

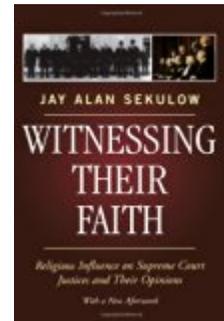
H-Net Reviews

in the Humanities & Social Sciences

Edward L. Cleary, Allen D. Hertzke, eds. *Representing God at the Statehouse: Religion and Politics in the American States*. Lanham: Rowman & Littlefield Publishers, 2006. xii + 253 pp. \$72.00 (cloth), ISBN 978-0-7425-3437-7.

Jay Allen Sekulow. *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions*. Lanham: Rowman & Littlefield Publishers, 2006. xviii + 350 pp. \$27.95 (cloth), ISBN 978-0-7425-5064-3.

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The Politics of Religion and Politics

Washington Post editorialist E. J. Dionne recently opined that the “mellowing of evangelical Christianity may well be the big American religious story of this decade.” He noted that “the evangelical political agenda is broadening as new voices insist on the urgency of issues such as Third World poverty and the fights against AIDS and human trafficking,” while others within the community were “urging evangelicals to make environmental stewardship a central element of their political mission.” He argued that all of this is occurring as “believers reflect on the perils of partisanship and ideology and their reasons for being Christian. This,” he concluded, “will probably affect the nation’s political life, but it will certainly affect the country’s spiritual direction.”[1]

It will also affect scholarship in the area of religion and politics. At least that is the hope after reading Edward L. Cleary and Allen D. Hertzke’s *Representing God at the Statehouse* and Jay Allen Sekulow’s *Witnessing Their Faith*. These works seem to represent two sides of the scholarship related to evangelicalism in contemporary America. The former, a classically formatted edited volume of case studies investigating the impact of religious organizations on state-level legislative processes, is one of the finer examples of this sort of literature I have read in some time. The essays by a variety of scholars (from the more veteran—Charles Bul-

lock, Mary Segers, and Clyde Wilcox, for example—to the more junior, and even a few doctoral students) build on Hertzke’s now classic *Representing God in Washington: The Role of Religious Lobbies in the American Polity* (1988) to examine religious lobbies in a variety of states (New Jersey, Massachusetts, Virginia, Georgia, Texas, Michigan, Wisconsin, Utah, and California). These states have been selected for regional diversity, political and institutional contexts, as well as their classification according to the typology developed by Daniel Elazar in his now-classic *American Federalism: A View from the States* (1966). While not all literature in this genre has been entirely preoccupied with the role of evangelical groups in legislative or electoral politics, this volume is a welcome, balanced approach that examines the role of conservative Christian groups where appropriate, but also takes into account the role of other groups large and small, from the various state Catholic conferences, charities, and issue-based organizations to those connected to Jewish, Quaker, and Mormon theologies. For an edited volume, the case studies are unusually even in tone and approach, and while some readers may disagree with the consistently social scientific method (at the expense of more historical depth)—or maybe even with some of the conclusions—the overall quality of the analysis is strong and straightforward. While the conclusions of the analyses are as undramatic as the case studies themselves—

coalitions work, resources matter, political climate of the state has an impact, etc.—the real value is in the approach, description, and method of analysis, providing for all readers a format by which to conduct future examinations of organized religion on the state level. I was so drawn into the material and the approach that by the volume’s end I found myself wanting analyses of religious lobbies in other states—and I cared not which.

This is not to suggest that the Cleary and Hertzke volume is without error; a very few stand out, both appearing in the same essay. For example, while not uncommon (particularly in the South or among non-cosmopolitans), it is both historically and culturally inaccurate to refer to Jewish congregations as “churches” (p. 178). It is also historically inaccurate (and possibly revisionist) to refer to a “Territory of Deseret” (p. 180)—such a construction existed only in the minds of LDS leadership, and was never recognized by the federal government who created the Utah Territory in 1850. But these errors are more the exception than the rule, and overall the volume is interesting, foundational, and a good read, and will be of use to any student or scholar interested in religion and politics, particularly where they intersect in state legislative activity.

If the Cleary and Hertzke edited volume reflects a level-headed, even-handed approach to the study of religion and politics, then the work written by Jay Sekulow, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions*, is an example of a polemic masquerading as scholarship. Like the Cleary and Hertzke volume, this work is organized as a series of case studies, each examining a particular moment in Supreme Court history, a particular justice in that moment, and a specific decision (authored by that justice) that has had a profound impact on concepts of religious liberty. The work is built on the presumption that the faith of the specific justices selected is the foundation of (and therefore reflected in) the decisions they author. Sekulow chooses nine justices associated with eight decisions to support his argument: Joseph Story (*Vidal v. Girard’s Executors*, 1844), Samuel Miller (*Watson v. Jones*, 1871), Morrison Waite (*Reynolds v. United States*, 1878), David Brewer (*Church of the Holy Trinity v. United States*, 1892), George Sutherland and Charles Evans Hughes (respectively, author of the majority decision and a dissenting opinion, *United States v. Macintosh*, 1931), Hugo Black (*Everson v. Board of Education*, 1947), Thomas Clark (*School District v. Schempp*, 1963), and Warren Burger (*Lemon v. Kurtzman*, 1971).

In contrast to the clearly identified logic of the selection of states examined in the Cleary and Hertzke volume, there is no clear rationale for the selection of justices and their opinions in the Sekulow volume, other than that the book “seeks to examine the impact of the religious faith and practices of Supreme Court justices on their court decisions involving the religion clauses of the First Amendment.” He notes that in each of the nine cases, “the opinion of the justices coincided with the official positions held by the religious denomination that had influence on them,” and that it is his hope “to provide a clear understanding of the effect that religious faith, practices, and experiences have had on the justices and their opinions” (pp. xii-xiii). Sekulow never strays far from the mainstream, never investigating the work of the eleven Catholic or seven Jewish justices on the court, even the obvious “block-breakers,” Taney (first Catholic) and Brandeis (first Jew). Surely *they* would merit some investigation. Instead, he investigates the faith of two Baptists (Hughes and Black, both Southern Baptists), two Episcopalians (Waite and Sutherland), two Presbyterians (Burger and Clark, who had been raised in the Episcopal movement but was Presbyterian “by marriage”), two Unitarians (Story and Miller) and one Congregationalist (Brewer). Even the recently departed Chief Justice Rehnquist, the Court’s lone Lutheran (ELCA), might have provided a bit more diversity. Sekulow also avoids the great free exercise decisions. Why not investigate the way Catholicism affected Justice Scalia (Catholic) in his writing of the landmark decision *Oregon v. Smith* (1990)? Or Justice Brennan (Catholic) in *Sherbert v. Verner* (1963)? How did Justice Frankfurter’s Judaism affect his decision in *Minersville v. Gobitis* (1940) or his dissent in *West Virginia Board of Education v. Barnette* (1943)?

But Sekulow is an advocate, not a scholar, and he is making a case here in support of his ideology; it might have been more accurate to have titled the work “Witnessing My Faith.” Most legal historians would approach, with greater circumspection, the proposition that one could accurately identify specific religious ideals in an individual justice’s life to such an extent as to discern how they affect that justice’s jurisprudence—particularly for the two decisions that were as close as one could get to a “split” decision (5-4). Sekulow, however, marches in where angels fear to tread, apparently ignoring completely the entire library of materials on judicial politics and the processes of decision-writing at the Supreme Court. This presumption, of course, furthers the author’s conviction that religious faith is a proper element of pub-

lic rhetoric, an argument to which, on the most basic level, it is foolish to object. But it is also an argument that often degenerates into a presumption that religious conviction trumps any other kind of conscientious conviction, or worse still that a particular *form* of religious conviction trumps all others or is due more esteem than other religious or non-religious convictions; for Sekulow, by the second half of the twentieth century in the realm of First Amendment religion jurisprudence, there are Christians (non-preferential accommodationists) and secularists (strict separationists). It also overlooks the *realpolitik* of judicial processes in favor of a more pure ideological (or theological) motive. For example, Sekulow appropriately minimizes Justice Hugo Black's involvement with the Ku Klux Klan as the political posturing of a younger politician in Alabama, but is unwilling to do the same when analyzing Black's lectures to large church audiences in the same period. Why is something said at a Sunday school meeting more believable than something said at a Klan meeting, particularly since, according to Sekulow, there were more potential voters at the Sunday school meeting than at the Klan gathering?

Clearly there are problems here. In the very first paragraph Sekulow makes the classic ahistorical, over-enthusiastic mistake of identifying religion as foremost on the minds of the authors of the Bill of Rights, based simply on its presence as the first of the amendments. If this were in fact true and order revealed priority, then the Framers were more likely thinking of themselves, their wealth, and their power, and not religion; the first two amendments of the twelve originally sent to the states dealt with apportionment and salaries. The first was never ratified (and thankfully so—it would have resulted in a House of Representatives with more than five thousand members by 2000); the second was finally ratified as the Twenty-Seventh Amendment in 1992. The fact that the “First Amendment” was actually third puts it in a more historical perspective; it is more likely that the amendment that became the First Amendment had more to do with the powers of Congress—that is, federalist compromises with the states—than with any enlightened notion of religious liberty. But the assumed privileged role of religion in the Constitution—and since they were overwhelmingly Protestant, the privileged role of the Framers' own religion—is a fundamental historic shibboleth in the community Sekulow now represents.

Sekulow, the flamboyant head of the conservative Christian-based American Center for Law and Justice (ACLJ) and a network of related organizations, star of Christian radio, ardent supporter of Harriet Meiers's

nomination for the U.S. Supreme Court, and subject of a number of allegations related to unethical financial dealings, came to prominence as a converted messianic Jew successfully representing Jews for Jesus before the Supreme Court in *Airport Commission v. Jews for Jesus* (1987), a case involving the right to distribute leaflets at an airport. (As another note, Sekulow ignores the work of both of the women on the High Court, even though it was Justice Sandra Day O'Connor—the Court's first woman justice—who significantly altered the terrain of church-state debate in *Lynch v. Donnelly* [1984], sought to salvage thirty years of Supreme Court precedent in her concurrence in *Oregon v. Smith* [1990], and, ironically, authored the opinion that catapulted Sekulow to prominence in the first place.) A few of his other publications include *The Christian, the Court, and the Constitution: Your Rights as a Christian Citizen* and *Chief Counsel's Confidential Report on the Homosexual Agenda* (both published by ACLJ in 2000 and 1997 respectively). He seems uninterested in historical method, but instead engages in historical legerdemain, creating the impression that many of his positions are grounded historically. Throughout the case studies there is a subtle (and at times, not so subtle) historicizing—proof-texting, really—of the current evangelical political agenda of which Sekulow is champion, whether it is in support of the common nostalgic myth of a “Christian America” or of an accommodationist, non-preferentialist view of the “No Establishment” clause, in which all that was intended by the Framers was a prohibition of governmental preference of any one specific religion or religious institution. This motive is borne out in the final chapter which abandons completely any investigation of faith as it concludes that history is the proper guide for the Court, particularly nineteenth-century history. As usual in this genre, Sekulow's arguments shed more heat than light, and at times Sekulow has difficulty overcoming personal biases. His first argument on Justice Story barely hides a mild anti-Catholicism, his chapter on Justice Miller minimizes Protestant support of slavery in the South, and his discussion of Justice Waite seems almost dismissive of the Church of Jesus Christ of Latter-day Saints. As a result, Sekulow is often more persuasive than he is accurate, and he seems unconcerned about the complexities and contexts of the history he presents.

One can, of course, die by the same sword that one lives by, and Sekulow—like many originalists—ignores the difficulty of demanding historical foundations for some doctrines but not for others. Just because an all-male, all-Protestant cast of characters felt that America was a

Christian nation does not actually make it so, nor does it make it the kingdom, and the power, and the glory, for ever and ever Amen. There is no doubt that Protestant Christianity is buried deeply in the foundations of this country, but so was slavery. In the same way that Sekulow wants us to take Hugo Black's word in front of a church crowd but not in front of the Klan, he wants us to accept the continuing validity of a "Christian" America without questioning any of its contemporary baggage. Sekulow, like many others, confuses a Christian history (which America certainly has) with a Christian heritage (which only Christian Americans certainly have).

Where the Cleary and Hertzke edited volume is an even handed, rational, social scientific approach to the study of religious organizations as they participate in the (state) legislative process, the Sekulow volume is a one-sided, often dangerously ahistorical sermon in search of a "Christian" (that is, evangelical Protestant) America that values a superficial religious diversity where it is, as the Virginia Declaration of Rights put it, "the mutual duty of all to practice Christian forbearance, love, and char-

ity towards each other." Where the Cleary and Hertzke volume continues a tradition of interest group analysis, yet retools it to address state-level issues as well as issues arising from the changing conditions of American religious institutions (including, but not limited to evangelical groups), the Sekulow volume is preaching to the chorus of believers, but is of very little value to scholars of anything other than the form of evangelical Protestantism Sekulow represents. It is a volume filled with facts, many of which are actually true; but where the Cleary and Hertzke volume is of great substantive and methodological value to many and represents some of the outstanding work done in the field of religion and politics, the Sekulow volume is valuable only as a primary source to a select few, a relic of an era that (one would hope) is soon to pass in the "mellowing of evangelical Christianity."

Note

[1]. E. J. Dionne, "A Shift among the Evangelicals," *Washington Post* (June 16, 2006): A25.

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