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# Review of: One Nation Under Law: America's Early National Struggles to Separate Church and State, and The Founders on God and Government

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***One Nation Under Law: America's Early National Struggles to Separate Church and State.*** By Mark D. McGarvie. (DeKalb: Northern Illinois University Press, 2004. Pp. xii, 256. Illustrations. Cloth, \$38.00.)

***The Founders on God and Government.*** Edited by Daniel L. Dreisbach, Mark D. Hall, and Jeffrey H. Morrison (Lanham, MD: Rowman and Littlefield Publishing, 2004. Pp. xv, 312. Cloth, \$80.00; paper, \$29.95.)

Mark D. McGarvie's *One Nation Under Law* is the most innovative recent study of church-state relations in the early republic. McGarvie argues that the separation of church and state resulted from the contract clause of the Constitution, not the First Amendment, and that the separation of church and state was the original intent of the Constitution's Framers. The Framers sought to reconstruct American society along liberal lines, replacing both colonial Christian communitarianism and classical republicanism with a radical new society.

McGarvie enters a vibrant debate about the status of religion in the early republic. Philip Hamburger's recent study argues that the effort to separate church and state did not emerge until the 1830s, and then only as a mechanism by which Protestants denied Catholic institutions public patronage (*Separation of Church and State*, 2002). Like Hamburger, McGarvie looks beyond the First Amendment to actual institutional relationships, but unlike Hamburger, McGarvie argues that the effort to separate church and state began with the Constitution, a "declaration of war between two groups of Americans harboring contesting worldviews" (15).

"The process of disestablishment," McGarvie writes, was America's "greatest ideological debate" before the Civil War, pitting liberals against communitarians (3-4). To liberals, human beings were naturally good and enterprising if freed from the shackles of the past. Following Joyce O. Appleby, McGarvie argues that Jeffersonian Republicans embraced liberalism and encouraged voluntary relations between free and equal citizens. They believed that a society of free individuals would be self-harmonizing (Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s*, 1984). Christian and classical republican communitarians remained wedded to the view that humans were sinful and slothful and only government and religion could maintain social order. These skeptics formed the Federalist Party.

Politics was incapable of solving these metaphysical questions about

human nature but “the law could” (13). Judges relied on the contract clause to transform the social order, replacing a society of inherited status with one in which free individuals voluntarily entered into contractual relations with one another. Contracts became the legal basis for social relations in every state; McGarvie includes chapter-length case studies of New York, South Carolina, and New Hampshire. New Hampshire’s experience is the most important because in 1819 it led to the famous decision in *Dartmouth College v. Woodward* in which the U.S. Supreme Court imposed a “model of privatization on all the states” (13). By ruling that Dartmouth’s charter was a contract, the Marshall court separated public and private spheres, “designating separate forums in which the two worldviews would hold sway” (3). Law succeeded where politics could not. In *Dartmouth College*, Americans accepted the institutional separation of religion from the state, even if they continued to battle over the nature of humanity in civil society.

To McGarvie, “the constitutional separation of church and state cannot be understood apart from the delineation of public and private institutions” and the contract clause provided the legal foundation for separation (48). Battles over religion in the early republic were, in essence, about whether Americans would accept the proliferation of private institutions with competing worldviews. In *Dartmouth College*, the Supreme Court said yes.

McGarvie’s argument is nuanced and sophisticated in ways that no summary can capture. His writing is clear and a joy to read. However, he exaggerates the intent of the Framers. It is not clear that the Framers of the Constitution intended a complete reconstitution of American society, as McGarvie argues. Moreover, the contract clause had the narrow goal of protecting creditors from debtors and ensuring that contracts, once made, would not be revoked by what Madison called “vicious legislation.” In fact, in the Dartmouth controversy, a Federalist chief justice sided with Federalist trustees to protect Dartmouth from supposedly liberal Jeffersonians seeking greater state control over civil society. By reading the *Dartmouth College* doctrine back to 1787, McGarvie underplays the role of political conflict in forcing both Republican and Federalist ideas about civil society to evolve over time. As a result, McGarvie’s groundbreaking analysis of the role of law in changing the “institutional structure” of civil society is weakened by his use of the static categories of liberalism and communitarianism (189).

If McGarvie overstates the case for liberalism, the authors of the essays

in *The Founders on God and Government* overstate the argument that America's Founders actively encouraged the communitarian values of Protestant Christianity. The collection includes chapters on George Washington, John Adams, Thomas Jefferson, James Madison, Benjamin Franklin, and the less-often-discussed John Witherspoon, James Wilson, and George Mason. Taken together, the authors make a consistent case that the Founders believed in the importance of religious faith in the new republic.

In his unfortunate foreword, Michael Novak argues that only Judeo-Christianity could produce a tolerant society that respects individual conscience and freedom, doubting that Islam or other religions could have done the same. As for the Enlightenment, Novak is confident that its effort to base ethics on reason "has ended in failure" (xi, xv). The Introduction implies that the goal of the book is to defend Christian America against Muslims in the post-9/11 era.

Barry Alain Shain's conclusion similarly distorts the evidence in the intervening chapters. Shain argues that American elites drafted the Constitution without influence from the Enlightenment. Dismissing Henry May's characterization of a "moderate Enlightenment" in which Christianity and reason coexisted, Shain contrasts the Founders to such radical European thinkers as Voltaire. Noting that few Americans hated religion as much as Voltaire, Shain jumps to the conclusion that the Founders were unenlightened (Henry May, *The Enlightenment in America* [1976]. More recently, see Mark A. Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* [2002]). Yet while many Founders considered themselves Christian, they did not assume that Christianity required them to repudiate the natural and human sciences, drafting instead an enlightened Constitution with no reference to God. They did not reject religion, but they realized that governments are created by human artifice. As McGarvie notes, in their treaty with Tripoli, President Washington and the members of the Senate agreed that "the government of the United States is not in any sense founded on the Christian religion" (59). Whatever Americans may then have believed about the foundations of the Constitution, Shain's goal is to prove that America was, is, and ought to be "a Protestant nation" (277).

Despite the authors' intent in *The Founders on God and Government*, the chapters show the Founders engaged in something less adamant. American leaders did not choose between liberalism and communitarianism, whether Christian or classical republican, but rather hoped to bal-

ance them against each other. Almost every Founder argued that under the right conditions, religion could foster the moral virtues necessary for republican citizens. Even Franklin, whose faith was less than robust, asserted that religion might “reaffirm faith in the public good” (148–49). If this is the case, as McGarvie writes, “the pragmatic use of Christian morality implicitly placed God in service to man, reversing the traditional order of religious deference” (82). If utility is the measure, the only question we need ask is whether a multicultural, pluralistic democracy like the modern United States would benefit from state-sponsored religion. While the authors prove that by modern standards, America’s Founders freely employed religious ideas in their public statements, they do not prove that they would have done so today. In fact, Howard L. Lubert’s chapter on Franklin suggests that Franklin supported public religion only when it was so generic that it offended nobody. Similarly, Washington initially supported mandating religious taxes in Virginia, but backed down when he realized that such a policy would be divisive (3). That some Founders supported religion for utilitarian purposes cannot answer the question of utility today.

The authors also hope to prove that the U.S. Supreme Court has misunderstood the First Amendment and wrongly erected an impermeable “wall of separation” between church and state. This is a legitimate correction to those who suggest that the Constitution was actively hostile to religion. The First Amendment was not originally intended to apply to the states. Jefferson’s “wall of separation” applied primarily to the activities of the federal government, although his Republican Party was the moving force for disestablishment in New England. The Fourteenth Amendment has made this particular argument moot.

The second question is whether the Founders’ understanding of church-state relations can inform us today. Here the record is murky. No Founder in this volume favored state support for religion if it threatened the freedom of conscience. They were divided, however, over what constituted a threat. Adams believed that Massachusetts’s 1780 constitution created a “mild and equitable establishment” that balanced dissenters’ rights with communal needs, as John Witte Jr. argues (26). Other citizens disagreed and demanded the separation of church and state, achieving it in 1833. Many went further than Adams, of course. Madison, in his famous Remonstrance (reprinted in the volume), argued that state-supported religion violates the rights of nonbelievers and is “not necessary for the support of Civil Government” (108–9). In *Notes on the*

*State of Virginia*, Jefferson argued, “it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg” (Query XIV in *Notes on the State of Virginia* [1787] in *Thomas Jefferson: Writings*, ed. Merrill D. Peterson [1984], 284–85).

The goal of the First Amendment, as well as similar declarations in the state constitutions, was to protect the freedom of conscience. The Founders contrasted America’s religious regimes to the old establishments of Europe. Compared to the Old World, even New England’s establishments could be seen as “mild and equitable.” Nonetheless, the Founders were consistent about one thing: no matter where they drew the line between church and state, they agreed that government support of religion should never violate the freedom of conscience. Drawing that line was a difficult task when most Americans were Protestant. Answers differed between states, denominations, parties, and individuals. Today, in a much more diverse nation, we have an even harder time drawing that line. By applying their constitutional test and privileging the freedom of conscience, however, we continue to carry out the Founders’ intent.

McGarvie and the authors in *The Founders on God and Government* make the same mistake. They take an either/or attitude to the relationship between state and religion. More broadly, they take an either/or attitude to the relationship between liberalism and communitarianism. Analytically, the two philosophies may be incompatible; in the lives of ordinary and elite Americans, however, both were considered necessary. Individual liberty and equality were the best bulwarks against arbitrary power and were ideals to be celebrated. Equally important was a moral glue that would foster communal obligations, shared values, and limits as to how individuals used (abused?) their liberty. The challenge faced by Americans then was not so different from that confronting us today: how to reconcile individual freedom with communal needs.

The Founders proposed an answer that is compatible with the analyses but not with the normative arguments made in either book. When it comes to religion, the Founders suggested, liberate the individual through law, granting each person greater freedom of conscience. Yet they also encouraged shared moral values to ensure that individualism does not destroy the community. While there was disagreement over the means, American elites simultaneously created a more liberal legal and political system, hoping that in civil society—whether through voluntary efforts or the rhetorical invocation of the Creator by political elites—communitarian values would become part of America’s civil religion. To

America's Founders, the question was how to make both liberalism and communitarianism serve republicanism. They hoped to balance two competing goods without sacrificing the benefits offered by either.

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***The Unknown American Revolution: The Unruly Birth of Democracy and the Struggle to Create America.*** By Gary B. Nash. (New York: Viking, 2005. Pp. 540. Cloth, \$27.95.)

One of the tried-and-true tricks of graduate school is to learn historiography through the careful study of acknowledgement pages. Gary Nash's *The Unknown American Revolution* does not disappoint. His list of friends is really a who's who of "new" social historians, including Alfred Young, Peter Wood, Francis Jennings, Jesse Lemisch, Robert Gross, Mary Beth Norton, and Linda Kerber. This group of diverse and prolific scholars began in the late 1960s and early 1970s to emphasize history from the "bottom up" with the purpose of recovering from the dustbin scores of dynamic and significant actors who were not elite white males. Nash himself, of course, was a luminary in this project of giving voice to the traditionally voiceless, producing such important books as *Red, White, and Black: The Peoples of Early America* (1974) and *The Urban Crucible: Political Consciousness and the Origins of the American Revolution* (1979) early in what would be a prodigious, pathbreaking career. It is fitting then that Nash be the one who provides the capstone to that generation of scholarship.

On the first page of his book, Nash restates Carl Becker's near century-old formulation that the Revolution was as much about home rule as it was who would rule at home. *The Unknown American Revolution* proceeds to spend more than four hundred pages detailing vividly the contestation over the latter but far too little noting the significance of the former. This concentration of the spotlight solely on the race, class, and gender battles over who would rule at home illustrates both the strengths and weaknesses of the now-not-so-new "new" social history. In the end, by throwing the founding fathers out with the bathwater, and by exten-