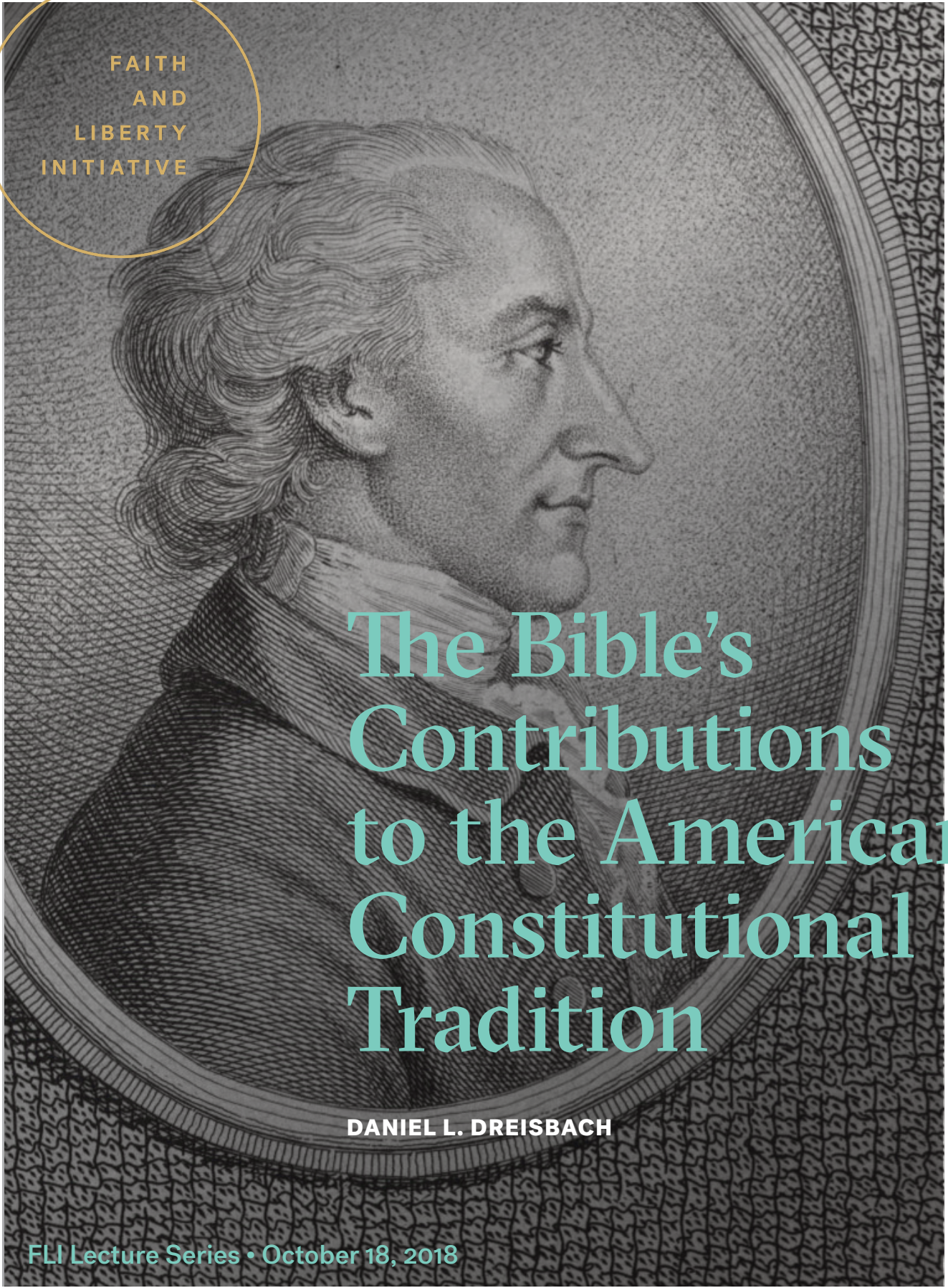


A detailed engraving of James Madison in profile, facing right. He has wavy hair and is wearing a high-collared coat. The portrait is set within an oval frame with a decorative, textured border.

FAITH
AND
LIBERTY
INITIATIVE

The Bible's Contributions to the American Constitutional Tradition

DANIEL L. DREISBACH

FLI Lecture Series • October 18, 2018

The Bible's Contributions to the American Constitutional Tradition

This lecture by American University professor **Daniel L. Dreisbach** was delivered on October 18, 2018 at the National Constitution Center in Philadelphia, Pennsylvania. It was part of the “America’s Town Hall” series and co-hosted by American Bible Society. Dr. Dreisbach is a member of the Scholars Advisory Council of the Faith and Liberty Initiative. He has authored or edited ten books and numerous articles in scholarly journals. He is coeditor of *The Sacred Rights of Conscience* (Liberty Fund, 2009) and *The Forgotten Founders on Religion and Public Life* (University of Notre Dame Press, 2009). He is the author of *Thomas Jefferson and the Wall of Separation Between Church and State* (New York University Press, 2002) and *Reading the Bible with the Founding Fathers* (Oxford University Press, 2017).

THIS EVENING, I WANT TO CONSIDER the Bible’s influence on the American constitutional tradition.¹ My thesis is modest, and yet, I suspect it will strike some as provocative insofar as it challenges the prevailing view in the academy. I use the word “Bible” in the same sense it would have been used in America by late-eighteenth-century Protestants, who constituted the vast majority of the former colonists. I am referring to the canonical texts sacred to the Christian faith, comprising the Old and New Testaments, as well as the books commonly called Apocrypha. For purposes of this discussion, I emphasize that this text included the “Hebrew Bible” (the Tanakh; or the Old

Testament, as it is commonly called by Christians), especially the Books of Moses (Pentateuch), because this, even more than the New Testament, was the text to which eighteenth-century Protestants turned for insights into the establishment of law and civil government. Let me also note that the King James Version of the Bible was the English-language translation most widely used in the founding era.

No book has had a greater influence on Western culture than the Bible. Its expansive influence on public culture—including language, education, arts, and letters—is well documented. This influence extends to the western *legal* tradition. Consider, for example, the

¹ Portions of this lecture were adapted from Daniel L. Dreisbach, *Reading the Bible with the Founding Fathers* (New York: Oxford University Press, 2017). All biblical quotations in this lecture are taken from the Authorized (King James) Version of the Bible because this is the English language translation most widely used in the American founding era.

influence of the Ten Commandments on laws throughout Christendom, including the American colonies.² This evening, I pose this question: did that influence extend to the American *constitutional* tradition and, more specifically, the U.S. Constitution? If so, how was that influence manifested?

In early 2017, American Bible Society announced plans to open a Faith & Liberty Discovery Center on Philadelphia's Independence Mall. The Center promises to offer insights into the Bible's contributions to the American experience. This announcement prompted some to ask, what will this Center, located in the cradle of American independence and constitutional government midway between Independence Hall and the National Constitution Center, contribute to the story told daily to visitors to the Mall? More to the point, does the Bible have anything to teach us about the American constitutional experiment in republican self-government and liberty under law?

The prevailing view in the academy is that the American constitutional experiment that came to fruition on this historic Mall was a strictly secular project. It is often said that the American founding in the last third of the eighteenth century, sandwiched between two great religious revivals, was an Age of Enlightenment when rationalism was in the ascendancy and revelation was, if not rejected outright, relegated to the sidelines.³

In a provocative polemic entitled *The Godless Constitution*, Cornell University professors Isaac Kramnick and R. Laurence Moore claimed that “the principal architects of our national government envisioned a godless Constitution.”⁴ The framers of that document, they continued, “created an utterly secular state” unshackled

from the intolerant chains of religion. They purportedly found evidence for this thesis in the constitutional text, which they described as radically “godless” and distinctly secular.⁵ In a *Philadelphia Inquirer* story on the proposed Discovery Center, University of Pennsylvania law professor Kermit Roosevelt reportedly commented: “I’m not sure it’s historically accurate to say the founders drew their thoughts from the Bible. I don’t think the U.S. Constitution reflects Christian ideals or doctrine. The Bible is not useful to interpret the Constitution.”⁶ In this same vein, historian Steven J. Keillor asserted: “A ‘remarkably secular’ Convention produced ‘a perfectly secular text’ . . . [C]ompared to state constitutions, it was irreligious: it was a product of

No book has had a greater influence on Western culture than the Bible.

the irreligious Enlightenment.”⁷ The late historian Stephen Botein similarly observed: “it cannot be denied that the Constitution was a perfectly secular text—if, by that term, nothing more or less is signified than the absence of manifest religious content.”⁸ These are a few illustrations of a sentiment popular in the academy.

Notwithstanding this familiar refrain, I contend that the Bible was among the influences that contributed to an American constitutional tradition—a tradition committed to, among other things, limited government, rule of law, due process of law, separation of powers, checks and balances, republican self-government, liberty of

2 See Daniel L. Dreisbach, “Christianity and American Law,” in *Great Christian Jurists in American History*, ed. Daniel L. Dreisbach and Mark David Hall (New York: Cambridge University Press, 2019), 1–15.

3 See, for example, Wilson Carey McWilliams, “The Bible in the American Political Tradition,” in *Religion and Politics*, ed. Myron J. Aronoff (New Brunswick, NJ: Transaction Books, 1984), 21 (“the founding generation rejected or deemphasized the Bible and biblical rhetoric”).

4 Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York: W.W. Norton, 1996), 22.

5 Isaac Kramnick and R. Laurence Moore, “In Godless We Trust: Why the Founding Fathers Created a Religion-Free Political Order, and Why We Shouldn’t Change It,” *Washington Post*, January 14, 1996, C1 (“The Constitution [the Founders of the United States] crafted is a godless document, and radically so. Nowhere in the text are God and Christianity mentioned. Its language created an utterly secular state. . . . The Framers erected a godless federal structure.”). See also Brooke Allen, “Our Godless Constitution: The faith of our Founding Fathers definitely wasn’t Christianity,” *The Nation*, 280, no. 7 (February 21, 2005): 14–20.

6 Alfred Lubrano, “\$60 million Bible center planned for Independence Mall,” <http://www.philly.com/news> (January 12, 2017).

7 Steven J. Keillor, *This Rebellious House: American History & the Truth of Christianity* (Downers Grove, IL: InterVarsity Press, 1996), 96–97.

8 Stephen Botein, “Religious Dimensions of the Early American State,” in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press for Omohundro Institute of Early American History and Culture, 1987), 317 (footnote omitted).

conscience, and the right of the people to resist tyrannical rule.

The Bible, to be sure, was not the sole source of the ideas that animated the nation's founding. The founding generation drew on and synthesized diverse intellectual traditions in forming their political thought. Among them were English common law and British constitutionalism, Enlightenment liberalism (in manifold forms), and various expressions of republicanism both ancient and modern.⁹ In my book, *Reading the Bible*

Acknowledging the Bible's often-ignored role in the founding enriches our understanding of the ideas that informed the founders' political thoughts and shaped their innovative constitutional experiment at the end of the eighteenth century.

with the *Founding Fathers*, I argue that the Bible must be studied alongside these other intellectual perspectives and traditions if we want to understand the broad range of ideas that inspired and informed the founding of the American constitutional republic.

Drawing attention to the Bible's contributions to the founding is not meant to diminish, much less dismiss, other intellectual influences on the founders. Rather, acknowledging the Bible's often-ignored role in the founding enriches our understanding of the ideas that informed the founders' political thoughts and shaped their innovative constitutional experiment at the end of the eighteenth century.

Furthermore, the claim that the Bible influenced the American constitutional tradition is not a claim that this constitutional tradition or the U.S. Constitution formally and legally established biblical Christianity or even gave preference to Christianity in law or policy.

It merely acknowledges that the Bible was among the diverse intellectual traditions that informed American constitutionalism.

THE BIBLE IN POLITICAL THOUGHT AND DISCOURSE

The founding fathers read the Bible. Their many quotations from and allusions to both familiar and obscure scriptural texts confirm that they knew the Bible from cover to cover. Biblical language and themes liberally seasoned their rhetoric. The phrases and cadences of the King James Bible, especially, informed their written and spoken words. Its ideas shaped their habits of mind and informed their political pursuits.

The Bible was an accessible and authoritative text for most eighteenth-century Americans; and effective communicators, especially politicians and polemicists, adeptly used it to connect with their audiences. The mere fact that a founder quoted the Bible, however, does not indicate whether that individual was a believer or a skeptic. Both, including some who doubted the Bible's divine origins, appealed frequently to Scripture in their political discourse. (Consider, for example, Thomas Paine's many appeals to Scripture in *Common Sense* [1776].)

In an often-cited study published in the *American Political Science Review* on the sources referenced in the political literature of the American founding, political scientist Donald S. Lutz reported that the Bible was cited more frequently than any European writer or even any European school of thought, such as Enlightenment liberalism. The Bible, he found, accounted for approximately one-third of the citations in the literature he surveyed. The book of Deuteronomy alone—the fifth book of Moses—was the most frequently cited work, followed by Baron de Montesquieu's *The Spirit of the Laws* (1748), the most referenced secular source. In fact, Deuteronomy was referenced nearly twice as often as all of John Locke's writings put together, and the apostle Paul, a New Testament writer, was mentioned about as frequently as Montesquieu.¹⁰

9 For an introduction to and survey of the scholarship examining the diverse schools of political thought that influenced the American founding, see Alan Gibson, *Interpreting the Founding: Guide to the Enduring Debates over the Origins and Foundations of the American Republic*, 2d rev. and enl. ed. (Lawrence: University Press of Kansas, 2010).

10 Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *American Political Science Review* 78 (March 1984): 189–97; Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 140; Lutz, *A Preface to American Political Theory* (Lawrence: University Press of Kansas, 1992), 136.

Given the Bible's pervasive presence in eighteenth-century culture, it should not surprise us that the founding generation appealed frequently to biblical language and principles in their political discourse and deliberations. The Bible was referenced and quoted in their political rhetoric, including debates in deliberative assemblies, and in state papers, such as official proclamations setting aside days for public prayer, fasting, humiliation, and thanksgiving. The nineteenth-century historian John Wingate Thornton wrote, the Bible "was the great political text-book of the patriots."¹¹

Not all founders revered the Bible, but even those who doubted Christianity's transcendent claims or the notion that the Bible was divine revelation thought it was vital to their experiment in republican self-government. (Interestingly, some of the most skeptical, heterodox founders, like Benjamin Franklin and Thomas Paine, were the most prolific in referencing Scripture in their political discourse.) Notwithstanding their diverse backgrounds and personal theological views, including diverse views on God, Jesus, and even the divine origins and authority of the Bible, the founders valued the Bible for its insights into human nature, civic virtue, social order, political authority, the rights and duties of citizens, and other concepts essential to framing a new political society. There was, in particular, broad agreement that the Bible was a useful handbook for nurturing the civic virtues that give citizens the capacity for self-government in a republic. For this reason, both John Adams and John Dickinson called the Bible "the most republican book in the world."¹² In various representative assemblies of the age, as well as in pamphlets, political sermons, and private papers, founding figures appealed to the Bible for principles, precedents, normative standards, and cultural motifs to define their community and to order their political and legal experiments. Some founders also saw in Scripture, especially in the Hebrew Scriptures, political and legal models—such as republicanism and separation of powers—that they believed enjoyed divine favor and were worthy of emulation in their own polities.

The Bible was not an uncontested source of ideas.

Neither did the founders always agree on the interpretation and application of Scripture to the great issues they confronted, as evidenced by bitter debates over slavery, the right to resist unjust rulers, prudential church-state relations, and the like. And yet ideas and values informed by Judaism and Christianity and their shared sacred texts were rarely removed from these difficult conversations.

THE BIBLE AND THE CONSTITUTION

The United States Constitution hammered out in Philadelphia's Independence Hall in the summer of 1787 gives evidence of a political vision informed, in part, by the Bible, and it includes features that were familiar to a Bible-reading people. Although it is difficult to establish definitively that constitutional provisions were taken from specific biblical passages, the lineage of selected constitutional principles can be traced back to biblical

There was, in particular, broad agreement that the Bible was a useful handbook for nurturing the civic virtues that give citizens the capacity for self-government in a republic.

concepts that had previously found expression in Western legal tradition, especially in English common law, as well as in colonial laws and customs.

Those who reject that there were biblical influences on the Constitution note that records from the Constitutional Convention reveal few mentions of the Bible during the delegates' deliberations on substantive provisions. It is a mistake, however, to draw conclusions regarding the Bible's influence, or lack thereof, on the U.S. Constitution based solely on the number of references to God and the Bible in the text of the Constitution or records of Convention debates. The surviving records

¹¹ John Wingate Thornton, ed., *The Pulpit of the American Revolution; or, The Political Sermons of the Period of 1776* (Boston: Gould and Lincoln, 1860), 327.

¹² John Adams to Benjamin Rush, 2 February 1807, in *The Spur of Fame: Dialogues of John Adams and Benjamin Rush, 1805–1813*, ed. John A. Schutz and Douglass Adair (San Marino, CA: The Huntington Library, 1966), 75–76 ("The Bible . . . is the most Republican Book in the World"); John Dickinson, notes [n.d.], R.R. Logan Collection, Historical Society of Pennsylvania. Copy provided courtesy of The John Dickinson Writings Project, University of Kentucky ("the Bible is the most republican Book in the World").

of Convention deliberations, including James Madison's famous notes, are abbreviated and arguably unreliable in some respects. There is no verbatim record of the Convention proceedings. Again, some commentators dismiss claims of biblical influence on the Constitution because the delegates, according to extant records, only occasionally referenced the Bible explicitly during substantive debates. This analysis, however, misses the multiple channels through which the Bible exerted its

Beyond a few explicit references to the Bible in the surviving records of the Convention proceedings, the Bible's influence on the Constitution was manifested in multiple ways.

influence on the political, legal, and constitutional traditions that informed the Constitution.

Convention delegates occasionally invoked the Bible in surprising and interesting ways. In the Convention's waning days, for example, during debate on the qualifications for public office, the venerable Benjamin Franklin spoke in opposition to any proposal that, in his words, "tended to debase the spirit of the common people. . . . We should remember the character which the Scripture requires in Rulers," Doctor Franklin said,

invoking Jethro's advice to Moses regarding qualifications for prospective Israelite rulers, "that they should be men hating covetousness."¹³ Significantly, Franklin appealed to a biblical standard in this debate on a substantive constitutional provision, he informed his audience in unambiguous language that his source was "Scripture," and then he apparently referenced a specific biblical text (Exodus 18:21).

Beyond a few explicit references to the Bible in the surviving records of the Convention proceedings, the Bible's influence on the Constitution was manifested in multiple ways. Let me identify and illustrate several of those ways:

First, general theological or doctrinal propositions regarding human nature, civil authority, political society, and the like informed conceptions and institutions of law and civil government.

The Constitution's basic design, defined by the separation of powers and checks and balances, reflected an awareness of "original sin" (Genesis 3) and the necessity to guard against the concentration or abuse of government powers vested in fallen human actors. This biblical anthropology was expressed in the Constitutional Convention.¹⁴ James Madison, for example, acknowledged a fellow delegate's strong view regarding "the political depravity of men, and the necessity of checking one vice and interest by opposing to them another vice & interest. . . . The truth was," Madison concurred, "that all men having power ought to be distrusted to a certain degree."¹⁵ One cannot appreciate the Constitution's near obsession with the separation of powers and checks

¹³ Benjamin Franklin, Constitutional Convention, 10 August 1787, as quoted in James Madison's *Notes of Debates in the Federal Convention of 1787*, in *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven, CT: Yale University Press, 1911), 2:249.

¹⁴ See generally Marci A. Hamilton, "The Calvinist Paradox of Distrust and Hope at the Constitutional Convention," in *Christian Perspectives on Legal Thought*, ed. Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella (New Haven, CT: Yale University Press, 2001), 293–306.

¹⁵ James Madison, Constitutional Convention, 11 July 1787, as quoted in James Madison's *Notes of Debates in the Federal Convention of 1787*, in *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven, CT: Yale University Press, 1911), 1:584.

Humankind's radical depravity was a familiar theme in James Madison's writings and, more generally, in the political literature of the founding era. Because men are not angels, Madison famously counseled in *The Federalist No. 51*, "[a]mbition must be made to counteract ambition." *The Federalist* (Gideon Ed.), ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001), 268. Although this is the most famous passage, it is certainly not the only passage, in *The Federalist Papers* that addresses humankind's fallen nature. See the warning in Number 6: do not forget "that men are ambitio[u]s, vindictive, and rapacious." *The Federalist No. 6*, 21. See also *The Federalist No. 15*, 73, 74; *The Federalist No. 24*, 119; *The Federalist No. 37*, 185 ("the infirmities and depravities of the human character"). It should be acknowledged that various political traditions recognize the fallibility of human actors, but the tradition that most influenced Americans of the founding era on this point was Reformed Protestantism.

Humankind's radical depravity was a central tenet of the Reformed or Calvinist theological tradition, which was well represented in late eighteenth-century America. Historians estimate that around the time of independence, 98 percent or more of Americans of European descent identified with Protestantism. See Eric Kaufman, "American Exceptionalism Reconsidered: Anglo-Saxon Ethnogenesis in the 'Universal' Nation, 1776–1850," *Journal of American Studies* 33 (1999): 440 ("the American free population on the eve of revolution

and balances without understanding this biblical view of human nature.

For another example, the Constitution's four oath provisions found in Article I, § 3, cl. 6; Article II, § 1, cl. 8; Article VI, cl. 3; and Amendment IV arguably mandated a profoundly religious act, reflecting explicitly theological propositions. Moral philosophers and constitutional framers in the founding era and well into the nineteenth century typically defined an oath as a solemn appeal to God for the truth of what is said by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments.¹⁶ Note that oaths of office and civic responsibility, ubiquitous in state constitutions and statutes in the founding era, were often explicitly premised on a belief in a future state of rewards and punishments—a concept aligned with Christian eschatology.¹⁷ There is further evidence of biblical influence on the Constitution's four oath clauses in the accompanying provisions permitting an "Affirmation" in the alternative to an oath. These were almost certainly an accommodation for Quakers, Moravians, Mennonites, and other religious sects for whom oath-taking offended their religious scruples because they take literally the biblical injunction to "swear not at all" (Matthew 5:33–37; see also James 5:12) and, for some, they objected to references to God in oaths (fearing, perhaps, that this violated the Third Commandment).

Second, the founding generation saw in the Bible political and legal models that they thought worthy of their consideration and, perhaps, incorporation into their political and legal systems.

In Article IV, § 4, cl. 1, the Constitution requires every state to maintain "a Republican Form of Government." The political discourse of the founding era is replete with appeals to the Hebrew "republic" described

The founding generation saw in the Bible political and legal models that they thought worthy of their consideration and, perhaps, incorporation into their political and legal systems.

in the Old Testament—from the exodus to the coronation of Saul as king of Israel—as a divinely inspired model for republican government, which was worthy of emulation in their own political experiments. In an influential 1775 Massachusetts election sermon, for example, the Reverend Samuel Langdon, the politically active president of Harvard College and later a delegate

was . . . 98 per cent Protestant"); Barry A. Kosmin and Seymour P. Lachman, *One Nation Under God: Religion in Contemporary American Society* (New York: Harmony Books, 1993), 28–29. On the size of the population that identified with the Reformed theological tradition, see Sydney E. Ahlstrom, *A Religious History of the American People* (New Haven, CT: Yale University Press, 1972), 124 ("Puritanism provided the moral and religious background of fully 75 percent of the people who declared their independence in 1776"), 350 (the Reformed theological tradition was "the religious heritage of three-fourths of the American people in 1776"); William R. Hutchison, *Religious Pluralism in America: The Contentious History of a Founding Ideal* (New Haven, CT: Yale University Press, 2003), 20–21 ("At least 90 percent of the colonists, moreover, had come out of the Calvinist rather than the Lutheran side of the Protestant Reformation. . . . [T]he colonists had been at least 85 percent English-speaking Calvinist Protestants"). Adherents of the Reformed theological tradition included the New England Puritans and later the Congregationalists, Scottish Covenanters, French Huguenots, Dutch and German Reformed communities, and Scotch and Irish Presbyterians.

¹⁶ This standard definition of an oath was repeated in the debates on Article VI of the U.S. Constitution in the state ratifying conventions. See, for example, the July 30, 1788 speech of Judge James Iredell (N.C.), in Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d ed., vol. 4 (Washington: Printed for the editor, 1836), 196. See also "Kentucky Constitution of 1792," art. VIII, § 5; and "Kentucky Constitution of 1799," art. VI, § 7, *Text of Kentucky Constitutions of 1792, 1799 and 1850* (Frankfort, KY: Legislative Research Commission, 1965). Virtually every late-eighteenth-century moral philosopher defined oaths in similar terms. See, for example, John Witherspoon, "Of Oaths and Vows," in *Lectures on Moral Philosophy*, ed. Varum Lansing Collins (Princeton, NJ: Princeton University Press, 1912), 130.

¹⁷ The South Carolina Constitution of 1778, for example, described a qualified elector as one who "acknowledges the being of a God, and believes in a future state of rewards and punishments." South Carolina Constitution of 1778, art. XIII. The Pennsylvania Constitution of 1790 stated: "no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth." Pennsylvania Constitution of 1790, art. IX, § 4. See generally James Hutson, *Forgotten Features of the Founding: The Recovery of Religious Themes in the Early American Republic* (Lanham, MD: Lexington Books, 2003), 1–44 (Chapter 1: "'A Future State of Rewards and Punishments': The Founders' Formula for the Social and Political Utility of Religion"); Carl J. Richard, *The Founders and the Bible* (Lanham, MD: Rowman and Littlefield Publishers, 2016), 213–29 (discussion of the founders' views on the afterlife and a future state of rewards and punishments).

to New Hampshire's constitutional ratifying convention, opined: "The Jewish government, according to the original constitution which was divinely established, . . . was a perfect Republic. . . . The civil Polity of Israel is doubtless an excellent general model . . . ; at least some principal laws and orders of it may be copied, to great advantage, in more modern establishments."¹⁸ From various biblical passages chronicling the Hebrew polity, some Americans derived support for essential republican principles, such as government by consent of the governed as exercised through representatives chosen by the people.¹⁹

Most of what the founding generation knew about the Hebrew republic they learned from the Bible. They were well aware that ideas like republicanism found

Although the founders did not seek to replicate the Hebrew model in its details, its biblical precedent reassured many that republicanism was a political system that enjoyed God's approval.

expression in traditions apart from the Hebrew experience, and, indeed, they studied these traditions both ancient and modern. Although the founders did not seek to replicate the Hebrew model in its details, its biblical precedent reassured many that republicanism was a political system that enjoyed God's approval.

Third, the U.S. Constitution includes provisions that were almost certainly derived from or informed by the Bible or Christian doctrine or practice. Again, the surviving records rarely reveal a Convention delegate citing Scripture when proposing specific constitutional provisions; rather, delegates discussed selected principles and practices that were widely accepted in Western legal tradition to have been informed by a biblical culture.

Consider, for example, Article I, § 7, cl. 2 excepting Sundays from the ten days within which a president must veto a bill. This is an implicit recognition of the Christian Sabbath, commemorating the Creator's sanctification of the seventh day for rest (Genesis 2:1–3), the fourth commandment that the Sabbath be kept free from secular defilement (Exodus 20:8–11), and, in the Christian tradition, the resurrection of Jesus from the dead.²⁰ "Sunday laws," requiring a respectful observance of the "Dies Domini" or "Lord's Day," are rooted in a Christian reading of Scripture and are a familiar feature in legal regimes throughout Christendom. Leading common law jurists and commentators through the centuries have noted that Sunday laws, derived from the Bible and Christian practice, were affirmed in the customary laws of England.²¹ Drawing on both biblical and English legal traditions, they were written into the laws of the colonies and, later, the states and the nation.

Article I, § 8, cl. 5 grants the Congress the authority to "fix the Standard of Weights and Measures." Regimes for millennia have recognized the need for a uniform system of weights and measures. This concern was addressed in the English legal tradition before the Norman Conquest, but it was expressed most famously in Magna Carta (1215), requiring standard measures and

¹⁸ Samuel Langdon, *Government Corrupted by Vice, and Recovered by Righteousness. A Sermon Preached before the Honorable Congress of the Colony of the Massachusetts-Bay in New England, assembled at Watertown, on Wednesday the 31st Day of May, 1775. Being the Anniversary fixed by Charter for the Election of Counsellors* (Watertown, MA: printed by Benjamin Edes, 1775), 11, 12.

¹⁹ Some scholars have claimed that the design of Presbyterian ecclesiastical governance, with its emphasis on representative government, divided and distributed powers, and checks and balances, influenced the U.S. Constitution. The constitution of the Presbyterian church, which was crafted in Philadelphia at the same time the delegates at the Constitutional Convention were framing the U.S. Constitution in Independence Hall, "was built on the same architecture of distrust" of a fallible, sinful human nature as the U.S. Constitution. The two constitutions shared philosophical and operational assumptions, design elements, and structures of governance. Hamilton, "The Calvinist Paradox of Distrust and Hope at the Constitutional Convention," 304. As one Presbyterian church historian has written, "whatever may be said of the similarities and the differences between the two constitutions, both were the result of those ideas of representative popular government of which our [Presbyterian] Synod was the outstanding illustration and the most influential advocate throughout the colonial period." Marci A. Hamilton, "The Reverend John Witherspoon and the Constitutional Convention," in *Law & Religion: A Critical Anthology*, ed. Stephen M. Feldman (New York: New York University Press, 2000), 63 n. 5, quoting Frederick W. Loetscher, "Address on the 200th Anniversary of the Adopting Act" (1929), 10.

²⁰ See generally Jaynie Randall, "Sundays Excepted," *Alabama Law Review* 59 (2007–08): 507–37.

²¹ See, for example, Edward Coke, *The Second Part of the Institutes of the Lawes of England*, 1st ed. (London: 1642), 220 ("no Merchandizing should be on the Lord[']s Day").

weights throughout the kingdom for various goods and produce. This provision, wrote Sir Edward Coke in his *Institutes of the Laws of England* (published in the mid-seventeenth century and widely recognized as an authoritative commentary on common law), was “grounded upon the Law of God.” Coke, the most eminent English jurist of the age and, perhaps, the greatest authority on common law, cited Deuteronomy 25:13–14 in support of this claim of divine provenance (“Thou shalt not have in thy bag divers weights, a great and a small. Thou shalt not have in thine house divers measures, a great and a small.”),²² although he, like subsequent commentators, could have cited numerous other supporting biblical texts (see, for example, Leviticus 19:35–36; Proverbs 11:1, 16:11, 20:10, 23).

The Article III, § 3, cl. 1 provision that convictions for treason be supported by “the testimony of two witnesses” conforms to a familiar biblical mandate, asserted in both the Old and New Testaments, requiring multiple witnesses of malfeasance for conviction and punishment (see Deuteronomy 17:6: “At the mouth of two witnesses, or three witnesses, shall he that is worthy of death, be put to death: but at the mouth of one witness he shall not be put to death”; see also Deuteronomy 19:15; Numbers 35:30; Matthew 18:16; John 8:17; 2 Corinthians 13:1; 1 Timothy 5:19; Hebrews 10:28). For centuries, leading English legal authorities have acknowledged that requiring multiple witnesses in selected legal contexts was, if not derived from the sacred text, affirmed by the authority of Scripture. “And it seemeth that by the ancient Common law,” Sir Edward Coke wrote in his *Institutes of the Laws of England* (The Third Part, 1644), “one accuser, or witsnesse was not sufficient to convict any person of High Treason. . . . And that two witnesses be required, appeareth by our books, and I remember no authority in our books to the contrary: and the Common

law herein is grounded upon the law of God expressed both in the old and new Testament.”²³ In support of this proposition, Coke cited Deuteronomy 17:6, 19:15; Matthew 18:16; 2 Corinthians 13:1; and Hebrews 10:28, in addition to earlier commentators on the English law. These authorities confirm that a multiple witness rule, buttressed by the weight of biblical authority, was grafted into selected common law procedural practices

Simply counting the number of biblical quotations and references to God and Christianity in the surviving records of the Constitutional Convention is not the only or most accurate way to establish biblical influence on the Constitution, or the lack thereof.

and, eventually, found expression in English statutory law.²⁴ The principle was written into early colonial laws, such as article 47 of the Massachusetts “Body of Liberties” (1641), requiring “the testimony of two or three witnesses” in capital cases.²⁵ Other colonies followed suit, as did states in crafting their laws following independence.²⁶ (Significantly, in *Cramer v. United States*, 325 U.S. 1 [1945], the U.S. Supreme Court noted that “the two witness requirement . . . was a familiar precept of the New Testament, and of Mosaic law.”)²⁷

The Fifth Amendment, framed by the first federal Congress, prohibits double jeopardy, or trying a

22 Edward Coke, *The Second Part of the Institutes of the Lawes of England*, 1st ed. (London: 1642), 41.

23 Edward Coke, *The Third Part of the Institutes of the Laws of England*, 1st ed. (London, 1644), 26.

24 See, for example, the Treason Act of 1547, 1 Edw. VI, c. 12 § XXII (1547), in *Statutes of the Realm: Volume the Fourth* (1819), 22; and Treason Act of 1695, 7 & 8 Gul. III, c. 3 § II (1695–6), in *Statutes of the Realm: Volume the Seventh* (1820), 6.

25 Massachusetts “Body of Liberties” (1641), article 47.

26 See George Lee Haskins, *Law and Authority in Early Massachusetts* (New York: Macmillan, 1960), 152–53 (discussion of the biblical origins and application of rules governing the number of witnesses needed in Massachusetts colonial law and English common law). See also *New-Haven's Settling in New-England, and some Lawes for Government* (London, 1656), reprinted in Charles J. Hoadly, ed., *Records of the Colony or Jurisdiction of New Haven* (Hartford, CT: Case, Lockwood and Co., 1858), 572.

For more on the requirement of multiple witnesses in the western legal tradition, see John H. Wigmore, “Required Numbers of Witnesses; A Brief History of the Numerical System in England,” *Harvard Law Review* 15, no. 2 (June 1901): 83–108; L. M. Hill, “The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law,” *American Journal of Legal History* 12, no. 2 (April 1968): 95–111.

27 *Cramer v. United States*, 325 U.S. 1, 24 and nn. 36 and 37 (1945).

defendant twice for the same offence. In a late fourth-century commentary, Saint Jerome (and legal scholars ever since) said this was a principle found in the book of the prophet Nahum 1:9 (“affliction shall not rise up the second time”). From these origins, the doctrine entered into canon law and English customary law and was transferred to American colonial codes and early state declarations of rights before it was eventually enshrined

A popular, but not unchallenged, notion was that, insofar as the U.S. Constitution accredited the common law, the American people incorporated Christianity into their organic law upon ratification of the Constitution.

in the Fifth Amendment to the U.S. Constitution. The protection against double jeopardy found expression in early colonial laws, such as article 42 of the Massachusetts “Body of Liberties” (1641), which stated that “No man shall be twice sentenced by civil justice for one and the same crime, offense, or trespass.”²⁸ This provision would influence subsequent laws in Massachusetts and other colonies. (Interestingly, in *Bartkus v. Illinois*, Associate Justice of the U.S. Supreme Court Hugo L. Black traced this biblical lineage of the principle of double jeopardy.)²⁹

The interpretation and application of the Eighth Amendment’s prohibition on “cruel and unusual punishments” have provoked much controversy and debate. From early in the colonial experience, biblical law, even

more than common law, informed American notions of what constitutes cruel and unusual punishment. The Massachusetts “Body of Liberties” (1641), for example, included a prohibition on “inhumane Barbarous or cruell” punishments (article 46), and it limited corporal correction to “forty stripes” (article 43), as directed by Mosaic law (see Deuteronomy 25:3: “Forty stripes he may give him, and not exceed: lest, if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee.”).³⁰ These provisions were reaffirmed in the Massachusetts “Laws and Liberties” (1648), as well as in subsequent laws of the Commonwealth and other colonies. Significantly, the limitation on corporal punishment was rooted in biblical law and a departure from common law.³¹

During the War for Independence, Roger Sherman of Connecticut, an influential founder and a devout Calvinist, opposed a proposal presented in a congressional committee to increase the maximum number of lashes allowed for military discipline from one hundred to five hundred. John Sullivan reported in a letter to George Washington that, “though a Great Majority of Congress were for it[,] the Question was Lost” due to “principles Laid Down in the Levitical Law Strongly urged by Roger Shearman Esqr and Co.”³² The records do not reveal the specific biblical text for Sherman’s objection, but he almost certainly had Deuteronomy 25:1–3 in mind.³³

The Mosaic injunction placing specific limitations on acceptable physical punishment also found expression in the regulations and laws of the new nation. Among the punishments for misconduct authorized by Congress in June 1775, a soldier in the Continental Army could receive a “whipping not exceeding *thirty-nine* lashes.”³⁴ The first Congress under the U.S. Constitution similarly

28 Massachusetts “Body of Liberties” (1641), article 42.

29 See *Bartkus v. Illinois*, 359 U.S. 121, 152 n. 4 (1959) (Black, J., dissenting); Jay A. Sigler, “A History of Double Jeopardy,” *American Journal of Legal History* 7, no. 4 (1963): 284.

30 Massachusetts “Body of Liberties” (1641), articles 46 and 43.

31 See Thorp L. Wolford, “The Laws and Liberties of 1648,” in David H. Flaherty, ed., *Essays in the History of Early American Law* (Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture, 1969), 167 (limiting punishment to forty stripes was a rule “of Biblical origin, not present in the common law”).

32 John Sullivan to George Washington, 2 July 1781, in *Letters of the Members of the Continental Congress*, ed. Edmund C. Burnett (Washington, DC: Carnegie Institution, 1933), 6:133.

33 Commentators have also argued that the principle of *lex talionis* (law of retaliation or law of retribution), expressed in the laws of Moses as “eye for eye, tooth for tooth [Exodus 21:24; Leviticus 24:20; Deuteronomy 19:21],” represents a principle of proportionate punishment, prescribing a maximum level of appropriate punishment (that is, the punishment [or compensatory remedy] may equal but must not exceed the original wrong, harm, injury, or offense). Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted: The Original Meaning,” *California Law Review* 57, no. 4 (October 1969): 839, 844. Punishments that exceed the limitations of proportionality, it is suggested, may constitute cruel and unusual punishment. This principle eventually found expression in Anglo-American law. *Ibid.*, 844–47.

34 “Rules and Regulations,” *Journal of Continental Congress, 1774–1789*, ed. Worthington C. Ford et al. (Washington, DC, 1904–1937), 2:119 (30 June 1775).

reflected Mosaic law when it authorized the punishment of flogging “not exceeding thirty-nine stripes.”³⁵ Why thirty-nine stripes when the Hebrew Scriptures allowed for a maximum of forty? The most likely explanation is found in Judaic traditions and practices regarding corporal punishments that eventually found expression in rabbinic literature reducing the maximum number of lashes to forty less one (i.e., thirty-nine) to avoid exceeding the biblical provision due to a miscount.³⁶

For one final example, commentators throughout American history have suggested that Christianity and its sacred text were incorporated into American legal culture in general and constitutional tradition in particular by way of the English common law. As distinguished from statutory or civil law, the common law is the body of laws derived from principles, rules of action, customs, and prior decisions of judicial tribunals. The principal doctrine of the common law is *stare decisis*, which requires judges to adhere to legal principles set forth in prior cases (precedents). A fundamental and enduring question in Anglo-American jurisprudence is whether Christianity is the basis of the common law. According to the most authoritative common law jurists in both England and America—including Sir Matthew

Hale, Sir William Blackstone, Lord Mansfield, James Wilson, James Kent, and Joseph Story—Christianity is and always has been the foundation of the common law, and nothing in the common law is valid that is not consistent with divine revelation.³⁷ A popular, but not unchallenged, notion was that, insofar as the U.S. Constitution accredited the common law, the American people incorporated Christianity into their organic law upon ratification of the Constitution.³⁸ This is an expansive claim that Christianity and its sacred text were woven into the very fabric of American law, including the U.S. Constitution.

The Bible’s influence on the American constitutional tradition arguably extends far beyond the handful of examples presented here. Scholars have identified additional constitutional provisions that may reflect biblical influence, including measures addressing due process of law, emoluments, presidential pardon power, and corruption of blood. In the context of Western legal culture, these and other provisions, it is argued, were almost certainly informed or affirmed by a biblical tradition.³⁹

Tracing intellectual influences is not always easy or certain. In fact, it is often complicated and downright

35 “An Act for the Punishment of certain Crimes against the United States,” 1st Cong., Sess. II, Ch. 9, 1 U.S. Statutes at Large 115–116 §§ 15, 16 (30 April 1790).

36 A precedent more familiar to the American founders than the Mishnah and Talmud was the Apostle Paul’s testimony that five times he suffered under Judeans “forty stripes save one” (2 Corinthians 11:24). This was likely a Judean synedion penalty, perhaps administered by authorities in the synagogues. The restriction on corporal punishment to 39 lashes was later detailed in rabbinic literature (see, e.g., Mishnah tractate Makkot). See generally Markus Oehler, “The Punishment of Thirty-Nine Lashes (2 Corinthians 11:24) and the Place of Paul in Judaism,” *Journal of Biblical Literature* 140, no. 3 (2021): 623–40.

37 See generally Stuart Banner, “When Christianity was Part of the Common Law,” *Law and History Review* 16 (1998): 27–62; Bradley S. Chilton, “Cliobernetics, Christianity, and the Common Law,” *Law Library Journal* 83 (1991): 355–62; Courtney Kenny, “The Evolution of the Law of Blasphemy,” *Cambridge Law Journal* 1, no. 2 (1922): 127–42; and James R. Stoner, Jr., “Christianity, the Common Law, and the Constitution,” in *Vital Remnants: America’s Founding and the Western Tradition*, ed. Gary L. Gregg II (Wilmington, DE: ISI Books, 1999), 175–209.

38 Thomas Jefferson disputed Christianity’s seminal contributions to common law in a posthumously published essay, asserting “that Christianity neither is, nor ever was, a part of the common law.” Thomas Jefferson, “Whether Christianity is a Part of the Common Law?,” in *Reports of Cases Determined in the General Court of Virginia. From 1730, to 1740; and From 1768, to 1772* (Charlottesville, VA: F. Carr and Co., 1829), 140, reprinted in *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding*, ed. Daniel L. Dreisbach and Mark David Hall (Indianapolis, IN: Liberty Fund, 2009), 541. Jefferson’s claim challenged the legal authorities of his day and, in this sense, was an outlier. In his inaugural lecture as Harvard’s Dane Professor of Law, Associate Justice of the U.S. Supreme Court Joseph Story promptly countered that “[t]here never has been a period in which the common law did not recognize Christianity as lying at its foundations.” Joseph Story, “The Value and Importance of Legal Studies: A Discourse Pronounced at the Inauguration of the Author as Dane Professor of Law in Harvard University, August 25, 1829,” in *The Miscellaneous Writings of Joseph Story*, ed. William W. Story (Boston: Charles C. Little and James Brown, 1851), 517. See also [Joseph Story], “Christianity a Part of the Common Law,” *American Jurist and Law Magazine* 9 (April 1833): 346–48, reprinted in Dreisbach and Hall, *Sacred Rights of Conscience*, 551–52. All sides were keenly aware that this debate was about the extent of Christianity’s influence on the fabric of the American legal tradition.

39 The suggestion here is not that these concepts are original to the Bible; and, indeed, they find similar expression apart from the biblical tradition. For many Americans, however, the Bible would have been a widely accessible, authoritative source for these ideas. Furthermore, the purported compatibility of these ideas with Scripture would have reassured pious Americans that these constitutional provisions enjoyed divine favor.

messy, and one is well advised to bring a strong dose of humility to the enterprise. Simply counting the number of biblical quotations and references to God and Christianity in the surviving records of the Constitutional Convention is not the only or most accurate way to establish biblical influence on the Constitution, or the lack thereof. Evidence indicating influence is sometimes found in unusual and unexpected places. In the search for intellectual influences on the American founding, one must look wide and dig deep. And that includes plumbing the depths of civil law, canon law, and common law, as well as colonial laws and customs, for evidence of biblical influences that may have subsequently found expression in American law.

CONCLUSION

Some years ago, in a cover story on “The Bible in America,” *Newsweek* magazine reported that the Bible “has exerted an unrivaled influence on American culture, politics and social life. Now historians are discovering

that the Bible, perhaps even more than the Constitution, is our founding document.”⁴⁰ Martin E. Marty, an eminent scholar of American religious history, similarly remarked, America “has more than the Declaration of Independence and the United States Constitution enshrined in a vault in its archival heart. The Bible also is there.”⁴¹ In an increasingly secular age, the Bible’s role in the nation’s founding is much contested. Whether or not one accepts these statements regarding the Bible’s place in the nation’s founding, the evidence suggests that the story of the American constitutional experiment cannot be told accurately or adequately without referencing the Bible. If we miss or dismiss the Bible’s contributions to the American constitutional tradition, we distort our understanding of the nation’s bold constitutional experiment in republican self-government and ordered liberty.

In closing this evening, let me encourage us all to read, re-read, and study the Constitution; and to better understand the Constitution, read Blackstone, Montesquieu, Locke, and, yes, the Bible. ■

⁴⁰ Kenneth L. Woodward and David Gates, “How the Bible Made America,” *Newsweek*, 27 December 1982, 44.

⁴¹ Martin Marty, “America’s Iconic Book,” in *Humanizing America’s Iconic Book: Society of Biblical Literature Centennial Addresses 1980*, ed. Gene M. Tucker and Douglas A. Knight (Chico, CA: Scholars Press, 1982), 3.



The **Faith and Liberty Initiative** from **American Bible Society** explores the relationship between faith and liberty in America from its founding to today by illuminating the influence of the Bible on individuals in key historical and personal moments.

The FLI **Scholars Advisory Council** is comprised of historians, students of religion, legal scholars, and other subject experts from across the nation and around the world. SAC members shape and contribute to ongoing educational programming for the initiative and ensure historical accuracy.

Discover more at faithandliberty.org.

101 North Independence Mall East FL8, Philadelphia, PA 19106 | 215-309-0401 | info@faithandliberty.org

© 2018, 2024 American Bible Society

Cover image: Engraving of John Dickinson, 1783. Waidner-Spahr Library, Dickinson College.