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## The Legal Ramifications of Christian Nationalism

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# The Legal Ramifications of Christian Nationalism

Steven K. Green\*

## INTRODUCTION

One of the more resilient debates about American constitutional history is the one over the nation's purported religious founding. As predictable as the Chicago Cubs' collapse every summer, legal and religious conservatives periodically raise claims about America's Christian heritage in their efforts to gain the moral and legal high ground in the ongoing culture wars. One recent example of this is found in the June 24, 2018, Sunday sermon of Reverend Robert Jeffress of First Baptist Church of Dallas, Texas.<sup>1</sup> In that sermon, titled "America is a Christian Nation," Reverend Jeffress asserted that the nation's Founders were predominately evangelical Christians and that they intended to instill Christian values in the nation's governing documents.<sup>2</sup> America was founded as a Christian nation, Jeffress insisted, and the nation's law and institutions needed to rediscover and reaffirm this basis.<sup>3</sup>

While Reverend Jeffress's claims could be passed off as the ramblings of a fundamentalist preacher, Dallas First Baptist is

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1. Robert Jeffress, *America Is a Christian Nation*, FIRST BAPTIST DALLAS (June 24, 2018), <https://www.firstdallas.org/media/worship/america-is-a-christian-nation/> [<https://perma.cc/LZ79-4JNS>].

2. *Id.*

3. *Id.*

considered one of the more prestigious congregations in the nation's largest Protestant denomination.<sup>4</sup> And Reverend Jeffress is not alone in his assertions—he is part of a large group of political and religious figures who raise similar truth-claims and use Christian nation arguments to promote a conservative social and political agenda.<sup>5</sup> More than a handful of Christian Nationalists have access to the holders of the nation's political and judicial power; Jeffress, for one, was among President Donald Trump's closest religious advisors, serving on his Evangelical Advisory Board.<sup>6</sup> Although claims that America was founded as a Christian nation have existed for a long time, ebbing and flowing in response to cultural forces,<sup>7</sup> the maxim witnessed a resurgence in the latter decades of the twentieth century, carrying over into the twenty-first century.<sup>8</sup> Investigative journalists at *Religion Dispatches* and *Church & State* magazine have documented the rise in Christian nationalism for some time,<sup>9</sup> and in 2019 the moderate-leaning Baptist Joint Committee for Religious Liberty (BJC) launched an initiative to combat this trend, "Christians Against Christian Nationalism," with the BJC's director declaring that the "threat of

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4. Daniel Silliman, *At Jeffress' First Baptist Church of Dallas, Trump Support is Part of a 150-Year Tradition*, RELIGION DISPATCHES (July 31, 2018), <https://religiondispatches.org/at-jeffress-first-baptist-church-of-dallas-trump-support-is-part-of-a-150-year-tradition/> [<https://perma.cc/BUD7-NKNE>].

5. See, e.g., Rob Boston, *All the President's Men and Women: Members Of Trump's Evangelical Advisory Board Are Hard at Work Changing Public Policy – But They'd Rather You Not Know About It*, CHURCH & STATE MAGAZINE (Oct. 2018), <https://www.au.org/church-state/october-2018-church-state/cover-story/all-the-presidents-men-and-women-members-of> [<https://perma.cc/VC4X-9K77>].

6. See *id.*; Liz Hayes, *The Apostle of Trump: The Rev. Robert Jeffress Wasn't Known to Most Americans Before He Emerged As President's Chief Evangelical Defender*, CHURCH & STATE MAGAZINE (July/Aug. 2018), <https://www.au.org/church-state/julyaugust-2018-church-state-magazine/featured/the-apostle-of-trump-the-rev-robert> [<https://perma.cc/28NK-5QK5>].

7. See generally STEVEN K. GREEN, *INVENTING A CHRISTIAN AMERICA: THE MYTH OF THE RELIGIOUS FOUNDING* (2015).

8. See Liz Theoharis, *The rise of Christian Nationalism in America*, SALON (Oct. 4, 2020), [https://www.salon.com/2020/10/04/the-rise-of-christian-nationalism-in-america\\_partner/](https://www.salon.com/2020/10/04/the-rise-of-christian-nationalism-in-america_partner/) [<https://perma.cc/JM4W-KUNA>].

9. See, e.g., Simon Brown, *Founded On Faith?*, CHURCH & STATE MAGAZINE (July/Aug. 2015), <https://www.au.org/church-state/julyaugust-2015-church-state/featured/founded-on-faith> [[perma.cc/27GK-J5QU](https://perma.cc/27GK-J5QU)]; see also Silliman, *supra* note 4.

Christian Nationalism has reached [a] high tide.”<sup>10</sup> Indeed, some scholars have maintained that the election of Donald Trump as president in 2016 can be explained in part by Trump’s loaded rhetoric that appealed to Christian nationalist voters.<sup>11</sup>

Before proceeding further, the proposition that America is a Christian nation requires defining, as does the impulse of Christian nationalism. Defining the former is more difficult than it looks, as the concept of America being a Christian nation has a protean quality. A high degree of scholarly consensus exists about the religious impulses behind the settling of the British-American colonies and the significant role that religious rhetoric played during the founding period that inspired popular support for the revolutionary and republican causes.<sup>12</sup> Scholars also generally agree that the evangelical revivals of the 1740s spawned nascent democratic impulses by emphasizing liberty of conscience and turning religious affiliation into a voluntary enterprise.<sup>13</sup> There is much less agreement over whether there was a direct connection between Calvinist-covenantal theology and Biblical principles on one side and the sources of republican ideology on the other side.<sup>14</sup> Proceeding further in this taxonomy, a smaller number of scholars and popular writers argue that a Protestant ethos pervaded the

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10. Amanda Tyler, Opinion, *Threat of Christian Nationalism Has Reached High Tide*, GOOD FAITH MEDIA (July 30, 2019), <https://goodfaithmedia.org/threat-of-christian-nationalism-has-reached-high-tide/> [perma.cc/4LAT-ZBEZ].

11. Andrew L. Whitehead, Samuel L. Perry & Joseph O. Baker, *Make America Christian Again: Christian Nationalism & Voting for Donald Trump in the 2016 Presidential Election*, 73 *SOC. RELIGION* 147, 153 (2018).

12. *See generally* CATHERINE L. ALBANESE, *SONS OF THE FATHERS: THE CIVIL RELIGION OF THE AMERICAN REVOLUTION* (1976); RUTH H. BLOCH, *VISIONARY REPUBLIC: MILLENNIAL THEMES IN AMERICAN THOUGHT, 1756–1800* (1985); NATHAN O. HATCH, *THE SACRED CAUSE OF LIBERTY: REPUBLICAN THOUGHT AND THE MILLENNIUM IN REVOLUTIONARY NEW ENGLAND* (1977); THOMAS S. KIDD, *GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION* (2010); MARK A. NOLL, *AMERICA’S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN* (2002).

13. *See generally* CEDRIC B. COWING, *THE GREAT AWAKENING AND THE AMERICAN REVOLUTION: COLONIAL THOUGHT IN THE 18TH CENTURY* (1971); ALAN HEIMERT, *RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION* (1966); FRANK LAMBERT, *INVENTING THE “GREAT AWAKENING”* (1999).

14. *See* MARK A. NOLL, NATHAN O. HATCH & GEORGE M. MARSDEN, *THE SEARCH FOR CHRISTIAN AMERICA* 70–106 (1983).

founding period—rather than a post-Enlightenment one—and that the ubiquitous religious rhetoric indicates that: (1) the majority of people, including the political leadership, held orthodox-Christian beliefs; and (2) that framers of the nation’s governing documents intended to incorporate Christian principles into them.<sup>15</sup> Finally, an even smaller number of writers and politicians claim that the United States was specially blessed or chosen by God, that his providential hand directed the framers in the nation’s founding.<sup>16</sup> Under this last perspective, the nation’s past and founding documents assume an almost sacred quality. As can be appreciated, due to the variety of potential understandings and fluidity between perspectives, it can be difficult to decipher what one means when speaking of America’s Christian heritage or of it being a “Christian nation.”<sup>17</sup>

As a result, rhetoric about America’s Christian founding can appeal to a wide audience. Many people hold vague, if not ill-defined ideas about America’s Christian nationhood.<sup>18</sup> A study by the First Amendment Center revealed that over fifty percent of Americans believe that the U.S. Constitution created a Christian nation, notwithstanding its express prohibitions on religious establishments and religious tests for public office holding.<sup>19</sup> A

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15. See MARK D. HALL, DID AMERICA HAVE A CHRISTIAN FOUNDING? SEPARATING MODERN MYTH FROM HISTORICAL TRUTH 23–55 (2019).

16. See generally GARY DEMAR, AMERICA’S CHRISTIAN HISTORY: THE UNTOLD STORY (1995); JOHN FEA, WAS AMERICA FOUNDED AS A CHRISTIAN NATION?: A HISTORICAL INTRODUCTION (2011); TIM LAHAYE, FAITH OF OUR FOUNDING FATHERS (1987). In a 2000 study, sociologist Christian Smith identified six meanings of a “Christian America” among evangelicals, with the more common conceptions being that America was founded by people in search of religious liberty, that the laws and structures of American government incorporated Christian principles, and that the Founders were devout Christians or theists who sought God’s will in founding the nation. CHRISTIAN SMITH, CHRISTIAN AMERICA? WHAT EVANGELICALS REALLY WANT 26–37 (2000).

17. FEA, *supra* note 16, xiv–xvi.

18. See David Barton, *Is America a Christian Nation?*, WALL BUILDERS, <https://wallbuilders.com/america-christian-nation/> [perma.cc/R7PJ-RBCD] (last visited Mar. 6, 2021).

19. FREEDOM FORUM INST., STATE OF THE FIRST AMENDMENT 2008 3 (2008), [https://www.freedomforuminstitute.org/wp-content/uploads/2014/09/FAC\\_sofa\\_2008report.pdf](https://www.freedomforuminstitute.org/wp-content/uploads/2014/09/FAC_sofa_2008report.pdf) [perma.cc/3J37-HPQ3] (indicating that 63% of Americans either strongly or mildly agree that “the nation’s founders intended the United States to be a Christian nation,” while 55% either strongly or mildly agree that “the U.S. Constitution establishes a Christian nation”).

similar study conducted by the Pew Forum on Religion in Public Life revealed even higher numbers, noting that “Americans overwhelmingly consider the U.S. a Christian nation: Two-in-three (67%) characterize the nation this way.”<sup>20</sup> Other studies indicate that a majority of Americans believe that the nation’s political operations should be based on “Judeo-Christian principles,” if the nation’s founding principles are not already.<sup>21</sup>

Politicians are notorious for playing on these prepossessions and, in turn, reinforcing this narrative. Christian nation rhetoric is such low-hanging fruit that many politicians cannot resist making at least vague claims. At times, such rhetoric is used as a ceremonial flourish; at other times, the claims are more robust. President Ronald Reagan, who was not a devout church-goer, despite his support from the evangelical Religious Right, regularly alluded to the nation’s providential past, remarking in one speech: “[c]an we doubt that only a Divine Providence placed this land, this island of freedom, here as a refuge for all those people in the world who yearn to breathe free?”<sup>22</sup> In a 1984 prayer breakfast he declared that “faith and religion play a critical role in the political life of our nation,” asserting that the Founders had affirmed this relationship in the founding documents: “Those who created our country,” Reagan remarked, “understood that there is a divine order which transcends the human order.”<sup>23</sup> And President George W. Bush, a conservative evangelical, frequently revealed his belief in America’s Christian origins, once affirming that: “[o]ur country was founded by men and women who realized their dependence on God and were humbled by His providence and grace.”<sup>24</sup> According to Bush, the Founders did not simply acknowledge their obligation toward God; they (like Bush) believed that America was specially

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20. *Many Americans Uneasy with Mix of Religion and Politics*, PEW RESEARCH CTR. (Aug. 24, 2006), <https://www.pewforum.org/2006/08/24/many-americans-uneasy-with-mix-of-religion-and-politics/> [perma.cc/47DA-RWZZ].

21. Mariana Servin-Gonzalez & Oscar Torres-Reyna, *The Polls-Trends: Religion and Politics*, 63 PUB. OPINION Q. 592, 604 (1999).

22. RICHARD V. PIERARD & ROBERT D. LINDER, CIVIL RELIGION AND THE PRESIDENCY 273–74 (1988).

23. Ronald Reagan, *Politics and Morality are Inseparable*, 1 NORTE DAME J.L. ETHICS & PUB. POL’Y 7, 7 (1985).

24. *President’s Thanksgiving Day Proclamation*, SEATTLE TIMES (Nov. 22, 2007, 12:00 AM), <https://www.seattletimes.com/nation-world/presidents-thanksgiving-day-proclamation/> [perma.cc/4F42-BDVM].

chosen, “not because we consider ourselves a chosen nation” but because “God moves and chooses [us] as He wills.”<sup>25</sup>

Whether intended or not, such rhetoric has fueled a meaty variant of the Christian nation maxim, one that is being pushed by a new wave of Christian Nationalists.<sup>26</sup> In books, articles, and reports, they document the extensive use of religious discourse during the founding period and the various public affirmations of God and religion—such as Thanksgiving day proclamations—to construct a conclusive narrative about America’s religious origins.<sup>27</sup> As one author wrote: “[t]he history of America’s laws, its constitutional system, the reason for the American Revolution, or the basis of its guiding political philosophy cannot accurately be discussed without reference to its biblical roots.”<sup>28</sup>

Not only do Christian Nationalists promote the meatier versions of the maxim, they seek to move beyond the symbolic to “return” the nation and its policies to its Christian roots.<sup>29</sup> They argue that scholars, judges, and the liberal elite have censored America’s Christian past in a conspiracy to install a regime of secularism.<sup>30</sup> The absence of this narrative from public school and

25. *President Bush’s Second Inaugural Address*, NPR (Jan. 20, 2005), <https://www.npr.org/templates/story/story.php?storyId=4460172> [<https://perma.cc/P77K-BHCQ>]; see also RICHARD T. HUGHES, *CHRISTIAN AMERICA AND THE KINGDOM OF GOD 157–70* (2009) (detailing the relationship between President George W. Bush and conservative religious voters).

26. See, e.g., ANDREW L. SEIDEL, *THE FOUNDING MYTH: WHY CHRISTIAN NATIONALISM IS UN-AMERICAN* 8–12 (2019); KATHERINE STEWART, *THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM* (2020); ANDREW L. WHITEHEAD & SAMUEL L. PERRY, *TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES passim* (2020).

27. See generally GARY T. AMOS, *DEFENDING THE DECLARATION: HOW THE BIBLE AND CHRISTIANITY INFLUENCED THE WRITING OF THE DECLARATION OF INDEPENDENCE* (1989); DAVID BARTON, *ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION* (5th ed. 2011); DAVID BARTON, *SEPARATION OF CHURCH & STATE: WHAT THE FOUNDERS MEANT* (2007); DAVID BARTON, *AMERICA’S GODLY HERITAGE* (1993); DAVID BARTON, *THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE?* (1992) [hereinafter *MYTH OF SEPARATION*]; DEMAR, *supra* note 16; JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS* (1987); JOHN W. WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* (1982).

28. BENJAMIN HART, *FAITH & FREEDOM: THE CHRISTIAN ROOTS OF AMERICAN LIBERTY* 19 (1988).

29. See WHITEHEAD & PERRY, *supra* note 26, at 55–119.

30. See GREEN, *supra* note 7, at 5.

college history texts reveals a bias against the Christian perspective; as one author wrote: “[t]he removal of religion as history from our schoolbooks betrays the intellectual dishonesty of secular humanist educators and reveals their blind hostility to Christianity.”<sup>31</sup> It is nothing less than the “deliberate rape of history.”<sup>32</sup> As a scholar sums up this phenomenon:

The number of contemporary authors on the quest for a Christian America is legion. The Christian America concept moves beyond a simple and fundamental acknowledgement of Christianity’s significance in American history to a belief that the United States was established as a decidedly Christian nation. Driven by the belief that separation of church and state is a myth foisted upon the American people by secular courts and scholars, defenders of Christian America historiography claim they are merely recovering accurate American history from revisionist historians conspiring to expunge any remnant of Christianity from America’s past.<sup>33</sup>

This narrative, when communicated to sympathetic listeners, usually calls for a response. Increasingly, its promoters have urged the integration of a Christian nation perspective into law and policy.<sup>34</sup> One example was a 2007 resolution in the United States House of Representatives that called for “[a]ffirming the rich spiritual and religious history of our Nation’s founding and subsequent history and expressing support for designation of the first week in May as ‘American Religious History Week’ for the appreciation of and education on America’s history of religious faith.”<sup>35</sup> Beginning in 2010, the Texas State Board of Education—a partisan elected entity controlled by Republicans—undertook to rewrite the state’s social science curriculum to reflect aspects of a

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31. See LAHAYE, *supra* note 16, at 2.

32. *Id.* at 5.

33. Stephen M. Stookey, *In God We Trust? Evangelical Historiography and the Quest for a Christian America*, 41 SW. J. OF THEOLOGY 41, 42 (1999).

34. See H.R. Res. 888, 110th Cong. (2007), <https://www.congress.gov/bill/110th-congress/house-resolution/888/text> [<https://perma.cc/TW5M-GHZ3>].

35. *Id.* (the resolution stalled in committee).

Christian nationalist approach.<sup>36</sup> More recently, the Congressional Prayer Caucus Foundation—an organization with ties to several Christian right groups—instituted a massive legislative agenda (“Project Blitz”) to encourage state legislatures to enact laws that promote “Our Country’s Religious Heritage” in public schools and in other public settings.<sup>37</sup>

So long as claims about the Christian founding of the nation’s political institutions remain in the rhetorical realm, there is less cause for concern, at least constitutionally. But, as this Article explores, Christian nation rhetoric has long influenced judicial decision-making, and variants of the maxim impact current Supreme Court church-state jurisprudence. This Article explores the legal ramifications of the Christian nation maxim and how it has affected outcomes in church-state cases in subtle, but also significant ways. This Article also explores how in the process the Court has used, and misused, the historical record to reach many of its conclusions about church-state matters.

#### I. INVENTING A CHRISTIAN AMERICA

A paradox arises when considering whether America is Christian in a legal or constitutional sense, such that the nation’s laws and policies should reflect and reinforce a Christian perspective. What this means in conventional terms is that legislatures would (and should) be able to enact legislation that promotes Christian values and that the Constitution’s Establishment Clause would be interpreted in such a way as to accommodate, if not protect, such policies (presumably, the Free Exercise Clause would also be reinterpreted to remove any prohibition on religious favoritism of Christianity or on disfavoring non-Christian traditions in the receipt of benefits).

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36. See Mark A. Chancey, *Rewriting History for a Christian America: Religion and the Texas Social Studies Controversy of 2009–2010*, 94 J. OF RELIGION 325, 325 (2014); see also Russell Shorto, *How Christian Were the Founders?*, N.Y. TIMES (Feb. 11, 2010), <https://www.nytimes.com/2010/02/14/magazine/14texbooks-t.html> [https://perma.cc/2RUL-492M].

37. See WHITEHEAD & PERRY, *supra* note 26, at 159; see also Frederick Clarkson, *Ring in a Christian Nationalist 2019 With an Even Larger Legislative Playbook*, RELIGION DISPATCHES (Dec. 18, 2018), <https://religiondispatches.org/ringing-in-a-christian-nationalist-2019-with-an-even-larger-legislative-playbook/> [perma.cc/T52C-DWXJ].

The reason a paradox exists is that notwithstanding the presence of religious discourse during the founding period, including affirmations of God's providential hand in the nation's creation, the nation's core founding documents are bereft of references to religious principles or affirmations of God's authority for republican governance.<sup>38</sup> To be sure, the Articles of Confederation conclude with an assertion that uniting the states under one government "pleased the Great Governor of the World," but that reference is hortatory, containing no claim that the authority for government comes from God.<sup>39</sup> Similarly, the Declaration of Independence contains four references to or affirmations of a deity, but these references are in Enlightenment natural law terms—"Nature's God," "Creator," "Supreme Judge of the world," and "divine Providence."<sup>40</sup> No doubt, Thomas Jefferson—who included only the first two terms in his draft<sup>41</sup>—appreciated the power of religious allusions, particularly during a time of war, and understood that these deific references would appeal to rationalists and orthodox Christians alike. But these deific affirmations, couched in Enlightenment terms, do not support a Christian basis for the Declaration, republicanism, or the new government. On the contrary, the Declaration is clear that the authority for rebellion, independence, and the confederation of states rested on "self-evident" truths and the "consent of the governed," not on some higher source.<sup>42</sup>

In contrast to those hortatory declarations, the Constitution is bereft of even a passing nod to God.<sup>43</sup> Authority to establish the

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38. See Jared A. Goldstein, *How the Constitution Became Christian*, 68 HASTINGS L.J. 259, 267 (2017); see also *Is America a Christian Nation?*, AM. UNITED, <https://www.au.org/resources/publications/is-america-a-christian-nation> [<https://perma.cc/24U8-66N6>] (last visited Mar. 6, 2021).

39. ARTICLES OF CONFEDERATION OF 1777, LIBRARY OF CONG., <https://tile.loc.gov/storage-services/service/l1/uscode/uscode1952-00100/uscode1952-001000005/uscode1952-001000005.pdf> [<https://perma.cc/88Y2-AM8D>] (last visited Mar. 6, 2021).

40. THE DECLARATION OF INDEPENDENCE (U.S. 1776), NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/declaration-transcript> [[perma.cc/FA37-HV3X](https://perma.cc/FA37-HV3X)] (last visited Mar. 6, 2021).

41. See 1 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON, 1760–1776, 243–47 (Julian P. Boyd ed., 1950).

42. See GREEN, *supra* note 7, at 163–73.

43. See Goldstein, *supra* note 38, at 267.

new United States is derived from “We, the people.”<sup>44</sup> The absence of an affirmation of God, even one in Enlightenment terms, is remarkable considering that the majority of contemporary state constitutions contained deistic affirmations.<sup>45</sup> So, in that context, the omission is significant. This does not mean that the drafters intended to create a “Godless Constitution” in the sense of it being an antireligious or irreligious document, but one can fairly infer that the omission was purposeful, considering the prevailing practice with state constitutions, such that the drafters intended to place the authority for republican government on human will.<sup>46</sup>

The omission did not go unnoticed. In fact, two of the more contentious points about the Constitution that Anti-Federalists raised during the ratification debates were that the Constitution lacked a deific affirmation and that it banned any religious prerequisite for public office-holding, the latter also being common in state constitutions.<sup>47</sup> Speaking for many Anti-Federalists, the *Virginia Independent Chronicle* declared that these two reinforcing aspects to the Constitution revealed a “cold indifference towards religion.”<sup>48</sup> As a remedy, one delegate to the Connecticut ratifying convention called for adding “an explicit acknowledgement of the being of a God, [of] his perfections and his providence” in the Constitution.<sup>49</sup> And an essayist in the *Boston Independent Chronicle* charged that “all religion is expressly rejected[ ] from the Constitution. Was there ever any State or kingdom that should subsist without adopting some system of religion?”<sup>50</sup> The answer,

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44. See U.S. CONST. pmb.

45. See Allan W. Vestal, *The Lingering Bigotry of State Constitution Religious Tests*, 15 U. MD. L.J. OF RACE, RELIGION, GENDER & CLASS 55, 56 (2015).

46. ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 24–45 (1996).

47. See GREEN, *supra* note 7, at 183.

48. *A Proposal for Reviving Christian Conviction*, VA. INDEP. CHRON., Oct. 31, 1787, reprinted in 5 *THE COMPLETE ANTI-FEDERALIST* 125, 126–27 (Herbert J. Storing ed., 1981).

49. Letter of William Williams, AM. MERCURY, Feb. 11, 1788, reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788*, 207, 207 (Paul Leicester Ford ed., 1892).

50. *Essay by Samuel*, INDEP. CHRON. & UNIVERSAL ADVERTISER (Boston), Jan. 10, 1788, reprinted in 4 *THE COMPLETE ANTI-FEDERALIST* 191, 195 (Herbert J. Storing ed., 1981).

so far as it concerned the Constitution, was apparently “yes.” Scholars have generally agreed that the ideological sources for ideas about republican governance came from classical models (i.e., the Greek and Roman republics), the common law, Enlightenment theorists (John Locke, Baron Montesquieu, etc.), and Whig writers, not from Christianity.<sup>51</sup>

Contemporaries acknowledged the irreligious character of the Constitution, or at least that its authority came from the people, rather than from a higher source. Even orthodox clergy who were prone to making providential claims, agreed about the nation’s secular foundations. Speaking in a 1791 Fourth of July sermon, Presbyterian minister William Linn advanced a popular Calvinist narrative of analogizing the union of states to the tribes of Old Testament Israel as a way of declaring the nation’s chosen status.<sup>52</sup> At the same time, however, Linn acknowledged that constitutional authority was based on the “representation of the people from whom all legitimate government is derived.”<sup>53</sup> He contrasted the new republican government with “[the] government which Jesus Christ hath instituted in his Church [which] is distinct from the power which appertains to the kingdoms of this world.”<sup>54</sup> Several years later, as the nation became embroiled in financial crisis and international intrigue, the absence of a religious foundation for the government became a cause for concern.<sup>55</sup> Presbyterian minister

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51. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22–54 (1967).

52. See WILLIAM LINN, *THE BLESSINGS OF AMERICA* 9 (1791); see also ENOS HITCHCOCK, *AN ORATION IN COMMEMORATION OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA* (1793), reprinted in 2 *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805*, 1171, 1173–83 (Ellis Sandoz ed., 2d ed. 1998) (extolling the virtues of the United States’ republican government as the progeny of great civilizations, but surpassing their limitations); JOHN THAYER, *A DISCOURSE DELIVERED AT THE ROMAN CATHOLIC CHURCH IN BOSTON* (1798), reprinted in 2 *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA*, *supra*, at 1341, 1343–61 (urging the listeners to respect the government as established in the United States Constitution and cautioning them against insubordination lest they follow in the footsteps of revolutionary France, with its deleterious effects on religious institutions).

53. LINN, *supra* note 52, at 17.

54. *Id.* at 19.

55. See 3 JOHN M. MASON, *Divine Judgments*, in *THE COMPLETE WORKS OF JOHN M. MASON* 39, 53 (Ebenezer Mason ed., 1852).

John Mason bemoaned that while the nation had received God's blessings:

[T]hat very [C]onstitution which the singular goodness of God enabled us to establish, does not so much as recognize his *being!* . . . [F]rom the constitution of the United States, it is impossible to ascertain *what* God we worship; or whether we own a God *at all.* . . . Should the citizens of America be as irreligious as her constitution, we will have reason to tremble lest the Governor of the universe . . . crush us to atoms.<sup>56</sup>

This lament about the irreligious nature of the government continued into the 1800 presidential election where orthodox clergy charged that Thomas Jefferson's election would perpetuate a "civil society as founded in Atheism."<sup>57</sup> John Mason again raised the charge that the "Federal Constitution *makes no acknowledgement of that God* who gave us our national existence."<sup>58</sup> In "the pride of our *citizenship,*" Mason declared, the Founders had "forgotten our *Christianity.*"<sup>59</sup>

If members of the founding generation largely agreed that the nation's governing documents were based on secular, rational principles, then how did the narrative arise about the nation's Christian origins? Several events came together in the early nineteenth century to support the belief that America was founded as a Christian nation. The first event that fueled a reevaluation of the nation's founding was the extensive growth in evangelical Protestantism in the early 1800s, fueled by a proliferation of revivals, commonly called the Second Great Awakening.<sup>60</sup> This expansion of an evangelical perspective coincided with a general discrediting of deistic and rationalist thought as a result of popular revulsion of the excesses of the French Revolution.<sup>61</sup> In addition to seeking reaffirmations of piety in the public realm, evangelicals shared an eschatology (post-millennialism) that taught that Jesus'

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56. *Id.* (emphasis in original).

57. 4 JOHN M. MASON, *Voice of Warning*, in THE COMPLETE WORKS OF JOHN M. MASON 533, 552 (Ebenezer Mason ed., 1852).

58. *Id.* at 570.

59. *Id.* at 561; see also GREEN, *supra* note 7, at 190–98.

60. See GREEN, *supra* note 7, at 201.

61. See *id.* at 211–12.

second coming would occur after a thousand-year reign of a godly society brought about by Christians.<sup>62</sup> Evangelicals dusted off Puritan motifs of America being specially chosen by God to be an exemplar to the world.<sup>63</sup> The belief that God's kingdom would become manifest in America necessitated a reconsideration of the nation's founding, which evangelical leaders quickly set out to sanctify.<sup>64</sup> By the 1820s, evangelical authors were making claims about how God had directed the Founders in their political endeavors. Evangelical reformer Lyman Beecher declared in the 1820s that "our own republic, in its constitution and laws, is of heavenly origin. It was not borrowed from Greece or Rome, but from the Bible."<sup>65</sup> Similarly, Reverend Jasper Adams, nephew and cousin to presidents, published a sermon in 1833 that asserted that the United States had sprung from the efforts of "our strong and pious forefathers, in the exercise of a strong and vigorous faith."<sup>66</sup> The Christian religion "was intended by them to be the corner stone of the social and political structures which they were founding."<sup>67</sup> These "powerful Christian explanations" about the foundations of republican government reinforced people's beliefs about America's exceptionalism, and before long they became the accepted narrative.<sup>68</sup>

A related event coincided with the growth of evangelicalism and fueled its efforts to sanctify the founding. During the early nineteenth century, revisionist histories began to appear that offered hagiographic accounts of the American Revolution, its leaders, and the drafting of the nation's governing documents.<sup>69</sup> This movement began almost immediately upon the death of George Washington in 1799, where the first president was not only venerated but turned into a deific figure.<sup>70</sup> This second generation

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62. *Id.* at 213.

63. *See id.*

64. *Id.* at 211–19.

65. *Id.* at 215 (quoting 1 LYMAN BEECHER, BEECHER'S WORKS 189 (1852)).

66. *Id.* at 217 (quoting JASPER ADAMS, THE RELATION OF CHRISTIANITY TO CIVIL GOVERNMENT IN THE UNITED STATES 9 (2d ed. 1833)).

67. *Id.* (quoting ADAMS, *supra* note 66, at 9).

68. *Id.* at 215 (quoting JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE 212 (1990)).

69. *See id.* at 205–10.

70. *See id.* at 205.

of historians set out to glorify the founding and provide explanations for how the thirteen colonies could defeat the most powerful nation on earth. Washington became the American Moses who benefitted from the interposing of God's providential hand.<sup>71</sup> "Divine Providence gave [Washington] opportunities and dispositions to add great acquired, to the greatest of natural abilities," proclaimed Reverend Henry Holcomb; his record of leadership "was evidence of the disposals of an all superintending Providence."<sup>72</sup> These same biographers and historians turned the deist-leaning Washington into an evangelical Christian.<sup>73</sup> The sanctification of Washington then served to sanctify those events and actions in which he had directly participated, including the drafting of the Constitution. By the second and third generations, Washington became "irrevocably linked to the Constitution," Catherine Albanese writes, such that his Christian character infused the document and influenced his fellow drafters to ground American government on religious principles.<sup>74</sup> As religious historian Robert Baird wrote in 1844: "Most certainly, the convention which framed the [C]onstitution in 1787, under the presidency of the immortal Washington, was of neither an infidel nor atheistical character . . . . All the leading men in it were believers in Christianity, and Washington, as all the world knows, was a Christian."<sup>75</sup> This narrative only grew in later years. Writing two decades later, revisionist historian Benjamin Morris declared that "[m]ost of the statesmen themselves were Christian men; and the convention had for its president George Washington, who everywhere paid a public homage to the Christian religion."<sup>76</sup> Further, "[t]he Christian faith and character of the men who formed the Constitution forbid the idea that they designed not to place the

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71. *See id.*

72. *Id.* at 205–06.

73. *Id.* at 205–10; *see* HENRY HOLCOMB, A SERMON OCCASIONED BY THE DEATH OF WASHINGTON (1800), *reprinted in* 2 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, *supra* note 52, at 1397, 1405–06.

74. GREEN, *supra* note 7, at 209 (quoting CATHERINE L. ALBANESE, *SONS OF THE FATHERS* 164–65 (1976)).

75. *Id.* (quoting ROBERT BAIRD, *RELIGION IN THE UNITED STATES* 259–60 (1844)).

76. B. F. MORRIS, *CHRISTIAN LIFE AND CHARACTER OF THE CIVIL INSTITUTIONS OF THE UNITED STATES* 249 (1864).

Constitution and its government under the providence and protection of God and the principles of the Christian religion.”<sup>77</sup> As a result, Morris concluded, “the Constitution was formed under Christian influences and is, in its purposes and spirit, a Christian instrument.”<sup>78</sup> By the mid-century, this narrative of the nation’s Christian origins was firmly embedded in popular literature, school textbooks, and the public imagination. There it would remain for much of the century.

## II. CHRISTIAN NATIONALISM AS A LEGAL PRINCIPLE

The idea that Christian principles underlay and informed the law predates the early nineteenth century rise of Christian nation revisionism. This notion originated from two interrelated concepts: first, that the authority for law is derived from a “higher” or “divine” law; and second, that Christian principles were incorporated into the common law.<sup>79</sup> Higher law notions (sometimes referred to as natural law) date back to ancient times (e.g., Cicero) and were ingrained into the Western legal tradition thanks to medieval theorists such as Thomas Aquinas (1225–1274).<sup>80</sup> Early British legal writers such as Henry de Bracton (1210–1268) integrated higher law theory into the emergent common law, which became more established in the law thanks to later legal writers including Christopher St. Germain and Sir Edward Coke.<sup>81</sup> St. Germain wrote in the 1530s that the law of England was “based squarely on the law of God: ‘law eternal is called the first law,’ he wrote, ‘for it was before all other laws, and all other laws be derived from it.’”<sup>82</sup> Coke, Lord Chief Justice under King James I, promoted the “idea that divine principles underlay the law by writing in *Calvin’s Case* (1610) that the ‘law of nature is that which God at the time of creation of the nature of man infused into his heart (which is also

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77. *Id.*

78. *Id.* at 248–49.

79. See STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* 149–50 (2010).

80. CORNELIA GREER LEBOUTILLIER, *AMERICAN DEMOCRACY AND NATURAL LAW* 59–68 (1950); *id.* at 150–51.

81. See GREEN, *supra* note 79, at 151.

82. *Id.* (quoting CHRISTOPHER ST. GERMAIN, *THE DOCTOR AND STUDENT* 3, 10 (1874)).

the moral law).”<sup>83</sup> “This natural/higher law, Coke asserted, was prior and superior to ‘any judicial or municipal law in the world,’ ‘immutable,’ and ‘part of the laws of England.’”<sup>84</sup> Finally, William Blackstone also promoted the idea of a preeminent higher law, writing in his *Commentaries* that “natural law was ‘dictated by God himself’ and was ‘of course superior in obligation to any other [law].’”<sup>85</sup> Coke and Blackstone were highly influential for early American lawyers, with the latter’s *Commentaries* selling over 1500 copies in the American colonies at the cusp of the American Revolution.<sup>86</sup>

The second idea was a variant of higher law theorems: that Christian doctrines were expressly incorporated into the common law.<sup>87</sup> This maxim arose in part due to the legal status and official recognition of the Church of England, which, in addition to having its own ecclesiastical law, received support from the common law.<sup>88</sup> Sir Henry Finch’s 1627 treatise, *Law or a Discourse Thereof*, popularized the maxim that “Christianity formed part of the common law by claiming that all types of law (including the common law) were founded on ‘holy scripture.’”<sup>89</sup> British courts quickly put meaning on the maxim by relying on it to uphold criminal prosecutions for blasphemy.<sup>90</sup> In one famous case, Lord Matthew Hale asserted that a defendant’s blasphemy “not only offended God and the Christian religion but also subverted the laws and government itself.”<sup>91</sup> “Christianity is parcel of the laws of England,” Hale wrote, so “to reproach the Christian Religion is to

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83. *Id.* at 151–52 (quoting *Calvin’s Case*, 7 Co. 4b, 12a–12b (1610)).

84. *Id.* at 152 (quoting *Calvin’s Case*, 7 Co. at 12a–12b).

85. *See id.* at 153–54 (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 40–42 (Stanley N. Katz ed., Univ. of Chi. Press 1979) (1765)).

86. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 88–89 (1973).

87. *See* GREEN, *supra* note 79, at 154–55.

88. *See* Bradley S. Chilton, *Cliobernetics, Christianity, and the Common Law*, 83 *LAW LIBR. J.* 355, 356 (1991).

89. GREEN, *supra* note 79, at 152; Chilton, *supra* note 88, at 358, 361–62.

90. Chilton, *supra* note 88, at 358–59; *see* GREEN, *supra* note 79, at 152–53.

91. GREEN, *supra* note 79, at 152.

speak Subversion of the Law.”<sup>92</sup> Later blasphemy cases reaffirmed that principle.<sup>93</sup> William Blackstone promoted the maxim too, asserting that “blasphemy, as well as other offenses against God and religion, were punishable at common law by fine and imprisonment because ‘Christianity is part of the laws of England.’”<sup>94</sup>

These complimentary notions, embedded in the British legal tradition by the eighteenth century, became part of the common law of colonial and early national America. Many early American lawyers likely considered both notions to be chiefly theoretical propositions, but a handful of leading jurists promoted both concepts and argued for their practical applications.<sup>95</sup> James Wilson was a leading member of the Constitutional Convention, a law professor at the College of Philadelphia, and Associate Justice of the U.S. Supreme Court.<sup>96</sup> In his published law lectures, Wilson asserted that there was a higher law comprised of those “general and fixed rules” that the “great Creator of all things has established.”<sup>97</sup> Natural law, too, “flow[ed] from the same divine source . . . the law of God,” though he insisted that municipal law and the “law of nations—those areas that ‘form[ ] the objects of the profession of law’—were governed chiefly by reason, conscience, and custom.”<sup>98</sup> Going a step farther than Wilson, “Maryland law professor David Hoffman wrote in 1823 that even municipal law had its ‘deep foundations in the universal laws of our moral nature,

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92. *Id.* (quoting *Rex v. Taylor*, 1 Vent. 293; 3 Keble 607, 621 (1676)); see LEONARD W. LEVY, *TREASON AGAINST GOD: A HISTORY OF THE OFFENSE OF BLASPHEMY* 313–14 (1981). Taylor reputedly declared Christ to be a “whore-master” and a “bastard” and religion to be a “cheat.” *Id.* at 418 n.9 (quoting *Taylor*, 3 Keble at 621). Taylor also claimed to be the younger brother of Jesus. *Id.* In another blasphemy case 53 year later, Chief Justice Raymond would write that “Christianity in general is parcel of the common law of England and therefore to be protected by it.” *Rex v. Woolston*, 2 Strange’s Rpts., 832, 834; 1 Barn. 162 (K.B. 1729); 94 Eng. Rep. 112.

93. See GREEN, *supra* note 79, at 152–53.

94. *Id.* at 153 (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 55 (Charles M. Harr ed., Beacon Press 1962) (1765–1769)).

95. See *id.* at 155–56.

96. *Id.* at 156.

97. *Id.* (quoting 1 JAMES WILSON, *THE WORKS OF JAMES WILSON* 123–26 (Robert G. McClosky ed., 1967)).

98. *Id.* (quoting WILSON, *supra* note 97, at 123–26).

and, all its positive enactments, proceeding on these, must receive their just interpretation with a reference to them.”<sup>99</sup> “Hoffman identified the Bible as the first and preeminent foundation of the law: it was ‘the foundation of the common law in every [C]hristian nation. . . . There is much law in it.’”<sup>100</sup> As a result, “[t]he [C]hristian religion is a part of the law of the land,’ Hoffman asserted, and ‘should certainly receive no inconsiderable portion of the lawyer’s attention.’”<sup>101</sup>

The two most notable proponents of a higher law theorem and for the incorporation of Christian principles into American law were New York Chancellor James Kent and United States Supreme Court Justice Joseph Story. “Both Kent and Story had trained on Coke and Blackstone and had a deep affection for the common law,”<sup>102</sup> and their writings were highly influential on generations of American lawyers.<sup>103</sup> In his influential *Commentaries on American Law*, Kent sprinkled higher law concepts liberally throughout its discussions.<sup>104</sup> Kent asserted that positive law could not be separated entirely from “natural jurisprudence . . . from which the science of morality is deduced.”<sup>105</sup> The law of nations, Kent continued, “so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind.”<sup>106</sup> But “the Christian nations” were governed by “a brighter light, [with] more certain truths . . . which Christianity has communicated to the ethical jurisprudence of the ancients, hav[ing] established a law of nations peculiar to themselves.”<sup>107</sup>

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99. *Id.* at 157 (1 DAVID HOFFMAN, A LECTURE, INTRODUCTORY TO A COURSE OF LEGAL STUDY 64–66 (1823)).

100. *Id.* (quoting HOFFMAN, *supra* note 99, at 64–66).

101. *Id.* (quoting HOFFMAN, *supra* note 99, at 64–66).

102. *Id.*

103. See generally Symposium, *The Influence of Story and Kent on the Development of the Common Law*, 17 AM. J. LEGAL HIST. 221 (1973).

104. See GREEN, *supra* note 79, at 157.

105. See *id.* at 157–58 (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 2–3 (Little, Brown & Co. 13th ed. 1884) (1826)).

106. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 4 (O.W. Holmes, Jr. ed., Little, Brown & Co. 12th ed. 1878) (1826).

107. *Id.*; GREEN, *supra* note 79, at 419 n.26 (quoting KENT, *supra* note 106, at 2–4).

Story, a close friend of Kent, also emphasized a higher law source to natural law in several of his speeches and writings.<sup>108</sup> “Story stressed that natural law lay ‘at the foundation of all other laws’” and was a requisite “for understanding of all aspects of jurisprudence, especially constitutional law and the common law.”<sup>109</sup> For Story, natural law had an unmistakable theistic quality:

The obligatory force of the law of nature upon man is derived from its presumed coincidence with the will of the Creator. God has fashioned man according to his own pleasures, and has fixed the laws of his being . . . . He has the supreme right to prescribe the rules, to which man shall regulate his conduct, and the means, by which he shall obtain happiness and avoid misery.<sup>110</sup>

Story asserted that “as [God] is our Lawgiver and Judge, we owe an unreserved obedience to his commands.”<sup>111</sup> This fealty was equally required of public officials: “[a]ll magistrates are responsible to God for the due and honest discharge of their duty.”<sup>112</sup>

Story’s and Kent’s acceptance of a higher basis for the law led them to embrace the maxim that Christian principles were incorporated into the law itself. Story wrote about the maxim more frequently than Kent, though the latter famously put the maxim into practice. In 1829, Story delivered his inaugural address as the Dane Professor of Law at Harvard Law School.<sup>113</sup> Five years earlier, a letter of Thomas Jefferson’s had been publicized where the former president had decried the idea of the law’s incorporation of Christianity as a “judiciary forgery,” based on “a conspiracy . . . between Church and State.”<sup>114</sup> Upon hearing about Jefferson’s

108. GREEN, *supra* note 79, at 158.

109. *Id.* (quoting JOSEPH STORY, *The Value and Importance of Legal Study* (Aug. 25, 1829), in *MISCELLANEOUS WRITINGS OF JOSEPH STORY* 503, 533 (William W. Story ed., 1852)).

110. *Id.* (quoting Joseph Story, *Natural Law*, in 9 *ENCYCLOPEDIA AMERICANA* 150, 150 (Francis Leiber ed., 1836)).

111. *Id.* (quoting Story, *supra* note 110, at 151).

112. *Id.* (quoting Story, *supra* note 110, at 158).

113. STORY, *supra* note 109, at 503.

114. GREEN, *supra* note 79, at 193 (quoting Letter from Thomas Jefferson to John Cartwright (June 5, 1824), in 16 *THE WRITINGS OF THOMAS JEFFERSON* 42,

letter, Story wrote a friend that “[i]t appears to me inconceivable how any man can doubt, that Christianity is part of the Common Law of England.”<sup>115</sup> But Story waited until Jefferson’s death to attack him publicly, which he did in his Harvard lecture:

One of the most beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the common law, from which it seeks to sanction its rights, and by which it endeavors to regulate its doctrines. And notwithstanding the specious objection of one of our distinguished statesmen, the boast is as true as it is beautiful. There has never been a period in which the common law did not recognize Christianity as lying at its foundations.<sup>116</sup>

For Story, this meant that the United States was “a part of the Christian community of nations,” which acquired their authority for their “policy of laws” through their consistency with Christian precepts.<sup>117</sup> Story followed up on his brief retort to Jefferson with a more comprehensive rebuttal in an 1833 article in *The American Jurist* titled *Christianity a Part of the Common Law*.<sup>118</sup> Story refuted Jefferson’s historical analysis (calling it “novel”) with an extensive review of British authority that had affirmed the maxim.<sup>119</sup> He noted several areas of the law—domestic, behavioral, criminal—that drew on Christian values for their meaning.<sup>120</sup> “But

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50–51 (Andrew A. Lipscomb & Albert Allery Bergh eds., 1903)). Jefferson had long held similar sentiments, writing in an earlier essay in the appendix to his *Reports of Cases Determined in the General Court of Virginia* of “judicial forgery” underpinned by an “alliance between church and state in England [which had] made their judges accomplices in the frauds of the clergy.” 1 THOMAS JEFFERSON, *Whether Christianity is Part of the Common Law?* (1764), reprinted in THE WRITINGS OF THOMAS JEFFERSON 360, 360 n.1, 367 (Paul Leicester Ford ed., 1892). Jefferson’s citation of Blackstone’s *Commentaries*, published in 1769, however, makes 1764 too early for the essay’s publication. GREEN, *supra* note 79, at 424 n.65.

115. Letter from Joseph Story to Edward Everett (Sept. 15, 1824), in LIFE AND LETTERS OF JOSEPH STORY, 429, 429–30 (Williams W. Story ed., 1851).

116. STORY, *supra* note 109, at 517.

117. *Id.* at 534–35.

118. See Joseph Story, *Christianity a Part of the Common Law*, 9 AM. JURIST & L. MAG. 346, 346–48 (1833).

119. *Id.*

120. See *id.* at 347.

independently of any weight in any of these authorities,” Story declared, “can any man seriously doubt, that Christianity is recognized as *true*, as a revelation, by the law of England, that is, by the common law?”<sup>121</sup>

Story demonstrated the practical application of the maxim in an 1827 decision while riding circuit as a trial judge. During one trial, the defendant’s counsel moved to exclude the testimony of two witnesses on the ground they were Universalists and did not believe in God or in a future state of punishments and rewards, which rendered them unable to swear an oath.<sup>122</sup> Story agreed, ruling that the witnesses’ lack of religious belief rendered them incompetent to testify.<sup>123</sup> “Persons who do not believe in the existence of God or a future state, or have no religious belief, are not entitled to be sworn as witnesses,” Story wrote, applying the traditional common law rule.<sup>124</sup> Although Story did not elaborate on the basis for his holding, he noted in his Harvard speech that a religious prerequisite for swearing an oath was one example of how the law incorporated Christian principles.<sup>125</sup>

Another case in which the maxim came up was the famous 1844 case of *Vidal v. Girard’s Executor*, involving a two-million-dollar bequest to establish a college in Philadelphia, but only on the condition that the institution be nonsectarian in the sense that no religious tenets be taught.<sup>126</sup> Daniel Webster represented those relatives of the testator who sought to have the gift nullified as “derogatory to the Christian religion.”<sup>127</sup> Before the Supreme Court, Webster argued that the bequest was void because it conflicted with the principle that Christianity was part of the law.<sup>128</sup> Because “Christian religion, its general principles, must ever be regarded among us as the foundation of civil society,”

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121. *Id.* at 348 (emphasis in original).

122. *Wakefield v. Ross*, 28 F. Cas. 1346, 1347 n.2 (Story, Circuit Justice, D.R.I. 1827).

123. *Id.*

124. *Id.*

125. STORY, *supra* note 109, at 517.

126. *Vidal v. Girard’s Executor*, 43 U.S. (2 How.) 127, 130, 133 (1844).

127. DANIEL WEBSTER, *The Christian Ministry and the Religious Instruction of the Young* (Feb. 20, 1844), in *THE SPEECHES AND ORATIONS OF DANIEL WEBSTER* 505, 505, 508 (Edwin P. Whipple ed., 1906).

128. *Id.* at 508–30.

Webster argued, “the preservation of Christianity is one of the great and leading ends of government.”<sup>129</sup> Webster cited to areas of the law such as prohibitions on blasphemy and Sunday labor to demonstrate how the law reinforced Christianity.<sup>130</sup> All of these examples, Webster insisted, “proclaim that Christianity, general, tolerant Christianity . . . is the law of the land.”<sup>131</sup> Webster’s argument was no doubt directed at Justice Story, who told his wife that “the whole discussion ha[d] assumed a semi-theological character.”<sup>132</sup>

Writing the opinion in *Vidal* for the Court, Story upheld the bequest, reading the will’s language narrowly so as to prohibit sectarian instruction only, such that lay teachers could still instruct in “the general principles of Christianity.”<sup>133</sup> Meeting Webster’s argument half-way, Story declared:

[W]e are compelled to admit that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public.<sup>134</sup>

Story did not address Webster’s claims that Christianity served as the foundation for government other than calling the United States a “Christian country;” rather, he simply noted that the justices were satisfied that “there is nothing in the devise establishing a college . . . which [is] inconsistent with the Christian religion.”<sup>135</sup> Although Story read the language of the bequest generously, his opinion suggested that a clearer irreligious bequest might still be struck down as being “inconsistent with the Christian religion.”<sup>136</sup>

In contrast to Story’s subtle affirmation of the Christian nation maxim was an 1811 opinion written by James Kent while he served

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129. *Id.* at 525, 529.

130. *Id.* at 529.

131. *Id.* at 530.

132. Letter from Joseph Story to Sarah Waldo Story (Feb. 7, 1844), in 2 LIFE AND LETTERS OF JOSEPH STORY 467, 468 (William W. Story ed., 1851).

133. *Vidal v. Girard’s Executor*, 43 U.S. 127, 200 (1844).

134. *Id.* at 198.

135. *Id.* at 198, 201.

136. *Id.* at 201.

as Chief Justice of the New York Supreme Court.<sup>137</sup> In *People v. Ruggles* the defendant was convicted of “wickedly, maliciously, and blasphemously” uttering false and scandalous words that “Jesus Christ was a bastard, and his mother must be a whore.”<sup>138</sup> The defendant appealed on the ground that New York did not have a statute criminalizing blasphemy and that his conviction conflicted with the state constitution’s guarantee of freedom of conscience.<sup>139</sup> Brushing aside Ruggles’ sound arguments, Kent upheld the conviction on the ground that Christianity was part of the state’s common law: “Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law.”<sup>140</sup> Kent did more than simply affirm that the law recognized and reinforced certain Christian principles by declaring the nation’s dependence on Christianity. Christian discipline and virtue, “which help to bind society together,” were essential interests of civil government, Kent wrote, and “whatever strikes at the root of [C]hristianity, tends manifestly to the dissolution of civil government.”<sup>141</sup> Here, Kent conflated the ideas of the law’s recognition of Christianity with Christianity serving as a foundational principle for government. Referencing New York, Kent declared that the framers of the state constitution “never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation from all consideration and notice of law.”<sup>142</sup> On the contrary, he noted, the law “assumes that we are a [C]hristian people, and the morality of the country is deeply ingrafted upon Christianity.”<sup>143</sup>

*People v. Ruggles* was a seminal case for the propositions that Christianity served as a foundation of republican government and that the law in turn enforced certain Christian principles. It was cited throughout the remainder of the nineteenth century and

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137. *People v. Ruggles*, 8 Johns. 290, 292–93 (N.Y. 1811).

138. *Id.* (internal quotations omitted).

139. *Id.* at 295–97.

140. *Id.* at 297.

141. *Id.* at 293–94.

142. *Id.* at 296.

143. *Id.* at 295.

served as precedent for other legal areas where judges affirmed the authority of Christianity in the law and civil government.<sup>144</sup>

A. *Blasphemy*

Blasphemy was usually a common law offense, a carry-over from the time of religious establishments when civil courts would enforce crimes against the official church. Without an established church in the United States, judges justified blasphemy prosecutions for the effect on society writ large, insisting that blasphemy tended to “corrupt the morals of the people[ ] and to destroy good order.”<sup>145</sup> Despite that rationale, the offense did not require evidence that anyone was corrupted or that the words actually disturbed the peace or interfered with religious worship; instead, it operated on an assumption of a Christian foundation for morals and public order and of the law’s obligation to protect and promote Christian principles.<sup>146</sup>

No more than a handful of blasphemy prosecutions were reported during the nineteenth century, with the last significant case occurring in 1837.<sup>147</sup> In each case, prosecutors relied on some formulation of the Christian nation maxim.<sup>148</sup>

Three reported appeals of blasphemy convictions are particularly notable for the way the judges employed the Christian nation maxim to uphold the convictions. In one case, the Pennsylvania Supreme Court declared that the defendant’s assertion that “the Holy Scriptures were a mere fable,” made in a private debating society, revealed a “malicious intention” to “vilify the Christian religion” and were punishable.<sup>149</sup> Further, it posited that “[n]o free government now exists in the world, unless where

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144. See Note, *Blasphemy*, 70 COLUM. L. REV. 694, 702–10 (1970).

145. *Id.* at 694.

146. See GREEN, *supra* note 79, at 162–69, 174–78; LEVY, *supra* note 92, 400–23; Note, *supra* note 144, at 694–723.

147. See Note, *supra* note 144, at 696, 702–10. Blasphemy was a minor behavioral offense, so most prosecutions occurred in a municipal or justice of the peace court and were never reported or appealed. See LEVY, *supra* note 92, at 400–01. It is impossible to know the true number of cases. *Id.*

148. See Note, *supra* note 144, at 702–10.

149. *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 398–99 (Pa. 1824).

Christianity is acknowledged, and is the religion of the country.”<sup>150</sup> Christianity was “the only stable support of all human laws.”<sup>151</sup> Similar ill-affection toward Christianity was present in the other two cases: the blasphemous statements represented a “malicious and wanton attack on the [C]hristian religion”<sup>152</sup> and a desire “to destroy the veneration due to [God].”<sup>153</sup> In all instances, there was no evidence that the defendants’ utterances had disturbed the peace; they had simply struck at Christianity, which was “the preserver of the peace and good order of society.”<sup>154</sup> The role that Christianity played was not simply persuasive but was “said to be the foundation of all human laws,” declared the Delaware Supreme Court; “without this religion no nation has ever yet continued free.”<sup>155</sup> Blasphemy prosecutions declined in mid-century, evolving into civil offenses such as profane swearing and disorderly conduct, which required evidence of an actual public disturbance.<sup>156</sup> During their reign, however, blasphemy decisions represented one of the clearer applications of the Christian nation maxim in American law.

#### B. *Sunday Laws*

The idea that Christianity served as a foundation for the law and government found application in other areas of the law including Sunday law enforcement, oath requirements, probate law, and domestic law.<sup>157</sup> At times, reliance on the maxim was subtle without an express affirmation of the principle; in other instances, the presence of the maxim was more pronounced. Because of the historical connection between Christianity and Sunday observance, enforcement of laws prohibiting work, transportation, and entertainment on Sundays was a prime vehicle

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150. *Id.* at 406.

151. *Id.* at 407.

152. *State v. Chandler*, 2 Del. (2 Harr.) 553, 555 (Gen. Sess. 1837).

153. *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 220 (1838). For a detailed account of *Kneeland*, see *The Trial of Abner Kneeland*, in 13 *AMERICAN STATE TRIALS* 450–575 (John D. Lawson, ed., 1921).

154. *Chandler*, 2 Del. at 563.

155. *Chandler*, 2 Del. at 557–58, 560.

156. See Green, *supra* note 79, at 239.

157. See generally Stuart Banner, *When Christianity Was Part of the Common Law*, 16 *L. & HIST. REV.* 27 (1998).

for affirming the nation's Christian character. For at least the first half of the nineteenth century, judges readily acknowledged the religious functions of Sunday laws, chiefly to promote public piety and to demonstrate a collective societal respect for the Lord's Day. As the Alabama Supreme Court wrote almost casually in 1843, "[w]e do not think the design of the legislature in the passage of the act can be doubted. It was evidently to promote and advance the interest of religion, by prohibiting all persons from engaging in their common and ordinary avocations of business, or employment, on Sunday."<sup>158</sup> Enforcement of Sunday or "Sabbath" laws varied widely, but when enforced, their sanctions came down particularly hard on religious minorities—Jews, Seventh Day Baptists, and Seventh-day Adventists—often in the form of hefty fines and imprisonment.<sup>159</sup> As with blasphemy, prosecutors initially faced no obligation to show that the Sabbath violation disturbed other's religious worship or caused a public annoyance; rather, actions deemed inconsistent with the Sabbath were considered "*constructively* a breach of the peace" because of their affront to the Lord's Day and their tendency to create a bad example.<sup>160</sup>

By acknowledging the religious function of Sunday laws, judges implicitly affirmed the relationship between the law and Christianity; in several cases, however, judges candidly acknowledged that connection. In an 1834 case, the Maryland Court of Appeals declared that "[t]he Sabbath is emphatically *the day of rest*, and the day of rest here is the 'Lord's day' or [C]hristian's Sunday."<sup>161</sup> Maryland was "a [C]hristian community, and a day set apart as the day of rest, is the day consecrated by the resurrection of our Saviour."<sup>162</sup> "Sunday or the Sabbath is properly and emphatically called the Lord's day," concurred the Arkansas Supreme Court in 1850, "and is one amongst the first and most sacred institutions of the [C]hristian religion. This system of religion is recognized as constituting part and parcel of the common

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158. O'Donnell v. Sweeney, 5 Ala. 467, 469 (1843).

159. See KYLE G. VOLK, MORAL MINORITIES AND THE MAKING OF AMERICAN DEMOCRACY 37–68 (2014).

160. Pearce v. Atwood, 13 Mass. 324, 347 (1816) (emphasis in original).

161. Kilgour v. Miles, 6 Gill & Johns. 268, 274 (Md. 1834) (emphasis in original).

162. *Id.*

law, and as such all of the institutions growing out of it . . . .”<sup>163</sup> And a New York trial court asserted in 1861 that the “stability of government, [and] the welfare of the subject and interests of society” required “that the day of rest observed by the people of the nation should be uniform, and that its observance should be to some extent compulsory.”<sup>164</sup> Not only were Sabbath laws proof of the law’s relationship to Christianity, the religion they protected constituted the linchpin that held together republican society.

One notable Sunday law decision was the 1846 case of *City Council of Charleston v. Benjamin*.<sup>165</sup> The defendant, a Jewish merchant, was fined forty dollars for opening his store on Sunday, and he requested a bench trial.<sup>166</sup> Benjamin received a surprising decision from the judge who dismissed the fine, writing that the law could not stand in “a community where there is complete severance between Church and State, and where entire freedom of religious faith and worship is guaranteed to all its citizens alike.”<sup>167</sup> The prosecutor appealed that holding, arguing that “[C]hristianity is a part of the common law” and that it served as “the foundation of those morals and manners upon which our society is formed.”<sup>168</sup> The appeal presented the South Carolina Supreme Court with a clear choice between two competing values: church-state separation or America’s Christian nationhood. Not surprisingly, the high court chose the latter principle.<sup>169</sup> The court initially affirmed the religious basis for Sunday laws, stating that they properly reminded people of “the Resurrection” and “the first visible triumph over death, hell, and the grave!”<sup>170</sup> Indulging majoritarian tendencies, the court emphasized, “[o]n *that* day we rest, and *to us* it is the Sabbath of the Lord—its decent observance, in a Christian-community, is *that* which ought to be expected.”<sup>171</sup> Sunday

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163. *Shover v. State*, 10 Ark. 259, 263 (1850).

164. *Lindenmuller v. People*, 33 Barb. 548, 568 (N.Y. 1861).

165. *City Council of Charleston v. Benjamin*, 33 S.C.L. (2 Strob.) 508, 509 (1848).

166. *Id.*

167. *Id.* at 511.

168. *Id.* at 520.

169. *Id.*

170. *Id.* at 521.

171. *Id.*

observance was not just a moral obligation; its legal enforcement was justified because “the Christian religious is part of the common law of South Carolina!”<sup>172</sup> The court declared that Christianity’s influences extended beyond the law into “the foundation of even the Article of the Constitution under consideration.”<sup>173</sup> In fact, the court continued, “[i]t was Christianity robed in light, and descending as the dove upon our ancestors,” that inspired them to create a government based on liberty.<sup>174</sup> Courts would continue to affirm a religious basis for Sunday laws throughout the remainder of the century, although those rationales were gradually replaced with justifications based on health and public welfare rationales.<sup>175</sup>

### C. Oaths

The Christian nation maxim also impacted judicial determinations of the necessity and substance of oath requirements for participating in legal proceedings. The traditional common law rule was that for a witness, juror, or declarant to be competent to testify or undertake a legal obligation, he had to assert a belief not only in God but also in the accountability of his soul after death for swearing falsely.<sup>176</sup> When rigorously enforced, this rule excluded Jews, Universalists, skeptics, and sometimes Catholics from undertaking important legal functions.<sup>177</sup> Early antebellum judges regularly affirmed the connection between the oath requirement

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172. *Id.*

173. *Id.*

174. *Id.* at 522.

175. The transition to secular justifications for Sunday laws began in mid-century. In 1849, the Ohio Supreme Court upheld that state’s Sabbath law, prohibiting acts deemed contrary to the “common and religious observance of the day,” but only over a vigorous dissent. *Sellers v. Dugan*, 18 Ohio 489, 490 (1849). Four years later the majority of the Ohio Supreme Court changed course, insisting that Sunday was merely a civil day of rest from labor. *Bloom v. Richards*, 2 Ohio St. 388, 390 (1853). The court expressly disavowed that Christianity formed a part of the law in Ohio: “it follows that neither [C]hristianity, nor any other system of religion, is part of the law of the state.” *Id.* The court averred, “[w]e have no union of church and state, nor has our government ever been vested with authority to enforce any religious observance, simply because it is religious.” *Id.* at 387. See GREEN, *supra* note 79, at 231–47.

176. D. X. JUNKIN, *THE OATH: A DIVINE ORDINANCE, AND AN ELEMENT OF THE SOCIAL CONSTITUTION* 1 (1845).

177. *Id.* at 72, 186–87.

and the law's Christian basis, often extending that connection to reinforce notions of the nation's religious foundations.<sup>178</sup> In the 1820 case of *Jackson v. Gridley*, the New York Supreme Court held that a Universalist could not be sworn as a witness because he lacked an orthodox belief in God and in a future state of punishments and rewards.<sup>179</sup> Repeating the traditional rule, the court held that testimony was not competent or admissible, "unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to punishment in the life to come."<sup>180</sup> In the court's mind, the rule did more than merely ensure the trustworthiness of oral testimony.<sup>181</sup> The oath, with its appeal to God, sanctified the legal process: "[o]n this great principle rest all our institutions, and especially the distribution of justice between man and man."<sup>182</sup> To abolish the oath's religious requirements, wrote another judge, would undermine the entire judicial system because there would be no "tie upon his conscience, and of course, that sanction which the law requires."<sup>183</sup> Arguments that the oath requirement violated principles of religious freedom and equality failed because "Christianity is a part of the common law of the land."<sup>184</sup> The oath, therefore, continually reaffirmed the religious foundations of the law and of God's ultimate authority over matters of truth.<sup>185</sup>

Religious justifications for behavioral laws dropped off as the nineteenth century progressed. This was due to a growing religious diversity, expanding notions of religious toleration, and the

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178. *Id.* at 219.

179. *Jackson v. Gridley*, 18 Johns. 98, 103 (N.Y. 1820).

180. *Id.* at 106.

181. *Id.*

182. *Id.*

183. *Atwood v. Welton*, 7 Conn. 66, 73–74 (1828).

184. *Id.* at 76.

185. As with the transition that occurred with Sunday law justifications, as the nineteenth century progressed, judges slowly liberalized the oath requirements, first removing the necessity of affirming a belief in a future state of rewards and punishments, and then transitioning to allowing declarants to swear to a religious obligation to tell the truth. See GREEN, *supra* note 79, at 214–18.

professionalization of the legal profession.<sup>186</sup> As the law was called on to respond and adapt to new developments, such as industrialization and corporations, an emphasis on the moral quality of the law gave way to more practicable virtues of adaptability and predictability.<sup>187</sup> Statutes, with their set remedies, came to replace the common law with its moral quality. Over time, the institution of the law became amoral.<sup>188</sup>

D. *Treatise Writers*

This evolving “secularization” of the law did not forestall popular claims about the religious foundations for law and government; in fact, fears about the secularization of society may have fueled such claims in reaction to this perceived shift. During the second half of the nineteenth century, a new generation of writers picked up on the narrative promoted by Robert Baird and Benjamin Morris.<sup>189</sup> Some of the Christian nation claims were pronounced, while others were more subtle. Writing near the end of the century, Presbyterian minister, Isaac A. Cornelison, responded to the perceived secularizing trend in the culture and to efforts “towards a still further restriction of the religious function of civil government.”<sup>190</sup> It was a “well-established fact,” Cornelison wrote, that “the civil institutions of this country are necessarily, rightfully, and lawfully Christian.”<sup>191</sup> This was demonstrated by the religious inclinations of the Founders and their efforts to incorporate Christian principles into the operations of government.<sup>192</sup> Thus, the trend, “which requires the removal of every vestige of Christian basis, motive, and purpose from its laws, is unwarranted.”<sup>193</sup> Cornelison called for renewed enforcement of Sunday laws and even a revival of blasphemy prosecutions: “[t]he

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186. *Id.* at 214, 216.

187. *Id.* at 207 (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 1, 4 (1977)).

188. *Id.*

189. *Id.* at 102–03.

190. ISAAC C. CORNELISON, *THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA 175–76* (1895).

191. *Id.* at 164.

192. *Id.* at 372.

193. *Id.* at 308–09.

government possesses a positively religious character; it is Christian,” Cornelison asserted, “and to modify its regulation of a Christian observance in accommodation to the views of the irreligious or the anti-Christian” would invite anarchy.<sup>194</sup> Sounding an ominous warning, Cornelison insisted that “[i]f the government is Christian, the anti-Christian must be regarded as in that respect an enemy” of the nation.<sup>195</sup>

Taking a less threatening tone were treatises by church historians Philip Schaff and Sanford H. Cobb. Building on the hagiographic accounts of the founding period, Schaff asserted that “the framers of the Constitution were, without exception, believers in God and in future rewards and punishments . . . . All recognized the hand of Divine Providence in leading them through the war of independence.”<sup>196</sup> As a result, Schaff remarked, the Constitution “is Christian in substance, though not in form. It is pervaded by the spirit of justice and humanity, which are Christian. The First Amendment could not have originated in any pagan or Mohammedan country, but presupposes Christian civilization and culture.”<sup>197</sup> Sanford Cobb agreed with Schaff’s account, insisting the argument that “the American constitutions are unchristian. . . . is specious, appealing only to a superficial religious sentiment.”<sup>198</sup> Documenting the various religious affirmations contained in state constitutions, official proclamations, and behavioral laws, Cobb concluded that from “the constant resort in legislation and judicature to religious and Christian principles—we may safely declare that, if the American people be not a Christian nation, there is none upon the earth.”<sup>199</sup>

Legal treatise writers during the latter-half of the nineteenth century were generally more restrained, though many repeated modified claims that the law incorporated Christian principles. This was due in no small part to the long shadow cast by Joseph Story’s writings, which later legal writers continued to cite as

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194. *Id.* at 373–74.

195. *Id.* at 374.

196. PHILIP SCHAFF, *CHURCH AND STATE IN THE UNITED STATES* 41 (New York, G.P. Putnam’s Sons, 1888).

197. *Id.* at 40.

198. SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 524 (New York, Cooper Square Pub., 1902).

199. *Id.* at 525.

authority. As a result, in his influential *Constitutional Limitations*, Thomas Cooley wrote that “[i]t is frequently said that Christianity is a part of the law of the land. In a certain sense and for certain purposes this is true.”<sup>200</sup> Yet, he did not relate how laws concerning “family and social relations” and public behavior relied on Christian precepts.<sup>201</sup> Cooley also asserted that there was nothing in the Constitution that prohibited official acknowledgements of God or officials from “recognizing a superintending Providence” behind the nation’s founding: “the notorious fact [was] that the prevailing religion in the States is Christian.”<sup>202</sup> Henry Campbell Black’s *Handbook of American Constitutional Law* offered a similarly measured account of the maxim.<sup>203</sup> Citing to Story, Black wrote that the “statement that Christianity is part of the law of the land must be taken in a qualified and limited sense.”<sup>204</sup> But whatever those limitations, Black maintained that “many of our best civil and social institutions, and the most important to be preserved in a free and civilized state, are founded upon the Christian religion.”<sup>205</sup> As a result, Black felt comfortable asserting that “the whole purpose and policy of the law assume[s] that we are a nation of Christians, and while toleration is the principle in religious matters, the laws are to recognize the existence of that system of faith, and our institutions are to be based on that assumption.”<sup>206</sup>

Despite promoting a moderate form of the maxim, the law writers’ endorsement of the Christian foundations for law and government had the effect of validating the concept for later generations while fostering the idea of Christian privilege within the law with non-Christians merely being tolerated. More important, both the legal and popular religious authors asserted that there was no inconsistency between the Christian nation maxim and the Constitution’s provisions regarding religious free

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200. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 670 (7th ed. 1903).

201. *Id.*

202. *Id.* at 669.

203. HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 390 (1895).

204. *Id.* (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1877, 1879 (1833)).

205. *Id.*

206. *Id.* at 391.

exercise, non-establishment, and no religious tests. In reconciling these seemingly contradictory principles, these authors effectively made the latter subject to the former and limited the scope and understanding of non-establishment and religious equality.

E. *The “Christian Nation” Decision*

One final nineteenth-century acknowledgement of America’s Christian nationhood is worth noting, if for no other reason than it came from the United States Supreme Court. In 1892, the Supreme Court heard a case brought by a prominent New York City Episcopal church after it was fined for hiring a foreign minister in violation of an immigration law.<sup>207</sup> *Holy Trinity Church v. United States* called upon the justices to rule whether the anti-foreign recruitment provision of the immigration law applied to entities such as churches.<sup>208</sup> Writing for a unanimous Court, Justice David J. Brewer held that Congress had not intended the hiring restriction to apply to “ministers of the gospel or, indeed any class whose toil is of the brain.”<sup>209</sup> Instead, wrote Brewer, Congress meant the statute to apply “only to the work of the manual laborer, as distinguished from that of the professional man.”<sup>210</sup> Rather than ending his opinion there, Brewer offered a second reason for reversing the fine.<sup>211</sup> According to Brewer, America was a “Christian nation” that had been founded by religious people who had formed a government based on religious principles.<sup>212</sup> The nation’s laws and charters recognized the importance of Christianity and accommodated its practice.<sup>213</sup> As support for his statement that America was a Christian nation Brewer quoted extensively from colonial charters and early state constitutions that acknowledged God’s authority over human action or that favored Christianity.<sup>214</sup> Brewer also referred to several state cases where

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207. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458 (1892).

208. *Id.*; see Steven K. Green, *Justice David Josiah Brewer and the “Christian Nation” Maxim*, 63 ALB. L. REV. 427, 444–45 (1999).

209. *Holy Trinity*, 143 U.S. at 463.

210. *Id.*

211. *See id.* at 465–66.

212. *Id.* at 470–71.

213. *Id.* at 465–67.

214. *Id.*

judges had declared Christianity to be part of the common law.<sup>215</sup> Finally, he noted the prevalence of Christian institutions and of how Christianity informed various customs.<sup>216</sup> For Brewer, all of this evidence led to one conclusion:

These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that *this is a Christian nation*. In the face of all these, shall it be believed that a congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?<sup>217</sup>

The Court's "Christian Nation" decision, as it became known, did not go unnoticed. Religious conservatives cited to it as authority in attempts to prevent the Chicago Columbian Exposition from opening on Sundays, and the opinion fueled a drive for a proposed constitutional amendment to insert an acknowledgement of God in the Preamble.<sup>218</sup> Brewer, a moderate evangelical, was proud of his opinion, and for the next eighteen years of his life he spoke and wrote about the subject with enthusiasm.<sup>219</sup> Through two works in particular, *American Citizenship* (1902) and *The United States A Christian Nation* (1905), both of which were based on a series of college lectures, Brewer elaborated on the themes raised in *Holy Trinity*:<sup>220</sup> "[C]hristianity has entered into and become part of the life of this republic," Brewer maintained, such that "the principles of [C]hristianity [serve as] the foundations of our social and political life."<sup>221</sup> Brewer understood the meaning of the maxim in several ways. The first was historical, that many American colonies were founded by devoutly religious people who sought to establish communities based on Christian principles.<sup>222</sup> America's

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215. *Id.* at 470.

216. *Id.* at 471.

217. *Id.* (emphasis added).

218. Green, *supra* note 208, at 463–66.

219. *See id.* at 448–50.

220. *See generally* DAVID J. BREWER, *THE UNITED STATES A CHRISTIAN NATION* (1905) [hereinafter *A CHRISTIAN NATION*]; DAVID J. BREWER, *AMERICAN CITIZENSHIP* (1902) [hereinafter *AMERICAN CITIZENSHIP*].

221. *AMERICAN CITIZENSHIP*, *supra* note 220, at 20.

222. Green, *supra* note 208, at 448–49.

“beginnings were in a marked and marvelous degree identified with Christianity.”<sup>223</sup> Brewer also believed America was Christian in a cultural-demographic sense and that Christian traditions and beliefs influenced daily customs and practices.<sup>224</sup> In addition, he posited that America’s Christian culture represented the highest form of civilization.<sup>225</sup> Like many of his contemporaries, Brewer’s assertion went hand-in-hand with a belief in the superiority of Anglo-American culture. “The most thoroughly Christian nation is the most civilized,” he claimed.<sup>226</sup> Finally, Brewer believed that Christian values informed the law and the nation’s public institutions: “I could show how largely our laws and customs are based upon the laws of Moses and the teachings of Christ,” he wrote.<sup>227</sup> Yet, Brewer saw that proposition as having limited application: “I do not mean that as a nation we should have a state religion, or that by secular means we support any form of Christianity.”<sup>228</sup> Brewer strongly believed that two attributes of a Christian nation were a respect for religious liberty and the existence of separation of church and state.<sup>229</sup> Religious liberty—the right to believe and practice the religion of one’s choice—was at the heart of the freedoms epitomized by a Christian nation: “[E]ach [person] stands alone with his conscience,” Brewer maintained.<sup>230</sup> He continued, “[n]o one is in duty bound as a citizen to attend a particular church service, or indeed any church service. The freedom of conscience, the liberty of the individual, gives to every individual the right to stay away.”<sup>231</sup> Brewer also understood the maxim to be consistent with church-state separation:

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223. *A CHRISTIAN NATION*, *supra* note 220, at 13; *see AMERICAN CITIZENSHIP*, *supra* note 220, at 21–22.

224. Green, *supra* note 208, at 450.

225. *See A CHRISTIAN NATION*, *supra* note 220, at 65.

226. *See id.*; Green, *supra* note 208, at 452.

227. *See A CHRISTIAN NATION*, *supra* note 220, at 39.

228. Green, *supra* note 208, at 448–49 (quoting David J. Brewer, *A Plea for the Bible*, *RAM’S HORN*, Sept. 10, 1904, at 27).

229. *Id.* at 458.

230. *AMERICAN CITIZENSHIP*, *supra* note 220, at 22; Green, *supra* note 208, at 458.

231. *A CHRISTIAN NATION*, *supra* note 220, at 54; Green, *supra* note 208, at 448.

We have no state church, and the settled rule in this country is of entire separation between state and church, and yet that separation is not so complete that the state is indifferent to the welfare and prosperity of the church. This is a Christian commonwealth. We believe that the best interests of both are promoted by enforcing entire separation between the state and the church . . . .<sup>232</sup>

Brewer thus offered a nuanced understanding of what it meant to say that America was a Christian nation. In no place did he suggest the maxim should be used to enforce Christian mores on unwilling people or to marginalize religious minorities. Unfortunately, most commentators at the time and since have not explored Brewer's detailed meaning.<sup>233</sup> For religious conservatives in particular, the *Holy Trinity* opinion was confirmation from no less an authority than the Supreme Court that America was and remained a Christian nation;<sup>234</sup> the American Sabbath Union effused that "this important decision rests upon the fundamental principle that religion is imbedded in the organic structure of the American government" and "establishes clearly the fact that our Government is Christian."<sup>235</sup> As a legal holding, Brewer's statements in *Holy Trinity* have not withstood the test of time, with later justices calling the decision an "aberration"<sup>236</sup> and his declaration "arrogant[ ]" and a "long step backward."<sup>237</sup> Yet, his Christian nation declaration has lived on in popular religious literature, adding authority to claims of America's Christian

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232. *Comm'rs of Wyandotte Cty. v. First Presbyterian Church of Wyandotte*, 1 P. 109, 112 (Kan. 1883).

233. Green, *supra* note 208, at 430.

234. *Id.* at 462–68; *see also* CORNELISON, *supra* note 190, at 144–47 (noting the Court's affirmation of Christianity as part of the public life and customs of the United States).

235. Green, *supra* note 208, at 463, 463 n.268 (quoting THE PEARL OF DAYS, May 7, 1892 *reprinted in* WILLIAM ADDISON BLAKELY, AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION, at 508 n.1 (William Allen Colcord ed., Da Capo Press rev. and enlarged ed. 1970) (1891)).

236. *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

237. *Lynch v. Donnelly*, 465 U.S. 668, 717–18 (1984) (Brennan, J., dissenting).

nationhood. Modern Christian nation proponents quote it regularly.<sup>238</sup>

### III. MODERN APPLICATIONS

By the early twentieth century, the maxim that America was a Christian nation had lost most of its resiliency. Several factors contributed to this change. Within legal philosophy, the popularity of natural law had declined, supplanted by amoral schools of legal positivism and legal realism.<sup>239</sup> Law was based on human will, and nothing more.<sup>240</sup> Culturally, American Protestantism splintered into followers of the Social Gospel, Modernism, mainstream Evangelicalism, and Fundamentalism,<sup>241</sup> with the first two factions questioning claims of the nation's "chosen" status and of a special relationship between Christianity and democratic government.<sup>242</sup> In contrast, Fundamentalism, with its pessimistic pre-millennial eschatology, saw itself at odds with what it perceived to be a sinful culture that was nonredeemable.<sup>243</sup> The horrors of World War I also destroyed the earlier Protestant sense of an optimistic Christian America exceptionalism.<sup>244</sup> Finally, the early 1900s witnessed the rise of the ecumenical interfaith movement that promoted religious pluralism and a national identity in terms of a broadly conceived Judeo-Christian culture.<sup>245</sup> All of these

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238. See, e.g., MYTH OF SEPARATION, *supra* note 27, at 83; DEMAR, *supra* note 16, at 11–13.

239. See generally Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005) (examining the strengths and weaknesses of legal realist theory and noting its rejection of the connection between law and morality present in natural law theory); Charles J. Reid, Jr., *The Three Antinomies of Modern Legal Positivism and Their Resolution in Christian Legal Thought*, 18 REGENT U. L. REV. 53 (2005) (discussing the history and philosophy of legal positivism and natural law, as expressed by Catholic leaders, and examining the tensions between the two).

240. See Green, *supra* note 239, at 1927–36.

241. See ROBERT T. HANDY, UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA 1880–1920 126–36, 139–52 (2016).

242. See *id.* at 98–112.

243. See MATTHEW AVERY SUTTON, AMERICAN APOCALYPSE: A HISTORY OF MODERN EVANGELICALISM 79–113 (2014).

244. See HANDY, *supra* note 241, at 186.

245. See *id.* at 178–82, 187–89; see also K. HEALAN GASTON, IMAGINING JUDEO-CHRISTIAN AMERICA: RELIGION, SECULARISM, AND THE REDEFINITION OF

occurrences were at odds with claims of America's Christian nationhood, which lost favor within polite society.

Exceptions existed. Woodrow Wilson, likely the most religiously devout president until Jimmy Carter, famously declared that "America was born a Christian nation. America was born to exemplify that devotion to the elements of righteousness which are derived from the revelations of Holy Scripture."<sup>246</sup> Similarly, a noticeable strain of Christian nationalism appeared with the rise of post-war nationalism, "100 percent Americanism," and the resurgence of the Ku Klux Klan in the 1920s.<sup>247</sup> But, generally, the maxim was not promoted to the same degree as it had been in the nineteenth century and all but disappeared in legal treatises and political histories, the latter field, now dominated by members of the "Progressive" school of history which emphasized the nation's social and economic inequalities, not America's exceptionalism.<sup>248</sup>

This may suggest that aside from the resurgence of Christian nationalism in popular literature in the late-twentieth century, the Christian nation maxim is dead as a legal concept. Certainly, the Supreme Court's initial church-state decisions were hostile to claims of a religious basis for government or law. Both *Everson v. Board of Education* (1947) and *McCullum v. Board of Education* (1948), with their embrace of a strict-separationist approach to church-state relations, presumed the secular nature of the law and government.<sup>249</sup> "The Constitution requires, not comprehensive identification of state with religion, but complete separation," wrote Justice Wiley Rutledge.<sup>250</sup> In fact, a main criticism of the Court's

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DEMOCRACY 1–18 (2019) (summarizing themes of Judeo-Christian America from the First World War to the present).

246. RICHARD V. PIERARD & ROBERT D. LINDER, *CIVIL RELIGION AND THE PRESIDENCY* 153 (1988).

247. See WALTER A. MCDUGAL, *THE TRAGEDY OF U.S. FOREIGN POLICY: HOW AMERICA'S CIVIL RELIGION BETRAYED THE NATIONAL INTEREST* 175–77 (2019).

248. See GASTON, *supra* note 245, at 46–59; see generally CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

249. *Illinois ex rel. McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948) (invoking Jefferson's "wall" between church and state (quoting *Everson v. Bd. of Ed.*, 330 U.S. 1, 16 (1947))); *Everson*, 330 U.S. at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

250. *Everson*, 330 U.S. at 60 (Rutledge, J., dissenting); see also *McCullum*, 333 U.S. at 217 (Frankfurter, J., concurring) (maintaining that a secular public school was "a symbol of our secular unity").

decisions was that it had unnecessarily endorsed a legal and cultural regime of secularism in conflict with the nation's religious traditions.<sup>251</sup> That ongoing critique, combined with the rise of Cold War anti-Communism and a spiritual reawakening in the 1950s, led the justices to backtrack in their rhetoric in *Zorach v. Clauson* (1952).<sup>252</sup> There, a six-justice majority again reaffirmed the value of church-state separation—“[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated”—while asserting that “[w]e are a religious people whose institutions presuppose a Supreme Being.”<sup>253</sup> Even though the latter statement sounded reminiscent of Christian nation rhetoric, it was consistent with the popular religious rhetoric of the time, epitomized by President Dwight Eisenhower's iconic statement: “our form of government has no sense unless it is founded in a deeply-felt religious faith, and I don't care what it is.”<sup>254</sup>

Likewise, the movements behind the eventual insertion of “one nation under God” in the Pledge of Allegiance, the adoption of “In God we Trust” as the national motto, and its placement on U.S. currency reflected a widespread desire to equate a sense of religiosity with the “American Way of Life,” in contrast to godless Communism.<sup>255</sup> While both successful drives suggested a vague sense of Christian nationalism, most scholars and church-state advocates at the time perceived both affirmations to be innocuous—“so conventional and uncontroversial as to be constitutional,” wrote one legal scholar—and chiefly reflective of a national civil

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251. See DANIEL MCCOLLUM, *THE LORD WAS NOT ON TRIAL: THE INSIDE STORY OF THE SUPREME COURT'S PRECEDENT-SETTING MCCOLLUM RULING* 193–208 (2008).

252. James E. Zucker, *Better a Catholic Than a Communist: Reexamining McCollum v. Board of Education and Zorach v. Clauson*, 93 VA. L. REV. 2069, 2104–18 (2007).

253. *Zorach v. Clauson*, 343 U.S. 306, 312–14 (1952).

254. KEVIN KRUSE, *ONE NATION UNDER GOD* 67–68 (2015); see generally ROBERT S. ELLWOOD, *THE FIFTIES SPIRITUAL MARKETPLACE: AMERICAN RELIGION IN A DECADE OF CONFLICT* (1997); MARK SILK, *SPIRITUAL POLITICS: RELIGION AND AMERICA SINCE WORLD WAR II* (1989).

255. KRUSE, *supra* note 254, at 100–25. In fact, the chief group behind the Pledge of Allegiance addition was the Knights of Columbus, a Catholic fraternal organization, not evangelical Protestants. *Id.* at 100–10.

religion.<sup>256</sup> In contrast, around the same time Congress rejected a proposal to adopt an amendment to the Constitution that would have declared that “[t]his Nation devoutly recognizes the authority and law of Jesus Christ, Savior and Rule of nations through whom are bestowed the blessings of Almighty God.”<sup>257</sup> Ceremonial acknowledgments of God were acceptable, but not an amendment to make the Constitution officially “Christian.”<sup>258</sup>

Over the next two decades, the Supreme Court continued to affirm the secular nature of the nation’s character, laws, and institutions, though at times maintaining that the paradigm of pluralism more accurately reflected the correct understanding of church-state relations. In 1961, the Court upheld the constitutionality of Sunday closing laws, turning back challenges based on both the Free Exercise and the Establishment Clause.<sup>259</sup> Chief Justice Earl Warren went through legal gymnastics to demonstrate that the laws were secular health-welfare regulations, despite their admittedly religious origins.<sup>260</sup> “In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, . . . presently they bear no relationship to establishment of religion as those words are used in the Constitution,” Warren concluded.<sup>261</sup> In a another church-state case that term the Court struck down a state requirement that public office-holders affirm a belief in God.<sup>262</sup> Like Sabbath laws, religious oaths were a relic of colonial times that presupposed an interdependence between religion and government.<sup>263</sup> Rejecting that pattern, Justice Hugo Black reaffirmed that the correct arrangement was one of church-state separation as announced in *Everson* and *McCullum*.<sup>264</sup>

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256. *See id.* at 98–100; *see also* FEA, *supra* note 16, at 50–51.

257. KRUSE, *supra* note 254, at 95–100.

258. *See id.*

259. *McGowan v. Maryland*, 366 U.S. 420, 428, 453 (1961).

260. *See id.* at 444–45.

261. *See id.* at 444.

262. *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961). For the other church-state decisions during that term, *see Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961).

263. *See Torcaso*, 367 U.S. at 490.

264. *Id.* at 492–96.

Then, in 1962 and 1963, the high Court handed down two of its more controversial and consequential church-state holdings ever, *Engel v. Vitale* and *School District of Abington Township v. Schempp*, striking down prayer and Bible reading in the nation's public schools.<sup>265</sup> Despite consciously employing moderating rhetoric to counter claims that the decisions reflected an anti-religious animus, both decisions put the justices squarely behind the proposition that public schools, like other public institutions, were to be secular: "a secular program of education."<sup>266</sup> The Court acknowledged the nation's religious heritage—it was "true that religion has been closely identified with our history and government"—but noted that "this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."<sup>267</sup> The idea that America was a Christian nation that promoted Christian principles through laws and policy was inconsistent with the Court's holdings.

In *Engel* and *Schempp*, the Court had affirmed that the government's stance toward religion should be one of "neutrality," rather than using the word "secularity."<sup>268</sup> That conscious use of terminology supported the idea of religious pluralism as an alternative paradigm to secularism. So, in *Walz v. Tax Commission*, the Court upheld the longstanding practice of states providing property tax exemptions for houses of worship.<sup>269</sup> Writing for the majority, Chief Justice Warren Burger stated that the proper stance of the government toward religion should be one of "benevolent neutrality" so as to "permit religious exercise to exist without sponsorship and without interference."<sup>270</sup> The implication was that the government should not impose a regime of secularism,

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265. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963); *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

266. See *Schempp*, 374 U.S. at 225 ("We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' We do not agree, however, that this decision in any sense has that effect."); *Engel*, 370 U.S. at 433–35.

267. *Schempp* 374 U.S. at 212, 216.

268. *Id.* at 226 ("In the relationship between man and religion, the State is firmly committed to a position of neutrality.")

269. *Walz v. Tax Commission*, 397 U.S. 664, 677–80 (1970).

270. *Id.* at 669.

but one of neutrality toward religion that fostered religious pluralism, a point Justice William Brennan made clearer by asserting that the government “grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society.”<sup>271</sup> But this idea that the government could promote religious pluralism, even though a step beyond maintaining a stance of secularism, was still quite modest, with Burger noting that this authority was permissive, not mandated on the government, and that the Constitution simply allowed for a “play in the joints” between the free exercise and establishment clauses.<sup>272</sup> This was a far cry from imposing a mandate upon the government to accommodate religion because of America’s heritage as a Christian nation.

#### IV. THE REEMERGENCE OF THE MAXIM

The perspective that the Constitution established a regime of either secularity or religious neutrality continued into the early 1980s, with the Court highlighting the need for government to maintain a secular stance in cases involving religion in public schools and public funding of religious schools<sup>273</sup> and a neutral stance—permitting an accommodation to advance religious pluralism—in cases involving religious conduct.<sup>274</sup>

That approach began to unravel, gradually, beginning in the 1980s. Several factors external to the Court helped to initiate this shift. The first was the rise of the Religious Right, a movement of conservative Protestants who reacted to a cultural secularization brought on by the social revolution of the 1960s, the secularization of the academy, the school prayer decisions, *Roe v. Wade*, and the government’s revocation of tax exemptions for Christian segregationist educational institutions.<sup>275</sup> Religious Right leaders

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271. *Id.* at 689 (Brennan, J., concurring).

272. *Id.* at 669 (majority opinion).

273. *See* *Stone v. Graham*, 449 U.S. 39, 40–43 (1980); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 773 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 619–20, 625 (1971).

274. *See* *Widmar v. Vincent*, 454 U.S. 263, 276–77 (1981); *McDaniel v. Paty*, 435 U.S. 618, 628–29 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 214, 236 (1972).

275. FEA, *supra* note 16, at 54–55; MATTHEW C. MOEN, *THE TRANSFORMATION OF THE CHRISTIAN RIGHT* 15–43 (1992); KENNETH D. WALD & ALLISON CALHOUN-BROWN, *RELIGION AND POLITICS IN THE UNITED STATES*, 191–

disagreed among themselves whether the nation's government and institutions had been founded on Christian principles but had drifted from those moorings, or whether the nation's Founders had wrongfully abjured those principles in establishing the new government.<sup>276</sup> Despite those divergent views of the founding, both camps agreed on two essential points: the true authority for government came from God; and it was time for the nation to recognize that authority and for conservative Christians to (re)impose Christian values on the nation's laws and institutions.<sup>277</sup>

During this time a new generation of Christian nationalist authors emerged, gaining popularity among conservative evangelicals. Two early influential figures were Rousas John Rushdoony and Francis Schaeffer. Rushdoony was the founder of Christian Reconstructionism or "Dominion Theology," which advocates establishing a Biblical theocratic republic based on Old Testament law and "the Lordship of Jesus Christ," whereas Schaeffer argued for a tradition of biblical principles for government that went back to the Protestant Reformation.<sup>278</sup> Both writers were highly influential on a generation of Religious Right leaders including Jerry Falwell, Pat Robertson, D. James Kennedy and a host of authors of popular histories about the founding, including John Whitehead, David Barton, Tim LaHaye, and Gary DeMar, among others.<sup>279</sup>

The second external event, facilitated in part by the first, was the election of Ronald Reagan as president and the alignment of the Republican Party with more culturally and morally conservative positions, including opposition to abortion, feminism, gay rights,

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224 (Traci Crowell & Mary Malley eds., Rowman & Littlefield 8th ed. 2018) (1987).

276. FREDERICK CLARKSON, *ETERNAL HOSTILITY: THE STRUGGLE BETWEEN THEOCRACY AND DEMOCRACY* 83–87 (1997).

277. *Id.*

278. ROBERT BOSTON, *WHY THE RELIGIOUS RIGHT IS WRONG ABOUT SEPARATION OF CHURCH AND STATE* 182–185 (1993); CLARKSON, *supra* note 276, at 77–89; SARA DIAMOND, *ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES* 246–249 (1995); FEA, *supra* note 16, at 54–56; JULIE J. INGERSOLL, *BUILDING GOD'S KINGDOM: INSIDE THE WORLD OF CHRISTIAN RECONSTRUCTION* 14–27 (2015).

279. BOSTON, *supra* note 278, at 189–91; FEA, *supra* note 16, at 57–75; INGERSOLL, *supra* note 278, at 14–27.

and church-state separation. This in turn brought about an alliance between the Republican Party and Christian conservatives and their leaders who espoused Christian nationalist ideas.<sup>280</sup> Reagan supported a constitutional amendment to permit prayer in public schools and legislation to restrict abortion access.<sup>281</sup> And as noted, Reagan and then President George W. Bush regularly used rhetoric laced with forms of the Christian nation narrative.<sup>282</sup>

That realignment, aided by twenty-plus years of Republican control of the White House, impacted the composition of the federal judiciary. Prior to the early-1970s, the judicial philosophy and personal ideology of Republican-appointed federal judges did not vary that considerably from Democrat-appointed judges, particularly at the lower court level.<sup>283</sup> That began to change, beginning with the appointment of William Rehnquist in 1973, as the social conservatism of nominees increasingly became a factor, as could be seen in the appointments of Antonin Scalia, Clarence Thomas, John Roberts, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, not to mention dozens of lower appellate judges.<sup>284</sup> Although none of the people appointed to the Supreme Court espoused Christian nationalist views, their conservative political and social perspectives, combined with their embrace of originalism with its emphasis on rediscovering “original understandings” of constitutional values from the founding era, made them sympathetic to mild versions of the Christian nation narrative.<sup>285</sup>

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280. WALD & CALHOUN-BROWN, *supra* note 275, at 198–99, 205–08.

281. ASSOC. PRESS, *Reagan Proposes School Prayer Amendment*, N.Y. TIMES (May 18, 1982), <https://www.nytimes.com/1982/05/18/us/reagan-proposes-school-prayer-amendment.html> [perma.cc/J8S6-QAJU]; Steven V. Roberts, *Reagan Backs Anti-Abortion Bill As Opponents Resume Filibuster*, N.Y. TIMES (Sept. 9, 1982), <https://www.nytimes.com/1982/09/09/us/reagan-backs-anti-abortion-bill-as-opponents-resume-filibuster.html> [perma.cc/9K2X-SFCW].

282. DAVID DOMKE & KEVIN COE, *THE GOD STRATEGY: HOW RELIGION BECAME A POLITICAL WEAPON IN AMERICA* 50–51, 53–61 (2008).

283. See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 310–17 (2016); see generally SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

284. See LAURA KALMAN, *THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT* 307–31 (2017).

285. WALD & CALHOUN-BROWN, *supra* note 275, at 90–92.

The first modern Supreme Court decision to rely on the nation's purported Christian heritage to resolve a church-state conflict was the 1983 case of *Marsh v. Chambers*, upholding the practice of paid legislative chaplains.<sup>286</sup> Declining to apply the analytical standard from *Lemon v. Kurtzman*, with its secular purpose and primary religious effect inquiries, Chief Justice Burger applied a historical pedigree test.<sup>287</sup> Noting that the First Congress had authorized the appointment of paid chaplains three days before finalizing the language of the First Amendment, Burger asserted syllogistically that this "historical evidence sheds light . . . on what the draftsmen intended the Establishment Clause to mean."<sup>288</sup> The holding did not turn solely on that timing coincidence, however; Burger also insisted that public prayer was "part of the fabric of our society."<sup>289</sup> "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion," Burger wrote, and he concluded by quoting *Zorach* for the principle that "[w]e are a religious people whose institutions presuppose a Supreme Being."<sup>290</sup> Although justices had previously relied on historical data to inform their understanding of the purposes of the religion clauses,<sup>291</sup> *Marsh* was the first decision in which historical "facts" were determinative of constitutionality.<sup>292</sup>

Burger's reliance on a mild version of the Christian nation narrative was not a one-shot deal. The following year he authored an opinion upholding the public display of a city-owned nativity scene during Christmastime.<sup>293</sup> This time, the practice lacked the same direct historical pedigree as legislative prayer; Burger could point to no contemporaneous practice of the government erecting

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286. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

287. *See id.* at 786–92.

288. *Id.* at 786–90.

289. *Id.* at 792.

290. *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

291. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 267–278 (1963) (Brennan, J., concurring); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 213–20 (1948) (Frankfurter, J., concurring); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–14 (1947); *id.* at 31–43 (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religion clause of the First Amendment.").

292. Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1210 (2009).

293. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

religious symbols.<sup>294</sup> Undeterred, Burger relied on what he described as “an unbroken history of official acknowledgement[s] . . . of the role of religion in American life.”<sup>295</sup> That history was “replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.”<sup>296</sup> Burger then provided a laundry list of official declarations, proclamations, and events: Thanksgiving proclamations, declarations of a National Day of Prayer, the adoption of the national motto, and the insertion of “One nation under God” in the Pledge of Allegiance.<sup>297</sup> In no place did Burger discuss the context behind the acts or what political reasons may have motivated public officials to employ religious rhetoric.<sup>298</sup> These declarations were simply part of the “traditions” and “heritage” that underlay the nation’s founding.<sup>299</sup> This “history,” Burger declared, “reveals . . . the contemporaneous understanding of the guarantees” of the religion clauses.<sup>300</sup> Burger’s second foray into a Christian nation narrative drew the ire of Justice Brennan, who in a dissent remarked that “[b]y insisting that such a distinctively sectarian message is merely an unobjectionable part of our ‘religious heritage,’ the Court takes a long step backwards to the days when Justice Brewer could arrogantly declare of the Court that ‘this is a Christian nation.’”<sup>301</sup>

Arguments that the nation’s religious heritage and traditions, revealed through official declarations concerning religion, should control the outcome in church-state controversies surfaced in later cases. In *County of Allegheny v. ACLU*, Justice Kennedy criticized the majority’s use of a “no-religious endorsement” standard to

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294. *See id.* at 672–78. According to Justice Kennedy, “displays commemorating religious holidays were not commonplace in 1791.” *County of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

295. *Lynch*, 465 U.S. at 673–74.

296. *Id.* at 675.

297. *Id.* at 675–77.

298. *See id.*

299. *Id.* at 677–78.

300. *Id.* at 677.

301. *Id.* at 717–18 (Brennan, J., dissenting) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892)) (internal citation omitted).

strike the display of a creche inside a county courthouse.<sup>302</sup> Such an approach, Kennedy argued, “would invalidate longstanding traditions” of public acknowledgements of Christianity, and Kennedy supported his position by referencing not only the familiar litany of Thanksgiving proclamations and National Day of Prayer declarations but also the mythological claim of George Washington kneeling in prayer at Valley Forge.<sup>303</sup> The “meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings,” apparently informed by the Christian nation narrative.<sup>304</sup> Similarly, in *Lee v. Weisman*, which struck down the practice of prayers at public school graduation ceremonies, Justice Scalia argued in his dissent for allowing the prayers based on events such as the Declaration of Independence’s invocation of “divine Providence” and George Washington’s first inaugural address and first Thanksgiving Proclamation with their acknowledgements of the nation’s dependence on the “Great Lord and Rules of Nations.”<sup>305</sup> Although these various references could be dismissed as merely reflections of a civil religion, they still rely on a particular interpretation of history that emphasizes the allegedly religious influences on the nation’s founding, influences that should control church-state adjudication today.

That a narrative about the purported religious influences on the founding began appearing in Court decisions after 1980 was not by happenstance. *County of Allegheny* marked the beginning of what would become a growing cottage industry that continues to this day: the filing of amicus curiae briefs by Religious Right advocacy groups. Two Religious Right groups filed briefs in *Allegheny*—Concerned Women for America and National Legal Foundation—with both alleging there was a close relationship

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302. *County of Allegheny v. ACLU*, 492 U.S. 573, 669–75 (1989) (Kennedy, J., concurring in part and dissenting in part).

303. *Id.* at 671–72. There is no evidence to support the claim of Washington kneeling in prayer at Valley Forge. See Paul Boller, *GEORGE WASHINGTON AND RELIGION* 10 (1963).

304. See *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part).

305. *Lee v. Weisman*, 505 U.S. 577, 633–35, 645 (1992) (Scalia, J., dissenting).

between Christianity and the nation's founding.<sup>306</sup> As the former's brief asserted:

Religion, by virtue of history and tradition, was so enmeshed in American culture that the Establishment Clause could not, even if that were the desired result, entirely sever government from religion. . . .

. . . .

Both before and after the drafting and enactment of the First Amendment, governmental acknowledgment of a Supreme Being was a naturally accepted feature of American public life. The Framers of the Constitution and government officials invoked the name of God, asked his blessings upon our Nation, and encouraged our people to do the same.<sup>307</sup>

The practice of filing amicus briefs grew steadily through the 1990s as more Religious Right organizations entered the picture: the American Center for Law and Justice; the Rutherford Institute; Liberty Council; the Alliance Defense Fund (now, Alliance Defending Freedom); and the Christian Legal Society, among others. The legal disputes the Court heard during that decade did not lend themselves to arguments about the nation's religious founding. In the new century, however, the Court heard several cases that invited arguments about the nation's purported religious founding. In *Elk Grove Unified School District v. Newdow*, the justices considered the contentious issue of removing the words "under God" from the Pledge of Allegiance.<sup>308</sup> The case elicited a plethora of amicus briefs that argued the phrase was consistent with, if not mandated by, the nation's religious heritage.<sup>309</sup> The nation's "founding documents acknowledge God," asserted the brief of Liberty Counsel and Wallbuilders (the organization of Christian nationalist David Barton), which was chocked full of religious

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306. Brief for Concerned Women for America as Amicus Curiae Supporting Petitioners, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (No. 87-2050), 1988 WL 1026116, at \*4 [hereinafter Brief for Concerned Women for America]; Brief for National Legal Foundation as Amicus Curiae Supporting Petitioners, *County of Allegheny*, 492 U.S. 573 (No. 87-2050), 1988 WL 1026118, at \*2-\*9.

307. Brief for Concerned Women for America, *supra* note 306, at \*4, \*9.

308. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004).

309. *Id.* at 3-5.

statements by presidents and other political figures.<sup>310</sup> “[W]ithout our belief in God, there is no foundation for our belief in the inalienable rights given by God.”<sup>311</sup> Other amicus briefs made similar claims.<sup>312</sup> “We cannot read the history of our rise and development as a nation, without reckoning with the place the Bible has occupied in shaping the advances of the Republic,” asserted the Institute in Basic Life Principles.<sup>313</sup> “Thus it establishes a philosophy that God is a ruler and that His transcendent [sic] laws are to govern and be the guide for, and superior, to man’s laws. That does not establish a religion, but the legal philosophy of government of these United States.”<sup>314</sup> Those amici were cheated out of a hoped-for confirmation from the Court that the nation existed “under God” when the majority side-stepped the issue, holding that the plaintiff lacked standing to challenge the recitation of the Pledge.<sup>315</sup>

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310. Brief of Liberty Counsel et al. as Amici Curiae Supporting Petitioners, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624), 2003 WL 23051982, at \*6–\*8.

311. *Id.* at \*2.

312. *See, e.g.*, Brief of the Knights of Columbus as Amicus Curiae Supporting Petitioners, *Newdow*, 542 U.S. 1 (No. 02-1624), 2003 WL 23011469, at \*2–\*4 (“Our government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.”); Brief of the Rutherford Institute as Amicus Curiae Supporting Petitioners, *Newdow*, 542 U.S. 1 (No. 02-1624), 2003 WL 23010742, at \*10 (“From the earliest days of colonization to the inception and expansion of the American Republic, our nation’s government has never been symbolically neutral with regard to the existence and providence of God.”); Brief of Pacific Justice Institute as Amicus Curiae Supporting of Petitioners, *Newdow*, 542 U.S. 1 (No. 02-1624), 2003 WL 23002712, at \*2 (The phrase “‘under God’ in the pledge . . . is merely a restatement of the political philosophy underpinning this nation’s form of government.”).

313. Brief of the Institute in Basic Life Principles et al. as Amici Curiae Supporting Petitioners, *Newdow*, 542 U.S. 1 (No. 02-1624), 2003 WL 23112949, at \*12.

314. *Id.* at \*9.

315. *Newdow*, 542 U.S. at 16–18. In his concurring opinion urging the Court to rule on the merits, Chief Justice Rehnquist wrote:

To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, “under God” might mean several different things: that God has guided the destiny of the United States, for example, or that the

Christian nation proponents had an opportunity to press their claims before the Court the following year when the justices heard two cases involving the display of the Ten Commandments on public property: *Van Orden v. Perry* and *McCreary County v. ACLU*.<sup>316</sup> In those two cases, the justices issued seemingly contradictory rulings, upholding a Ten Commandments monument on the Texas Capitol grounds in *Van Orden* while striking Ten Commandments plaques hung in Kentucky county courthouses in *McCreary County*.<sup>317</sup> The issue of the nation's Christian heritage was front and center as the Kentucky displays were justified on the ground that the "Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition."<sup>318</sup> Again, an onslaught of amicus briefs raised Christian nation claims.<sup>319</sup> "Our laws, our form of government, and our political history are not understandable without reference to the biblical ethical monotheism," asserted the amicus brief for the Family Research Council, an organization

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United States exists under God's authority. How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation. The phrase "under God" in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances.

*Id.* at 26 (Rehnquist, C.J., concurring in the judgment).

316. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (plurality opinion); *McCreary County v. ACLU*, 545 U.S. 844, 850 (2005). Justice Breyer was the deciding fifth vote in both *Van Orden* and *McCreary County*, with the other eight justices voting consistently to allow or disallow the displays. *Van Orden*, 545 U.S. at 679; *McCreary County*, 545 U.S. at 848.

317. *Van Orden*, 545 U.S. at 681; *McCreary County*, 545 U.S. at 850.

318. *McCreary County*, 545 U.S. at 856 (quoting Appendix to Petition for Certiorari at 189a, *McCreary County*, 545 U.S. 844 (No. 03-1693)).

319. See, e.g., Brief of the Family Research Council, Inc. & Focus on the Family as Amici Curiae Supporting the Petitioners, *McCreary County v. ACLU*, 545 U.S. 844 (2005) (No. 03-1693) [hereinafter Brief of the Family Research Council, Inc. and Focus on the Family]; Brief of the National Legal Foundation as Amicus Curiae, *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003) (No. 01-5935) [hereinafter Brief of the National Legal Foundation].

founded by Religious Right leader James Dobson.<sup>320</sup> Likewise, the National Legal Foundation declared that “authoritative voices establish that the Ten Commandments impacted law and jurisprudence in America.”<sup>321</sup>

In his plurality opinion upholding the Ten Commandment monument in *Van Orden*, Chief Justice Rehnquist borrowed evidence from the amicus briefs, though he stopped short of embracing their conclusions.<sup>322</sup> Quoting from *Lynch*, Rehnquist reaffirmed the “unbroken history of official acknowledgement . . . of the role of religion in American life,” then, going a step further to specify that that included, “[r]ecognition of the role of God in our Nation’s heritage,” as well.<sup>323</sup> After citing to Washington’s Thanksgiving Proclamation for that general proposition, he segued to more recent “acknowledgements of the role played by the Ten Commandments in our Nation’s heritage.”<sup>324</sup> Missing from that discussion was any citation to official acknowledgements or use of the Ten Commandments coincident to the founding, in part because such historical evidence is lacking.<sup>325</sup> As Christian nationalists are apt to do, however, Rehnquist was happy to draw from generalities to reach a specific conclusion.

In contrast to the *Van Orden* plurality, Justice Scalia’s dissenting opinion in *McCreary* openly embraced the Christian-nation narrative.<sup>326</sup> “Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality,” Scalia wrote.<sup>327</sup> Based on the historical record of religious

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320. Brief of the Family Research Council, Inc. & Focus on the Family, *supra* note 319, at 14.

321. Brief of the National Legal Foundation, *supra* note 319, at 2.

322. See *Van Orden*, 545 U.S. 686–89 (plurality opinion).

323. *Id.* at 686–87 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)).

324. *Id.* at 689. Rehnquist noted that “President Washington’s [Thanksgiving] proclamation directly attributed to the Supreme Being the foundations and successes of our young Nation.” *Id.* at 686–87.

325. See Brief of Legal Historians & Law Scholars as Amici Curiae Supporting Respondents at 6–26, *McCreary County v. ACLU*, 545 U.S. 844 (2005) (No. 01-5939) [hereinafter Brief of Legal Historians]; see generally Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. L. & REL. 525 (1999).

326. See *McCreary County*, 545 U.S. at 887, 893 (Scalia, J., dissenting).

327. *Id.* at 887.

declarations and proclamations, Scalia asserted, the Constitution did not require government neutrality toward religion but it could favor the prevailing religion of the people: “With respect to public acknowledgement of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”<sup>328</sup> With that language, Justice Scalia indicated how a Christian nation perspective might be applied in law.

For nine years following the Ten Commandments cases, the Court’s church-state docket provided little opportunity for applying a Christian nation approach. In 2014, however, the justices revisited the issue of prayers in legislative forums in *Town of Greece v. Galloway*.<sup>329</sup> That issue again invited arguments based on the perceived religious practices of the Founders and of their purported intent for government to foster religion.<sup>330</sup> The town and several of its supporting amici argued for the constitutionality of public invocations based on *Marsh* and the historical legacy of such practices.<sup>331</sup> Other supporting amici, however, raised broader claims, with one citing George Washington’s First Thanksgiving Proclamation for the proposition that “[i]t is the duty of all nations to acknowledge the providence of the Almighty God.”<sup>332</sup> The Declaration of Independence was crafted “in prayer and Bible study,” claimed another amici.<sup>333</sup> “The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; That There Is a Moral Law Which the State

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328. *Id.* at 893.

329. *Town of Greece v. Galloway*, 572 U.S. 565, 569–570 (2014).

330. *See id.* at 576–77.

331. Brief for Petitioner at 12, *Galloway*, 572 U.S. 565 (No. 12-696); Brief for the State of South Carolina as Amici Curiae Supporting Petitioners at 13–14, *Town of Greece*, 572 U.S. 565 (No. 12-696); Brief for the United States as Amici Curiae Supporting Petitioners at 2, *Galloway*, 572 U.S. 565 (No. 12-696).

332. Brief of Foundation for Moral Law as of Amicus Curiae Supporting Respondent at 19, *Galloway*, 572 U.S. 565 (No. 12-696) (quoting *McCreary County*, 545 U.S. at 887 (Scalia, J., dissenting)); *see also* Brief of WallBuilders, Inc. as Amicus Curiae Supporting the Petitioner and supporting reversal at 13–23, *Galloway*, 572 U.S. 565 (No. 12-696).

333. Motion for Leave to File Brief out of Time and Brief of The Faith & Action Networks as Amicus Curiae Supporting the Petitioner at 2, *Galloway*, 572 U.S. 565 (No. 12-696).

Is Powerless to Alter; That the Individual Possesses Rights, Conferred by the Creator or, Which Government Must Respect.”<sup>334</sup> Once again, the Court’s opinion upholding the practice steered clear of any express Christian nation rationalization: “[a]s practiced by Congress since the framing of the Constitution,” wrote Justice Kennedy, “legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.”<sup>335</sup> Yet Justice Kennedy opened the door to the Court’s greater use of history in ways that might be determinative. Rather than *Marsh* representing an exception to the Establishment Clause, Kennedy remarked, “the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”<sup>336</sup> “Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”<sup>337</sup> In so stating, Kennedy provided no guidance as to what counts as an “accepted” historical practice or how courts are to determine the relevance of one practice over another.<sup>338</sup> Even Justice Thomas acknowledged that “the relationship between church and state in the fledgling Republic was far from settled at the time of ratification.”<sup>339</sup> Yet Thomas’s colleagues believed that some consensus understanding could be divined; as Justice Alito declared in his concurring opinion (with Justice Scalia) that cited the same historical confluence as was highlighted in *Marsh*:

This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment

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334. *Id.* at 5–6.

335. *Galloway*, 572 U.S. at 575.

336. *Id.* at 576 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part)).

337. *Id.* at 577 (citing *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part)).

338. *See id.* at 575–78.

339. *Id.* at 606 (Thomas, J., concurring in part).

Clause decisions on the original meaning of that provision. . . .

There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment.<sup>340</sup>

Unfortunately, neither Justice Breyer's nor Justice Kagan's dissenting opinions challenged the majority's reliance on history or, except in a passing footnote, its historical interpretation of the practice of legislative prayers.<sup>341</sup>

*Town of Greece*, like *Marsh* before it, was, in many ways, an easy decision because of the clear example of legislative chaplains and public prayer concurrent to the founding.<sup>342</sup> That clarity becomes more oblique when an exact historical pedigree is missing. This is where Christian nation arguments become more troubling and misleading because they invite the Court to rule by analogy—does President Washington's issuance of a Thanksgiving proclamation also validate a government-owned religious symbol?<sup>343</sup> This was the situation in 2019 with the case of *American Legion v. American Humanist Association*, a challenge to a thirty-two foot Latin cross monument erected on government property alongside a prominent thoroughfare.<sup>344</sup> The cross had stood at its location since 1925 as a tribute to local soldiers who had died in World War I.<sup>345</sup> But the Fourth Circuit Court of Appeals had held the cross represented an unconstitutional endorsement of

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340. *Id.* at 602 (Alito, J., concurring) (citations omitted).

341. *See id.* at 610 (Breyer, J., dissenting); *See id.* at 615 (Kagan, J., dissenting). In her brief challenge to the majority's interpretation of the historical record, Justice Kagan argued that official prayers during the founding period were overwhelmingly inclusive in nature and couched in nonsectarian language, a record that would not support the practice in Greece. *Id.* at 619 n.1.

342. *See id.* at 576 (majority opinion).

343. *Cf.* Alex J. Luchenister & Sarah R. Goetz, *A Hollow History Test: Why Establishment Clause Cases Should Not Be Decided through Comparisons with Historical Practices*, 68 CATH. U.L. REV. 653, 679–80 (2019) (“Even if [presidential prayer proclamations] are . . . consistent with the intent of the First Amendment, they shed little light on how to decide church state controversies in other matters. . . . The Thanksgiving proclamations issued by early presidents were nonsectarian, ecumenical, isolated written statements that were not presented in coercive environments.”).

344. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2077–78 (2019).

345. *Id.* at 2074.

Christianity,<sup>346</sup> which triggered an alarm among religious conservatives who again flooded the Court with amicus briefs arguing for constitutionality based on historical practices and traditions.<sup>347</sup> Again, claims of the nation's Christian foundations and the piety of the nation's Founders figured prominently in many amicus briefs supporting the cross. "From the Republic's inception its Founders embraced governmental expressions of religious belief, unabashedly intertwining the secular and religious," argued a group of professors from conservative Christian colleges.<sup>348</sup> The Founders engaged in religious expression, the Billy Graham Evangelistic Crusade asserted, because they "understood that religious beliefs and ethical principles provided a foundation for, and helped the preservation of, the type of government that they had set up in the Constitution."<sup>349</sup> No brief went as far as the one by the Foundation for Moral Law, however, which boldly asserted that "all valid human law must rest upon the Revealed Law, which is 'to be found only in the Holy Scriptures,' and on the Law of Nature, 'which is expressly declared so to be by God himself.'"<sup>350</sup> The brief then cited favorably from the 1811 *Ruggles* blasphemy decision for the proposition that "whatever strikes at the root of Christianity, tends manifestly to the dissolution of civil government."<sup>351</sup> Leaving little to doubt about its position, the brief concluded by asserting that "we constantly speak of this republic as a Christian nation—in fact, as the leading Christian nation of the

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346. *Id.* at 2079.

347. *See, e.g.*, Brief of Citizens United et al. as Amici Curiae Supporting Petitioners, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (No. 17-1717) [hereinafter Brief of Citizens United et al.]; Brief of the Foundation for Moral Law as Amicus Curiae Supporting Petitioners, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717) [hereinafter Brief of the Foundation for Moral Law]; Brief of Various Professors as Amici Curiae Supporting the Petitioners, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717, 18-18) [hereinafter Brief of Various Professors]; Brief of Veterans in Defense of Liberty et al. as Amici Curiae Supporting Petitioners and urging reversal, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717, 18-18) [hereinafter Brief of Veterans in Defense of Liberty et al.].

348. Brief of Various Professors, *supra* note 347, at 8; *see also* Brief of Citizens United et al., *supra* note 347, at 21–25.

349. Brief of Veterans in Defense of Liberty et al., *supra* note 347, at 11.

350. Brief of the Foundation for Moral Law, *supra* note 347, at 19–20 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 41–42 (Robert Bell 1772) (1765-69)).

351. *Id.* at 20 (quoting *People v. Ruggles*, 8 Johns. 290 (N.Y. 1811)).

world. The popular use of the term certainly has significance.”<sup>352</sup> The connection between such “historical” arguments and the Christian nation maxim was finally in the open.<sup>353</sup>

Unlike in *Marsh* and *Town of Greece* with the founding era example of chaplains, the Court in *American Legion* lacked any direct example of government-sponsored religious symbols at the time of the founding—the closest examples provided in the briefing were privately erected crosses and crosses found in government cemeteries.<sup>354</sup> Undeterred, Justice Alito declared that the Court’s approach in such disputes was one that “looks to history for guidance.”<sup>355</sup> The void of historical evidence, though, forced Justice Alito to analogize to other practices and declarations.<sup>356</sup> Alito offered a laundry list, referencing Washington’s Thanksgiving Proclamation and his Farewell Address (perennial favorites), legislative chaplaincies, and even American cities with religious names (e.g., San Diego, Los Angeles) to demonstrate a tradition of official use of religious language and of government recognition of religion generally.<sup>357</sup> This allowed Alito to blithely conclude that “[w]here categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.”<sup>358</sup>

This expansive view of relevant history and traditions has relieved the justices from relying on more robust Christian nation arguments. Still, there can be no denying that such arguments have been in the background of religious symbolism cases as the dissenting opinions in *Van Orden* and *McCreary County* acknowledged.<sup>359</sup> The constant barrage of amicus briefs raising claims of the nation’s religious heritage and of the religious beliefs

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352. *Id.* at 28 (citing DAVID J. BREWER, *THE UNITED STATES A CHRISTIAN NATION* 12 (1905)).

353. *Id.* at 19–20, 28.

354. Brief of Various Professors, *supra* note 347, at 3, 16–19.

355. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion).

356. *See id.* at 2087–89.

357. *Id.*

358. *Id.* at 2089.

359. *See McCreary County v. ACLU*, 545 U.S. 844, 895–900 (2005) (Scalia, J., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 722–35 (2005) (Stevens, J., dissenting) (criticizing arguments that raise a “Christian nation” rationale).

of the Founders, purportedly demonstrated by their occasional use of religious rhetoric, has no doubt had a subtle effect on those judges who are already predisposed to such arguments and are otherwise hostile to the previous legal regime of church-state separation. The emboldened Christian nation arguments have helped to install a jurisprudence of “Christian nation light.”

#### V. BAD HISTORY<sup>360</sup>

For decades, legal historians have scrutinized and criticized the use of history by lawyers and courts.<sup>361</sup> The term “law office history” has become synonymous for the use of history in adversarial legal proceedings where lawyers and judges rely on incomplete historical accounts to reach a particular legal outcome.<sup>362</sup> Instead of approaching the historical record dispassionately and with a critical eye as professional historians are trained to do, history for lawyers and judges is merely another form of evidence or argumentation to support a desired legal result.<sup>363</sup> As Charles Miller once related sarcastically: “[f]or certainty in the law a little bad history is not too high a price to pay.”<sup>364</sup>

One particularly pernicious form of law office history is originalism. As promoted by the late-Justice Scalia and Justice Thomas, originalism searches for the “original meaning” or “understanding” of a constitutional principle or provision and then

360. See *Wallace v. Jaffree*, 485 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (criticizing Jefferson’s “wall of separation” metaphor as “based on bad history”).

361. E.g., CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 25 (1969); Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORD. L. REV.* 1611, 1611–12 (1997); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 *COLUM. L. REV.* 523, 526 (1995); Larry Kramer, *Fidelity to History—And Through It*, 65 *FORD. L. REV.* 1627, 1627–29 (1997); Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 *FORD. L. REV.* 1587, 1587–88 (1997).

362. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *SUP. CT. REV.* 119 *passim* (1997).

363. DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* *passim* (1970); see Steven K. Green, “Bad History”: *The Lure of History in Establishment Clause Adjudication*, 81 *NOTRE DAME L. REV.* 1717, 1732–33 (2006).

364. MILLER, *supra* note 361, at 194 (quoting WILLIAM HOLDSWORTH, *ESSAYS IN LAW AND HISTORY* 24 (1946)).

promises to apply that meaning with fealty to a current constitutional conflict.<sup>365</sup> For religion clause purposes, therefore, an originalist would attempt to divine the original understanding of free exercise and non-establishment and then apply that understanding with rigor to determine the outcome of a dispute. As Scalia asserted in his *McCreary* dissent, after documenting public religious affirmations during the founding period, the Establishment Clause “*was* enshrined in the Constitution’s text, and these official actions show *what it meant*. . . . What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?”<sup>366</sup> Justice Thomas made an even more explicit call for a “return to the original meaning” of the Establishment Clause in his *Van Orden* concurrence, writing that:

[O]ur task would be far simpler if we returned to the original meaning of the word “establishment” than it is under the various approaches this Court now uses. The Framers understood an establishment “necessarily to involve actual legal coercion.” . . .

There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional.<sup>367</sup>

The lure of history for constitutional adjudication is irresistible. History legitimizes legal arguments and judicial decision-making by offering an aura of authority and objectivity.<sup>368</sup> History purportedly serves as an external constraint on judicial

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365. See generally Charles A. Lofgren, *The Original Understanding of Original Intent?* 5 CONST. COMMENT. 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887 (1985); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 661 (1987) [hereinafter *Rules for Originalists*]; Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159 (1996).

366. *McCreary County v. ACLU*, 545 U.S. 844, 896–97 (2005) (Scalia, J., dissenting) (emphasis in original).

367. *Van Orden v. Perry*, 545 U.S. 677, 693–94 (2005) (Thomas, J., concurring) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in judgment)).

368. MARK DE WOLF HOWE, *GARDEN AND WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 167–68* (1967); *Rules for Originalists*, *supra* note 365, at 660–61; Antonin Scalia, *Originalism: The Lesser Evil*, 57 CINN. L. REV. 849, 854 (1989).

subjectivity by providing an independent and non-ideological source of information from which all parties can draw and upon which all people can agree. As Dean Erwin Chemerinsky has observed, judges “want very much to make it appear that their decisions are not based on their personal opinions, but instead are derived from an external source.”<sup>369</sup>

This notion that there is an objective, consensus, and pellucid interpretation of any historical event is ridiculous. Historians are committed to objectivity, but they understand—in a manner that is apparently incongruous to some jurists—that history is not objective. Any exploration into history is selective, and all good accounts of history are interpretive.<sup>370</sup> The difference is that historians recognize the selective and interpretive aspect to their craft while jurists act as if such “shortcomings” are inconsistent with a historical analysis instead of being part of the undertaking.<sup>371</sup> Historians also avoid efforts to identify “historical truths.” Rather than mining pages of historical information to uncover “truths,” historians seek explanation and illumination; the study of history is not to provide “answers” to modern questions but to provide understanding of our past in the hope it may inform the present.<sup>372</sup> In contrast, lawyers primarily approach history as advocates seeking authority for the propositions they hope to prove.<sup>373</sup>

The final fallacy of law office history (and originalism in particular) is the failure to recognize the indeterminacy and incompleteness of the historical record. We have only those documents that have survived the ravages of time and have been

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369. Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 *HASTINGS L.J.* 901, 908 (1993).

370. R.G. COLLINGWOOD, *THE IDEA OF HISTORY* 218–19 (1964); FISCHER, *supra* note 363, at 4–5, 64–65.

371. *Rules for Originalists*, *supra* note 365, at 660–61 (“Historical judgments . . . necessarily involve elements of creativity and interpretative choice.”).

372. FISCHER, *supra* note 363, at 40 (“It is no easy matter to tell the truth, pure and simple, about past events; for historical truths are never pure, and rarely simple.”).

373. Cass R. Sunstein, *The Idea of a Useable Past*, 95 *COLUM. L. REV.* 601, 602 (1995).

transcribed, compiled, and authenticated.<sup>374</sup> No doubt, other important, unrecorded discussions about the purpose and meaning of the Establishment Clause took place during the House committee on style, in the House debates, and in the Senate debate (which was not recorded in the Senate Journal), let alone in the near-by taverns.<sup>375</sup> In addition, the records that do exist may be woefully inaccurate, as they were transcribed by people who made mistakes and self-edited as they went along (not to mention allegations that the transcriber for the Annals of Congress was frequently inebriated).<sup>376</sup> Madison stated that the accuracy of the reported debates of the First Congress was “not to be relied on”:

The face of the debates shews [sic] that they are defective, and desultory, where not revised, or written out by the Speakers. In some instances, he makes them inconsistent with themselves, by erroneous reports of their speeches at different times on the same subject. [The reporter] was indolent and sometimes filled up blanks in his notes from memory or *imagination*.<sup>377</sup>

In addition, remarks contained within documents whose accuracy can be presumed can easily be misunderstood. The framers used terms and phrases familiar to the late eighteenth century, and frequently employed rhetoric that was intentionally vague, duplicitous, or loaded with irony.<sup>378</sup> For example, several motivations can be read into Benjamin Franklin’s famous call for prayer at the Constitutional Convention: personal piety; irony; or

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374. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 38 (1986).

375. Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L. REV. 409, 412–13 (1986).

376. See Hutson, *supra* note 374, at 36 (discussing the excessive drinking of the reporter, Thomas Lloyd, and relating that his notes were “frequently garbled and that he neglected to report speeches whose texts are known to exist elsewhere”).

377. *Id.* at 38 (quoting Letter from James Madison to Edward Everett (Jan. 7, 1832), in Marion Tinling, *Thomas Lloyd’s Reports of the First Federal Congress*, 18 WM. & MARY Q. 519, 537–38 (1961) (emphasis in original)).

378. Laycock, *supra* note 375, at 413–14.

shaming the delegates into compromise.<sup>379</sup> The Framers' remarks and letters also arose within particular contexts that may not be apparent from the documents themselves. Therefore, the precise meanings of recorded statements may be ambiguous at best.<sup>380</sup>

All of this suggests that history can easily be misunderstood and manipulated by modern advocates and jurists. Those who advance a Christian nation or "religious founding" narrative can cherry-pick statements and present them as "facts" without having to do the hard work of providing context, explanation, and possible motivation. As the author of several amicus briefs that have examined historical events, I can attest that court briefs with a restricted word count are not the best mediums to explain historical complexity and nuance.<sup>381</sup> Although codes of legal ethics forbid an attorney from lying or concealing evidence, there is little to prevent one from presenting highly selective historical data accompanied by a skewed interpretation (otherwise known as "advocacy").

A prime example of the dangers of relying on history in constitutional adjudication is represented in the case that ushered in this approach: *Marsh v. Chambers*. As noted, *Marsh* parted from the established analytical standard of asking whether a practice violated current notions of non-establishment of religion, asking instead whether the modern practice of legislative chaplaincies and prayers had a historical basis.<sup>382</sup> As discussed, Chief Justice Burger boldly asserted that the practice of chaplaincies was

379. See THOMAS S. KIDD, *BENJAMIN FRANKLIN: THE RELIGIOUS LIFE OF A FOUNDING FATHER* 228–30 (2017); MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 194 (2016).

380. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) ("[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed.").

381. See, e.g., Brief of Baptist Joint Committee for Religious Liberty et al. as Amici Curiae in Support of Respondents, *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246 (2020) (No. 18-1195), 2019 WL 6169967; Brief of Amici Curiae, Legal and Religious Historians in Support of Respondent, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 136 S. Ct. 891 (2016) (No. 15-577), 2016 WL 3667052.

382. *Marsh v. Chambers*, 463 U.S. 783, 788–92 (1983); see *supra* notes 286–292 and accompanying text.

supported by an “unambiguous and unbroken history of more than 200 years” and that the evidence demonstrated “clearly” that the drafters of the First Amendment “did not view paid legislative chaplains and opening prayers as a violation of that Amendment.”<sup>383</sup> Neither of those claims survives a closer examination. In his comprehensive review of legislative chaplains, Professor Christopher Lund has remarked that the Court’s “view of that history was deeply partial—partial in the sense of being a bit slanted as well as partial in the sense of being somewhat incomplete.”<sup>384</sup> According to Lund, Chief Justice Burger’s historical analysis omitted several important details, such as contemporary objections to the practice and how later members of Congress used chaplaincies to advance sectarian goals.<sup>385</sup> “*Marsh*’s view of legislative prayer, ultimately, is a somewhat idealized and romanticized one,” Lund notes.<sup>386</sup> This slanted history “perpetuates the very false illusion that the chaplaincies were altogether innocuous and universally supported; it ignores all the ways in which the chaplaincies were sometimes controversial and divisive. In the end, the Court’s desire to portray the chaplaincies as benign ends up distorting its historical analysis.”<sup>387</sup>

The same can be said for the majority opinion in *Van Orden* and the dissenting opinions in *McCreary County*. As discussed above, several amici argued the displays were permissible based on acknowledgments of religion during the founding period while claiming that the Ten Commandments were a central source for the nation’s political and legal principles.<sup>388</sup> These assertions no doubt impacted the justices’ views about the legal pedigree of the Commandments.<sup>389</sup> Justice Scalia commended the Ten

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383. *Id.* at 788, 792; *see supra* notes 293–301 and accompanying text.

384. Lund, *supra* note 292, at 1211.

385. *Id.* at 1211–12.

386. *Id.* at 1173, 1211.

387. *Id.* at 1213.

388. *See supra* notes 318–21 and accompanying text.

389. *See Van Orden v. Perry*, 545 U.S. 677, 687 (“Recognition of the role of God in our Nation’s heritage has also been reflected in our decisions. We have acknowledged, for example, that ‘religion has been closely identified with our history and government.’” (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 237 (1963))); *Id.* at 688 (“[A]cknowledgements of the role played by the

Commandments' "unique contribution to the development of the legal system" and asserted that their frequent display "testifies to the popular understanding that the Ten Commandments are a foundation of the rule of the law, and a symbol of the role that religion plays, and continues to play, in our system of government."<sup>390</sup> Even Justice Souter stated in his majority opinion in *McCreary* that he did not "deny that the Commandments have had influence on civil or secular law."<sup>391</sup> Justices Scalia and Souter are not alone, as the idea that the Commandments, as a legal code, directly impacted the development of Western law (and American law in particular) is widely shared.<sup>392</sup> Yet, widely-held perceptions can be wrong, particularly when they are based on anecdotes. Professor Paul Finkelman and I have separately examined the historical record, and we found no evidence that jurists and political leaders contemporaneous to the founding claimed that the Ten Commandments were a basis for American law or republican government.<sup>393</sup> To be sure, passing allusions to the Commandments or Decalogue appear in contemporary sermons (unsurprisingly) and in a smattering of statements by political leaders,<sup>394</sup> but as best can be determined, no person or persons of influence asserted that the Commandments served as the

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Ten Commandments in our Nation's heritage are common throughout America.").

390. *McCreary County v. ACLU*, 545 U.S. 844, 905, 907 (Scalia, J., dissenting).

391. *Id.* at 869 (majority opinion).

392. Former federal judge, John T. Noonan, who wrote extensively about church-state matters, asserted that the Ten Commandments are "the most influential law code in history." JOHN T. NOONAN, JR., *THE BELIEVERS AND THE POWERS THAT ARE* 4 (1987). While former law professor Harold Berman declared that until recently, "if one had asked Americans where our Constitution—or, indeed, our whole concept of law—came from, on what it was ultimately based, the overwhelming majority of them would have said, 'the Ten Commandments' or 'the Bible.'" Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective* 35 EMORY L.J. 777, 788–89 (1986).

393. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere* 73 FORD. L. REV. 1477, 1518–20 (2005); Green, *supra* note 325, at 558.

394. In his book, Christian nationalist William J. Federer lists only a handful of statements by members of the founding generation praising the Ten Commandments and he wrongly equates references to natural or higher law with the Decalogue. *Contra* WILLIAM J. FEDERER, *THE TEN COMMANDMENTS AND THEIR INFLUENCE ON AMERICAN LAW*, 17–38 (2003).

foundation of American law or government, and there certainly was no consensus about that point.<sup>395</sup> Significantly, the debates of the Constitutional Convention contained in Madison's *Notes* are devoid of any claims of the authority of the Ten Commandments or the Bible generally.<sup>396</sup> "In the wide-ranging debates—reprinted in Madison's *Notes*, the *Annals of Congress*, Farrand's *Records*, Elliot's *Debates*, and elsewhere—the Founders mentioned Roman law, European Continental law, British law, and various other legal systems, but as can best be determined, no delegate ever mentioned the Ten Commandments or the Bible."<sup>397</sup> Similarly, neither the "Bible" nor "Scripture" nor the "Ten Commandments" appears in the index of the *Federalist Papers*, which are generally considered to contain the most important discussions of the meaning of the United States Constitution at the time of ratification.<sup>398</sup> The claim that the "Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country" is not supported by history and is a legal fiction.<sup>399</sup>

These two examples demonstrate the danger of relying on history to any significant degree to resolve a modern constitutional dispute. As Justice Brennan observed several decades ago:

[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed.<sup>400</sup>

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395. Green, *supra* note 325, at 543–48. In fact, in *State v. Chandler*, 2 Del. 553, 557 (1837), the court expressly disclaimed that the common law had ever adopted "the laws of God as revealed in the old testament."

396. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (2d ed. 1984).

397. Brief of Legal Historians, *supra* note 325, at 13–22.

398. See generally ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

399. *McCreary County v. ACLU*, 545 U.S. 844, 856, 879–81 (2005).

400. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

In addition to the indeterminacy of the historical record and its questionable relevance to modern conflicts, historical analysis lends itself to cherry-picking data. We should follow the wise words of Justice Brennan that “[a] too literal quest for the advice of the Founding Fathers upon the issues of these cases seems . . . futile and misdirected.”<sup>401</sup>

#### CONCLUSION

There is little danger—or at least one would hope—that a Supreme Court justice or appellate court judge would today make a direct affirmation about America being a Christian nation in either a legal or political sense as Justice Brewer did in 1892.<sup>402</sup> Brewer’s declaration was criticized at the time<sup>403</sup> and, as discussed, has subsequently been repudiated by members of the Supreme Court, including Justice Scalia.<sup>404</sup> But the fact that Christian-nationalist ideas and rhetoric are being pushed by advocates and have influenced the Court’s decision making in subtle ways is more troubling than a boldfaced declaration like that of Justice Brewer, which at least had the advantage of transparency. Because of the indeterminacy of the idea of the nation’s Christian founding, and its visceral appeal to many people, a jurisprudence promoting a narrative of “Christian nation light” may be more damaging to the integrity of the idea of separation of church and state. For this reason, people should not dismiss Christian nation rhetoric as harmless to the Constitution’s religion clauses.

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401. *Id.*

402. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

403. Green, *supra* note 208, at 427–28.

404. *See Lynch v. Donnelly*, 465 U.S. 668, 717–18 (1984) (Brennan, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 641 (Scalia, J., dissenting); *supra* notes 236–37 and accompanying text.