make on one another. Conflicts, in short, are the raw material for an education in higher or synthetic truths that the intellectual will put forth in the future. It is not the role of the intellectual merely to participate in the creation of alternative practices and diverse views.

Mill's expectation that the instructed minds would stand above society and develop as reconcilers and synthesizers of competing values and practices has not been fulfilled, and here one may wonder whether his thoughts on this issue would have benefited from the treatment of democratic intellectuals and culture in Tocqueville's *Democracy in America*, volume 2. Tocqueville's thesis is that democracy overruns modern culture. His concern is that in democracies, higher ideas will no longer be proposed at all, and individuals of independent minds will become isolated and dispirited by the weight of public opinion. Tocqueville believes that as democracy grows, the belief in the general equality of the intellect insinuates itself into the public outlook, and it becomes extremely difficult for the views of the highly educated, whatever these may be, to exert influence over public opinion.

In his generally laudatory reviews of Tocqueville's *Democracy in America* in 1836 and 1840, Mill explicitly rejects Tocqueville's thesis regarding the "learned class" being subsumed by democracy. Mill counters that, in England, intellectuals generally embrace the idea that they must balance the undue influence of social interests, and he argues that these learned minds must be cultivated as a social bulwark for sentiments and opinions that transcend those views that arise from the mass (a consideration that leads him to propose that the highly educated receive extra votes in elections). He concludes that England has an advantage over America in that it possesses a well-articulated intellectual class and that energy must be devoted to making it better and better qualified for the important function of representing a unified impartial outlook capable of educating society.

–Robert Devigne
Tufts University

Ellis M. West: *The Free Exercise of Religion in America: Its Original Constitutional Meaning*. (Cham, Switzerland: Palgrave MacMillan, 2019. Pp. xiv, 317.)

doi:10.1017/S003467051900072X

This book, the author reports, "was a long time in the making" (v). Its genealogy traces back to a 1971 doctoral dissertation on the Supreme Court's decisions interpreting the so-called Religion Clauses of the First

Amendment to the Constitution and runs through a paper presented in 1989 at Notre Dame Law School examining the "original meaning of the free exercise clause" (vi) of that amendment and a 1994 law-review article on early Americans' views regarding exemptions for religious pacifists from military service. It asks and proposes an answer to a specific question: "What … did … early Americans mean by 'the free exercise of religion' that they wanted to be protected by the Constitution?" (1).

It is worth emphasizing, in part because West emphasizes, that *The Free Exercise of Religion in America* is "a work in constitutional history only" (2). It does not engage, for example, with contemporary debates among "originalists," or between originalists and nonoriginalists, about how our Constitution or constitutions generally ought to be interpreted; it does not develop arguments regarding the justifications for countermajoritarian judicial review of politically accountable actors' actions in a liberal democracy; it does not purport to resolve current controversies about the utility of this or that constitutional test or doctrine; and it does not review or rework recent Supreme Court decisions involving war-memorial crosses, opening prayers at legislative meetings, recycled-tire grants to Lutheran preschools, or the application of antidiscrimination rules to cake artists with religious objections to same-sex marriage.

West contends that, by the time the First Amendment became law, "the great majority of those persons who championed [the free exercise of religion] did agree on its basic, general meaning"; that is, they agreed about "the *principle* that [the religion clauses], like similar state laws, were intended to uphold—the free exercise of religion" (24). The best evidence of this meaning, he believes, is not what any particular eminent Founder said in a letter or speech and is not the various laws that were passed or official actions that were taken in the years closely following the First Amendment's ratification. The best evidence, instead, is "statements … that were made during the debates that occurred over proposed laws or policies dealing with religion" in the states (24–25). And, he notes, there is no shortage of such evidence. Quoting approvingly Thomas Curry, West agrees that "we can know as much about what ordinary Americans … believed about Church-State relations in 1789 as we can know about perhaps any other subjects in American history prior to the advent of modern polling" (25).

Again, the objects of West's search are not the intentions, understandings, plans, or expectations of those Founding-era actors who proposed and ratified the First Amendment's text. The original meaning that matters to him is the meaning, for most Americans, of a principle, namely, "free exercise of religion." In the book's middle four chapters, the religious-freedom-related provisions that were incorporated into the newly independent states' constitutions, and the "widespread, vigorous, and continuing" (196) public debates over them, are mined thoroughly for evidence of that meaning.

West reports, among other things, that by 1790, "most people subscribed to a jurisdictional understanding of the free exercise of religion, that is, it meant

'freedom from certain types of legislation,'" from "laws that take a position for or against specific religions or religious doctrines and practices" (196). In addition, most Americans' understanding of the religious-freedom principle excluded "laws discriminating on the basis of religion; it required equal treatment of all religions and of all persons regardless of their religion or lack thereof" (197). This understanding, West explains, was in keeping with the early Americans' view that governments violate freedom when they pass laws or take actions they are not authorized to pass or take. And, perhaps most important for contemporary debates, the widely shared understanding of the free-exercise principle did not, in West's account, preclude governments from enacting nondiscriminatory laws that they are authorized to pass—that is, laws dealing with "temporal, earthly, or this-worldly affairs" (206)—even when those laws incidentally regulate some persons' religiously motivated actions. In other words, West concludes, the understanding of the religious-freedom principle that was widely shared at the time of the First Amendment's ratification did not include a general constitutional right to religious exemptions from otherwise valid laws. And, he continues, this understanding was "incorporated into the religion clauses of the First Amendment" (258).

Along the way, in several places, West argues that both religion clauses—the Free Exercise Clause and the Establishment Clause—"have the same meaning because they both were intended to protect the free exercise of religion as it had come to be understood in most of the states" (15). Other scholars' arguments that the latter clause was not so much the affirmation of separationist principle as a pragmatic, federalist decision to let states decide whether to retain what John Adams called "mild and equitable establishment[s] of religion" are rejected, probably too hastily.

West's study is, notwithstanding its above-mentioned long gestation, timely, in part because there are reasons to believe that more than a few, and perhaps a majority, of the current members of the Supreme Court are open to reconsidering the 1990 ruling in *Employment Division v. Smith*, which announced a rule that is consistent with West's conclusions: generally speaking, although legislative exemptions from general laws for religious objectors are constitutionally permissible and, in many cases, morally warranted, the Free Exercise Clause does not require, or even authorize, judges to create them. Of course, the *Smith* ruling was criticized and controversial from the outset, and Congress and state legislatures alike responded to it with statutory exemption-creation regimes such as the 1993 Religious Freedom Restoration Act. Some of *Smith*'s leading scholarly critics insist, contra West, that the case's rule is inconsistent with the First Amendment's original meaning. Others emphasize the fact that, regardless of public understanding or expectations in 1791 (or, perhaps, in 1868, when the Fourteenth Amendment was ratified), the dramatic increases in both religious diversity and government regulations require a constitutional role that provides greater protection for vulnerable minorities from political majorities. And

still others warn that, for a variety of reasons—the weakening of and loss of confidence in religious institutions, the much-remarked "rise of the nones" and general secularization, the increasing salience of "culture war"–related conflicts between the religious commitments of some and others' understandings of equality's demands, and so on—it can no longer be taken for granted that American officials, administrators, regulators, and citizens assign foundational importance to religious freedom and its demands.

West ends with the suggestion that, whether or not the early Americans' understanding of the free-exercise principle is morally attractive or should guide the construction of Supreme Court doctrine, understanding and giving a "respectful hearing" to the principle's original meaning can help Americans today decide, "in a careful and thoughtful way," "how government should treat religion" (308). We should hope that he is correct.

–Richard W. Garnett
University of Notre Dame

John von Heyking: *Comprehensive Judgment and Absolute Selflessness: Winston Churchill on Politics as Friendship*. (South Bend, IN: St. Augustine's, 2018. Pp. ix, 187.)

doi:10.1017/S0034670519000615

John von Heyking intends to make the case for friendship as a central political category. The case is not, as cynics would have it, that friendship is a means to power, but that the best politics is itself the practice of a certain form of friendship. Aristotle's foundational account of virtue friendship provides the theoretical framework, while the life and statecraft of Winston Churchill bring theory to life. In framing Churchill's deeds and thought in Aristotelian terms, von Heyking does us the service of reminding us of the possibility of a nobler vision of friendship, politics, and the convergence of the two than is usually met with today.

The opening chapters introduce the main themes, most of which concern the interpenetration of theory (understood in terms of story rather than philosophic contemplation) and practice. Praising the bard at the court of the king of the Phaeacians, Homer's Odysseus acknowledges the festive banquet hall as the appropriate setting for reflection on great deeds; this ancient scene prefigures Churchill's own dining society, the Other Club, whose function is at once leisurely and practical. Sharing in convivium with one another, members cement the personal ties that will reinforce their political friendships and public pursuits of virtue. Friendly conversation mixes reflective