

judges struggle to decide which claims of conscience merit special treatment and which do not. Here is the bitter irony toward which the squinty-eyed, bandy-legged little error born in *Opelika II* has been leading us. A doctrinal departure undertaken in the mistaken hope of facilitating pluralism leads to the distinctly counter-pluralistic result of favoring some believers over others as unelected judges confer constitutional immunities which are beyond the power of ordinary legislative majorities to correct. Justice Jackson had it right:

The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal in the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a minority to fix its own limits.

Insofar as their constitutional advocacy has persuaded us otherwise, the Jehovah's Witnesses have led us astray.

A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING. By Ellis Sandoz.¹ Louisiana State University Press. 1990. Pp. xiv, 240. Cloth, \$37.50.

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At least to a nonspecialist like me, recent scholarship about the founding generation looks like a virtual deluge. Why then do we need another book on this subject? The question is especially appropriate in the case of Professor Ellis Sandoz's study because his book is hardly as elegant or readable as, say, Bernard Bailyn's work. Professor Sandoz's organization is not tight, and his diction is often irksome: the book is filled with references to such things as "Metaxy," "horizons" (as in the founders' "horizon" or the "horizon of philosophy"), and the "tensional dimension of participatory reality."

Despite these shortcomings, *A Government of Laws* adds an essential dimension to the "liberalism versus civic republicanism" histories that are now so familiar to constitutional scholars. Indeed, if Sandoz is right, those histories have largely missed the most important points. In addition, by comparison to much of the recent legal-

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historical scholarship, Sandoz speaks more directly (in a sense I will try to explain) to present concerns and needs. For those reasons, his argument deserves close analysis.

I

Perhaps the most conspicuous aspect of Sandoz's study is his emphasis upon the religious character of the founders' thought. Religion, he argues, was not merely a veneer or a vocabulary; on the contrary, biblical precepts and symbols permeated the thinking of the founding generation. And it is a mistake to suppose that intellectual and political leaders such as Madison and Jefferson had escaped the piety of the general population to achieve a secular, "enlightened" perspective; the intellectual elite were, if anything, even more deeply religious in their thinking than were less educated Americans.

As he acknowledges, Sandoz is hardly the first scholar to notice the importance of religion to the founding generation. His discussion of the religious element is nonetheless valuable for at least two reasons. First, as Sandoz repeatedly notes with evident exasperation, many historians and scholars seem immersed in an "obtuse secularism" that leads them, despite mountainous evidence to the contrary, to view the American founding as a principally secular development. I cannot say whether this indictment is valid with respect to professional historians, but discussions of the founding period in legal literature do deserve Sandoz's criticism. To be sure, the founders' religiosity is sometimes considered in legal literature specifically dealing with the first amendment's religion clauses, but in more general discussions this dimension is commonly overlooked.

A contribution to this journal can serve as an example. In an essay entitled "The Intellectual Origins of the Constitution: A Lawyer's Guide to Contemporary Historical Scholarship,"³ Professor Suzanna Sherry lists four principal influences on the founders' thought: "Country" or Old Whig ideology, Enlightenment philosophy, John Locke, and the common law tradition as expounded by Coke and Blackstone.⁴ Notice what is missing: there is no mention of the pervasive influence of Protestant Christianity or of the fact that the Bible—not Bolingbroke or Blackstone or Locke—was the most widely-read and cited book in America.⁵ Noting the impor-

3. 5 CONST. COMM. 323 (1988).

4. *Id.* at 337-39.

5. Although Sherry does not actually *deny* the importance of religion, she does offer hints to that effect. *E.g., id.* at 329 ("Taught by the Enlightenment to reject the workings of

tance of "virtue" in the founders' thought, Professor Sherry proceeds to ask, "How did a society cultivate virtue?" Remembering statements by Washington and Jefferson asserting that religion is the essential foundation of republican morality, one might expect that this question would elicit at least a passing allusion to religion. But no—Sherry finds in the founders' thinking four sources of virtue: broad distribution of land ownership, education, equality, and an inborn moral sense.⁶ Even with respect to education there is still no mention of religious instruction; instead she quotes *The Worcester Speculator* as to the importance of "the spirit of literature." Reading Sherry's generally useful essay, one would have no inkling that religion influenced the founders' thinking in any way.

Likewise current legal doctrine, which holds that government violates the Constitution if it acts in a way that even creates a perception that it has "endorsed" religion, powerfully reflects such an "obtuse secularism." So long as such attitudes persist, arguments like Sandoz's will be a necessary antidote.

But Sandoz's emphasis upon religion serves as more than a reminder of what we already know but are wont to forget. It also addresses a critical and more difficult question: What did the founders actually derive from their religious beliefs? It is conceivable, after all, that the founders' beliefs might have been incidentally religious but not inherently or essentially so. For example, some scholars have stressed the colonial attachment to "covenant theology." In this vein, Donald Lutz has argued that Americans derived the idea of government by consent from biblical precedent, and indeed were practicing the idea well before they could have gotten any contractarian notions from Locke. Lutz may be right, but his point does not suffice to show that religion was more than incidentally significant. Even if Americans acquired the idea of government by consent from the Bible, there is nothing inherently religious about that notion. Hence, modern secular interpreters may be right to downplay its religious origins as incidental.

For Sandoz, however, religion provided the founders not just with a precedent for government by consent; it offered them a full-blown "civil theology" and a "comprehensive vision of ultimate reality." I will try to summarize the content of that vision in a moment. For now, it suffices to note that, in Sandoz's view, we cannot begin to understand the founders' thinking unless we recognize their "classical and Christian notions of a common human nature

Providence as a sufficient explanation [for political corruption], eighteenth-century writers blamed the ways of men.").

6. *Id.* at 337-39.

present to all men *qua* men and the dignity of man created in the divine image and loved of God.” If this is so, the religious influence on the founders’ thought can hardly be dismissed as incidental.

Indeed, the statement just quoted (and much else of a similar nature) might lead one to interpret the book as a sort of “Christian nation” tract. But Sandoz disclaims such an interpretation, and I incline to believe that his disclaimer is warranted. To see why, one must consider another of the book’s major themes—the classical element in the founders’ thinking.

II

Everyone knows that the founders, or at least the better educated among them, studied the classics. The critical question, once again, is what did they learn from this study? And the answer, according to some historians, is “not much.” Bernard Bailyn suggested that the founders had only a superficial grasp of what they read from Greek and Roman thinkers; Jefferson held Plato in contempt, and John Adams thought—not implausibly, I would add—that the *Republic* must have been meant as a satire. What the founders mainly derived from their classical studies, Bailyn argued, was a collection of inspiring stories and heroic examples demonstrating the need for courage and determination in the struggle against corruption and for political liberty.

Sandoz’s founders were equally zealous for liberty but less philosophically obtuse. From the classics, Sandoz argues, the founders derived a “comprehensive vision of ultimate reality” that offered an account of the universe and of the place of mankind within that universe. The fact that this comprehensive vision ran parallel in important respects to the world view which the founders derived from Christian and biblical precepts allows Sandoz to speak of a dominant “classical and Christian” tradition,⁷ and thus to avoid the narrower “Christian nation” interpretation.

And what was this “comprehensive vision” or “civil theology” that underlay all of the founders’ thought? Sandoz describes the vision somewhat differently at different points in the book, but a

7. This equation of the classical and Christian traditions strikes me as a vulnerable point in Sandoz’s argument. The biblical God, personal, loving, active in human history, differs dramatically from the “God of the Philosophers,” as represented by Aristotle’s Unmoved Mover, passive and oblivious to things mortal; and Sandoz’s argument would indicate that the founders were attached to the former rather than the latter deity. However, Sandoz sees similarities only on a very abstract level, and argues only that the classical and Christian traditions were compatible in the eclectic thought of the founders. That claim seems plausible; if the founders assumed a rough equation between biblical precepts and Greek philosophy, they would at least not have been the first to do so.

succinct summary of its essential tenets would have to include the following. First, there is an overarching providential order with both physical and spiritual dimensions. Second, this order constitutes an ontological hierarchy—a Great Chain of Being with levels and degrees ranging from the merely physical to the spiritual, from the inert to the divine. Third, the place of human beings within this hierarchy can be characterized as “In Between.” Humans are in between the beasts and the gods; they are physical beings given to fleshly lusts, but are also possessed of reason and freedom which permit them to participate in the divine nature. Consequently, humanity finds its fulfillment in “happiness (*eudaimonia*) or blessedness (*makarios*),” according to the classical account, or, in the Christian version, in “union with God or beatitude.” Finally, government facilitates human fulfillment by upholding a “sacred liberty” that must be distinguished both from a “vulgar liberty” or license and from a coerced righteousness.

This comprehensive vision, Sandoz argues, directly informed the establishment of constitutional government, which reflected a “grand but limited conception of man and government.” Both terms—the “grand” and the “limited”—are essential, and serve to distinguish Sandoz’s interpretation of the founders’ political theory from competing interpretations which he rejects. Thus, unlike those who argue that the founders broke decisively with classical thought by severing the political question—How should government be constituted?—from the ethical question—What is the good life for man?—Sandoz argues that the founders’ political ideas were firmly rooted in an encompassing ethical vision. They would have had little patience with the modern notion—advocated by constitutional scholars such as Ronald Dworkin and Bruce Ackerman—that government must be agnostic about questions of human nature and of the good. But the founders would also have rejected the proposition, evident in the writings of some radicals and civic republicans, that government’s job is to transform human nature, or to drum “civic virtue” into its citizens. Their philosophy recognized, Sandoz contends, that “the notion of saving mankind through politics is, indeed, not only mistaken but ultimately disastrous.”

Eschewing the extremes of ethical agnosticism and compulsory virtue, Sandoz’s founders adopted a middle course consistent with our “In Between” status. They designed a government that would encourage human flourishing—understood in a spiritual as well as a material sense—but that was carefully limited to prevent either opportunistic or idealistic interferences with the freedom essential to

that flourishing. "Liberty" and "law" were the cornerstones of this government.

III

At this point let us note a puzzle that helps to illumine the book's larger significance. The puzzle is that although Sandoz's ostensible theme concerns the intellectual character of the founding generation, much of his discussion seems at best distantly related to that theme. His important introductory chapter dwells on Plato and Aristotle, making barely a gesture in the direction of the American founders. Later he discusses and quotes some political writings of Thomas Aquinas, ostensibly to illumine the founders' thinking, even though he acknowledges that the founders would have resented the insinuation that their ideas were derived from a Catholic philosopher. What is the point of these apparent diversions?

That question should be considered in connection with another one: What is the relevance *for us* of the founders' political and philosophical views? Scholars such as Frank Michelman and Cass Sunstein have recently devoted considerable energy to presenting the "civic republican" notions held by the founders. But why should we care? If scholars of republicanism were "originalists" like Robert Bork, their historical project would be understandable; but most such scholars are plainly not in that camp. So even if their analyses of history are correct, why does it matter? Or is it simply interesting intellectual history?

For some constitutional scholars this question may be difficult to answer. But Sandoz's view seems clear enough, and it also provides the clue to the puzzle described earlier. Sandoz believes that the founders' "comprehensive vision of reality" was not merely a transitory phase in the ongoing flow of philosophical fashions, but was rather the expression of a kind of perennial philosophy that, despite differences of detail, had been held by the major thinkers of Western culture from the Greeks onward. Moreover, that philosophy is of interest not merely because the founders (or anyone else) believed it but, more importantly, because it was—and is—*true*. Thus, Sandoz affirms that his interest is "theoretical rather than antiquarian or simply historical," and he insists that the founders' philosophy is worthy of study because it "retains its validity and vitality into the present."

This view explains why Sandoz devotes so much attention to Plato, Aristotle, and Aquinas. He wants to show that the founding was not so much a modern project as a restoration and rearticulation of medieval and classical ideas. Sandoz's view also provides the

link between the founding generation and the present. The connection lies not only in the legal contention that the founders' ideas were embodied in positive law—although they were—but also, and more importantly, in the philosophical claim that the founders' comprehensive vision is as valid now as it was two hundred or two thousand years ago. This philosophical claim is the book's truly important and daring contribution.

IV

Unfortunately, it is this philosophical claim that is also the hardest aspect of the book to evaluate. Sandoz never really tries to prove the claim; rather, he suggests that it is not susceptible to logical demonstration:

Ultimately, the question that underlies any philosophical discussion is always Socrates' question: Look and see if this is not the case Socrates means for us to consult the content of our own personal experience; consider the matter with our reason; consult with those whose opinions are worthy of consultation; and honestly ascertain, as far as we can, whether or not what is asserted truly conforms with the realities. These, then, compose the facts of our own experience, and to that we can give a rather strong name and speak of *existential truth*.

We are confronted, then, with a depiction of a comprehensive vision of ultimate reality and an invitation to test that vision through a Socratic experiment.

Although Sandoz cannot demonstrate that his philosophical claim is correct, he does argue that the founders' comprehensive vision is urgently needed. He notes the "contemporary crisis of the spirit" that afflicts Western civilization. This crisis is due in part to a Lockean liberalism which, by neglecting "the upper ranges of man's existence," has generated "grave psychic and social disorders" from which "recovery is, at best, improbable." Unfortunately, says Sandoz, there is little help to be derived from ideologies that might concur in this part of Sandoz's diagnosis—from a radicalism that "*obliterates* man by dissolving his essence into sociology," or from a civic republicanism whose nebulous notions of civic virtue imply a subordination of the individual directly contrary to the founders' design.

Given these forbidding alternatives, the classical and Christian tradition that Sandoz seeks to recover deserves reconsideration. In the prevailing intellectual climate it may seem alien for a serious scholar to claim that a particular vision of reality—especially a classical and Christian vision—is actually and universally *true*. But Sandoz's book will have failed of its most important purpose unless

his readers take the book on those terms and then perform the Socratic experiment he recommends.

THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835. By G. Edward White.¹ New York and London: Macmillan Publishing Company. 1988. Pp. xxi, 1009. Cloth, \$95.00.

JOHN MARSHALL'S ACHIEVEMENT: LAW, POLITICS, AND CONSTITUTIONAL INTERPRETATIONS. Edited by Thomas C. Shevory.² Westport, Connecticut: Greenwood Press. 1989. Pp. x, 232. Cloth, \$12.95.

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Over two decades ago Robert Faulkner, in *The Jurisprudence of John Marshall* (1968), belatedly demolished the progressive interpretation of the "Great Chief Justice" and, it might be argued, prophetically resolved the debate over republican and liberal influences on the founding fathers and Marshall before it even began. Progressive scholarship had long depicted Marshall as a conservative defender of property rights and national authority who impeded the progress of democratic states' rights doctrines. In the years after Faulkner's study, scholarly controversy focused on whether the founders—and John Marshall as the preeminent expositor of the constitutional ideas of the founding—were civic-minded virtuous republicans, or property-minded possessive individualists. Faulkner viewed Marshall as a liberal or modern republican who wrote the principles of constitutional democracy into our fundamental law. Faulkner did not anticipate, however, the controversy over the nature of constitutional interpretation that was to develop and that is now one of the major issues in Marshall scholarship.

These two books are significant contributions to Marshall historiography. By focusing on the problem of constitutional interpretation, they supplement Faulkner's work. Both books address the question of republican and liberal tendencies in the thought of Chief Justice Marshall. White and Shevory also examine Marshall in relation to the issues of judicial activism and public policymaking. In

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