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The Believer and the Powers That Are

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THE BELIEVER AND THE POWERS THAT ARE. By *John T. Noonan, Jr.* New York: Macmillan 1987. Pp. xvii, 510. $35.

In *The Believer and the Powers That Are,* John Noonan[1] provides a unique perspective on the religion clauses of the first amendment,[2] one of the most controversial and chaotic areas of constitutional law.[3] Noonan does not attempt to create and impose a logical structure on the Supreme Court's religion clauses doctrine. Instead, he uses an interdisciplinary approach, primarily invoking history to provide an increased understanding of the clauses. Constitutional theorists routinely use history as an aid to interpreting the Constitution.[4] Noonan, however, does not utilize history solely to ascertain the Framers' intentions. Instead, he takes history one step further and tries to enable the reader to "empathetically appropriat[e] the experience that undergirds the constitutional principles of free exercise and no establishment" (p. xiii). This perspective allows the reader to appreciate the religious freedom available in America. Noonan thus provides an interesting approach to the first amendment; however, his lack of analysis leaves the reader unable to create a structure for the first amendment amid the Court's chaotic struggle.

Like most historians, Noonan proceeds chronologically. He divides the book into three sections: *Roots, The American Experience,* and *Contemporary Controversies. Roots,* reflecting Holmes's maxim that "[a] page of history is worth a volume of logic" (p. xiii), contains philosophical excerpts and historical anecdotes. The excerpts span a

1. John Noonan, Jr. is a judge on the U.S. Court of Appeals for the Ninth Circuit and the Milo Robbins Professor of Law and Legal Ethics, Emeritus, at the University of California at Berkeley. Perhaps best known for his book *Bribes,* Judge Noonan is considered "an authoritative lay Catholic scholar." Gillette v. United States, 401 U.S. 437, 470 (1971) (Douglas, J., dissenting).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

3. *See, e.g.,* Marshall, *Introduction to Law and Religion Symposium,* 18 CONN. L. REV. 697 (1986).

4. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673, 676 (1980) ("It is both appropriate and useful to begin all constitutional interpretation by consulting the historical intent of the Framers."). *Cf.* L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION: THE COURT AS REFEREE OF CHURCH-STATE CONFRONTATION 4 (1975) (using historical background only "to clarify the situation as it exists today").

time period beginning with the Ten Commandments and ending in 1674. Noonan includes parts of the Bible and some letters of Augustine[5] in the description of the Roman period (pp. 3-20). The book then focuses on England.[6] Letters, governmental documents, and early books describing the law are represented.[7] Last, *Roots* focuses on those people who criticized religious intolerance and illustrates through letters and writings their thoughts and beliefs concerning church and state.[8] Noonan illustrates the factors that led to religious persecution in Europe and the theories that led to religious tolerance. Thus, by the end of part 1, the reader comprehends the behavior that drove men and women of the late seventeenth century to seek a place where leaders advocated religious freedom, and the theories upon which the concept of religious freedom was built.

Part 2, *The American Experience,* encompasses America's early struggle for religious tolerance and freedom. Noonan explores the battle leading up to the proposal and ratification of the first amendment and the writings of Madison and Jefferson. Noonan also describes the early doctrine of the religion clauses including the first church aid case,[9] and the first parochial school case.[10] This section, like the first, provides the perspective necessary to "empathetically appropriate" the origins of the religion clauses, but provides no real perspective on how these clauses are interpreted today. This is because, as many observers of religion clause doctrine have asserted, modern interpretation of the

5. Augustine, born in 354 A.D., was a pagan who converted to Catholicism. In 395 he was elected Bishop of Hippo in Africa. Noonan calls him "the most influential writer on morals for the Christian West." P. 12.

6. Pp. 21-60. England provides a backdrop for the struggle for supremacy between the Church and the State. The two legal systems overlapped, with the prince of the state involved with disputes over the property of the church and the church involved with issues that concerned public peace. P. 21. The events before the Magna Carta illustrate the power of the Catholic Church. When the see of Canterbury became vacant in 1205, a struggle ensued over who the electorates were. Pope Innocent III had the Cardinals he considered to be the electorates travel to Rome to vote. They chose Cardinal Langton; but Langton was not King John's choice. After a five-year struggle, John relented and conveyed his lands to the Pope, who gave the land back as John's fiefs. Pp. 27-29. Approximately 330 years later, during the reign of Henry VIII, secular princes were becoming more powerful. Henry wished to end his marriage to Catherine of Aragon, but the Pope refused to grant Henry an annulment. Finally, as the battle between the Church and the King of England came to a head, Parliament passed a general law, the Act of Supremacy, making the king the head of the Church of England and breaking with the Catholic Church. Pp. 52-54. Noonan considers this to be a "constitutional revolution," with the balance of power tilted toward "greater governmental control of the Church." P. 54.

7. Included are the writings of the clergy, including the Pope, pp. 30-31; portions of the Magna Carta, pp. 29-30; sections from Ralegh-Bratton's book on the laws of England, pp. 33-35; and writings of Thomas Aquinas, pp. 37-45.

8. Pp. 61-90. Governmental tolerance for religious differences really began in Germany when, in 1568, the Lutheran lords were granted legal toleration. P. 61. In 1573, the Polish nobility agreed to refrain from bloodshed over religious differences at the Warsaw Conference. Pp. 61-62.

9. Pp. 211-14. Bradfield v. Roberts, 175 U.S. 291 (1899).

10. Pp. 214-17. Quick Bear v. Leupp, 210 U.S. 50 (1908).

clauses rests largely on post-World War II cases.[11]

Contemporary Controversies presents the modern doctrine: Supreme Court cases from 1940 to the present. Noonan groups the Supreme Court cases into six categories: (1) Sacred Duties, (2) Belief and its Organization, (3) Double Effect, (4) Education, (5) Political Participation, and (6) Sexual Morals. "Sacred Duties" contains cases in which the state prohibited activities that religious groups consider essential to the practice of their religion. This is commonly considered to be the issue of defining religion. Before a court can determine if the government has infringed upon a religious belief, it must, as a threshold matter, define religion.[12] The substantive areas of constitutional law in which this threshold question arises range from canvassing door-to-door promoting religion (and breaking a local ordinance prohibiting the solicitation of money for any religious reason)[13] to consuming peyote, a form of mescaline, which plays a central role in the ceremony and practice of the Native American Church.[14]

Once a court has dealt with this threshold question, it can address substantive issues. In the second category, "Belief and its Organization," Noonan includes cases that, in England in the thirteenth century, would have been heard in an ecclesiastical court (p. 35). The cases in this section deal with disputes over such issues as which faction of a church has title to church property. In "Double Effects," Noonan analogizes to other areas of the law where, if an action has both good and bad effects, the act is allowed if the good effects outweigh the bad effects (p. 339). Noonan places here the difficult cases where "a state practice has the constitutionally protected effect of permitting the free exercise of religion and the constitutionally prohibited effect of establishing religion" (p. 339). As the Supreme Court has commented, "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[15] This problem arises, for example, when a state prohibits religious or political meetings in a public park.[16]

11. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984) ("Despite the customary invocation of James Madison and Thomas Jefferson . . . scholars know that the present doctrinal approach stems from post-World War II Supreme Court decisions.").

12. *See* Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Johnson, *supra* note 11, at 831-39.

13. P. 234. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

14. P. 291. *See* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

15. P. 344 (quoting *Walz v. Tax Commn.*, 397 U.S. 664 (1970), *reprinted at* pp. 342-52).

16. That is, in order to ban religious speech from the park, the city must determine what speech is considered religious, and this may have the effect of promoting some religions over others. A second example is the exemption of church property from taxes. An argument can be made that by exempting religious organizations from taxation, the state indirectly encourages individuals to make contributions to religious bodies, thereby violating the establishment clause.

The fourth group of cases, which Noonan calls "Education," is really a subdivision of the previous group, "Double Effects." It exhibits most clearly the inconsistencies in religion clause doctrine. Although a state may furnish books, lunches, and diagnostic services to church-run schools, it cannot provide maps, magazines, tape recorders, or salary supplements (p. 395). Group five, the "Political Participation" section, also clearly illustrates the clash between the two clauses. Most illustrative is *McDaniel v. Paty,*[17] where the Supreme Court struck down a law disqualifying ministers from holding legislative offices. The Tennessee Supreme Court had held that the law was justified as a means of restricting religious activity "in the lawmaking process of government — where religious action is absolutely prohibited by the establishment clause" (p. 445). The Supreme Court reversed, stating that the statute actually inhibited religious freedom by forcing a choice between political participation and religious activities. Finally, "Sexual Morals," group six, illustrates the role that religion has played in cases concerning sexual conduct. It includes cases covering sodomy, interracial marriage, and polygamy.

Noonan's book is basically descriptive. It supplies the primary documents that shaped the religion clauses and the seminal cases that guide the Supreme Court's current analysis. While Noonan's unwillingness to analyze the Supreme Court's decisions concerning the religion clauses sets him apart from other contemporary writers,[18] it also limits his book. Noonan wants "[t]o capture the legal process relating to religion in time, to push back to the experience at its roots and carry it forward to the present" (p. xvi), and this he does with resounding success. The book is a fascinating compilation of material for anyone interested in a broad descriptive overview of religion and history. If, however, the reader is searching for a method for thinking about religion in America, or for answers to important contemporary questions about first amendment jurisprudence, this book does not supply them. *Contemporary Controversies,* the book's third major section, reads like a law school casebook, but with even less guidance than most casebooks provide. For a reader with no background knowledge, the meaning of the cases is elusive, partly because only short excerpts of cases are included. But for a reader with the background to impose his own order upon the cases, the book most likely would be of limited value, since the reader will have read many of the primary sources.

Noonan's book, then, is paradoxical. If the reader knows nothing about the relationship between religion, history, and the religion clauses, parts of the book provide a good introduction. Yet, for that

17. 435 U.S. 618 (1978).

18. *See, e.g.,* S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE (1972); P. KAUPER, RELIGION AND THE CONSTITUTION (1964); L. LEVY, THE ESTABLISHMENT CLAUSE (1986); L. PFEFFER, RELIGION, STATE AND THE BURGER COURT (1984).

reader, other parts of the book, such as *Contemporary Controversies,* are quite confusing. Perhaps this book's best function is to act as a starting point for someone interested in learning about the religion clauses. The reader who wants answers will have to look elsewhere.

— *Elizabeth Ferguson*