

came in the guise of a generalized Protestantism. Was this, then, an important change from teaching the tenets of a particular sect? From a somewhat different perspective, efforts to cultivate a political and constitutional mind-set at the national university might be akin to making a religion of the Constitution with all the particularity of sectarianism.

Civil Religion and Constitutional Education

Madison's insistence on a professor "orthodox" in politics was rooted in an understanding that would place education beyond party. This is perhaps curious insofar as an "orthodox" understanding would seem to be situated within a particular party, much as Yale once insisted on "orthodox" ministers. Yet Madison, like most of the Founders who wanted to establish a national university, considered certain political and constitutional understandings as foundational to republicanism. Certain presuppositions and understandings were encoded in the very nature of the polity and, as such, would be agreed on in a manner that was beyond party (or sect). The national university curriculum – and particularly those aspects of it relating to the principles of government – was part of this understanding of politics beyond party. The curriculum designed for the university – like the essence of the university project itself – was a way to sustain the constitutional order in a nonpartisan and nonsectarian fashion. This was, to again borrow Richard Hofstadter's phrase, part of a "Constitution-against-Parties,"¹²² which we could also frame as a constitution against establishment. Of course, these political thinkers and actors recognized that education was, in a foundational sense, deeply political, as many such thinkers insisted that "all aspects of life had to be republicanized."¹²³ The "battle of the books" is about defining features of the polity. As we have repeatedly seen, education was to be refashioned to accord with the understandings of the new constitutional order. At the level of the polity, politics would frame education. But within the polity, education was understood to be beyond the particulars of party or sect – or at least so it was hoped.

Pondering this feature of constitutional design, thinkers from Rousseau forward have long wondered, in support and criticism, if modern constitutionalism, not unlike its ancient counterpart, inevitably creates a civil religion.¹²⁴ The

¹²² Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780–1840* (Berkeley: University of California Press, 1969). See also Harvey C. Mansfield, *Statesmanship and Party Government* (Chicago: University of Chicago Press, 1965), 15.

¹²³ Gordon Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (New York: Oxford University Press, 2009), 470.

¹²⁴ Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses* (New Haven, CT: Yale University Press, 2002), 253. See also Rousseau, "Considerations on the Government of Poland," in *Of the Social Contract and Other Political Writings* (New York: Penguin, 2012), 259.

American Constitution has often been drawn on as a touchstone of American political faith: the equivalent of America's sacred scripture that provides the basis of our civil religion.¹²⁵ Looking back on the Constitution from 1830, Madison wrote, "As the people of the United States enjoy the great merit of having established a system of Government on the basis of human rights, and of giving to it a form without example . . . they owe to themselves, to their posterity, and to the world, a preservation of the system in its purity, its symmetry, and its authenticity." Madison even called on the people to act in "sacred regard" to maintain the Constitution's boundaries.¹²⁶ Madison, as we have seen, viewed the constitution as an imperfect document in much need of support. Yet, at times, his thinking lent itself to the language of civic faith.¹²⁷ Constitutional principles may become articles of faith to unite (and truly create) the polity. Or, more aptly, insofar as a constitution seeks to structure and frame political life, it seeks to create its own world.

Constitutionalism, like religion, is rooted in a "world-view" with its own set of principles and values; it puts forward, and rests on, understandings that all individuals are created equal, entitled to rights, and create government for specific ends, which frames how we understand religion, culture, the family, and other features of civil life. More recent constitutions – Germany's Basic Law or the South African Constitution – have made explicit foundational principles and moral obligations to which state and society alike must ascribe.¹²⁸ This has led Ran Hirschl to argue that "the similarities between constitutional law and religion law may suggest that constitutionalism and religion often fail to get along well with each other not because they are so different . . . but because they are so similar."¹²⁹ There are, of course, important differences – most notably, in the American case, that the state cannot coerce faith. Furthermore, the cultivation of civic attachment does not have to take the form it did in the wake of the French Revolution, where "civil religion included such ceremonies as the 'Festival of the Goddess Reason'" as well as the "adoration of French revolutionary 'martyrs' instead of Catholic saints."¹³⁰

Yet, two hundred years after America's revolution, even admirers of the Founders would have to confess that admiration at times comes uncomfortably close to deification. There are also many of the accoutrements of

¹²⁵ Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1989), 11.

¹²⁶ Madison, *Writings of James Madison*, 9:429–31.

¹²⁷ See especially James Madison, *The Federalist*, No. 49, ed. Jacob Cooke (Middletown, CT: Wesleyan University Press, 1960).

¹²⁸ See especially Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 1997), 31–35.

¹²⁹ Ran Hirschl, *Constitutional Theocracy* (Cambridge, MA: Harvard University Press, 2010), 207. As Sanford Levinson puts it, "constitutionalism, like religion, represents an attempt to render an otherwise chaotic order coherent, to supply a set of beliefs capable of channeling our conduct." Levinson, "'The Constitution' in American Civil Religion," *Supreme Court Review* 1979: 136.

¹³⁰ Joel S. Fetzer and J. Christopher Soper, *Muslims and the State in Britain, France, and Germany* (New York: Cambridge University Press, 2005), 69.

“civil religion,” and having the Constitution on your side in American politics is probably more valuable than having god on your side.¹³¹ We can hardly blame the Founders for how posterity has treated them. Yet we can ask if the constitutional order they set in motion, and the political education they wanted to establish, would necessarily tend to such forms of civil religion? To be sure, acceptance of the “American creed” is not compelled in the manner that acceptance of the Thirty-Nine Articles of Faith once was. There is also a world of difference between a system that attempts to frame how we see the world (or at least a significant part of it) by teaching and example and a system that turns to coercion to enforce orthodoxy.¹³² And while I would suggest that civil religion is not essential to the constitutional order, we might still wonder if a mild form of it is inevitable. Hirschl’s comparison thus nevertheless raises interesting questions that I take up more fully in Chapter 6. Citizens may not have to accept constitutional principles, let alone an architectonic view framed by the Constitution, but enough citizens must act on constitutional understandings for the polity to take shape – understandings like religious liberty and the separation of theological from political authority.

This realization is what led Madison to insist on an orthodox professor of politics. As the Board of Visitors for the University of Virginia reported, “it is the duty of this Board to the Government under which it lives and especially to that of which this University is the immediate creation, to pay especial attention to the principles of government which shall be inculcated therein, and to provide that none shall be inculcated which are incompatible with those on which the constitutions of this State and the United States were genuinely based, in the common opinion.”¹³³ Whereas the board as a whole, and Jefferson in particular, thought that freedom of mind would benefit the republic, when it came to the teaching of government and politics, this was less clearly so. Jefferson even went so far as to list appropriate texts to be taught – something that was not done in any other subject. The central list of texts – expanded and refined a bit by Madison – included Locke’s *Essay Concerning the True Original Extent and End of Civil Government*, Sidney’s *Discourses on Government*, the Declaration of Independence, *The Federalist*, the Virginia Resolutions and the Alien and Sedition Acts, and Washington’s Farwell Address.¹³⁴

¹³¹ Or these are taken to be the same thing.

¹³² See generally Corey Brettschnieder, *When the State Speaks, What Should It Say?* (Princeton, NJ: Princeton University Press, 2012).

¹³³ Quoted in Pangle and Pangle, *Learning of Liberty*, 169.

¹³⁴ Jefferson wrote to Cabell that Antoine Destutte de Tracy’s *A Commentary and Review of Montesquieu’s Spirit of the Law* (Philadelphia: William Duane, 1811) was the best work for teaching the principles of government: “none in the world equal to the Review of Montesquieu. Chipman’s and Priestley’s Principles of Government, and the Federalist, are excellent in many respects, but, for fundamental principles, not comparable to the Review.” The work was adopted at William and Mary for the course in the principles of government at Jefferson’s urging. *Jefferson and Cable: The University of Virginia*, 53, 69. As De Tracy wrote, “government is like everything else, to preserve it you must love it. Our education, therefore, ought to instill

This was an education for statesmen and future civic leaders in the philosophy, principles, and practice of American constitutionalism. One question is whether this curriculum speaks to the whole of American constitutionalism. Jefferson's First Inaugural, as I noted in a previous chapter, seemed to take some form of disagreement within the contours of American constitutionalism as a healthy thing. We are "all republicans, we are all federalists" suggested a shared commitment to a core foundation or identity under the Constitution, even if it also pointed to "conflict within consensus."¹³⁵ Would the curriculum extend to Federalists, or was it to be a Republican understanding of American constitutionalism? The inclusion of *The Federalist* and of Washington's Farwell Address suggests a wider view. Yet the inclusion or exclusion of texts opens up the possibility that the curriculum might be manipulated for partisan ends. And what of understandings of politics that are at odds with American constitutionalism?¹³⁶

The Pangles contrast James Wilson's efforts at the University of Pennsylvania with Jefferson's at Virginia in an illuminating manner. Wilson, a signer of the Declaration and Constitution and supporter of the national university, offered a lecture course inaugurating the law school at the College of Philadelphia and spoke about the curriculum necessary to educate American civic leaders. Like Jefferson, Wilson sought to school future civic leaders in a distinctly American understanding of law and politics, which, also like Jefferson, he viewed largely in Lockean terms.¹³⁷ As one of the first justices on the Supreme Court, Wilson would in fact draw on Locke's understanding of sovereignty to explain in *Chisholm v. Georgia* that the language of sovereignty itself – and state sovereignty in particular – was ill suited to American constitutionalism.¹³⁸ Though a Federalist, Wilson was working off of shared political understandings with Jefferson. Yet Wilson was more open to disagreement; indeed, he sought to teach it. Wilson placed Locke at the core of a republican curriculum, but he also included Locke's critics, including those who wrote before Locke.¹³⁹ As Wilson argued, "the cause of liberty" and "the cause of 'the rights of men' require that 'in a subject essential to that cause and to those rights, error should be exposed, in order to be avoided.'"¹⁴⁰ Wilson's argument,

into us sentiments and opinions in unison with the established institutions, without which we may become desirous of overturning them" (23).

¹³⁵ Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Vintage Books, 1986), 29.

¹³⁶ Jean Yarbrough argues that Jefferson's "attempt to impose a narrow partisan curriculum on future statesman" is at odds with the general mission of the University of Virginia and the commitment to republican self-government. Yarbrough, *American Virtues: Thomas Jefferson on the Character of a Free People* (Lawrence: University Press of Kansas, 1998), 143.

¹³⁷ Wilson was also influenced by the Scottish Enlightenment.

¹³⁸ "To the constitution of the United States the term *sovereign* is totally unknown." *Chisholm v. Georgia*, 2 U.S. 419, 454 (1793).

¹³⁹ Pangle and Pangle, *Learning of Liberty*, 174.

¹⁴⁰ *Ibid.*, 175.

not unlike Locke's in the *Conduct*, anticipates the sort of liberal argument for freedom of mind made by John Stuart Mill in *On Liberty* and that Jefferson often made.¹⁴¹ This suggests the possibility that the curriculum of American colleges, while attempting to foster a mind-set rooted in the particulars of the American constitutional order, should also include material that is critical of, and possibly hostile to, that very order.¹⁴² And yet we should not mistake this for what has come to be understood as neutrality regarding political principles.

Constitutional Development and Education

Cultivating the Constitution's moral and political principles was central to the educative mission of these thinkers and statesmen. This was part of an overarching whole that had its roots in what has been called the "democratization of mind."¹⁴³ The curriculum would reflect a more open and, in time, more democratic society based on the individual exercising, in John Locke's terms, "the freedom of his reason and understanding."¹⁴⁴ Anticipating the profound reforms to come in education based on profound changes in politics, this understanding was rooted in liberal and democratic principles. It was democratic because the capacity to exercise one's understanding and reasoning was universal: it was the product of acquired habit more than natural faculty and belonged to the day laborer as much as to the cultivated gentleman.¹⁴⁵ It was liberal in that it sought to cultivate independent and individual judgment, which required a broad openness of mind; it also required individuals to be probing of their own opinions as well as tolerant of others' opinions.¹⁴⁶ The

¹⁴¹ Two of the works on politics that Jefferson strongly recommended – De Tracy's *Review of Montesquieu* and Joseph Priestley's *An Essay on the First Principles of Government* – suggest at times an openness and tolerance in pursuing truth that would naturally benefit free government. See also Yarbrough, *American Virtues*, 142–43.

¹⁴² As Jack Balkin suggests, "to become faithful servants of the Constitution, we must talk and think in terms of it; we must think constitutional thoughts, we must speak constitutional language." And yet this raises the problem of constitutional idolatry. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge, MA: Harvard University Press, 2011), 127.

¹⁴³ Fliegelman, *Prodigals and Pilgrims*, 12–13, and Ward, *John Locke and Modern Life*, 5, 59, 195. Jack Balkin argues that constitutional legitimacy depends on a Protestant political culture, which allows ordinary citizens to "claim the Constitution as Their Constitution." Balkin, *Constitutional Redemption*, 235.

¹⁴⁴ John Locke, *Some Thoughts Concerning Education and of the Conduct of the Understanding*, Section 3 (Indianapolis, IN: Hackett, 1996), 173.

¹⁴⁵ Locke, *Of the Conduct of the Understanding*, Sections 4 and 6, 174–76.

¹⁴⁶ *Ibid.*, Section 11, 185. See also John Locke, *An Essay Concerning Human Understanding* (New York: Oxford University Press, 1975), Book II, Chapter 21, 5–15; Book II, Chapter 11, 30; Book IV, Chapter 16, 5.