

THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC. By William Lee Miller¹ New York: Alfred A. Knopf. 1986. Pp. viii, 373. \$24.95.

RELIGION IN AMERICAN PUBLIC LIFE. By A. James Reichley.² Washington, D.C.: The Brookings Institution. 1985 Pp. xiii, 402. Cloth, \$31.95; paper, \$11.95.

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These two books both enrich our understanding of the role of religion in American society. Because their perspectives are quite distinct, I will discuss them separately.

I

William Lee Miller's *The First Liberty: Religion and the American Republic* is intellectual and cultural history at its best, an intelligent, insightful book written with graceful warmth and humor. It is one of those rare books that may be recommended not merely for its scholarship but for the pure pleasure of reading it.

Miller organizes his history of the religion clauses around extended portraits of two central figures in the development of America's cultural attitudes toward the relation of church and state, James Madison and Roger Williams. The portrayal of the "Great Little Madison" is particularly affectionate: Williams calls him "Jemmy," and argues convincingly that the diminutive and soft-spoken Madison ("a small, slight, reserved, bookish, sickly, and/or hypochondriacal man") was not merely, as John F. Kennedy remarked, "the most underrated of our presidents," but a giant figure, perhaps *the* giant figure, in shaping the foundations of American life, and in particular, the traditions of religious liberty. Using Madison and Roger Williams as his centerpieces, Miller paints a rich and expansive history of the idea of religious freedom, weaving themes and events and personalities from Jonathan Edwards to Thomas Jefferson to William O. Douglas into essays of remarkable subtlety.

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Perhaps all history is in a sense revisionist, for the historian cannot help but give his subject the gloss. And much of our history is gloss on gloss, original images layered with perceptions of successive generations. Comedians dramatically illustrate this process: an audience laughs at a stand-up comic's rendition of Richard Nixon, when the comic is really doing Dan Ackroyd doing David Frye doing Richard Nixon. And so the Roger Williams we see from William Lee Miller is to a degree William Lee Miller doing historian Edward Morgan doing historian Perry Miller, all doing violence to Williams's nineteenth-century biographer, Vernon Lewis Parrington.

With relaxed and self-confident candor, Miller takes us behind the scenes into his own historian's workshop as he strips away these layers of gloss. We learn not only about Roger Williams "the original," but also about the Roger Williams of successive interpreters. We are shown Williams not merely through a progression of academic intermediaries—the viewpoints are not limited to contrasting the Roger Williams revealed by Vernon Parrington with the Williams revealed by Edmund Morgan or Perry Miller—rather we see the development and exploitation of a succession of symbolic Roger Williamses by eighteenth-century liberals and nineteenth-century Baptists and twentieth-century civil libertarians; in short, by anyone who is able to make Williams, the first folk hero of religious liberty, suit his or her own notions of what religious liberty ought to mean.

Miller does show us Roger Williams raw and uncensored—a passionate Roger Williams whose writings are drenched in references to blood, and the various methods by which the wrath of blood is spilled in the name of religious conscience: "in the 'bloody, irreligious, inhumane, oppressions under the mask or veil of the name of Christ'; in the 'wrong and preposterous way of suppressing, parenting, and extinguishing such doctrine or practices [false and 'idolatrous' ones] by weapons of wrath and blood—whips, stock, imprisonment, banishment, death, etc.'" Miller delivers up a Williams who phrases his commitment to religious freedom with poetic violence, speaking of "spiritual rape," "soul yokes," "soul oppression," "rivers of civil blood," and "the blood of so many hundred thousands of slaughtered men, women, and children, by such uncivil and unchristian wars and combustions about Christian faith and religion."⁴

4. They don't write 'em like that any more—Jerry Falwell and Pat Robertson can't compete—television is a cool medium and it cools evangelism, bringing to the fore evangelists who try to keep blood off the air, evangelists who are well groomed and graying at the tem-

Miller also shows us the received Roger Williams, and the constant changing of that reception. He makes Williams *useful* to an American living in 1986, useful as a vehicle for understanding evolving patterns of American culture. That, more than anything, is the crowning achievement of *The First Liberty*. It is a true work of American Studies, an intellectual history, a cultural history, a folk history—a history with texture, humor, warmth, life. Miller conjures up in the reader a form of patriotism, patriotism shorn of false glitz and born of the pride in being part of a pluralistic, open culture that takes the idea of religious liberty seriously enough to make it a dominant theme in our consciousness for three centuries. The ideal is always balanced, however, with a certain “redeeming” American pragmatism, as with the “two Puritans on a ship approaching the New World, one saying to the other: ‘Religious freedom is my immediate goal . . . but my long-range objective is to go into real estate.’”⁵

Miller’s book provides a new perspective on the increasingly significant role played by religious groups, particularly Catholics and fundamentalist Protestants, in the politics of the 1980’s. President Ronald Reagan said at a “Prayer Breakfast” in Dallas in 1984: “The truth is, politics and morality are inseparable, and as morality’s foundation is religion, religion and politics are necessarily related.”⁶ Reagan was emphasizing a theme every bit as “American” as the first amendment, a theme that has always exerted a powerful counter-tension to the idea of separation of church and state.

There is nothing new in the contemporary surge of fundamentalist religious influence on American life. The “Great Awakening” in the 1730’s and 1740’s, described by H. Richard Niebuhr as “our national conversion,” began an almost cyclical American preoccupation with evangelical conversion and revival. There is something about “that old time religion” that always sells in the American marketplace of ideas.

If today the gospel is an element of mass culture spread through the medium of quasi-public utilities—the governmentally regulated broadcast spectrum and cable television franchises—there was once a time in America when government regulated not merely

ples and so *reasonable* in manner and style, evangelists who visit the White House, and maybe even, praise be, try to take up residence. Even the rhetoric against *Roe v. Wade* is sanitized for home viewing: imagine how bloody a stemwinder Roger Williams would deliver on abortion.

5. Miller attributes the line to Larry Tribe, who described it as the caption from a cartoon.

6. See Lowrie, Book Review, 3 CONST. COMM. 255, 256 (1986) (citing N.Y. Times, Aug. 24, 1984, at A11, col. 5).

the medium but the message. Religion itself was a public utility. As Miller puts it: "Citizens of this now very liberated country may find it stunning and amusing that once upon a time some of their forbears thought of religion as a kind of public utility like the gas or water works, but they did." Taxes could be used to support the established church, because the established church supplied the secular state with the morality necessary for survival. Virginia's General Assessment bill in 1784 recited the equation: "Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society . . ."—virtually Ronald Reagan's very words, exactly two hundred years later.

South Carolina's version of establishment in 1778 went so far as to provide a precise legal definition of the "Christian Protestant religion" it was establishing, nicely reduced to five tenets:

- 1st. That there is one eternal God, and a future state of rewards and punishments.
- 2nd. That God is publicly to be worshipped.
- 3rd. That the Christian religion is the true religion.
- 4th. That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice.
- 5th. That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth.

Depending on how the term is defined and when the sample is taken, over half the colonies, give or take one or two, had some form of established church. Williams includes in his list New Hampshire, Connecticut, New Jersey, Georgia, North Carolina, South Carolina, and with special reservations, Massachusetts. Massachusetts had established in its constitution the "Standing Order," the Congregational Church of Massachusetts. In 1780 a new Massachusetts constitution, heavily influenced by the efforts of John Adams, created a far stronger measure of religion, through a form of decentralized "multiple establishment." Each town was required to use its own tax money to hire "public Protestant teachers of piety, religion, and morality." The liberating element in this was that these preacher/teachers could theoretically be drawn from any Protestant church—Congregationalist, Anglican, Quaker, Baptist—though obviously no Catholics need apply. (Several ethnic migrations later, in a climate of constitutionally disestablished religion, their turn at political dominance in the state would come.) The provision in the new Massachusetts Constitution, which retained the device of tax supported religion, was supported by influential liberal or Unitarian elements in the state. (Even in 1780, it seems, liberals were important in Massachusetts, as if by some ironic form of political Calvinism it was predestined that Massachusetts would

be the only state one day carried by George McGovern). Establishment in Massachusetts was vigorously opposed, however, by the state's Baptists. Baptist preachers were, in fact, the most forceful and constant clerical advocates of freedom of religion in the emerging American nation. Perhaps fundamentalist leaders today should take a second look at their own heritage: Baptists were once the upstarts in the American religious spectrum, decidedly not the religious establishment in a law or social position. They had the most to lose from establishment, and fought eloquently against it, creating an improbable alliance with Madison and Jefferson, perhaps the "secular humanists" of the day.

Miller also provides a new perspective on the role of constitutional law in America's experience with religious liberty. The "de-greening of America" that forms a large part of the social agenda of Ronald Reagan's America—the establishment of prayer in (neighborhood) public schools, prohibition of abortion, trickle down relief for the poor, elimination of affirmative action, regulation of pornography and sexual mores, relaxation of criminal procedure protections—is dominated by disagreement with rulings of the Supreme Court, rulings primarily from the last thirty years. And so it is that public debate over these issues becomes, at least to those of us trained as lawyers, primarily a debate over "constitutional law." Constitutional law in any formal sense, however, is not the only strain or event the dominant strain of the debate. Pat Robertson is a graduate of the Yale Law School, but when he speaks about abortion or school prayer or pornography on the *700 Club*⁷ he does not speak the language of "strict scrutiny" or the three-part tests of *Lemon v. Kurtzman*⁸ or *Miller v. California*.⁹ And when Ralph Nader or Larry Tribe appear on the *MacNeil/Lehrer Report* to do battle with the emerging power of the political right, their appeal is not grounded in technical legal doctrine.

If anything, as "constitutional lawyers" we often demean and trivialize the large issues, which we approach like common-law conveyancers puzzling over a poorly drafted quit-claim deed. In reading Miller's book, I was struck by the contrast between the seemingly petty acrania of many modern constitutional law decisions—the emphasis in *Lynch v. Donnelly*,¹⁰ for example, on the fact that Jesus, Mary, and Joseph were joined in the public Christmas display by Santa, reindeer, and a teddy bear—and the power of the

7. See Gordon, *Video Vicars: How They Tune Out the Press*, WASH. JOURNALISM REV., April 1986, at 39-47.

8. 403 U.S. 602 (1971).

9. 413 U.S. 15 (1973).

10. 465 U.S. 668 (1984).

“larger dimension” of fundamental American philosophical conflicts. Miller captures the contrast with his own hypothetical anecdote:

When the local fundamentalist minister gets the notion of putting John 3:16 on the public water fountain at the municipal softball field in order to combat juvenile delinquency, fight communism, and maintain Godly softball . . . the local Unitarian minister, the local chapter of the American Civil Liberties Union, and the liberal columnist up on the state’s metropolitan newspaper attack this plan, citing the First Amendment, the founding fathers, and the principles that have made this country great, and perhaps also referring to the bodies burned in the Spanish Inquisition. The fundamentalist minister and his now much-augmented support counterattack, and in their turn refer also to the founding fathers and to their firm belief in God, and also to the principles that have made this country great—its institutions presupposing a Supreme Being—and mention angrily the dangerous inroads of secular humanism. The mayor, after having it explained to him that it would not do to have a Menorah on the other side of the water fountain, maintains total silence. Some judges, with a slight headache, then puzzle it out: Are *taxes* used to pay for the water fountain? Does any *state employee* turn on the water?

Part of the delight of this book is that rare pleasure of reading history through a truly graceful, intelligent narrative. The ordinary reading voice inside me gave way to the author’s voice, in much the way that the voice of a good poet or novelist just takes over, as one’s voice will always be hopelessly overwhelmed by the voice of Joan Didion, or William Styron, or E.B. White. William Lee Miller has that sort of literary voice, a style sufficiently charming to persuade me in the middle of a hot July to put down the latest John LeCarre and answer the call of *Constitutional Commentary* to read about Jonathan Edwards, Roger Williams, and James Madison.

II

Religion in American Public Life, by A. James Reichley, provides a useful but very different perspective. Although Reichley covers much of the same historical ground as William Lee Miller, Reichley’s purpose, perspective, and methodology are all quite different from Miller’s. Reichley does not write as a cultural historian but rather as an academic analyst imposing structural frameworks on his material.

Reichley’s analysis begins with an elaborate typology of seven “value systems”: egoism, authoritarianism, monism, idealism, personalism, civil humanism, and theist-humanism. As he traces American religious history from the puritan vision of “City on a Hill” through the enlightenment of Madison and Jefferson, the rulings of the Warren and Burger courts, to the impact of Jerry Falwell and the Moral Majority, Reichley constantly refers to his

opening typology, using it effectively as an organizing force and a vehicle for critique.

Some of Reichley's history seems oversimplified. James Madison, Thomas Jefferson, Benjamin Franklin, George Washington, Alexander Hamilton, and John Adams all emerge as suspiciously sympathetic to the notion that "a patriot must be a religious man." In discussing Jefferson, for example, one is almost given the sense that if permitted to travel through time, Jefferson would have taken up placards and picketed in protest of *McCullum v. Board of Education*:¹¹

Like Jonathan Edwards, Jefferson turned to the Old Testament for a parallel to the role and destiny of America. "I shall need," he said in his second inaugural address, "the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life." (Some commentators have argued that Jefferson's identification of the Deity as a "Being" or "Creator," rather than as God, indicates that he clung to deism. But did the watchmaker God lead "our fathers, as Israel of old"?) When he came to plan the University of Virginia, he proposed that the "religious sects of the state" should be invited to "establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their own sect," an approach similar to the "released time" system used in many public schools before it was declared unconstitutional by the Supreme Court in 1948.

The great bulk of Reichley's book, however, is balanced, well-written, and thoughtful, though his own views clearly emerge. In a discussion of "judicial activism," Reichley argues that the use of the incorporation doctrine to apply the establishment clause to the states was a step "neither constitutionally necessary nor consistent with American tradition." The weakness in interpretivist jurisprudence in the context of the religion clauses, Reichley claims, is that Supreme Court Justices do not draw from the same well of values as most Americans. Referring to his own typology, he states:

Supreme Court justices were hardly in the forefront of the cultural new wave. But civil-humanist and personalist values powerfully influence the educated and middle class to which the justices belonged. In varying degrees, therefore, and conditioned by individual temperaments and experiences, they drew on a different "general culture" than that from which the majority of Americans obtained basic values.

Reichley is at his best in the final third of the book, in which he applies his analytic structure to more recent events. The cultural turmoil and permissiveness that began in the 1960's led evangelicals in the 1970's to a general sense that the moral foundations of

11. 333 U.S. 203 (1948) (holding that public school released time program involving religious classes on public school premises violated establishment clause).

American society were crumbling. "Fundamentalists believed that they had identified the prime source of moral decline: 'secular humanism,' a philosophy which Tim LaHaye, a leading fundamentalist publicist, characterized as based on 'amorality, evolution, and atheism.'" To fundamentalists, secular humanism was itself becoming the established American religion.

Evangelism entered the political arena at first through the persona of Jimmy Carter. Once in office, however, Carter was perceived as Judas:

Once in office Carter was perceived by evangelicals to have turned his back on them. The administration made no effort to press for action on social issues like school prayer and abortion that had high priorities for evangelicals. "It was a tremendous letdown," said one evangelical activist, "if not a betrayal, to have Carter stumping for [the Equal Rights Amendment], for not stopping federally funded abortions, for advocating homosexual rights." Not incidentally, evangelical activists were not given federal jobs. "Carter promised in 1976 that if he were elected, he would appoint qualified evangelical Christians to positions in the federal government," an evangelical spokesman said in 1980. "He did not follow through."

And so a second coming was achieved through Carter's conqueror, Ronald Reagan. Reagan managed to remake himself as a member of the "new right," discarding the emphasis of the "old right." The old right, the right of Barry Goldwater and the *old* Ronald Reagan, had stressed almost exclusively foreign policy and economic issues. The new right, the right of Richard Viguerie and Jerry Falwell and the new Ronald Reagan, would emphasize social issues, such as busing, abortion, school prayer, and pornography—issues that appealed to constituents largely definable in religious terms, born-again Christians and conservative Catholics. One might even see Reagan's ascendancy as a shift in American religious politics, as the Republican party broadened its base from the high-church Protestant upper middle-class (who probably still care most about the issues of the old right), to evangelicals and Catholics, part of the old Democratic coalition of big northern industrial cities and the solid South, for whom the new right's agenda would carry both the philosophy of the day and the electoral college.

Reichley's book is an interesting and useful addition to the literature on church and state. It is not (and does not set out to be) a careful exploration of constitutional law, but it is a thoughtful analysis of the role of religion in American political life. Reichley argues that churches nurture moral values, helping to "humanize capitalism and give direction to democracy." But he also warns that if "churches become too involved in the hurly-burly of routine politics, they will eventually appear to their members and to the

general public as special pleaders for ideological causes or even as appendages to transitory political factions.”

THE UNPUBLISHED OPINIONS OF THE WARREN COURT. By Bernard Schwartz.¹ New York: Oxford University Press. 1985. Pp. ix, 470. \$29.95.

SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT. By Bernard Schwartz. New York: Oxford University Press. 1986. Pp. 245. \$19.95.

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Both of these books fall into that growing genre of literature that might be dubbed “insiders’ ” views of the Supreme Court. As such, they are descendants of two other books that penetrated the marble temple in pathbreaking—though sharply differing—ways. The first, *The Unpublished Opinions of Mr. Justice Brandeis*, appeared in 1957 under the editorship of the late Alexander Bickel.³ The second and more controversial work was *The Brethren*, written by two journalists, Bob Woodward and Scott Armstrong.⁴ It is instructive to compare Professor Bernard Schwartz’s efforts with these predecessors.

I

Bickel’s volume broke ground by bringing to light eleven opinions that Brandeis had suppressed for one reason or another. It remains rewarding reading not only for the opinions but for Bickel’s illuminating analysis. Professor Schwartz acknowledges a debt to Bickel. In his preface to *The Unpublished Opinions of the Warren Court*, he explains that when rummaging through collections of Justices’ papers for his biography of Earl Warren it occurred to him

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3. A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957).

4. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).