

January 2011

# Were the Framers - and the Writers Who Influenced Them - Unable to Foresee the Extent of Secularization That Could Result from the Separation of Church and State?

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### Recommended Citation

Teresa M. Blake, *Were the Framers - and the Writers Who Influenced Them - Unable to Foresee the Extent of Secularization That Could Result from the Separation of Church and State?*, 33 CAMPBELL L. REV. 723 (2011).

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# Were the Framers—and the Writers who Influenced Them—Unable to Foresee the Extent of Secularization that could Result From the Separation of Church and State?

## INTRODUCTION

While the United States is filled with religious sects, denominations, worshippers, and even fanatics, the truth is that American society has become largely secular.<sup>1</sup> When analyzing society's trend toward secularization from a legal perspective, it is only natural to begin with the Establishment Clause of the First Amendment<sup>2</sup>—the clause responsible for the separation of church and state. But is today's secular society really the brainchild of the Framers of the Constitution? Or is it an unintended result that was far beyond their realm of foreseeability? This Comment addresses these questions by surveying the writings of several influential Constitutional Framers.<sup>3</sup> However, in realizing that even great thinkers were inspired by others, this Comment goes beyond the likes of James Madison and Thomas Jefferson, and explores the works of John Locke and Adam Smith to discover the foundation upon which the Framers were working.

Locke's natural rights, limited government, and separation of spheres were based on Christian principles and a desire to protect religion and religious freedoms from political corruption. This ideology formed the basis of American liberalism, which resulted in the separation of church and state. This information, coupled with the

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1. See generally Gerald Marwell & N.J. Demerath III, "Secularization" by Any Other Name, 68 AM. SOC. REV. 314 (2003). Sociologists of religion have generally subscribed to a secularization theory for the past fifty plus years. The crux of the secularization theory says that Americans go to church less than they used to, and fewer Americans believe in God. For example, Marwell and Demerath note that the amount of Americans claiming that they have 'no religious preference' nearly doubled from 1990–2000. *Id.* at 314.

2. U.S. CONST. amend. I.

3. Because so many men played important parts in the framing of the Constitution and later the First Amendment, it is impossible to focus on all of them in a piece of such limited scope and length. For this reason, the "Framers" of focus in this Comment are primarily James Madison, Thomas Jefferson, and other separationists.

words and actions of the Framers themselves reveals that the Framers were unable to envision that society would become decreasingly religious at least in part because of the Establishment Clause. Because the Constitution was based on Locke's religiously inspired liberalism, this Comment argues that the Supreme Court should take an accommodation approach to interpreting the Establishment Clause. This approach is still within the limits of the First Amendment, but it is also more in line with the vision of the Framers because it prevents the Court from suppressing religion where it naturally occurs.

### I. BACKGROUND

The creation of this nation's Constitution and its amendments was a tremendous effort that involved fifty-five representatives from twelve of the thirteen states,<sup>4</sup> each with his own perspective. While the Bill of Rights was not added to the Constitution until 1789 and ratified until 1791, it was contemplated during the Constitutional Convention of 1787, and several states only ratified the Constitution in anticipation of its addition.<sup>5</sup> The Bill of Rights was mostly drafted by James Madison, but the views of many influential Framers—not just Madison—have been utilized when analyzing the Establishment Clause.<sup>6</sup> The problem with looking at the many Framers' intentions for the Establishment Clause is that there does not appear to be any general consensus among them.<sup>7</sup> This lack of uniformity has added to the controversy surrounding the Establishment Clause because nearly any desired intent can be found.<sup>8</sup> This means that judges and scholars alike have a great

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4. MAX FARRARD, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES*, 39 (1913). Fifty-five men in total attended the Constitutional Convention in 1787. *See id.* at 14–38. The number of representatives from each state was as follows: seven for Virginia, six for New Jersey, seven for Pennsylvania, five for North Carolina, five for Delaware, six for Georgia, three for New York, four for South Carolina, five for Massachusetts, three for Connecticut, five for Maryland, and four for New Hampshire. Rhode Island was the only state that did not have any representatives. *Id.*

5. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 5 (3d ed. 2006).

6. *See id.* at 5, 1184.

7. *Id.* at 1184.

8. *Id.* at 1184–85, 1192–99. Professor Chemerinsky notes that there are three main competing theories and ways of approaching the Establishment Clause: strict separation, neutrality theory, and accommodation. *Id.* at 1192–97. The first approach, and a focus of this Comment is strict separation, which advocates the strictest separation of religion and government. *Id.* at 1192. It is embodied by Thomas Jefferson's "wall of separation" metaphor, *infra* note 44, and was also advanced by James Madison. CHEMERINSKY, *supra*

amount of flexibility in their analyses, and can back up nearly any viewpoint with one of many different theories. As Erwin Chemerinsky puts it, “[T]he divergence of views among the Framers, and the abstractness with which they were stated, makes it possible for those on all sides of the debate to invoke history in support of their positions.”<sup>9</sup>

The First Amendment to the United States Constitution states, in part: “Congress shall make no law respecting an establishment of religion . . . .”<sup>10</sup> Because the actual text of the Establishment Clause is so broad, much of this controversy has involved discovering the intent of the Framers, which is the only way of deciphering what was truly meant by the Establishment Clause. Thus the need to go beyond the Framers and get an understanding of the works and philosophies that inspired them.

## II. A SEPARATION OF SPHERES

It is well known that this country was founded on the political and economic ideals of John Locke and Adam Smith.<sup>11</sup> Locke’s belief in natural rights, and Smith’s views on economic freedom combined to form the ideological basis for the foundation of the United States.<sup>12</sup> While both Locke’s and Smith’s ideas influenced the overall form of the United States government, their thoughts were also specifically applicable to the interaction between religion and state, although in a more discrete way.<sup>13</sup> Locke’s limited government and separation of

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note 5 at 1192. The second approach noted by Chemerinsky is the neutrality theory. *Id.* at 1193. This theory provides that the government must treat religion and secularism equally and that it cannot favor certain religions over others. *Id.* The neutrality theory has also been articulated by the Supreme Court as an endorsement test, in which the government cannot symbolically endorse religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring). The third notable approach to the Establishment Clause is the accommodation theory. CHEMERINKSY, *supra* note 5 at 1196. Advocates of this approach believe it is important for the Court to recognize religion’s place in society and accommodate its existence. *Id.* Under this theory, the Establishment Clause would only be violated if the government established an official state church or forced religious participation. *See infra* Part IV.

9. *Id.* at 1185.

10. U.S. CONST. amend. I.

11. Kenneth R. Himes, *Rights of Entitlement: A Roman Catholic Perspective*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 507, 513 (1997).

12. *Id.*

13. *See THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit

spheres was premised on religious principles, and both sought separation of church and state for the protection and growth of religion.

### A. John Locke

John Locke was perhaps the single greatest influence on the creation of the United States government. His concept of natural rights has a clear presence in the Declaration of Independence's proclamation that men have certain inalienable rights,<sup>14</sup> while his idea of a limited government is found in the separation of powers created by the Constitution.<sup>15</sup> These ideas come together in Locke's *Second Treatise of Civil Government*, where he maintained that a limited government is the

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of happiness."); U.S. CONST. amend. V ("[N]or shall be . . . deprived of life, liberty, or property."). These provisions demonstrate how Locke's belief that the right to own property was a natural right joined forces with the ideals of liberty to form the foundation on which this country stands.

14. See THE DECLARATION OF INDEPENDENCE para 2. (U.S. 1776). The inalienable rights bear a resemblance to Locke's natural rights:

To understand political power aright, and to discern its origin, we must consider what state all men are naturally in, and that is a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.

All men are by nature in a state of equality, wherein all power and authority is the same, no one having more than another. Nothing is more evident than that creatures of the same species, born to the same advantages of nature and with the use of the same faculties, should also be equal to one another without subordination or subjection.

JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 16 (Lester DeKoster ed., W.B. Eerdmans Publishing Co. 1978) (1690).

15. See U.S. CONST. art. I–III. The separation of powers created by the executive, legislative, and judicial branches in articles I, II, and III of the Constitution seems to be inspired by Locke's ideas of a limited government:

[B]ecause the laws that are once made have a constant and lasting force, it is necessary there should always be a power which should see to the perpetual execution of the laws. And thus the legislative and executive power come often to be separated.

LOCKE, *supra* note 14, at 64. Locke also noted:

[W]hoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; and these laws are to be administered by impartial and upright judges who are to decide controversies by these laws.

*Id.* at 58.

system that best promotes and protects man's natural rights.<sup>16</sup> He explained:

But though men when they enter into society give up the equality, liberty, and executive power they had in the state of nature into the hands of the society, to be so far disposed of by the legislative as the good of the society shall require, yet it remains the intention of everyone the better to preserve himself, his liberty, and his property by entering society . . . . [A] government is obliged to secure everyone's property by providing against those three defects above-mentioned that made the state of nature so unsafe and uneasy. And so whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees . . . . And all this to be directed to no other end but the peace, safety, and public good of the people.<sup>17</sup>

In essence, a government that is limited in its power and its purpose allows for the ultimate benefit to people and society.<sup>18</sup> The separation of the legislative from the executive prevents both branches from gaining too much power and putting their interests ahead of the people's interests.<sup>19</sup> Finally, a government that operates for the sole purpose of furthering peace and happiness will not invade upon those ideals by exercising too much power.<sup>20</sup> By relegating religion to the private sphere, the institution would be beyond governmental reach.<sup>21</sup>

16. LOCKE, *supra* note 14.

17. *Id.* at 58.

18. *Id.*

19. Locke explained this in the context of absolute monarchs:

For the absolute prince is presumed to have legislative and executive power in himself alone . . . . There is only this woeful difference to the subject, or rather the slave, of an absolute prince: whenever his property is invaded by the will and order of his monarch, he not only lacks all appeal as those in civil society ought to have, but is denied the liberty to judge of or defend his right, as if he were degraded from the common state of rational creatures.

*Id.* at 45. Locke also wrote:

But in governments where the legislative is in one lasting assembly, always in being, or in one man, as in absolute monarchies, there is danger still that they might think themselves to have a distinct interest from the rest of the community, and so will be apt to increase their own riches and power by taking what they think fit from the people.

*Id.* at 62.

20. Himes, *supra* note 11, at 512–13.

21. See Michael W. McConnell, *Religion and its Relation to Limited Government*, 33 HARV. J.L. & PUB. POL'Y 943, 948–49 (2010).

It is important to recognize that Locke's works do not simply protect religion—they embody it. Locke's *Second Treatise* suggested that God was the basis of his entire philosophy.<sup>22</sup> He wrote:

[T]he law of nature stands as an eternal rule to all men, legislators as well as others. The rules they make for other men's actions must be conformable to the law of nature—that is, *to the will of God*, of which it is a declaration—and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it.<sup>23</sup>

Thus, what was arguably the single biggest influence on the United States Constitution was based on religious principles and a profound belief in God.

While Locke's ideology was based on "the will of God,"<sup>24</sup> he did not address the separation of church and state directly in his *Second Treatise*. There, he laid out the general premise of separate spheres and his philosophy regarding man's natural rights that are handed down by God.<sup>25</sup> It was in his *Letter Concerning Toleration* that Locke delineated his ideas on the separation of religion and government.<sup>26</sup> He wrote: "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other."<sup>27</sup> Locke advocated strict separation, but he did so in thinking that compelled religion did not result in true belief or lead to salvation.<sup>28</sup> For this reason, Locke's limited government

22. See generally LOCKE, *supra* note 14.

23. *Id.* at 61 (emphasis added).

24. *Id.*

25. See generally LOCKE, *supra* note 14.

26. JOHN LOCKE, *A Letter Concerning Toleration*, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 215 (Ian Shapiro ed., 2003).

27. *Id.* at 218.

28. Ian Shapiro, *Introduction* to TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION ix, xiv (Ian Shapiro ed., 2003). Locke explained:

[T]he whole jurisdiction of the magistrate reaches only to these civil concerns; and that all civil power, right, and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls . . .

[T]he care of souls is not committed to the civil magistrate, any more than to other men. It is not committed unto him, I say, by God; because it appears not that God has ever given any such authority to one man over another, as to compel any one to his religion. Nor can any power be vested in the magistrate by the consent of the people; because no man can so far abandon the care of his own salvation as blindly to leave it to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace.

set forth in his *Second Treatise* is still the best way to reconcile a separation of church and state within a greater theological scheme.

Locke believed that the government had no role in regulating religion,<sup>29</sup> thus limiting one realm of the government's power. But under the Lockean premise of separate spheres, a limited government was meant to protect certain freedoms.<sup>30</sup> Because Locke's *Second Treatise* advocates a limited government but does not explicitly apply this principle to religion, it is best to do so through analogy. Locke saw that an abuse of power could lead to force,<sup>31</sup> and forbade the government from taking somebody's property without consent in order to promote happiness.<sup>32</sup> Where Locke maintained that the government should not forcefully take land, he also felt that it should not force religion on its people.<sup>33</sup> In addition, if a limited government could promote happiness, a limited government could similarly promote religion. Thus a separation of church and state meant religion could flourish as a result of freedom.<sup>34</sup>

When considering this premise of promoting religion with the fact that Locke's thesis was based entirely on the rule of God, it seems impossible to suggest that he was promoting a secular society. Locke's notion of a limited government is based entirely on the rule of God, and this does not change simply because he wanted to take religion out of government for religion's own protection. God was an integral part of Locke's ideology, and pursuant to his philosophy, separation did not have to equate to secularization. This application of Locke's principles to disestablishment is bolstered by the work of Adam Smith.<sup>35</sup>

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LOCKE, *supra* note 26, at 218–19.

29. LOCKE, *supra* note 26, at 220. (“These considerations . . . seem unto me sufficient to conclude, that all the power of civil government relates only to men's civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come.”).

30. Himes, *supra* note 11, at 512–13.

31. See *supra* note 18 and accompanying text.

32. LOCKE, *supra* note 14, at 62.

33. LOCKE, *supra* note 26, at 215. (“The business of true religion . . . is not instituted in order to the erecting an external pomp, nor to the obtaining of ecclesiastical dominion, nor to the exercising of compulsive force; but to the regulating of men's lives according to the rules of virtue and piety.”).

34. See McConnell, *supra* note 21, at 951.

35. *Id.* at 944.

### B. Adam Smith

While John Locke was partially responsible for establishing the philosophy that inspired the form of the United States government, Adam Smith furthered the idea of a limited government through economic principles nearly a century after Locke began publishing his treatises.<sup>36</sup> Smith's influence is mostly seen in the United States economy as a result of his famous work, *The Wealth of Nations*.<sup>37</sup> Smith spent the majority of this book advocating economic freedom and attacking European mercantilism.<sup>38</sup> He advanced the ideas that a free market would promote individual liberty, and that the "invisible hand" guiding the market would result in a greater good for society.<sup>39</sup> Smith's ideas of economic liberty quickly became associated with Locke's natural rights, particularly the right to own property.<sup>40</sup>

Adam Smith was an economist, yet his work also spoke on the religious organization of the day: he dedicated an entire chapter in *The Wealth of Nations* to religion.<sup>41</sup> Smith gave a current and historical account of the negatives that arise when religion and government come together; namely that establishment is bad for religion because it leads to governmental corruption of religion.<sup>42</sup> In the context of education—which was disseminated by the clergy—Smith explained that the clergy's "exertion, zeal, and industry are likely to be much greater" when they are relegated to the private sphere rather than funded by the government.<sup>43</sup>

36. Himes, *supra* note 11, at 513.

37. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (J.R. McCulloch ed., Edinburgh 4th ed. 1850) (1786).

38. McConnell, *supra* note 21, at 951.

39. SMITH, *supra* note 37, at 199. Smith explained:

By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it.

*Id.*

40. Himes, *supra* note 11, at 513.

41. SMITH, *supra* note 37 book V, chapt. I, art. III, pt. III, 353–66.

42. *Id.*

43. *Id.* at 354. Smith wrote:

Smith also explained that where an established religion exists, the clergy becomes corrupted and the sovereign becomes disempowered.<sup>44</sup> Thus an established church is bad for both church and state.<sup>45</sup> Smith also noted that where an established church is hurt by its connection to the government, smaller, independent sects thrive and get more out of their followers.<sup>46</sup> Through this analogy, it is possible to conclude that Smith thought that all religious sects would thrive through disestablishment.

While Smith was quite critical of the combination of religion and government, *The Wealth of Nations* reveals that he was unlikely to foresee a secular society given the separation of church and state.<sup>47</sup> Smith wrote:

[I]f politics had never called in the aid of religion, had the conquering party never adopted the tenets of one sect more than those of another . . . it would probably have dealt equally and impartially with all the different sects, and have allowed every man to choose his own priest and his own religion as he thought proper. There would in this case, no doubt, have been a great multitude of religious sects.<sup>48</sup>

Not only did he believe that religion would flourish numerically, he also thought that an increased number of sects would result in more competition—which would in turn create better teachers, better religious leaders, and more overall enthusiasm.<sup>49</sup> In discussing the resulting fervor, Smith noted that “the excessive zeal of each [religious sect] for its particular tenets could not well be productive of any hurtful effects, but, on the contrary, of several good ones . . . .”<sup>50</sup> Given the socio-political environment in which Smith was writing and the event of

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The clergy of an established and well-endowed religion frequently become men of learning and elegance, who possess all the virtues of gentlemen, or which can recommend them to the esteem of gentlemen; but they are apt gradually to lose the qualities, both good and bad, which gave them authority and influence with the inferior ranks of people, and which had perhaps been the original causes of the success and establishment of their religion.

*Id.*

44. *Id.* at 359–61.

45. *See id.*

46. *Id.* at 357. (“In little religious sects, accordingly, the morals of the common people have been almost always remarkably regular and orderly; generally much more so than in the established church.”).

47. *Id.* at 355–56.

48. *Id.* at 355.

49. *Id.* at 355–56.

50. *Id.* at 356.

disestablishment,<sup>51</sup> it appears that Smith could only foresee an overall increase in religion rather than a dip into secularization.

Perhaps most illustrative of Smith's lack of foresight regarding the separation of church and state is his view that religion has a constant influence over government. He explained that "positive law has, perhaps, never yet established, and probably never will establish in any country; because, with regard to religion, positive law always has been, and probably always will be, more or less influenced by popular superstition and enthusiasm."<sup>52</sup> He deemed a true separation of religion and government to be impossible; therefore Smith's ideas of disestablishment involved a society where religion flourished and the state was never entirely secular.

Locke and Smith combined to form a philosophy based on natural rights and economic freedom, which are promoted by a limited government. While a limited government was one of the founding principles of the United States and its Establishment Clause, Locke's and Smith's ideas regarding the separation of church and state were intended to advance religion's prominence in society, not hinder it.

### III. FROM SEPARATE SPHERES TO SEPARATION IN THE EIGHTEENTH CENTURY UNITED STATES

Locke's and Smith's ideals were integral in the foundation of the United States of America and the framing of its Constitution; but their views often take the backseat to those of the Constitutional Framers.<sup>53</sup> While liberalism would not have taken the same form without Locke, it is still important to study the Framers' views. Of the Framers, James Madison's perspective is perhaps the most important because he drafted the First Amendment and its Establishment Clause.<sup>54</sup> Thomas Jefferson's views are arguably next in importance because they have been quoted extensively.<sup>55</sup>

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51. Smith published his *Wealth of Nations* in 1776, when the Church of England was under British rule. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2189 (2003). The Church was entirely under government control: the monarch was the head of the Church, and parliament determined the liturgy of the Church. *Id.*

52. SMITH, *supra* note 37, at 356.

53. One of the most prevalent means of Constitutional interpretation involves studying the Framers' intent. CHEMERINSKY, *supra* note 5, at 17.

54. *Id.* at 5.

55. Thomas Jefferson, while an advocate for the separation of church and state, was not actually a "framer" of the Constitution, as he was out of the country fulfilling

James Madison was a prolific writer and many of his writings have been compiled over the years because of his political status.<sup>56</sup> Among these writings are bills, journals of the constitutional convention, and informal letters.<sup>57</sup> Madison wrote persuasively on the topic of religion, and advocated both freedom of religion and the separation of church and state before the Constitution was even written.<sup>58</sup> For example, in his *Remonstrance Against Religious Assessments*, Madison opposed Virginia's *Bill Establishing a Provision for Teachers of the Christian Religion* and argued that religion flourishes when it is not under governmental control.<sup>59</sup> Madison—like Adam Smith—also noted that the government could corrupt religion when he wrote: “ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.”<sup>60</sup> His ideas remained largely the same three years later when he contributed to *The Federalist Papers*.<sup>61</sup> There, Madison explained that a free government would allow religions and religious rights to grow.<sup>62</sup> Madison's position regarding the separation of church

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diplomatic duties during the Constitutional Convention of 1787. J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 *BYU L. REV.* 755, 767 (2001).

56. See, e.g., JAMES MADISON, *THE WRITINGS OF JAMES MADISON* (Gaillard Hunt ed., 1900–1910).

57. E.g., *THE FEDERALIST PAPERS* (James Madison); JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787, WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (Gaillard Hunt & James Scott Brown eds., 1987).

58. See JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785)* reprinted in 2 *THE WRITINGS OF JAMES MADISON, 1783–1787*, at 183 (Gaillard Hunt ed., 1901).

59. *Id.* Madison explained:

[T]he establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of his world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them . . .

*Id.* at 187.

60. *Id.*

61. *THE FEDERALIST PAPERS* (American Bar Association ed. 2009) (1788).

62. Madison wrote:

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the extent of country and number of people comprehended under the same government.

*THE FEDERALIST NO. 51* (James Madison) (American Bar Association ed., 2009).

and state never wavered, as he expressed it consistently in private letters and public addresses.<sup>63</sup>

Plainly stated, Madison's works evidenced his stance that disestablishment would be good for the church; but they also displayed his personal opinions on the sacredness of Christianity. For example, Madison's *Remonstrance* explains: "[T]he policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind."<sup>64</sup> Not only was Madison himself a religious man, he lived in a society that could envision a secular world.<sup>65</sup> His liberal ideals and reasons for separating church and state would not have been the same if Christianity were taken out of the picture.

Despite not being a "framer" of the constitution, Thomas Jefferson has become one of the most quotable and influential people from the late eighteenth century regarding the separation of church and state.<sup>66</sup> In 1802—twelve years after the First Amendment was ratified—Jefferson wrote in a letter:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and 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 and State.<sup>67</sup>

This "wall of separation" metaphor has mostly been taken out of context and used to justify the strict separation between church and state that has largely contributed to the secularization of American society.<sup>68</sup> However, Jefferson's very next sentence reads:

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63. Letter from James Madison to George Washington (June 12, 1788) in 5 THE WRITINGS OF JAMES MADISON, 1787–1790, at 176 (Gaillard Hunt ed., 1904). ("There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.")

64. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785) reprinted in 2 THE WRITINGS OF JAMES MADISON, 1783–1787, at 189 (Gaillard Hunt ed., 1901).

65. Stephen D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 966 (1989):

66. *Id.* at 973–74.

67. Letter from Thomas Jefferson to Messrs Nehemiah Dodge and Others, (Jan. 1, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON, 113 (H.A. Washington ed., 1854).

68. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

Adhering to this expression of the supreme will of the nation on behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to *restore to man all his natural rights*, convinced he has no natural right in opposition to his social duties.<sup>69</sup>

This direct reference to Locke's natural rights demonstrates how deeply Locke's philosophy penetrated American thought during the country's beginning decades. Even the "wall of separation" quote—the most persuasive quote for strict separationists—was the result of Lockean principles, which were in turn based on the will of God.<sup>70</sup>

Religious principles were not only deeply engrained in the Framers' minds—they were engrained in eighteenth century society.<sup>71</sup> Religious, and more specifically Protestant, ethics and assumptions formed the general framework upon which eighteenth century Americans formed their views.<sup>72</sup> Thus, "Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out."<sup>73</sup>

This religious influence over society appeared frequently in the government.<sup>74</sup> Perhaps Christianity's most glaring presence in the inception of this country is in the Declaration of Independence. The document, which was written by Jefferson and heavily influenced by John Locke, expressly refers to God four times.<sup>75</sup> There are numerous other instances of how the government promoted religion. Among these are the facts that every session of the Constitutional Convention opened up with a prayer, and that several early presidents, including Madison, issued Thanksgiving Day proclamations, calling for a day of prayer.<sup>76</sup> These political endorsements of religion contradict the argument that the Framers of the Constitution and founders of this country intended to purge religion completely from the government. Given Madison's belief that disestablishment would allow religion to flourish, Jefferson's reliance on Locke's natural rights, and the inherently religious society in

69. JEFFERSON, *supra* note 67, at 113 (emphasis added).

70. *See supra* note 23.

71. Smith, *supra* note 65, at 966.

72. *Id.*

73. *Id.*

74. Wallace, *supra* note 55, at 764–65.

75. THE DECLARATION OF INDEPENDENCE (U.S. 1776). The document contains the following references: "God," the "Creator," "the Supreme Judge of the world," and "the protection of Divine Providence." *Id.* paras. 1, 2, 5.

76. Wallace, *supra* note 55, at 761–62, 764–65.

which they lived, it appears that even the strict separationists among the Framers did not intend to create a secular society through the separation of church and state.

#### IV. MOVING FROM THE EIGHTEENTH TO THE TWENTY-FIRST CENTURY

Despite the historical evidence, the Supreme Court's interpretation of the Establishment Clause has ensured that religion can have almost no interaction with government.<sup>77</sup> Perhaps the line of reasoning that has created such strict separation is based on a misinterpretation of the circumstances under which the Framers' idea of "strict separation" came about.<sup>78</sup> Because the Framers, Locke, and Smith came from an inherently religious society and supported separation as a means of allowing religion to flourish, it appears they had no idea that separation would lead to secularization.<sup>79</sup> Thus, the Court should re-evaluate.

While strict separation may appear to be the most straightforward means of interpreting the Establishment Clause so that it aligns with the Framers' vision, a more lenient accommodation approach may be the best answer. The strict separation approach literally meets the standards set forth by Madison and Jefferson by providing that religion and government should be separated as much as possible to protect religious freedom.<sup>80</sup> However, strict separation ignores the fact that religion played a crucial role in the society, politics, and ideologies of the Framers.<sup>81</sup> Given the reasons for separating church from state, the best way for the Court to stop promoting the secularization of society is by accommodating religion's presence in government.<sup>82</sup> The accommodation theory is the approach to the Establishment Clause that

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77. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."); see also *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005) (enjoining counties from displaying the Ten Commandments in courthouses); *Lee v. Weisman*, 505 U.S. 577 (1992) (prohibiting non-sectarian invocation before a high school graduation ceremony); *Allegheny Cnty. v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (declaring a nativity scene in a county courthouse a violation of the Establishment Clause).

78. Wallace, *supra* note 55, at 756.

79. Smith, *supra* note 65, at 966–67.

80. See CHEMERINSKY, *supra* note 5, at 1192.

81. See *id.* at 1192–93.

82. *Id.* at 1196.

best aligns with the desire to keep religion and the government separate in order to allow religion to flourish and show its face in public society.<sup>83</sup>

The Supreme Court in varying degrees has applied the accommodation approach.<sup>84</sup> Under this approach “the Court should interpret the Establishment Clause to recognize the importance of religion in society and accommodate its presence in government . . . [T]he government violates the Establishment Clause only if it literally establishes a church, coerces religious participation, or favors one religion over others.”<sup>85</sup> One example of the accommodation approach in practice is *Lee v. Weisman*,<sup>86</sup> where the Court ruled that it was a violation of the Establishment Clause for a public school to have a clergy-led prayer before its graduation ceremony.<sup>87</sup> The Court ruled this way because prayers in a school setting are more coercive than in other public settings because students are more vulnerable to pressures to fit in.<sup>88</sup> However, the Court noted that the result might have been different were adults involved rather than children,<sup>89</sup> or if the prayer was not in a school setting.<sup>90</sup>

The majority in *Lee* touched upon the coercive aspect of the accommodation theory; but Justice Scalia’s dissent was much more true to the Framers and their forefathers.<sup>91</sup> He insisted that a narrow definition of coercion is historically accurate when he wrote:

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83. *See id.*

84. *See Lee v. Weisman*, 505 U.S. 577 (1992).

85. CHEMERINSKY, *supra* note 5, at 1196.

86. *Lee*, 505 U.S. 557.

87. *Id.* at 599.

88. *Id.* at 593.

89. *Id.*

90. *Id.* at 596–97 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)). The Court noted that in *Marsh*, prayer at the opening session of a state legislature was not a violation of the Establishment Clause because adults were free to come and go as they pleased, and distinguished it from possibly the most important event in a student’s career. *Id.*

91. Scalia writes:

[T]he Establishment Clause must be construed in light of the ‘government policies of accommodation, acknowledgement, and support for religion [that] are an accepted part of our political and cultural heritage.’ That opinion affirmed that ‘the meaning of the Clause is to be determined by reference to historical practices and understandings . . . [a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.’

[There is] no warrant for expanding the concept of coercion beyond acts backed by threat of penalty . . . . The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that “speech is not coercive; the listener may do as he likes.”<sup>92</sup>

This narrow interpretation of coercion means that the most extreme accommodation approach allows for the greatest amount of interaction between the government and religion that is still constitutional under the Establishment Clause.<sup>93</sup>

The majority and the dissent in *Lee* seemed to disagree over the definition of coercion, as well as the proper place for religion,<sup>94</sup> but these differences can be reconciled through an understanding of the Framers’ reasons for separation under the accommodation approach. The majority makes two important contentions: first, religious belief and worship should be kept in the private sphere;<sup>95</sup> and second, the Establishment Clause “exist[s] to protect religion from government interference.”<sup>96</sup> The dissent refutes the first claim that religion belongs solely in the private sphere with evidence that public ceremonies featuring prayer have been common since the inception of this country.<sup>97</sup> Justice Scalia also mentioned well-known references to God that occur during presidential inaugurations and prior to congressional and Supreme Court sessions.<sup>98</sup>

While the Court mentioned the Establishment Clause’s purpose to protect religion, it never discussed the parameters of this protection. The dangers arise when religions are forced to accommodate the government; however, no such harm occurs when the government accommodates religion’s natural presence in the public sphere. Thus there is no harm in accommodating un-coerced religion. A separation of church and state is necessary, but there is no need for the Supreme Court to snuff out religion every time it appears in the public sphere or near the government.

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*Id.* at 631 (Scalia, J., dissenting) (citing *Allegheny Cnty. v. ACLU*, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in part and dissenting in part)).

92. *Id.* at 642 (quoting *Am. Jewish Cong. v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)).

93. CHEMERINSKY, *supra* note 5, at 1197.

94. *See Lee*, 505 U.S. at 589–90, 633.

95. *Id.* at 589.

96. *Id.*

97. *Id.* at 633–35.

98. *Id.*

## V. CONCLUSION

Americans are much less religious now than they were when the Establishment Clause was written.<sup>99</sup> This secularization is partly due to the Supreme Court's interpretation of the Establishment Clause and the separation of church and state. However, the Constitution and the Establishment Clause would not have taken the same form if it were not for the religious principles incorporated into John Locke's philosophy. This is for two reasons: first, Locke's idea of natural rights was based on the premise that it was God's will for humans to enjoy certain freedoms;<sup>100</sup> and second, Locke's—and Adam Smith's—separate spheres and limited government were intended to protect freedom and religion. These principles were studied by the Framers and incorporated into the Declaration of Independence, the United States Constitution, and the Bill of Rights.

While James Madison and Thomas Jefferson were two of the biggest advocates for the separation of church and state, a look at their works and the world they lived in reveals that they expected religion to flourish through disestablishment. These efforts to protect religion and encourage its growth though the separation of church and state have been stifled by the Supreme Court's Establishment Clause jurisprudence. Perhaps the Court should revisit its interpretation: the best way to stimulate religion's role in society is to accommodate its presence in the government and the public sphere, so long as the government does not coerce people into religious practice, establish an official religion, or provide fiscal support to any religion. While this approach may seem extreme to strict separationists, it aligns with the writings and actions of the Framers and those who inspired them.

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99. See *supra* note 1 and accompanying text.

100. LOCKE, *supra* note 14, at 61.