BOOK REVIEWS

The Myth of Separation: What is the Correct Relationship Between Church and State?

by David Barton. Aledo, Texas: Wallbuilders Press. 336 pp., $7.95 paperback 1992.

Reviewed by Ellisandro Washington

David Barton's *The Myth of Separation* lays bare the popular view of the doctrine of Separation of Church and State for what it is: sophistry lacking any Constitutional foundation. Barton extends into the 1990s what authors such as Daniel L. Driesback and John Eidsmore started in the late 1980s: to tear down the shaky foundation of liberal Constitutionalism in order to reveal the true origins of American Constitutional law.

The history that Barton uncovers is so antithetical to what most law and history students are now taught as to make the reader incredulous that through a misguided belief in "judicial activism" the guardians of our American legal heritage have so thoroughly corrupted the Constitution's original intent.

Barton provides ample historical background on the Founders, their beliefs for a sound "strict constructionist" view of Constitutional interpretation, as well as the strategic and tactical considerations that existed prior to the drafting of the Constitution which continued to be respected in judicial opinions into the late 1940s. Barton cites a large number of primary sources in making his case that the Founders all believed in God and openly professed Christianity.

In Chapter Three ("The Origin of the Phrase 'Separation of Church and State'") Barton reveals that this phrase was first used by Thomas Jefferson in a letter to a group of Connecticut ministers from the Danbury Baptist Association. These ministers had written President Jefferson to voice their concerns about the possible creation of a state-sponsored church similar to the Anglican Church of England. This sentiment was addressed by the Framers in the very first statement of the First Amendment: "Congress shall make no law respecting an establishment of religion nor prohibit the free exercise thereof." However, the Danbury Baptists wanted more assurance. So, on January 1, 1802, President Jefferson responded to their letter, expressly stating that:

> [t]he federal government would not establish any single denomination of Christianity as the national denomination. I contemplate with solemn reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.

Thus, "wall" was intended in a unilateral sense, and was understood by Jefferson, the Framers, and the Courts as keeping *the government out of the church*, and not as it is typically used in today's jurisprudence, to purge all influence of the church (i.e., Christianity) from the state.

The Myth of Separation is not just a book on Constitutional law: it is a compendium of primary sources of pre-Constitutional philosophers such as Aristotle, Aquinas, Grotius, Pufendorf, Hooker, Hobbes, Locke, and Montesquieu; philosophers, theologians, and statesmen such as Blackstone, Franklin, Jefferson, Madison, and Mason; and post-Constitutional thinkers such as Marshall, Story, Witherspoon, Webster, and Henry—all held together with Barton's terse and unostentatious commentary style.

In making his case Barton uses a revealing piece of research on the source materials used by the Framers in writing America's founding documents performed by political science professors Donald S. Lutz and Charles S. Hyneman, who reviewed over 15,000 items, including 2,200 books, newspaper articles, pamphlets, and monographs of political materials written between 1760 and 1805. From this material Lutz and Hyneman found that the three philosophers quoted most frequently by the Framers were Montesquieu, Blackstone, and Locke, and that all three men were strong natural law adherents. Also of interest is a source quoted four times more frequently than Montesquieu or Blackstone and twelve times more frequently than Locke—the Bible.

Barton focuses on two primary philosophical movements—*relativism* and *legal positivism*—as having led to the decline of Constitutionalism in U.S. Constitutional law, leaving modern day judges and lawmakers without the original natural law philosophy that the Framers and the early Courts used to create and interpret the Constitution. Barton describes *legal positivism* as holding the following tenets:

(1) There are no objective, God-given standards of law, or if there are, they are irrelevant to the modern legal system.

(2) Since under legal positivism God is assumed not to be the author of law, the author must be man; thus, law is defined and supported by state authority alone.

(3) Since man and society evolve, law must evolve as well.

(4) Judges, through their decisions, guide the evolution of law.

(5) To study law, get at the original sources of law—the decisions of judges; hence most law schools today use the "case law" method of teaching.

Barton's concern is not only that modern Supreme Court Justices have departed from the original intent of the Framers, but having put aside the Constitution's natural law foundation, they cannot even agree on *fundamental principles* of Constitutional interpretation. By comparing the Framers' writings, intent, and early judicial opinions with today's Constitutional decisions, Barton reveals the marked differences.

Barton compares and contrasts modern and original judicial opinions on profanity, lewdness and indecency; blasphemy, deterring no religious belief, atheism, and Sunday laws. On lewdness and indecency, for example, he cites *Erznozik v. City of Jacksonville*, in which a city ordinance to prohibit public drive-in theaters from showing pornographic movies which were visible from two public streets and a church was struck down by the Court as "an unconstitutional infringement of First Amendment rights ... . Nor can the ordinance be justified as an exercise of the [city] ... for the protection of children." Earlier, however, in *Commonwealth v. Sharpless*, the Court ruled that,

> The destruction of morality renders the power of the government invalid ... . The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences ... . No man is permitted to corrupt the morals of the people.

Any legitimate constitutional jurisprudence, Barton argues, must include the substantive concerns embodied in the First Amendment, modified as necessary to be responsive to the problems of modern society. The conflicts involved in First Amendment adjudication, he argues, can best be remedied by applying natural law principles, because these principles created the First Amendment in response to this conflict in the first place.

Addressing the general criticism that, because of its normative principles, natural law lacks a comprehensive, coherent philosophical underpinning, Barton responds that "morality is vital to the success and prosperity of both nations and individuals," and that,

> [c]ivil law can address only externalized crimes, but Christianity, however, can address and help prevent crimes while they are still internalized. In the case of murder, Christianity can deal with it before it occurs; the civil laws can do nothing until after the fact. Civil laws do not deal with the heart, which is the actual source of violence, crime, drug abuse, etc. ... Without the aid from religion, government utilizes extensive manpower and expends massive sums attempting to restrain behavior which is the external manifestation of internal sins. The moral teachings of Christianity provide a basis for civil stability which allows a government to perform its primary function: serving, not restraining.

The natural law view imposes numerous limits on majority rule in favor of minority interests. Clearly, Barton favors these limits for the same reason James Madison did, to prevent the "tyranny of the majority" which is the political end in a pure democracy, where the majority vote rules. Citing Benjamin Franklin's famous statement, "... we have given you a republic—if you can keep it." Barton reminds the reader that America was not conceived by the Founders to be a democracy, but a *constitutional republic*.

Perhaps Barton's most compelling point is that our society has inherited natural law as the foundation of our Constitutional system, and that all other political and philosophical positions are inherently alien and inferior to it. Summing up the Framers' search for an adequate philosophy for their Constitution, Barton quotes the speech Franklin gave at the first Constitutional Convention: "We have gone back to ancient history for models of Government, and examined the different forms of those Republics ... . And we have viewed Modern States all around Europe." According to Barton, "The philosophers embraced by the Founders all expounded a similar theme: the importance of natural law and the Bible as the foundation for any government established by men. Natural law and the Bible formed the heart of our Founders' political theories and were incorporated as part of their new government."

One might wonder why natural law lost its preeminent position as the guiding philosophy in Constitutional interpretation. Some scholars believe that perhaps it never really occupied this position, others hold that perhaps natural law is merely a time-bound ideology inadequate to meet present day problems faced by the Court. Barton suggests that,

> [i]t required decades for the Supreme Court to dispose of natural law. Gradually, relativism discarded God from public affairs, and redistributed governmental powers among the branches. These actions were slow, but steady, gradual, but systematic. Therefore, correcting what has happened in and to America will not necessarily occur within a single year or through a singular act.

Rather than propose a wholly original theory of Constitutional interpretation (with which the literature is presently being deluged), Barton rediscovers the original natural law doctrine of the Framers. It is difficult to think of a more appropriate starting place when considering an interpretive model for Constitution decisionmaking. His discussion of natural la doctrine is, however, very accessible to the la man. *The Myth of Separation* maintains a coh sive and smooth flow from chapter to chapte This is true despite the fact that Barton's nat ral law doctrine is not expounded in detail un chapter 12, and then only after the basic natur law historical perspective is presented and co trasted with other political and philosophic perspectives. Any confusion this approach e genders, however, does not detract from th book's usefulness, because Barton's analysis the ideas of the Framers and their contempora ies, as well as of the fate of the natural law do trine after the *Everson* decision, is as interes ing as it is necessary to the development of hi perspective on reintroducing normative natura law philosophic principles back into Constitu tional decisionmaking.

The Myth of Separation offers an excel lent theoretical and practical attack on some o legal positivism's most sacred cows. That it doe so in a particularly careful and thoughtful way increases the likelihood that it may contribute to a return to our Framers' original intent o Constitutional jurisprudence. By concisely chronicling what the Framers of the Constitution and the early Courts believed and wrote, and offering a prudent, well-reasoned alternative to the secular revisionist view of Constitutional law, Barton's tome has greatly contributed to Constitutional law scholarship.

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