper article, "the importance of religion *and the utility of it to human society*."<sup>66</sup> Like many founders, he believed that religious liberty helped true faith to flourish, which in turn benefits society.

In Massachusetts, the pseudonymous author *Worcestriensis* opposed compulsion in matters of faith because "instead of making men religious, [it] generally has a contrary tendency, it works not to conviction, but most naturally leads them to hypocrisy."<sup>67</sup> The author had no doubt that religion was beneficial to civil society, and he did not even oppose state "encouragement of the GENERAL PRINCIPLES of religion and morality"; but he rejected compulsion primarily because it did not work.<sup>68</sup> Thomas Jefferson did not believe governments should encourage faith, but he was convinced that "[r]eason and free inquiry are the only effectual agents against error.

62. *Laws Agreed Upon in England, &c.* (1682), in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 118; *see also* Roger Williams, *Charter of Rhode Island and Providence Plantations*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 115.

63. RICHARD BAUMAN, *FOR THE REPUTATION OF TRUTH: POLITICS, RELIGION, AND CONFLICT AMONG THE PENNSYLVANIA QUAKERS: 1750-1800* at 1-15 (1971).

64. *See, e.g.*, PENN, *supra* note 60, at 62-74, 99-101, 126.

65. Isaac Backus, *An Appeal to the Public for Religious Liberty*, in *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA*, *supra* note 43, at 359.

66. *Quoted in* HUTSON, *supra* note 55, at 22 (emphasis added).

67. *Worcestriensis*, Number IV (Sept. 4, 1776), in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 274.

68. *Id.* at 273-76.

Give a loose to them, they will support the true religion by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only.”<sup>69</sup> Fifteen years later, the great Baptist minister John Leland utilized Jefferson’s arguments (and sometimes his very words) in his important 1791 pamphlet “The Rights of Conscience Inalienable.”<sup>70</sup>

In 1776, the Presbyterians of Hanover County, Virginia sent a memorial to the General Assembly wherein they argued that “if mankind were left in the quiet possession of their unalienable religious privileges, Christianity, as in the days of the Apostles, would continue to prevail and flourish in the greatest purity, by its own native excellence, and under the all-disposing providence of God.”<sup>71</sup> Returning to this theme almost a decade later, in 1785 the same Presbyterians contended:

We are fully persuaded of the happy influence of Christianity upon the morals of men; but we have never known it, in the history of its progress, so effectual for this purpose, as when left to its native excellence and evidence to recommend it, under the all directing providence of God, and free from the intrusive hand of the civil magistrate.<sup>72</sup>

These believers made a variety of arguments in favor of religious liberty and against religious establishments, but like virtually everyone advocating for these positions, a key contention was that religious liberty causes Christianity to flourish *and* to be purer.

Freedom of conscience was so important that it was not uncommon for it to be referred to as a “sacred right.”<sup>73</sup> For example, when the Continental Congress wrote instructions to commissioners appointed to Canada in 1776, they included the following charge: “You are further to declare, that we hold sacred the rights of conscience, and may promise to the whole people, solemnly in our name, the free and undisturbed exercise of their religion.”<sup>74</sup> Likewise, President James Madison’s July 23, 1813 call for prayer connects the “sacred rights of conscience” to our “present happiness” and “future hopes.”<sup>75</sup> These convictions led every state to protect religious liberty as a

69. Thomas Jefferson, *Notes on the State of Virginia* (1782), in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 292.

70. John Leland, *The Rights of Conscience Inalienable* (1791), in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 335–45.

71. *Memorial of the Presbytery of Hanover, Virginia* (Oct. 24, 1776), in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 270.

72. *Memorial of the Presbytery of Hanover, Virginia* (Aug. 13, 1785), in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 305.

73. THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at vii–viii.

74. *Id.* at vii.

75. James Madison, *A Proclamation* (July 23, 1813), in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 459.

matter of statutory and/or constitutional law by the end of the Revolutionary era.<sup>76</sup>

Unlike many state constitutions, the federal Constitution did not contain a provision protecting religious liberty. But this was because its supporters were convinced that the national government did not have the power to pass laws interfering with religious belief or practice. In the face of popular outcry, the first Congress proposed and the states ratified a constitutional amendment stating that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”<sup>77</sup> A central motivation behind the passage of this amendment was the founders’ conviction that religious liberty causes true religion to flourish, which in turn benefits society.<sup>78</sup>

### III. FOR MANY FOUNDERS, RELIGIOUS LIBERTY INCLUDED RELIGIOUS ACCOMMODATIONS

The Free Exercise Clause indisputably prohibits the national government from interfering with the ability of men and women to worship God according to the dictates of conscience. Whether the Free Exercise Clause was originally understood to require exemptions from neutral, generally applicable laws is hotly contested.<sup>79</sup> Yet there is no doubt that many founders supported such exemptions; indeed, they are found in numerous state constitutions and statutes from the era, and they appear in the text of the United States Constitution.<sup>80</sup> Because the national government was far less intrusive in the eighteenth century, there was less need to create accommodations to protect religious minorities from general, neutrally applicable laws.<sup>81</sup> But in two important policy areas—oath taking and militia service—governments at all levels routinely created exemptions to protect religious citizens. Because these accommodations help show that the founders

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76. For a good overview, see Vincent Phillip Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might it Mean? The Founders’ Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 NOTRE DAME L. REV. 1387 (2016).

77. U.S. CONST., Amendment I (1791), in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 433.

78. I flesh this argument out in *DID AMERICA HAVE A CHRISTIAN FOUNDING?*, ch. 5 (forthcoming).

79. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367 (1993–1994); Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 152 (2009).

80. See, e.g., *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 242, 244 (citing Pennsylvania Constitution of 1776 and South Carolina Constitution of 1778); U.S. CONST. art. II, § 1.

81. An earlier version of this and the following section were published in MARK DAVID HALL, *RELIGIOUS ACCOMMODATIONS AND THE COMMON GOOD* (2015), <http://thf-reports.s3.amazonaws.com/2015/BG3058.pdf>.

embraced a robust understanding of religious liberty, they warrant a brief discussion here.

### A. Oaths

Most citizens do not object to swearing oaths, but members of the Society of Friends (Quakers) refused to do so as early as the 1650s.<sup>82</sup> Simply put, they took literally biblical passages such as Matthew 5:33–37, which reads: “Swear not at all . . . But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.” In England, they were routinely jailed for failing to swear oaths in courts or, after the Revolution of 1688, to take oaths promising loyalty to the new regime.<sup>83</sup> In 1696, Parliament agreed to let Quakers offer a “Solemn Affirmation or Declaration,” which read “I A.B., do declare in the presence of Almighty God, the witness of the truth of what I say.”<sup>84</sup> This accommodation alleviated some of their troubles, but they still faced disabilities. For instance, they were not permitted to be witnesses in criminal cases or hold civic offices because of their unwillingness to swear oaths.<sup>85</sup> In spite of these advances in England, Quakers and others with conscientious scruples against swearing oaths were not able to testify in criminal trials until 1828 or to become members of Parliament until 1832.<sup>86</sup>

American colonial governments were not originally bound by the Quaker Act, but many voluntarily accommodated Quakers and others with objections to swearing oaths.<sup>87</sup> After America’s break with Great Britain, state governments could have revoked these accommodations, but none of them did so. When America’s founders gathered in Philadelphia to draft a new constitution, they wove religious accommodations into the nation’s new fundamental law. Articles I, II, and VI permit individuals to either swear or affirm oaths.<sup>88</sup> The best known of these provisions is Article II, Section 1, which reads: “Before he [the president] enter on the execution of his office, he shall take the following oath or affirmation: ‘I do solemnly swear (or affirm) that I will faithfully execute . . .’” Of course, one does not need to be religious to take advantage of these provisions, but in the context in which they were written, there is little doubt that these accommodations

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82. George Fox, *THE JOURNAL OF GEORGE FOX 176* (John L. Nickalls ed., Philadelphia Society of Friends rev. ed. 1997).

83. D. ELTON TRUEBLOOD, *THE PEOPLE CALLED QUAKERS* 193 (1966).

84. 7 & 8 Wm. III, cap. 34. S. 1., reprinted in 3 *THE PAPERS OF WILLIAM PENN., 1685–1700*, 451 (Marianne S. Woceck et al. eds., 1986).

85. *Id.*

86. Note, *A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century*, 75 MICH. L. REV. 1681, 1692 (1977).

87. Many of these accommodations were voluntary, but sometimes royal governors pressured colonial legislatures to adopt them. Later Parliamentary legislation did require some accommodations in the colonies.

88. U.S. CONST. art. I, II, and VI.

were intended for Quakers and others who had religious objections to taking oaths.

### B. *Military Service*

Among the many roles of the civil government, few are as important as national security. Virtually no one disputes that governments have an obligation to protect their citizens from external threats. In the modern era, states and nations have regularly relied upon compulsory militia service or conscription to raise armies. Religious pacifists often ask to be excused from such service, but many countries reject their pleas. Some American colonies and states have done this as well, but at their best, civic leaders in America have opted to protect religious pacifists. Such accommodations are particularly noteworthy in the early colonial era as colonies were, upon occasion, literally faced with extermination at the hands of Native Americans or foreign powers.<sup>89</sup>

During the American War of Independence, Congress did not have the power to require service in the Continental Army, and most troops were raised by the states. Although its resolution had no binding power, Congress supported accommodating religious pacifists with the following July 18, 1775 statement:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.<sup>90</sup>

Most states agreed.<sup>91</sup>

Fourteen years later, during the debates in the First Federal Congress over the Bill of Rights, James Madison proposed a version of what became the Second Amendment that stipulated that “no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.”<sup>92</sup> Although largely forgotten today, this provision provoked almost as much recorded debate as the First Amendment’s religion provisions. James Jackson, a Representative from Georgia, insisted that if such an accommodation was made, then those protected should be required to hire a substi-

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89. BERNARD BAILYN, *THE BARBAROUS YEARS: THE PEOPLES OF BRITISH NORTH AMERICA: THE CONFLICT OF CIVILIZATIONS, 1600–1675 passim* (N.Y.: Alfred A. Knopf, 2012).

90. 5 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1779*, 189 (Worthington Chauncey Ford ed., 1906).

91. See HALL, *supra* note 81, at 5.

92. James Madison, *Speech in the First Congress Introducing Amendments to the U.S. Constitution (June 8, 1789)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 420.



tute.<sup>93</sup> Connecticut’s Roger Sherman objected that it “is well-known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent; many of them would rather die than do either one or the other.”<sup>94</sup> Sherman’s point is an important one—pacifists regularly objected to the requirement that they pay someone to fight on their behalf, or to pay a fee to the state that could be used to hire someone.

Madison’s proposal was approved by the House but rejected by the Senate and did not make it into the final text of what would become the Second Amendment. Madison and Sherman returned to the issue two months later when Representatives debated a bill regulating the militia when called into national service. Madison offered an amendment to protect from militia service

persons conscientiously scrupulous of bearing arms. It is the glory of our country, said he, that a more sacred regard to the rights of mankind is preserved, than has heretofore been known. The Quaker merits some attention on this delicate point, liberty of conscience: they had it in their own power to establish their religion by law, they did not. He was disposed to make the exception gratuitous, but supposed it impracticable.<sup>95</sup>

Sherman immediately supported Madison’s amendment, arguing that he believed “the exemption of persons conscientiously scrupulous of bearing arms to be necessary and proper.”<sup>96</sup> The amended bill eventually passed, although with the requirement that conscientious objectors must hire a substitute.<sup>97</sup>

Few men were as influential in crafting the U.S. Constitution and Bill of Rights as Madison and Sherman. Their commitment to protecting religious citizens in this situation is surely noteworthy, even if the practical concerns that such accommodations could undermine national security are understandable. Fortunately, states generally accommodated pacifists, and when the national government got into the conscription business in the twentieth century, it did as well.<sup>98</sup>

Today, some academics and activists contend that religious accommodations violate the Establishment Clause.<sup>99</sup> As a matter of originalism, there

93. *House Debate over Religion Clauses (Aug. 17, 1789)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 429.

94. *Id.*

95. *Quoted in HALL*, *supra* note 2, at 144 (emphasis added).

96. *Id.*

97. *Id.* at 145.

98. *See Hall*, *supra* note 81.

99. *See, e.g., Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exceptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 *HARV. C.R.-C.L. L. REV.* 343 (2014). With one exception, the United States Supreme Court has rejected the contention that accommodations violate the Establishment clause. On this point, *see* *CARL H. ESBECK*,

is little reason to believe this is the case. The federal government had a very limited reach in the eighteenth century, but in those few areas where it enacted constitutional provisions, laws, or policies that could infringe upon the religious convictions of citizens—notably oaths and military service—America’s founders created accommodations to protect religious citizens. Religious accommodations are clearly permissible as a matter of originalism, and they are good public policy.

### C. *State Support for Religion?*

In the founding era, as in the present day, there is a tendency to think that if something is good for society, it should be protected, subsidized, or otherwise encouraged by the State. Most American colonies had established churches, and every colony encouraged or promoted Christianity to some degree.<sup>100</sup> Rhode Island, it is true, offered little support for Christianity, but given its reputation for licentiousness, it was the exception that proved the rule.

After independence, most states either disestablished their churches (especially states where the Church of England was previously established) or moved to a system of “plural” or “multiple” establishments. In either case, arguments were usually framed in terms of which arrangement would help true religion to flourish. In 1785, for instance, the Maryland House of Delegates proposed a general assessment bill that began with the following resolution:

That is the opinion of this house, that the happiness of the people, and the good order and preservation of civil government, depend upon morality, religion, and piety; and that these cannot be generally diffused through a community, but by the *public* worship of Almighty God.<sup>101</sup>

Similar arguments were made in virtually every state. The debates in each state are worthy of consideration, but those in Virginia have come to be particularly influential. In 1784, a legislative committee headed by Patrick Henry drafted a general assessment bill that would have provided support to ministers from different denominations.<sup>102</sup> Clergy should be supported by the government, the committee averred, because “the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society.”<sup>103</sup> In

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THIRD-PARTY BURDENS, CONGRESSIONAL ACCOMMODATIONS FOR RELIGION, AND THE ESTABLISHMENT CLAUSE (2015).

100. CURRY, *supra* note 56, at 1–192.

101. *Resolutions and Address by the Maryland House of Delegates (Jan. 8, 1785)*, in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 253–54.

102. *A Bill Establishing a Provision for Teachers of the Christian Religion, Virginia (1784)*, in THE SACRED RIGHTS OF CONSCIENCE, *supra* note 7, at 252–53.

103. *Id.* at 252.

Virginia, a supporter of the General Assessment Bill contended in the *Virginia Gazette*, that “[i]t is an opinion confirmed by the united suffrage of the thinking part of mankind in all former ages; ‘that the *general belief* and *public acknowledgement* of the great principles of religion are necessary to secure the order and happiness of society.’”<sup>104</sup>

The General Assembly received approximately ninety petitions supporting and opposing this bill, none of which denied the importance of Christianity; the main question in dispute was whether state support would help or hurt religion.<sup>105</sup> Consider, for instance, two petitions from Westmoreland County that arrived at the Virginia General Assembly on November 2, 1784. The first supported Henry’s bill, arguing that “religion is absolutely requisite for the well ordering of society” and that state subsidies are necessary to keep salaries high enough to attract the best candidates into the ministry.<sup>106</sup> Opponents of Henry’s plan did not challenge the claim that religion was necessary for public happiness. Instead, they contended that assessments were against “the spirit of the Gospel,” that “the Holy Author of our Religion” did not require state support, and that Christianity was more pure before “Constantine first established Christianity by human laws.”<sup>107</sup> Rejecting their fellow petitioners’ arguments that government support was necessary to attract good candidates to the ministry, they argued that clergy should

manifest to the world “that they are inwardly moved by the Holy Ghost to take upon them that Office,” that they seek the good of Mankind and not worldly Interest. Let their doctrines be scriptural and their Lives upright. Then shall Religion (if departed) speedily return, and Deism be put to open shame, and its dreaded Consequences removed.<sup>108</sup>

This petition is less famous than James Madison’s now-famous “Memorial and Remonstrance,” which was written in the same context.<sup>109</sup> But it was significantly more popular,<sup>110</sup> and reflects well the reality that many founders opposed establishments because they thought they hurt true religion.

Madison’s Memorial has often been referenced to shine light on the First Amendment, and it is sometimes treated as a rationalist, secular argument for religious liberty.<sup>111</sup> Madison was private regarding his religious

104. Quoted in HAMBURGER, *supra* note 55, at 69.

105. THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787 passim* (1977).

106. *Petitions For and Against Religious Assessment from Westmoreland County, Virginia* (Nov. 1784), in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 307.

107. *Id.* at 307–08.

108. *Id.* at 308.

109. JAMES MADISON, 8 *THE PAPERS OF JAMES MADISON* 297–98 (Robert Rutland et al. eds., 1973).

110. *Id.*

111. HALL, *supra* note 32, at 33–37.

convictions, but in the Memorial he contended that one of the reasons establishments should be opposed is because they are detrimental to the Christian faith. He argued that “ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation” and “the bill is adverse to the diffusion of the light of Christianity.”<sup>112</sup> Freeing Christianity from State control, he explained, will lead it to flourish, which will in turn “establish more firmly the liberties, the prosperity, and the happiness of the Commonwealth.”<sup>113</sup> Henry’s bill was defeated, and in its place Madison convinced the Assembly to enact Jefferson’s “Bill for Establishing Religious Freedom,” which, like his Memorial and Remonstrance, proclaims that State compulsion in matters of faith tends “only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion.”<sup>114</sup>

Late in life, Madison wrote several letters reflecting on the consequences of disestablishing the Anglican church in Virginia. He observed that there is no question that “there has been an increase of religious instruction since the revolution.”<sup>115</sup> As well, “the number, the industry, and the morality of the priesthood and the devotion of the people have been manifestly increased by the total separation of church and state.”<sup>116</sup> Toward the very end of his life, he reiterated these sentiments to Jasper Adams, noting that disestablishment led to “the greater purity & industry of the pastors & in the greater devotion of their flocks.”<sup>117</sup> In the context of his missives, it is evident that he believed these outcomes were desirable. Madison overemphasized the extent to which church and state had been “totally” separated in Virginia, but there are good reasons to affirm his conclusion that disestablishing the Anglican church caused religion to flourish.

#### IV. CONCLUSION

The founder and early Supreme Court Justice James Wilson, in his famous law lectures, observed that “of all governments, those are the best, which, by the natural effect of their constitutions, are frequently renewed or drawn back to their first principles.”<sup>118</sup> This does not mean that contemporary policy problems can be solved simply by asking “What would the

112. James Madison, *A Memorial and Remonstrance Against Religious Assessments (1785)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 311–12.

113. *Id.* at 313.

114. *A Bill for Establishing Religious Freedom, Virginia (1779 and 1786)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 250.

115. *Letter from James Madison to Robert Walsh (Mar. 2, 1819)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 594.

116. *Id.* at 595; *see also Letter from James Madison to Edward Livingston*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 596–97.

117. *Letter from James Madison to Jasper Adams (Sept. 1833)*, in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 7, at 613; *see generally* DANIEL L. DREISBACH, *RELIGION AND POLITICS IN THE EARLY REPUBLIC: JASPER ADAMS AND THE CHURCH-STATE DEBATE* (1996).

118. 1 *COLLECTED WORKS OF JAMES WILSON*, *supra* note 45, at 698.

founders do?” But it does suggest that we do well to reflect on the principles that animated the men and women who helped win American independence and create our constitutional republic. America’s founders believed that religion was necessary if a person was to be virtuous, and virtue was necessary for personal and public happiness and to support republican forms of government. They were convinced that religious liberty would cause faith to flourish.

In 1798, Benjamin Rush contended that “only foundation for a useful education in a republic is to be laid in religion. Without this there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments.”<sup>119</sup> With a liberality unusual in his generation, he continued:

Such is my veneration for every religion that reveals the attributes of the Deity, or a future state of rewards and punishments, that I had rather see the opinions of Confucius or Mahomed inculcated upon our youth, than see them grow up wholly devoid of a system of religious principles. But the religion I mean to recommend in this place, is that of the New Testament.<sup>120</sup>

Rush ended where many founders began—with the default assumption that Christianity supported and promoted virtues that allowed republican governments to flourish. But his openness to the possibility that other faiths might similarly encourage important virtues suggests that, even in a far more pluralistic twenty-first-century America, religion broadly conceived might promote societal and political happiness and support republicanism.<sup>121</sup> If, as the founders believed, religious liberty causes religion to flourish, that is one more reason for robustly protecting it today. Certainly, we should be skeptical of those scholars, jurists, and activists who would reduce the scope of religious liberty that is protected as a matter of law.<sup>122</sup> Doing so violates a core American commitment, and as this symposium has shown, it is also bad public policy.

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119. Benjamin Rush, *Of the Mode of Education Proper in a Republic (1798)*, in *THE SELECTED WRITINGS OF BENJAMIN RUSH* 88 (Dagobert D. Runes ed., 1947).

120. *Id.*

121. Lipka, *supra* note 39.

122. *See, e.g.*, MARCI HAMILTON, *GOD VS. THE GAVEL* (2d ed. 2014); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013).