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Mark W. Osler

University of St. Thomas, mark.osler@stthomas.edu

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ARTICLE

A BIBLICAL VALUE IN THE CONSTITUTION: MERCY, CLEMENCY, FAITH, AND HISTORY

MARK OSLER*

INTRODUCTION

Is America a “Christian nation”? To some religious conservatives, this assertion is an important definitional fact, while to many other Americans it is simply offensive. Through it all, one thing is clear: many people want to see biblical values lived out through our system of government. One challenge to this view lies in the Constitution, which is a starkly secular document.

Oddly, within this debate, one clear Christian value is expressly embodied in the Constitution and is often ignored: the pardon power. The power of the president to grant clemency is strikingly consistent with Christian principles—in fact, it is perhaps the only device in the Constitution which Jesus actually exemplified, in effectively granting clemency to someone being legally sentenced under the law.¹ This article has the limited goal of adding the pardon power to the broader discussion of Christian values within the American political and legal systems as an example of a strong Christian principle made manifest in our founding document.

This article considers this topic in three sections. Section One briefly explores the idea of a “Christian nation,” and some of the claims made relating to Christian values within American law along with the historical backing for these claims. In turn, Section Two develops the idea of clemency as reflecting a bedrock Christian value. Section Three then delves into the intersection of Christian faith and clemency in context of one of contemporary American politics’ thorniest subjects: the commutation of death sentences.

* Professor of Law, University of St. Thomas (MN), J.D. Yale Law School, B.A. College of William and Mary.

1. See *John* 8:1–11 (New Revised Standard Version).

I. A NATION OF CHRISTIANS

While politicians and Christian activists sometimes make broad claims that the United States was founded as a “Christian nation,”² that notion has never found much support in the academy or the courts.³ Historically, the idea of a “Christian nation” did not come from the framers who wrote the Constitution—they largely disavowed the idea and intentionally formed a secular government.⁴ Nevertheless, we are left with a widespread belief that Christian ideas permeate our form of government.⁵

Consistently, polls have found that substantial numbers of Americans believe that the United States should see itself as a “Christian nation.” For example, in 2007, USA Today reported that a poll of Americans, conducted by the First Amendment Center, revealed “55% believe erroneously that the Constitution establishes a Christian nation.”⁶ In 2009, 62% of Americans were reported to think that the United States is a “Christian nation,”⁷ and this belief seems to be particularly strong among “Tea Party” Republicans.⁸

“Christian nation” rhetoric permeates political discussions at all levels. In 2008, for example, presidential candidate John McCain said in an interview with Beliefnet.com that “this nation was founded primarily on Christian principles,”⁹ and that the United States Constitution itself established a “Christian nation.”¹⁰ McCain’s running mate, Governor Sarah Palin of

2. See discussion *infra* Parts I.A–B.

3. See discussion *infra* Parts I.A–B. Notably, some Christian groups conversely think not that the U.S. is already a “Christian nation,” but that our ambition should be to re-create America as such. For example, the credo for the web site ministers-best-friend.com is “A Christian Nation, in a Christian World, in Our Lifetime! Worth Living For? Dying For? Fighting For? YES!” *Dobson Again Calls for Parents to Pull Kids out of Government Schools*, MINISTERS-BEST-FRIEND.COM, <http://www.ministers-best-friend.com/James-Dobson-Calls-Preachers-To-Christian-Schools.html> (last visited Nov. 27, 2012).

4. See discussion *infra* Part II.A.

5. For purposes of this argument, I am addressing Christian themes on the face of the Constitution, and setting aside the important (and more subtle) issue of natural law. The idea of natural law permeating the structure of government, including the mandates of the Constitution, is too broad to address here. As I have already set out elsewhere, I do believe that natural law has and does inform the operation of our government, in sometimes surprising ways. See generally Mark Osler, *Seeking Justice Below the Guidelines: Sentencing as an Expression of Natural Law*, 8 GEO. J.L. & PUB. POL’Y 167 (2010).

6. Andrea Stone, *Most Think Founders Wanted Christian USA*, USA TODAY, Sept. 13, 2007, http://www.usatoday.com/news/nation/2007-09-11-amendment_N.htm.

7. Daniel Stone, *One Nation Under God*, NEWSWEEK, Apr. 6, 2009, <http://www.thedailybeast.com/newsweek/2009/04/06/one-nation-under-god.html>.

8. Eric Marrapodi, *Most Tea Partiers Call America a Christian Nation, Study Finds*, CNN.COM (Oct. 5, 2010), <http://religion.blogs.cnn.com/2010/10/05/most-tea-partiers-call-america-a-christian-nation-study-finds/>.

9. *John McCain: Constitution Established a ‘Christian Nation’*, BELIEFNET.COM, <http://www.beliefnet.com/News/Politics/2007/06/John-Mccain-Constitution-Established-A-Christian-Nation.aspx#extndVer> (last visited Oct. 13, 2012).

10. *John McCain: Constitution Established a Christian Nation?*, BELIEFNET.COM, <http://www.beliefnet.com/Video/News-and-Politics/John-McCain-2008/John-Mccain-Constitution-Established-A-Christian-Nation.aspx> (last visited Oct. 13, 2012).

Alaska, suggested two years after the 2008 election that it was “mind-boggling” that some leaders might not consider the United States a “Christian nation.”¹¹ Tellingly, President Barack Obama was roundly attacked for simply noting that “we do not consider ourselves a Christian nation or a Jewish nation or a Muslim nation; we consider ourselves a nation of citizens who are bound by ideals and a set of values.”¹² Newt Gingrich, for example, said that Obama “was fundamentally misleading about the nature of America,” and Sean Hannity found the statement flatly offensive.¹³

In one sense, those who call the United States a “Christian nation” are absolutely correct, in that the majority of Americans have always identified themselves as followers of some version of the Christian faith.¹⁴ There is no doubt that we are mostly a nation of Christians.¹⁵ That does not mean, though, that Christianity is *built into* our legal structure and system of government. That assertion is much less firmly grounded, especially when it rests on claims about the faith of those men who debated and drafted the Constitution.

A. *The Framers’ View of Religion and the Constitution*

It is indisputable that the framers were of a variety of beliefs and involvement with religion, ranging from the disinterested to the devout.¹⁶ The free-thinking ways of James Madison and Thomas Jefferson, who shared a certain skepticism about mainstream Christianity and worked together to disestablish the Anglican Church as the official religion of Virginia,¹⁷ are well documented. Other framers, however, were much more orthodox in their beliefs.¹⁸ However, the leaders among the group reflected a strong

11. Teddy Davis & Matt Loffman, *Sarah Palin’s ‘Christian Nation’ Remarks Spark Debate*, ABC NEWS (Apr. 20, 2010), <http://abcnews.go.com/Politics/sarah-palin-sparks-church-state-separation-debate/story?id=10419289>.

12. *Fox News figures outraged over Obama’s “Christian nation” comment*, MEDIAMATTERS.ORG (Apr. 9, 2009), <http://mediamatters.org/research/2009/04/09/fox-news-figures-outraged-over-obamas-christian/149056>.

13. *Id.*

14. Interestingly, President Obama acknowledged that the United States is a “predominately Christian” nation in the speech referred to above. *Id.*

15. The Pew Forum on Religion and Public Life’s “U.S. Religious Landscape Survey” provides a fascinating description of the mosaic of Christian sects and other faiths in this country. THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY (2008) *available at* <http://religions.pewforum.org/>.

16. To his credit, even while asserting that the United States is a “nation predicated on the Holy Writ,” and that “our great nation was founded by godly men upon godly principles to be a Christian nation,” Jerry Falwell recognized that “Our Founding Fathers were not all Christians” JERRY FALWELL, LISTEN AMERICA! 25 (1980).

17. See GARRY WILLIS, HEAD AND HEART: AMERICAN CHRISTIANITES 183–88 (2007).

18. An excellent set of essays describing these lesser-known figures, such as Patrick Henry, Edmund Randolph, and Benjamin Rush, can be found in THE FORGOTTEN FOUNDERS ON RELIGION AND PUBLIC LIFE (Daniel Dreisbach, Mark Hall, & Jeffrey Morrison eds., 2009).

deist bent,¹⁹ and the stunning and original document they produced, the Constitution of the United States, says nothing about religion beyond the use of the term “Year of Our Lord” and a prohibition against religious tests for public office.²⁰ On its face, there is simply nothing in our Constitution that reflects an intent to establish a “Christian nation,” and when the Bill of Rights was later enacted the First Amendment affirmatively disavowed any such intent through the Establishment Clause.

The Constitution (particularly as amended) does not seem to need clarifying, but some explanation was received anyway in the first ten years of the Republic, when an emissary of George Washington executed a treaty with Tripoli which set out that “the government of the United States is not, in any sense, founded on the Christian religion.”²¹ This was not an anomaly; rather, it was consistent with what the framers’ thoughtful construction of the Constitution already revealed.

Viewed historically, this absence of religion in our founding document should not be surprising. The framers lived in a unique historical period, during a “trough” in religious fervor, between the peaks of the First and Second Great Awakenings. At the time of the American Revolution, Christianity was in decline in the United States, and by the time the Constitution was drafted, only about 10%–20% of Americans were affiliated with a church.²²

Like other educated Americans of that time, many of the framers were greatly influenced by Enlightenment thinking, which thoroughly animated the process through which “the American colonists converted their frustration with overbearing British rule into a bold new conception of freedom.”²³ That freedom, it seemed, included a sharp break from the constraints of religious orthodoxy, just as it expressed a new division from political orthodoxy.²⁴ As the framers rejected the idea of a king who could dictate with near-absolute authority, some of them had already rejected the idea of an activist God who had a similar level of involvement with the world.²⁵

19. See Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1, 7 (2008). Stone identifies Thomas Paine, Thomas Jefferson, Benjamin Franklin, Ethan Allen, and Gouverneur Morris as “flat-out deists,” and John Adams, James Madison, Alexander Hamilton, James Monroe, and George Washington as “at least partial deists.” *Id.*

20. The First Amendment to the Constitution added the Free Exercise and Establishment clauses.

21. Jon Meacham, *A Nation of Christians is Not a Christian Nation*, N.Y. TIMES, Oct. 7, 2007, http://www.nytimes.com/2007/10/07/opinion/07meacham.html?_r=1.

22. Stone, *supra* note 19, at 4.

23. *Id.*

24. One expression of that freedom (other than the Constitution itself) can be found in Thomas Jefferson’s rewriting of the Bible, published by Beacon Press, in which Jefferson excises the mystical accounts of Jesus’s birth and death and rearranges the remaining materials of the Gospels. THOMAS JEFFERSON, *THE JEFFERSON BIBLE* (1989).

25. Stone, *supra* note 19.

Certainly, there are historical events from the era of the founding of the nation that reflect a general belief in a creator among the framers; President Washington's proclamation of a National Day of Thanksgiving in 1789²⁶ is just one example.²⁷ However, these events generally reflect a broad theism rather than any substantial effort to incorporate Christian thought into the structure of government. The harsh truth for those who want to see a more coherent Christian mission played out in the Constitution is stymied by the realities of that document and the diversity of beliefs among the men who wrote it.²⁸ Even the adage that the Ten Commandments serve as the basis for American law does not hold up to scrutiny: The First Commandment directs that "Thou shalt have no other gods before me,"²⁹ but the First Amendment guarantee of free exercise of religion bars such exclusivity.³⁰ Not only does the First Amendment ignore the imperative of the First Commandment, but it protects the right to violate that Commandment.

B. *Origins of Viewing the United States as a "Christian Nation"*

Rather than manifesting itself at the time of the founders, the idea that the United States is a "Christian nation" seems to come from two subsequent periods: the years just following the founding of the Republic and, more recently, the 1950s. In both instances, Americans wrapped their identity in Christian ideals in reaction to European excesses—specifically, the violence of the French Revolution (in the years of the early Republic) and the godlessness of European Communism (in the 1950s).

The first of these periods was the Second Great Awakening. This re-emergence of religious enthusiasm in the United States, which lasted from the 1790s to the 1840s, was a sharp break from the more secular political culture which predominated at the time of the writing of the Constitution.

26. *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984) (explaining that "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers . . . Thanksgiving was celebrated as a religious holiday. . .").

27. The Declaration of Independence stirring refers (in the words of Jefferson, the deist) to self-evident truths, including that "all men . . . are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This does not, of course, mean that the revolution itself was motivated by religion; in fact, a much stronger argument can be made that the impetus for revolution was primarily a dispute over the most secular of topics—tax policy. Osler, *supra* note 5, at 183.

28. Stone, *supra* note 19.

29. Quoted here as used by the Supreme Court. *McCreary Cnty., Ky. v. Am. Civil Liberties Union*, 545 U.S. 844, 853 (2005).

30. This common claim that the Ten Commandments form the basis of American law is an especially odd one. Only two and a half of the moral laws encompassed by the Commandments—murder, stealing, and (sometimes) lying—are covered by our criminal laws. I have addressed this in some depth elsewhere. See generally Mark Osler, *Aseret Had'Varim in Tension: The Ten Commandments and the Bill of Rights*, 49 J. CHURCH & ST. 683 (2007).

During this period millions of Americans were “born again” at large revival meetings.³¹ It was during this period, not the time the Constitution was drafted, that the idea of the United States as a “Christian nation” first took root.³² Seeking to integrate religious belief with government, evangelicals fought to do away with Sunday mail delivery,³³ promote the prosecution of blasphemy,³⁴ and limit obscenity through government action.³⁵

Much of this demand for greater social order was inspired by revulsion at the violence of the French Revolution and the further advances of European deism.³⁶ In a way, the Second Great Awakening was a moment of American self-definition, as something distinct from and truer (in a religious sense) than the ideals of Europe.

The second of these periods took place in the modern context. Much of the evidence used today to show that the United States is a “Christian nation” is drawn from another time period in which Americans actively defined themselves and their thinking as distinct from European ideas—in this case Communism rather than the Enlightenment. It was during the Cold War that many of the markers of theistic influence on American government emerged. For example, the Pledge of Allegiance was written in 1892, but the words “under God” were added by Congress in 1954, at the height of America’s reaction to the spread of Communist ideology in Europe and throughout the world.³⁷ Similarly, the Ten Commandments monument on the grounds of the State Capitol in Texas, which was at the center of the Supreme Court’s decision in *Van Orden v. Perry*,³⁸ was erected in 1961 by the Fraternal Order of Eagles.³⁹ The crucial context to the building of that monument was the fact that the global threat of Communism was still very real, and the presence of God’s word at the Capitol defined Americans, and Texas, as something very different than godless Communism.

C. *Role of Christianity in Modern Politics*

The fact that the Constitution was not explicitly structured by the framers to embody Christian ideals, however, does not mean that Christian ideals are irrelevant in our modern political debates. As a nation of Christians (if not a “Christian nation”), many would prefer that the government at least

31. Geoffrey R. Stone, *The Second Great Awakening: A Christian Nation?*, 26 GA. ST. U. L. REV. 1305, 1307 (2010).

32. *Id.*

33. *Id.* at 1314.

34. *Id.* at 1318.

35. *Id.* at 1325. Notably, the Second Great Awakening also inspired crusaders against the institution of alcohol and slavery. *Id.* at 1321, 1323–24.

36. *Id.* at 1308.

37. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6–7 (2004) (describing the history of the Pledge of Allegiance).

38. *Van Orden v. Perry*, 545 U.S. 677 (2005).

39. *Id.* at 681–82.

be consistent with the ideals of the majority faith, even if that faith is not the basis for that government. After all, there is a certain integrity in that.

It may not be historically accurate to say that America was founded as a “Christian nation,” but it is still legitimate for the Christian majority in this nation to look for and celebrate those parts of the Constitution that are consistent with and promote their values. The same Constitution that does not systemically dictate or direct faith imperatives also grants citizens the freedom not only to use faith to inform their political choices, but to promote those aspects of governmental power that embody and encompass their beliefs. I argue here that first among those provisions of the Constitution that Christians should celebrate is the Pardon Clause, which promotes the undisputable Christian values of mercy, redemption, and reconciliation.

II. CLEMENCY AS A CONSTITUTIONAL AND CHRISTIAN VALUE

A. *The Creation of the Pardon Clause*

The pardon power given to the president by the United States Constitution is muscular, unchecked, and plainly consistent with the message of Christ. In enumerating the powers of the executive, the Constitution establishes that the president “shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”⁴⁰ There, in a few short phrases, hides the very power at the heart of the Christian faith—the power of mercy and rebirth.

Most directly, the pardon power was derived from the traditional power of clemency given to British kings.⁴¹ The framers consciously rejected (and for good reason) not only the idea of a king but nearly all kingly powers; yet, the founding fathers were intentional in importing clemency into the Constitution even as they rejected much of the British structure they had so recently cast off through violent revolution and a startling revision of what government could and should be. The idea of giving the president such power was introduced as a margin note by John Rutledge of South Carolina, who chaired the Committee of Detail, which was largely responsible for drafting the document’s text.⁴² Thereafter, it became a matter of dispute between the Federalists, who favored a strong executive and the inclusion of the pardon power, and the opposing Anti-Federalists.⁴³

The Federalists won out on this point, and the language was included in the draft sent to the states for ratification. Though it appears that there was little debate in the state ratifying conventions about clemency powers,⁴⁴ Alexander Hamilton argued in support of that provision in *Federalist Papers*

40. U.S. CONST. art. II, § 2.

41. JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* 12–13 (2009).

42. *Id.* at 15.

43. *Id.*

44. *Id.* at 18.

69 and 74. Most pointedly, in Federalist 74, Hamilton specifically asserts that the pardon power serves the interests of “mercy”:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. . . . [A]s men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the *mercy* of government, than a body of men.⁴⁵

Hamilton’s language reflects and embodies several discrete Christian themes: the avoidance of cruelty, morality as embodied within the individual, and the very idea of mercy as a positive value for governments as well as men. Given his religious training and background, Hamilton would have recognized these themes as such, too—his college roommate described Hamilton as a regular churchgoer who was “on his knees both morning and night offering up fervent prayers.”⁴⁶

That is not to say, however, that Hamilton was a mainstream Christian at the time he authored Federalist 74. Like many of the other founding fathers, Hamilton is a bit of an enigma in terms of faith, and it appears that during the prime of his life, he mixed natural religion and Protestant Christianity with rationalism.⁴⁷ He believed in God as a creator and the author of nature, felt that people possess immortal souls, and that God intervened in the course of human events.⁴⁸ During Hamilton’s primary period of political activism, however, from 1777 through 1792, he seemed largely indifferent to matters of faith.⁴⁹

Importantly, even though founders like Hamilton did not seem motivated by faith issues, they were within a culture that was often linked by a common bond of Christianity as, at the very least, a common touchpoint and area of shared knowledge. In a nation where in many (if not most) homes the only book was a Bible,⁵⁰ even those who were not believers were shaped by the stories of Christianity. In other words, even if Christianity

45. THE FEDERALIST NO. 74 (Alexander Hamilton) (emphasis added).

46. Gregg L. Frazer, *Alexander Hamilton, Theistic Rationalist*, in THE FORGOTTEN FOUNDERS, *supra* note 18, at 103.

47. *Id.* at 104–05. Later in life, Hamilton returned to a more orthodox form of Christianity. *Id.*

48. *Id.* at 106–07.

49. *Id.* at 109.

50. See generally WILLIAM J. WOLF, THE ALMOST CHOSEN PEOPLE: A STUDY OF THE RELIGION OF ABRAHAM LINCOLN 133 (1959) (noting that even Abraham Lincoln, born well after the drafting of the Constitution, attended a school where the only reading material was the Bible).

was viewed by some as a myth, it was a great myth, a binding and defining myth, and one which would profoundly influence the way a reader of the time might see and understand Hamilton's intentional use of the spare, sharp word he chose in Federalist 74: *mercy*. Christianity can claim Federalist 74 not because Hamilton was a Christian, or because the Constitution is a Christian document (which it is not), but because Federalist 74 drew deep from the wellspring of cultural Christianity, and like the Constitution embodies a power of forgiveness that is deep and wide within (and even beyond) the Christian consciousness.

Hamilton's use of language more often associated with religion than politics, in discussing the pardon power, was not isolated. Notably, in the 1833 case of *United States v. Wilson*,⁵¹ Chief Justice John Marshall wrote the first opinion of the U.S. Supreme Court relating to pardons. There, George Wilson and a co-defendant, James Porter, were convicted and sentenced to death for a robbery from the mail.⁵² Porter was executed. Wilson, however, received a pardon from President Andrew Jackson.⁵³

In considering whether (under somewhat odd circumstances) the pardon extended to a lesser included offense, Chief Justice Marshall described the pardon power this way:

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.⁵⁴

The term "an act of grace" encompasses the heart of Christianity. The elegance of the term, placed in the middle of a legal opinion, was an act of gentle moral authority. Whether Marshall used the term in a religious sense should not matter to Christians—the truth is that the Chief Justice accurately described the function of this Constitutional power in a way we should both understand and embrace. If Christians truly do believe that an "act of grace" is favored by our faith, why would we blanch when it is used in the context of law?

B. *The Bible and Clemency*

There is little debate that mercy through clemency is in the Constitution—it is, after all, explicit on the very face of the text. Less examined, yet just as clear, is the presence of mercy through clemency in the Bible. It does not take long to find clemency—not just analogies to clemency, but the actual *thing* of it—in the story of Jesus. Looking beyond the simple healings and grants of forgiveness dispensed by Christ, the Gospels reveal in-

51. *United States v. Wilson*, 32 U.S. 150 (1833).

52. *Id.* at 151–53.

53. *Id.*

54. *Id.* at 160.

stances in which clemency is in play explicitly within the realm of criminal law. I will consider here just a few of the more obvious moments in the chronicles of Christ's life where the pardon power is described as a positive virtue.

For many Christians, including myself, it was God who wrote the story of Jesus's life on Earth, with every known detail imbued with deep meaning. Should it not matter then that mercy through pardon, within the specific context of criminal law, comes up again and again in the life of Christ?

1. *Jesus Grants a Pardon from Execution (John 8)*

In one of the more well-known and remarkable stories from the Bible, and one of the more remarkable in John 8,⁵⁵ Jesus is challenged by his nemeses to address the moral issues of an execution:

The scribes and the Pharisees brought to him a woman who had been caught in adultery; and making her stand before all of them, they said to him, "Teacher, this woman was caught in the very act of committing adultery. Now in the law Moses commanded us to stone such women. Now what do you say?"⁵⁶

Jesus, in response to this challenge, bends down and writes on the ground for a minute,⁵⁷ then stands and famously tells them, "Let anyone among you who is without sin be the first to throw a stone at her."⁵⁸ The executioners then drift off, one by one, and Jesus is left alone with the woman.⁵⁹

As they walk away, Jesus addresses her: "Neither do I condemn you. Go your way, and from now on do not sin again."⁶⁰ These are powerful words—she is no longer condemned. It is, in the purest of ways, a pardon. The bare fact that Christ served as pardoner cements the idea of clemency as one that is fundamentally Christian.

2. *Pilate Considers Pardoning Christ*

One of the anomalies of the process leading to the execution of Christ is that he is brought through three stages that roughly approximate our modern post-conviction steps of appeal, habeas, and clemency. In short, he is first brought before Pilate on appeal,⁶¹ then appears before Herod (a sepa-

55. The provenance of John 8 is often disputed. It was not included in the oldest known Greek manuscripts of the book of John. THE NEW INTERPRETER'S STUDY BIBLE 1923 n. 7:53–8:11 (Walter J. Harrison ed., 2003).

56. *John* 8:3–5 (New Revised Standard Version).

57. *John* 8:6.

58. *John* 8:7.

59. *John* 8:9.

60. *John* 8:11.

61. *Luke* 23:1–5 (New Revised Standard Version).

rate sovereign) in what looks like a habeas petition,⁶² and finally is returned to Pilate, as governor, for a consideration of clemency.⁶³ The parallel to our own post-conviction process is striking.⁶⁴

Thus, Jesus experiences both sides of clemency—he grants it to the woman about to be stoned in John 8, and is denied clemency before his own execution by Pilate. The latter story, intriguingly, reveals a conflicted decision-maker in the person of Pontius Pilate.

Pilate sends Jesus to Herod, and then is faced with a dilemma when the prisoner is returned to him.⁶⁵ Pilate has the power to grant clemency under his own authority; in fact, he declares that Jesus “has done nothing to deserve death. I will therefore have him flogged and release him.”⁶⁶ Eventually, though, he succumbs to the political will of the crowd, which demands that he instead release Barabbas, an insurrectionist who had committed murder.⁶⁷

The plight of Pilate is not so different from the dilemma of modern governors and presidents, who may fear a popular backlash based on their clemency decisions.⁶⁸ Like that ancient figure, they are pulled by conscience towards clemency, and by fear they are pulled away from such displays of mercy.

3. *Jesus on the Cross*

Even with his last breath, Jesus expressed the idea of mercy through clemency. As he suffered on the cross, executed between two common criminals, he cried out, “Father, forgive them, for they do not know what they are doing.”⁶⁹ Jesus sought clemency even for his own killers, before they had completed the dark act itself.

There is something deeply moving in the fact that Jesus, having just been denied mercy, now offers it to his killers and those who supported them. Mercy must always be considered; even in the most extreme cases it cannot be rejected as a possibility.

III. CLEMENCY AND CONTEMPORARY POLITICS

On a practical level, American clemency debates revolve around three uses of the pardon power, at both the state and the federal level.⁷⁰ First, and

62. *Luke* 23:6–12.

63. *Luke* 23:13–25.

64. See generally MARK OSLER, *JESUS ON DEATH ROW* 87–108 (2009) (comparing Jesus’s post-conviction process to the current U.S. system).

65. *Luke* 23 (New Revised Standard Version).

66. *Luke* 23:15–16.

67. *Luke* 23:18–25.

68. See discussion *infra* Part III.

69. *Luke* 23:34.

70. CROUCH, *supra* note 41, at 20. I am here describing something less than the full scope of the pardon power by focusing on what is politically important. Scholars of the field acknowledge

perhaps most prominently, there is the ability of governors (and, in federal cases, the president) to commute death sentences. Second, the president and many governors have the power to pardon people—an act of clemency which results in a criminal conviction being effectively erased. Finally, there is the power of this same group to commute sentences, which does not remove the conviction, but does reduce the sentence a convict is serving.

Of these, it is the commutation of a death sentence that receives the most attention in our society, and it is there that we might look to see the power of faith. Commutation can apply to the lessening of any sentence by the executive, but the most dramatic use of this power has been in cases where the convict is saved from execution—the form of clemency we see Christ employing in John 8, and that was used by George Washington to save the leaders of the Whisky Rebellion.⁷¹ It is in this use that the competing principles in play stand out most starkly: on the one hand, a life is spared through a dramatic act of mercy, while at the same time the often tortuous vote of a jury (as all death penalty cases are sentenced by juries) is ignored.

In some jurisdictions, this form of clemency is almost never used. In Texas, for example, Governor Rick Perry waited eight years before granting his first commutation of a death sentence, in the case of an accomplice to murder.⁷² This was one of only two commutations of a death sentence in that state since the death penalty was reinstated in 1976.⁷³ During that same time period, there have been 484 executions in Texas.⁷⁴

When commutation is used to reduce a capital sentence, it often raises a political furor. For example, in Oregon, Governor John Kitzhaber granted a reprieve in November 2010 to convicted double-murderer Gary Haugen.⁷⁵ Haugen had waived all appeals and became what is known as a “volunteer”—someone who wanted to be executed.⁷⁶ The reprieve was actually something less than a commutation, since it would only stay Haugen’s execution until the end of Kitzhaber’s term,⁷⁷ but there was still a strong reac-

five manifestations of the constitutional pardon power: a full pardon, a commutation (or lessening) of a sentence, the ability to remit fines and forfeitures, the ability to grant a reprieve, and amnesty (which is granted prior to a charge).

71. *Id.* at 55–56.

72. Associated Press, *Texas Governor Grants Rare Death Penalty Commutation*, THE DEATH PENALTY INFORMATION CENTER (Aug. 30, 2007), <http://www.deathpenaltyinfo.org/node/2167> (granting a commutation for Kenneth Foster just six hours before he was to be executed).

73. *Clemency*, THE DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 18, 2013).

74. *State by State Database*, THE DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state_by_state (last visited Oct. 13, 2012).

75. Associated Press, *Gov. Kitzhaber Halts Haugen Execution*, KGW.COM (Nov. 22, 2011), <http://www.kgw.com/news/Kitzhaber-to-address-capital-punishment-ahead-of-Haugen-execution-134351233.html>.

76. *Id.*

77. *Id.*

tion. The former husband of one of Haugen's victims called Kitzhaber a "coward,"⁷⁸ and it seemed that others agreed.⁷⁹ Notably, Kitzhaber did not rely on faith as a basis for his decision, instead citing to his oath as a physician to "do no harm."⁸⁰ Though he struggled mightily and publicly with the decision,⁸¹ he did so in a way that did not reference faith.

Would it have mattered if Kitzhaber had referred to his faith when defending his decision? Maybe it would have. In contrast to the uproar over Kitzhaber's choice, there was perhaps less of a kerfuffle over the much broader commutation of fifteen death row inmates by Illinois Governor Pat Quinn in March of 2011.⁸² Quinn cleared death row at the same time that he signed a bill eliminating the death penalty as a sentence in Illinois.⁸³

Quinn's actions built on a previous mass commutation by Illinois Governor George Ryan, who took 167 people off death row while telling his staff, "I can't play God."⁸⁴ Quinn was even more explicit about the faith aspect of his action. A Catholic, Quinn quoted Cardinal Joseph Bernardin of Chicago as he announced the commutations, told reporters he had turned to the Bible for wisdom, and sought the counsel of Sister Helen Prejean.⁸⁵ According to one of the few people who attended the signing of the death penalty bill, Quinn carried physical copies of the Bible and Cardinal Bernardin's book "The Gift of Peace."⁸⁶

Cardinal Bernardin, who advocated a "consistent ethic of life" that focused on "ending abortion, poverty, nuclear war, euthanasia, and capital punishment," was a particularly powerful influence on Governor Quinn.⁸⁷ Quinn spoke openly about that influence to the *New York Times* after abolishing the death penalty and announcing the commutations for all of those on death row.⁸⁸ When asked about the role of faith in making and explaining his decision, Quinn said plainly, "I think it's indispensable. . . . When

78. *Id.*

79. *Id.*

80. *Id.*

81. Associated Press, *supra* note 75.

82. *Id.*

83. Christopher Wills, *Illinois Gov. Pat Quinn Abolishes Death Penalty, Clears Death Row*, WASH. POST, Mar. 9, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/09/AR2011030900319.html>.

84. *Id.*

85. Ray Long & Todd Wilson, *Gov. Pat Quinn Turned to Bible and Writings of Late Cardinal Joseph Bernardin for Difficult Death Penalty Decision*, CHI. TRIB., Mar. 10, 2011, http://articles.chicagotribune.com/2011-03-10/news/ct-met-illinois-death-penalty-bill-si20110309_1_death-penalty-pat-quinn-families-of-murder-victims; Illinois Abolishes the Death Penalty, NAT'L PUB. RADIO (Mar. 9, 2012, 1:35 PM), <http://www.npr.org/2011/03/09/134394946/illinois-abolishes-death-penalty>.

86. Jeanne Bishop, *Illinois Report: Gov. Quinn Abolishes the Death Penalty*, OSLER'S RAZOR (Mar. 10, 2011), <http://oslersrazor.blogspot.com/2011/03/illinois-report-gov-quinn-abolishes.html>.

87. Samuel G. Freedman, *Faith Was On the Governor's Shoulder*, N.Y. TIMES, Mar. 25, 2011, available at http://www.nytimes.com/2011/03/26/us/26religion.html?_r=1&emc=eta1&pagewanted=print.

88. *Id.*

you're elected and sworn into office, that oath really involves your whole life experience, your religious experience. You bring that to bear on all the issues."⁸⁹

Quinn described his actions as flowing from a process deeply imbued with faith. Intriguingly, this not only seems an honest reflection of his consideration of the issue, but may have served to insulate him from some forms of criticism for his actions—the reaction to his decision was “overwhelmingly favorable.”⁹⁰

As Governor Quinn's experience shows, seeing clemency as consistent with faith may not only be within the mainstream of American thought; it may also be politically expedient, provided that it is genuine. It is the secular Constitution that gives us (and the governor) the freedom to talk about clemency as a matter of Christian belief, and the imperatives of faith and honesty that demand nothing less.

CONCLUSION

America may not be a “Christian nation,” in the way that some would like, but it remains a “nation of Christians,” where a substantial majority of citizens look to Christian principles and teaching to inform their morality. The effort to see the Constitution as an expressly religious document is doomed by the text of the thing itself. However, that does not mean that Christians such as myself cannot celebrate and promote those parts of the Constitution that reflect and embrace our central values.

Of all the Constitution, the part that most clearly reflects the values of Christ is the pardon clause. It enables a person, the president, to grant mercy. Seen properly as not only a tool of the executive, but a lever of God's will, clemency should be embraced as a profound, important, and regularly used power of the man or woman in whom we invest so much trust.

89. *Id.*

90. *Id.*