

2009

Getting the Framers Wrong: A response to Professor Geoffrey Stone

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Recommended Citation

Samuel W. Calhoun, *Getting the Framers Wrong: A response to Professor Geoffrey Stone*, 57 UCLA L. Rev. Disc. 1 (2009).

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GETTING THE FRAMERS WRONG: A RESPONSE TO PROFESSOR GEOFFREY STONE

Samuel W. Calhoun*

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INTRODUCTION

Professor Geoffrey Stone's Essay, *The World of the Framers: A Christian Nation?*,¹ seeks to state "the truth about . . . what [the Framers] believed, and about what they aspired to when they created this nation."² Doing so will accomplish Professor Stone's main objective, helping us to understand what "the Constitution allows" on a host of controversial public policy issues.³ Regrettably, Professor Stone's effort is unsuccessful. Although he clearly tried to be fair in his historical account,⁴ the Essay ultimately presents a misleading view of the Framers' perspective on the proper relationship between religion and the state.

I. PROFESSOR STONE'S THESIS

"[T]he point" of Professor Stone's Essay is to use the Framers to offer insight on what "the Constitution allows" on contested public policy issues.⁵ He begins his historical account with the claim that "modern-day Christian evangelicals," who "assert that the United States was founded as a 'Christian nation'" embodying the Puritans' "rigidly theocratic" societal vision, are incor-

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1. Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1 (2008).

2. *Id.* at 26.

3. *See id.* at 2, 25–26.

4. *See infra* note 36 and accompanying text.

5. Stone, *supra* note 1, at 25–26.

rect.⁶ As proof, Professor Stone uses two main arguments. First, he makes a general assertion that “the founding generation” was profoundly influenced by deism, a “rational religion.”⁷ Deists “accepted the idea of a Supreme Being,” but rejected “the Judeo-Christian God, who intervenes in human history and listens to personal prayers.”⁸ Second, Professor Stone engages in an extended evaluation of “the beliefs of five key members of the founding generation: Benjamin Franklin, Thomas Jefferson, John Adams, George Washington, and Thomas Paine.”⁹ Although acknowledging that these five were not uniformly impacted by deism,¹⁰ the Essay’s bottom-line assertion is that “[t]he significance of deism for the creation of the United States ‘can hardly be overstated.’”¹¹ Deism led the “founding generation [to view] religion, and particularly religion’s relation to government, through an Enlightenment lens that was deeply skeptical of orthodox Christianity.”¹² While religion was valuable “in helping ‘to preserve the civil morality necessary to democracy,’”¹³

the Framers drew a sharp distinction in their understanding of the proper relation between religion and law in a free society. . . . “[T]hey saw the wisdom of distinguishing between private and public religion.” In churches, temples, and homes, “anyone could believe and practice” what he wished. But in the “public business of the nation,” it was essential for the government to speak of religion “in a way that was unifying, not divisive.”¹⁴

How is the government to be “unifying, not divisive” in “speak[ing] of religion” on public matters? Professor Stone does not say, but the implication is clear: government is divisive anytime it allows religion to leave its proper private sphere to intrude into the public arena.

6. *Id.* at 3.

7. *Id.* at 6.

8. *Id.* at 6.

9. *Id.* at 8. It is surprising that Paine is included in this group chosen for special study. Although he played an important role as a pamphleteer, his stature as a Framers is far beneath the other four. James Madison clearly would have been a better choice.

10. *See id.*

11. *Id.* at 7 (quoting FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 161 (2003)). Professor Stone says that “[t]o understand our national origins, it is essential to understand that deism had a powerful impact on the colonies.” *Id.*

12. *Id.* at 7–8 (quoting ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 24 (2005)).

13. *Id.* at 24.

14. *Id.* (quoting JON MEACHAM, *AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION* 22–23 (2006)). The Framers carefully distinguished between public and private religion due to “their knowledge of the religious strife that had plagued man’s history and their appreciation of the importance to individual liberty of both freedom of and freedom from religion.” *Id.*

It is only in the Essay's final paragraph that Professor Stone addresses the constitutional impact of his "keep religion private" characterization of the Framers' view of religion. Instead of a discussion, he says only that this "truth about the Framers" is helpful as we "consider whether the Constitution allows the government to have faith-based initiatives, deny homosexuals the right to marry, prohibit obscenity, forbid abortions, the use of contraceptives, or stem-cell research, teach creationism, dip the flag to Jesus, or ban the word 'fuck' in public."¹⁵ Professor Stone's Essay does not explicitly state, but nonetheless implies, the direction in which our deliberations should be influenced once we correctly understand the Framers—religion should be prohibited from influencing public policy in these areas.¹⁶

This Response will argue that Professor Stone is wrong in arguing that the Framers sought to bar religious influence from public policy disputes. Despite his desire to communicate historical truth, his Essay falls short of this goal. First, Professor Stone overstates the significance of deism in the Founding Era by exaggerating both its strength and also the weakness of traditional Christianity. Second, the Essay virtually ignores what should have been its chief historical inquiry—did the Framers, whatever their own religious convictions, act in ways that kept religion private? By failing to acknowledge the many intrusions of religion into the public sphere during the Founding Era, the Essay distorts the Framers' perspective on the appropriate place of religious belief in public life.

II. DEISM OVEREMPHASIZED

Professor Stone's evidence for deism's surpassing significance is flawed. By his own description of their beliefs, some of which were indisputably deistic, Benjamin Franklin and Thomas Jefferson do not belong in the "flat-out" deist category to which Professor Stone assigns them.¹⁷ Deists thought that God does not "intervene[] in human history,"¹⁸ yet Franklin believed that God "governs the World by his Providence."¹⁹ Jefferson was "the primary drafter of

15. *Id.* at 25–26.

16. *See id.*

17. *Id.* at 7.

18. *See supra* text accompanying note 8.

19. Stone, *supra* note 1, at 8 (citing Letter From Benjamin Franklin to Ezra Stiles (Mar. 9, 1790), in 3 THE LITERARY DIARY OF EZRA STILES 387, 387 (Franklin B. Dexter ed., Charles Scribner's Sons 1901)). There is other evidence that Franklin was not a "flat-out" deist. Deists deny a God who "listens to personal prayers," Stone, *supra* note 1, at 6, yet Franklin made an unsuccessful motion that the Constitutional Convention begin each day with prayer. Mark A. Noll, *Evangelicals in the American Founding and Evangelical Political Mobilization Today*, in RELIGION AND THE NEW REPUBLIC: FAITH IN THE

the Declaration of Independence.”²⁰ Professor Stone characterizes this document as “a statement . . . of American deism,”²¹ but its language shows the opposite to be true. If God does not interact with mankind, why did the signatories appeal to the “Supreme Judge of the World” to vindicate their honorable intentions, and also express confidence in “the Protection of divine Providence”?²²

Another way to overemphasize the impact of deism is to overstate the decline of orthodox Christianity. Professor Stone does this in part by oversimplifying the record concerning the complex issue of George Washington’s religious faith. A letter to Lafayette is quoted in which Washington said that he was “no bigot . . . to any mode of worship.”²³ It is also claimed that “Washington’s personal papers . . . offer no evidence that he believed in . . . Jesus[] divinity”²⁴; that “[i]n several thousand letters, he never once mentioned Jesus”²⁵; and that, “[a]s president, Washington was always careful not to invoke Christianity[, but h]is official speeches, orders, and other public communications scrupulously reflected the perspective of a deist.”²⁶

Contrast this rendering with the fuller picture. Washington’s statement to Lafayette is accurately related as far as it goes, but Professor Stone omits the critical words that follow the quoted phrase: “Being no bigot myself to any mode of worship, I am disposed to indulge the *professors of Christianity* in the church, that road to Heaven, which to them shall seem the most direct

FOUNDING OF AMERICA 137, 137–38 (James H. Hutson ed., 2000) [hereinafter RELIGION AND THE NEW REPUBLIC].

20. Stone, *supra* note 1, at 13.

21. *Id.*

22. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). Congress added this language to Jefferson’s draft, PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 148–49 (1997), but Jefferson signed the finished document. Moreover, other evidence makes it clear that Jefferson personally believed in a God who intervenes in human affairs. See *infra* notes 75–78 and accompanying text. Jefferson also believed in a God who answers prayers. How else would one explain the conclusion to his Second Inaugural Address, in which he asked his hearers to join him in supplications to

that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land, and planted them in a country flowing with all the necessities and comforts of life; who has covered our infancy with his providence, and our riper years with his wisdom and power.

Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 339, 345 (Adrienne Koch & William Peden eds., 1944).

23. Stone, *supra* note 1, at 17 (quoting Letter From George Washington to Marquis de Lafayette (Aug. 15, 1787), in 29 THE WRITINGS OF GEORGE WASHINGTON 258, 259 (John C. Fitzpatrick ed., 1939)).

24. *Id.* at 18.

25. *Id.*

26. *Id.* at 19.

plainest easiest and least liable to exception.”²⁷ Professor Stone is correct to suggest that had Washington been a committed Christian, one would expect to find more references to Jesus and Christianity in his works. But Professor Stone once again gives an incomplete account. First, at least one of his three specific claims about Washington’s use of language is incorrect.²⁸ Washington as president did not “scrupulously reflect[.]” a deistic perspective. In an October 1789 Thanksgiving Proclamation, Washington referred to “Almighty God,”²⁹ hardly a “deistic phrase[.]”³⁰ and also urged that various “prayers and supplications” be offered,³¹ a nonsensical entreaty had he shared the deistic belief that God does not “listen[.] to personal prayers.”³² Second, Professor Stone ignores two public occasions when Washington did refer to Jesus. In 1779, General Washington urged the Delaware Chiefs “to learn our arts and ways of life, and above all, the religion of Jesus Christ. These will make you a greater and happier people than you are.”³³ More importantly, Washington ended his 1783 *Circular Letter to the Governors of All the States on Disbanding the Army* by stating in his prayer for the Governors and their respective States that

God would . . . dispose us all to do justice, to love mercy, and to demean ourselves with that charity, humility, and pacific temper of mind, which were the characteristics of the Divine Author of our blessed religion, and

27. Letter From George Washington to Marquis de Lafayette, *supra* note 23, at 259 (emphasis added). This quote affords one small example of why assessing Washington’s personal faith is complicated. I suggest in the text that the phrase, “professors of Christianity,” shows that Washington considered himself to be a Christian. Others infer the opposite meaning. See PETER R. HENRIQUES, *REALISTIC VISIONARY: A PORTRAIT OF GEORGE WASHINGTON 177* (2006) (the phrase suggests that Washington “was an outsider to the faith”). What is free from doubt, however, is that Professor Stone should not have omitted the phrase in quoting the letter to Lafayette. His readers should have been allowed to form their own conclusions about its meaning.

28. The first of Professor Stone’s claims about Washington—that his personal papers do not show a belief in Jesus’ divinity, *supra* text accompanying note 24—may or may not be literally true. It is clear, however, that on one significant public occasion Washington did refer to Jesus as divine. See *infra* note 34 and accompanying text.

29. Thanksgiving Proclamation (Oct. 3, 1789), in *THE WASHINGTON PAPERS* 302, 302 (Saul K. Padover ed., 1955).

30. Stone, *supra* note 1, at 19.

31. Thanksgiving Proclamation, *supra* note 29, at 303. Washington says that these prayers should be offered to “the great Lord and Ruler of Nations,” *id.*, which might be considered deistic language, but in the same paragraph refers to God as “Him” and “He,” which connote a more personal conception of God.

32. See *supra* text accompanying note 8. For other evidence that Washington believed in prayer, see *infra* text accompanying note 34.

33. GEORGE WASHINGTON, Speech to the Delaware Chiefs (May 12, 1779), in 15 *THE WRITINGS OF GEORGE WASHINGTON* 53, 55 (John C. Fitzpatrick ed., 1936).

without an humble imitation of whose example in these things, we can never hope to be a happy nation.³⁴

Professor Stone also stresses the weakness of traditional Christianity by claiming that it was in “serious decline [during] the Revolutionary era.”³⁵ He proffers the fact that church membership had fallen to “not more than one person in . . . ten,”³⁶ as well as the assertion that “[e]vangelicalism, as defined by its contemporary exponents, played at most a ‘negligible role in the founding era.’”³⁷ Concerning the low rate of church membership, Professor Stone does not reveal that his quoted source, Sydney E. Ahlstrom’s *A Religious History of the American People*,³⁸ explains low membership rates in a way that shows that these numbers, in themselves, do not necessarily portend a decline in Christianity itself.³⁹ As for Evangelicalism’s asserted “negligible role in the

34. Circular Letter to the Governors of All the States on Disbanding the Army, in THE WASHINGTON PAPERS, *supra* note 29, at 204, 213–14. Professor Peter Henriques gives mixed signals as to whether he thinks “Divine Author” in fact refers to Jesus. In the text of his recent book on Washington, he states that the phrase “might well refer to Jesus, but may be a reference to Jehovah.” HENRIQUES, *supra* note 27, at 175. In his Notes on Sources, however, he states that “it is logical to assume it does refer to Christ.” *Id.* at 242 (internal citations omitted). In my mind, there is no ambiguity. Washington’s encouragement to “us all” to follow the “Divine Author[s]” example can only refer to Jesus, one who “lived for a while among us.” *John* 1:14 (NIV). It is also worth noting that here Washington also refers to Jesus’ divinity.

35. Stone, *supra* note 1, at 4.

36. *Id.* (quoting SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 365 (1972)). Ahlstrom actually says that “church membership had dropped . . . [to] not more than one person in twenty or possibly one in ten.” AHLSTROM, *supra*. It is thus probable that the church membership rate was 5 percent and only possibly approached 10 percent. Professor Stone did not even mention the lower figure, but instead edited Ahlstrom’s language to reflect the very highest percentage of church membership that it would support. This is a good example of a fair scholar at work. Although Professor Stone no doubt intended to be fair throughout his Essay, there nonetheless are other instances in which his use of authority risks misleading his readers. See, e.g., *supra* note 27 and accompanying text; *infra* notes 54–62 and accompanying text.

37. Stone, *supra* note 1, at 5 (quoting Noll, *supra* note 19, at 146).

38. AHLSTROM, *supra* note 36.

39. Professor Ahlstrom lists such factors as pastors dispersed by the War and a people made apathetic about religion due to “preoccup[ation] . . . with the problems of politics.” *Id.* at 36, at 365. In fairness to Professor Stone, I must point out that Ahlstrom does say that “[t]he revolutionary era was a period of decline for American Christianity as a whole,” *id.*, language that seemingly provides strong corroboration for Professor Stone’s thesis. Ahlstrom’s assertion, however, is principally defended by recounting a decline in the churches. See *id.* at 365–66. Again, this does not necessarily connote a decline in the Christian faith itself. Moreover, the main objective of Professor Stone’s argument is to show how profoundly American culture had changed from the time of the 1639 Fundamental Orders of Connecticut, which said that government should be “established according to God” and establish an official state church supported by taxes, Stone, *supra* note 1, at 3 (quoting THE FUNDAMENTAL ORDERS OF CONNECTICUT (1639), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 23 (Henry S. Commager ed., Appleton-Century-Crofts 7th ed. 1963)), to the time of the U.S. Constitution, which “made no reference whatsoever to God.” *Id.* at 5. The example of the 1780 Massachusetts Constitution undermines Professor Stone’s argument. See *infra* notes 56–62 and

founding era,” Professor Stone relies upon Professor Mark Noll, who wrote to show that Evangelicalism—a particular manifestation of Christianity—however important in our day, was not influential in “the 1770s and 1780s.”⁴⁰ Although Professor Stone uses language that technically says no more than this,⁴¹ the quote ends a three-sentence paragraph in which the main point is the decline of Christianity as a whole.⁴² The suggestion is that this “serious decline” led to Christianity’s, not just Evangelicalism’s, “negligible role.” Professor Noll’s article offers no support for this conclusion. In fact, a few pages before the language relied upon by Professor Stone, Professor Noll states that “Christian faith of a generally Protestant variety played a large part in the founding era of the United States.”⁴³

Beyond the specific factual errors in Professor Stone’s case for deism’s surpassing importance in the Founding Era, one wonders why he makes the argument at all. After all, the Essay is not a sociological work aimed simply at cataloguing the religious beliefs of the Framers. Instead, it seeks to advance a particular view of what they believed to be the proper relationship between religion and the state. Professor Stone claims that the Framers believed religion should be kept in its proper private sphere. Does the fact that some of them were deists corroborate this assertion? Not at all. Even if it could be shown that all were “flat-out deists,” that fact, standing alone, would offer no support to Professor Stone’s claim. The Framers’ religious beliefs, in themselves, are irrelevant.⁴⁴ What is needed is specific evidence showing they wanted to keep religion out of public life. Professor Stone’s Essay provides none. In fact, the Essay focuses so much on religious beliefs per se that it barely addresses the historical question actually relevant to its principal claim.

accompanying text. Finally, even if Christianity was in serious decline throughout the Founding Era, Professor Stone’s thesis is not necessarily proven. See *infra* note 44 and accompanying text.

40. Noll, *supra* note 19, at 146.

41. See *supra* text accompanying note 37.

42. See Stone, *supra* note 1, at 4–5.

43. Noll, *supra* note 19, at 139. Even the alleged “negligible role” of evangelicals is not free from doubt. It may all come down to how one defines evangelicalism, a question beyond the scope of this Response. Suffice it to say that Thomas Buckley argues that “members of evangelical churches” played the pivotal role in a critical event of the Founding Era—the defeat in Virginia of a proposed general tax assessment for the benefit of religion and the 1786 passage instead of Jefferson’s Statute for Religious Freedom. THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 175 (1977). “The key to understanding the nature of the religious settlement in Virginia rests with [the evangelicals], for they wrote and signed the overwhelming majority of the memorials which engulfed the legislature . . . and their representatives provided the votes in the Assembly which determined the outcome.” *Id.*

44. Professor Stone asks his readers to draw a fallacious inference—that non-orthodoxy in Christian beliefs inevitably leads one to oppose religious influence upon public policy.

III. RELIGION WAS NOT SOLELY A PRIVATE MATTER TO THE FRAMERS

Professor Stone makes no real attempt to convince his readers that the Framers intended to restrict religion to the private sphere. He simply makes this assertion.⁴⁵ The Essay offers no convincing corroborating evidence. Instead, it presents only a miscellany of scattered statements of weak probative value.

Some of Professor Stone's statements are too vague to be useful. For example, what is meant by saying that the "Framers viewed 'issues of religion and politics through a prism' that was highly critical of what they saw as Christianity's historical excesses and superstitions[]"?⁴⁶ Even if true, this claim offers no detail on what the Framers believed about Christianity's—much less religion's in general—proper relationship to law.⁴⁷ It certainly does not substantiate Professor Stone's thesis that the Framers would restrict all religion to the private sphere.

Professor Stone does make the more specific claim that "[l]ong before the American Revolution, the Puritan vision of a unified and orthodox religious community had proved unattainable."⁴⁸ Professor Stone encapsulates this "Puritan vision" of a "rigidly theocratic societ[y]" in the phrase, "Christian nation."⁴⁹ He cites the language of the U.S. Constitution as proof that the Framers did not intend "to establish a 'Christian nation,' but rather to create a secular state."⁵⁰ Professor Stone is correct that the Framers did not intend a "Christian nation," i.e., a "rigidly theocratic societ[y]." But there is a very large gap between this fact and Professor Stone's broader assertion that they wanted to confine religion to "churches, temples, and homes."⁵¹ Consider, for example, that the same Virginia Assembly that in 1786 "passed Jefferson's

45. See *supra* text accompanying note 14. Even though Professor Stone quotes Jon Meacham in making his "keep religion private" assertion, see *supra* note 14, Meacham actually disagrees with Professor Stone's ultimate conclusion: "The wall [of separation] Jefferson referred to is designed to divide church from state, not religion from politics." MEACHAM, *supra* note 14, at 19.

46. Stone, *supra* note 1, at 4 (quoting LAMBERT, *supra* note 11, at 161); see also text accompanying note 12.

47. The same thing can be said for one of John Adams's statements quoted by Professor Stone: "I mix religion with politics as little as possible." Stone, *supra* note 1, at 15 (quoting Letter From John Adams to Benjamin Rush (Apr. 12, 1809), in THE SPUR OF FAME: DIALOGUES OF JOHN ADAMS AND BENJAMIN RUSH, 1805–1813, at 142 (John A. Schutz & Douglass Adair eds., 1966)). The context for Adams's remark is to explain why, in an earlier letter to Rush, Adams had quoted only Cicero, not Job and St. Paul, as an example of the point he was making. See *id.*

48. *Id.* at 3.

49. See *id.*

50. *Id.* at 5.

51. See *supra* text accompanying note 14.

[Statute for Religious Freedom] also passed a statute requiring the observance of Sunday as a day of rest.”⁵² Thomas Buckley writes that

[t]his legislation inaugurated a series of so-called blue laws which would keep government firmly enmeshed in the business of religion. Ostensibly designed for the benefit of the whole community, and without reference to particular creeds or religious systems, they were in reality meant to impose the beliefs and values of the dominant Protestant churches upon the inhabitants of the state.⁵³

Equally unsupportive of Professor Stone’s thesis is his assertion that John Adams “was acutely aware of the need to separate religion from politics. ‘Nothing,’ [Adams] wrote, ‘is more dreaded than the national government meddling with religion.’”⁵⁴ This quote on its face reveals the narrow focus of Adams’s dread—the *national* government’s “meddling with religion.” Thus, Adams was not even talking about the general relationship between religion and law, much of which, of course, is implemented by state and local governments. Moreover, the letter’s context shows that Adams’s concern was narrower still. The quoted sentence is part of a paragraph in which Adams relates to Benjamin Rush the alarm caused by suspicions “that the Presbyterian Church was ambitious and aimed at an establishment as a national church.”⁵⁵ Professor Stone also does not reveal that while Adams feared an established church at the national level, he had no such qualms about religious establishments at the state level. Adams was the principal draftsman of the 1780 Massachusetts Constitution, a document that David McCullough calls “one of the most admirable, long-lasting achievements of . . . Adams’s life.”⁵⁶ The Preamble referred “to the constitution as ‘a covenant’ or ‘compact’ between the people and God.”⁵⁷ The language bespoke a “covenant ceremonial liturgy, rooted in the Hebrew Bible and in a New England tradition going back to the Mayflower Compact of 1620.”⁵⁸ The Declaration of Rights, which followed the Preamble, “affirmed the ‘duty’ of all people to worship ‘The Supreme Being, the great creator and preserver of the universe.’”⁵⁹ The

52. WILLIAM LEE MILLER, *THE FIRST LIBERTY: AMERICA’S FOUNDATION IN RELIGIOUS FREEDOM* 48 (2003).

53. BUCKLEY, *supra* note 43, at 181–82.

54. Stone, *supra* note 1, at 15 (quoting Letter From John Adams to Benjamin Rush (June 12, 1812), in *THE SPUR OF FAME: DIALOGUES OF JOHN ADAMS AND BENJAMIN RUSH*, *supra* note 47, at 224).

55. Letter From John Adams to Benjamin Rush, *supra* note 54, at 224.

56. DAVID MCCULLOUGH, *JOHN ADAMS* 220 (2001).

57. John Witte, Jr., “A Most Mild and Equitable Establishment of Religion”: *John Adams and the Massachusetts Experiment*, in *RELIGION AND THE NEW REPUBLIC*, *supra* note 19, at 1, 19.

58. *Id.*

59. MCCULLOUGH, *supra* note 56, at 221–22. The constitutional convention altered this language to make worshipping God “a right of all men, as well as a duty.” *Id.* at 224.

Constitution also required that both the Governor and Lieutenant Governor “be of the Christian religion.”⁶⁰ Even more significantly, the Constitution, in language not drafted by Adams but supported by him,⁶¹ also stipulated “the payment of religious taxes in support of congregational ministers.”⁶²

One statement offered by Professor Stone might initially seem sufficient in itself to substantiate his “keep religion private” characterization of the Framers’ perspective: Thomas Jefferson was “deeply committed to the separation of church and state.”⁶³ No elaboration is provided as to what this concept meant to Jefferson. Maybe Professor Stone assumed that everyone would know what “separation of church and state” entails. The “separation” concept, and in particular Jefferson’s metaphor of a “wall of separation,” has achieved iconic significance in the public mind and in constitutional law.⁶⁴ Discerning Jefferson’s intended meaning, however, is complicated.

Jefferson used his “wall of separation” imagery in an 1802 letter to the Danbury Baptist Association.⁶⁵ He apparently never used it again.⁶⁶ Professor Daniel Dreisbach argues that “Jefferson’s ‘wall,’ . . . was a metaphoric construction of the First Amendment, which governed relations between religion and the *national* government. His ‘wall,’ therefore, did not specifically address relations between religion and state authorities.”⁶⁷ This interpretation not only is corroborated by the text of the letter,⁶⁸ but also by Jefferson’s own conduct. Thus, although Jefferson as President refused to issue “executive proclamations

60. Witte, *supra* note 57, at 10.

61. *Id.* at 10–11, 24.

62. *Id.* at 10. It is curious that McCullough does not mention this provision in discussing “notable changes” to Adams’s draft made by the convention. See MCCULLOUGH, *supra* note 56, at 224–25.

63. Stone, *supra* note 1, at 12.

64. See DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 1–8 (2002); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1–9 (2002).

65. HAMBURGER, *supra* note 64, at 1 & n.1. The phrase appears in a very long sentence in the second of the letter’s three paragraphs:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.

Letter From Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), in DREISBACH, *supra* note 64, at 148.

66. DREISBACH, *supra* note 64, at 54. There thus “is little evidence that Jefferson thought this figure of speech expressed a universal principle, encapsulated the most salient features of his church-state views, or was his definitive word on the First Amendment.” *Id.*

67. *Id.* at 50.

68. See Letter From Thomas Jefferson to Danbury Baptist Association, *supra* note 65.

recommending religious observances,”⁶⁹ as Governor of Virginia “he issued a proclamation appointing ‘a day of publick and solemn thanksgiving and prayer to Almighty God.’”⁷⁰ The key question, however, is whether Jefferson intended the “wall” imagery to suggest that religious influence should be barred from public policy debates. Many have interpreted the “wall” to mean precisely this—that people have no right “to bring their distinct religious views to bear on politics.”⁷¹ Does Jefferson support them?

The answer is irrefutably “no.” First, Jefferson’s Danbury letter spoke of a “wall” between church and state, not religion and the state.⁷² Using “‘church,’ rather than ‘religion,’ . . . emphasized that the constitutional separation was between ecclesiastical *institutions* and the civil state.”⁷³ This language would have appealed to the “New England Baptists [who] framed their agenda in terms of disestablishment, but . . . did not want religious influences separated from public life and policy.”⁷⁴ Second, Jefferson brought his own religious beliefs “to bear on politics.” In the early 1780s he proposed slavery’s gradual abolition.⁷⁵ Why? In part because,⁷⁶ as explained in his *Notes on the State of Virginia*,⁷⁷ written in 1781–82, he feared that otherwise a

69. DREISBACH, *supra* note 64, at 65.

70. *Id.* at 59 (quoting Thomas Jefferson, Proclamation Appointing a Day of Thanksgiving and Prayer (Nov. 11, 1779)). He also supported Madison’s unsuccessful efforts to have a bill enacted that not only authorized Virginia governors “to designate days for thanksgiving and fasting and to notify the public by proclamation,” but also imposed a fine upon ministers who refused to participate without reasonable excuse. *Id.*

71. HAMBURGER, *supra* note 64, at 484; see DREISBACH, *supra* note 64, at 2, 7.

72. Letter From Thomas Jefferson to Danbury Baptist Association, *supra* note 65.

73. DREISBACH, *supra* note 64, at 51. It is important to keep in mind that “the civil state” Jefferson had in mind was the federal government. See *supra* notes 67–70 and accompanying text. Moreover, the letter’s focus was on the government’s potential interference with “faith” and “worship,” not on the church’s potential influence on the government. See Letter From Thomas Jefferson to Danbury Baptist Association, *supra* note 65.

74. DREISBACH, *supra* note 64, at 51. In this they were no different from the Virginia evangelicals who were instrumental in passing Virginia’s 1786 Statute for Religious Freedom. See *supra* note 43. The evangelicals “endorsed [that Statute] in terms of their own freedom but at the same time pressed for laws designed to enforce a style of public morality and life dictated by and expressive of their own particular religious beliefs.” BUCKLEY, *supra* note 43, at 181.

75. JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 145 (1996).

76. Joseph Ellis writes that Jefferson acted because he believed that slavery was incompatible “with the principles on which the American republic was founded.” See *id.* at 145–46. This is undoubtedly true, but what were those principles? Jefferson’s Declaration declared that the Creator made men equal and endowed them with inalienable rights. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). To be motivated by this belief in the realm of law is to bring religious faith “to bear on politics.”

77. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 163 (William Peden ed., 1955) (1787).

just God “by supernatural interference” would assist the slaves in gaining their freedom by the “extirpation” of their masters.⁷⁸

CONCLUSION

It has been shown that the actual history of the Founding Era does not substantiate Professor Stone’s claim that the Founders meant to separate religion from politics. One should not be surprised, for human nature would make any such separation impossible. Professor Stone concedes that virtually all the Founders, traditional religionists and otherwise, believed that religion was valuable in fostering “civic virtue,”⁷⁹ keeping alive “the best sense of moral obligation,”⁸⁰ and confining persons “within the bounds of social duty.”⁸¹ It is completely unrealistic to think that a religious person’s sense of right and wrong could ever be completely cabined within the private sphere. Is a person of faith to care about virtue only when dealing with a neighbor across one’s back fence? Can religious citizens reasonably be expected to have no interest in broader societal issues that implicate justice?⁸² The answer is “no,” and American history manifests their concern. As powerfully expressed by Professor William Miller:

The separating of church from state certainly has not meant—despite some shrill cries that it should—the separating of religion from politics. Far from it. Churches and churchgoers have been active in American politics and social policy on explicit religious grounds from the American Revolution through the abolition movement and the Civil War and the Social Gospel and the gospel of wealth and the Prohibition movement and the pacifist movement and the Civil Rights movement . . . and a great deal I am leaving out . . . There are protests, but the pattern is that one objects to religion in politics when one disagrees with the political position taken but endorses it when

78. See *id.*

79. Stone, *supra* note 1, at 22.

80. *Id.* (quoting Philips Payson, *A Sermon*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 523–29 (Charles S. Hyneman & Donald S. Lutz eds., Liberty Press 1983)).

81. *Id.* at 23 (quoting ALEXANDER HAMILTON, *The Stand*, No. III (April 7, 1798), in 21 THE PAPERS OF ALEXANDER HAMILTON 402, 405 (Harold C. Syrett ed., 1974)).

82. Professor Stone notes that Thomas Jefferson agreed with John Adams that “the essence of sound religious belief [is to] ‘be just and good.’” Stone, *supra* note 1, at 17, 14 n.102 (quoting Letter From John Adams to Thomas Jefferson (Dec. 12, 1816), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 499 (Lester J. Cappon ed., 1987)). It is unrealistic and unfair to expect religious citizens to confine their concerns about justice to the private sphere.

one agrees with that position—a “moral” issue is then discerned, and religion-in-politics is then not only acceptable but altogether fitting.⁸³

Professor Stone’s cry for separating religion from politics is not “shrill.” Still, his Essay suggests that he is among those who have only a selective aversion to religious influence in public affairs. Consider again the list of public policy issues that concern him.⁸⁴ All of them relate to the conservative end of the political spectrum. Where are civil rights, animal rights, the nuclear freeze, environmental protection, and other typically liberal issues that attract the involvement of religious citizens?⁸⁵ Moreover, why refer only to forbidding abortions, when some citizens support abortion rights for religious reasons?⁸⁶ A categorical objection to religious influence in public policy disputes, while more logically consistent,⁸⁷ would still be historically indefensible. Admittedly, a short essay cannot be expected to give a comprehensive account. Still, an author can reasonably be held to a “no distortion” standard. Professor Stone’s Essay unfortunately does not meet this test.

A final point must be made. Even though the ultimate goal of the Essay is to make an argument about what role the Constitution permits religion to play in public policy disputes, Professor Stone ignores a key source of insight—the United States Supreme Court. The Court has repeatedly said that no constitutional violation occurs from the fact that a governmental action implements a policy that coincides with a religious belief.⁸⁸ These decisions repudiate the

83. MILLER, *supra* note 52, at 247.

84. See *supra* text accompanying note 15.

85. One wonders what Professor Stone thinks of Dr. Martin Luther King Jr., who clearly was motivated by his Christianity. See Samuel W. Calhoun, *May the President Appropriately Invoke God? Evaluating the Embryonic Stem Cell Vetoes*, 10 RUTGERS J. L. & RELIGION 1, 19–22 (2008). And would Professor Stone have objected to the “Protestant ministers in New England and New York,” who in the 1850s “preached over 3,200 sermons in the space of only six weeks” in opposition to the “Nebraska Bill, which left open the possibility of slavery in the Kansas and Nebraska territories”? HAMBURGER, *supra* note 64, at 244–45. And what about the “more than 3,000 New England clergymen [who] signed a memorial to Congress” protesting the Nebraska Bill as “a great moral wrong . . . and exposing us to the righteous judgments of the Almighty”? *Id.* at 245 (quoting Protest of 3,050 New England Clergymen (Mar. 1, 1854), in DAVID CHRISTY, PULPIT POLITICS; OR ECCLESIASTICAL LEGISLATION ON SLAVERY 598, 598–99 (Negro University Press 1969) (1862)).

86. One outlet for such citizens is The Religious Coalition for Abortion Rights.

87. To be consistent, Professor Stone would have to object to President Obama’s March 2009 lifting of the federal ban on funding of embryonic stem cell research, as the President’s motivations were partly religious: “As a person of faith, I believe we are called to care for each other and work to ease human suffering.” President Barack Obama, Remarks on Signing an Executive Order Removing Barriers to Responsible Scientific Research Involving Human Stem Cells and a Memorandum on Scientific Integrity, Daily Comp. Pres. Doc., 2009 DCPD No. 00135 (Mar. 9, 2009) (*available at* <http://gpoaccess.gov/presdocs/index.html>).

88. See *Bowen v. Kendrick*, 487 U.S. 589, 604 n.8, 605 (1988) (rejecting a facial challenge to the Adolescent Family Life Act); *Harris v. McRae*, 448 U.S. 297, 319–20 (1980) (upholding abortion funding restrictions); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (upholding a

Essay's message that the Constitution bars religious influence on issues of public policy.

Sunday closing law). As the Court stated in *Harris*, “[t]hat the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.” 448 U.S. at 319. A showing that the overlap of religious and secular values was not entirely coincidental, for example, that Jews and Christians had worked zealously to criminalize stealing, presumably would not make such laws unconstitutional.