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THE FUNDAMENTAL FREEDOM: JUDGE JOHN T. NOONAN, JR.'S HISTORIOGRAPHY OF RELIGIOUS LIBERTY

CHARLES J. REID, JR.*

I. INTRODUCTION

In a scholarly and professional career now spanning a half century, Judge John T. Noonan, Jr. has produced path-breaking works in a number of disciplines. Noonan first trained as a philosophy doctoral student at the Catholic University of America where he authored an important thesis analyzing the Church's law and moral teaching regarding usury.¹ Since then, he has written a number of important studies about the interaction of Catholic moral doctrine and law, including comprehensive studies concerning contraception,² marriage and divorce,³ and abortion.⁴ He also has authored a series of

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1. See John T. Noonan, Jr., *Banking and the Early Scholastic Analysis of Usury* (1951) (unpublished Ph.D. dissertation, Catholic University of America). A substantially expanded version of the thesis was subsequently published by Harvard University Press. See JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* (1957). See also JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 25-31 (1998) (reminiscing on Catholic University experiences); Kevin Starr, *Judge John T. Noonan, Jr.: A Brief Biography*, 11 J. L. & RELIGION 151, 159-61 (1994-95) (reviewing his studies at Catholic University).

2. See John T. Noonan, Jr., *Do The Right Thing*, N.Y. TIMES, Oct. 24, 1999, § 7, at 34 (reviewing CHARLES CURRAN, *THE CATHOLIC MORAL TRADITION TODAY: A SYNTHESIS*); JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGAINS AND CANONISTS* (Enlarged ed., 1986); JOHN T. NOONAN, JR., *THE CHURCH AND CONTRACEPTION: THE ISSUES AT STAKE* (1967); John T. Noonan, Jr., *The History of Contraception: Seven Choices*, in *THE CONTRACEPTIVE ETHOS* (Stuart F. Spicker et al. eds., 1987); John T. Noonan, Jr., *Natural Law, the Teaching of the Church and the Rhythm of Human Fecundity*, 25 AM. J. JURIS. 16 (1980); John T. Noonan, Jr., *The Amendment of Papal Teaching by Theologians*, in *CONTRACEPTION: AUTHORITY AND DISSENT* 41 (Charles E. Curran ed., 1969); John T. Noonan, Jr., *Authority, Usury, and Contraception*, CROSS CURRENTS 55 (1966); John T. Noonan, Jr., *Tokos and Atokion: An Examination of the Natural Law Reasoning Against Usury and Contraception*, 10 NAT. L. F. 215 (1965). Cf. John T. Noonan, Jr., *Intellectual and Demographic History*, 97 DAEDALUS 463 (1968) (considering the "mythic-moral ideas" which have shaped thought on human populations in western history. *Id.* at 465).

3. See JOHN T. NOONAN, JR., *POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA* (1972). See also John T. Noonan, Jr., *Marital Affection in the Canonists*, 12 STUDIA GRATIANA 479 (1967); John T. Noonan, Jr., *Power to Choose*, 4 VIATOR 419 (1973); *Novel 22*, in *THE BOND OF MARRIAGE: AN ECUMENICAL AND INTERDISCIPLINARY STUDY* (William W. Bassett ed., 1968); John T. Noonan, Jr., *Marriage in Michoacán*, in *FIRST IMAGES OF AMERICA: THE IMPACT OF THE NEW WORLD ON THE OLD*

biographical articles concerning leading canon lawyers of the twelfth century.⁵ Additionally, he has written many thoughtful pamphlets, essays, and articles on scholastic philosophy (especially in its moral dimension),⁶ biblical studies,⁷ celibacy in the early Church,⁸ American

351 (Freda Chiappelli et. al. eds., 1976); John T. Noonan, Jr., *Ursa's Case*, in *DIVORCE AND REMARRIAGE IN THE CHURCH* 29 (Lawrence Wrenn ed. 1973); John T. Noonan, Jr., *Indissolubility of Marriage and Natural Law*, 14 AM. J. JURIS. 79 (1969); John T. Noonan, Jr., *History and the Values of Christian Marriage*, in *MARRIAGE IN THE LIGHT OF VATICAN II* 1 (James T. McHugh ed., 1968); John T. Noonan, Jr., *Freedom, Experimentation, and Permanence in the Canon Law on Marriage*, in *LAW FOR LIBERTY: THE ROLE OF LAW IN THE CHURCH TODAY* 52 (James E. Biechler ed., 1967); John T. Noonan, Jr., *Genital Good*, 8 COMMUNIO 198 (1981) (reviewing issues of sexual morality generally).

4. See John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 51 (John T. Noonan, Jr. ed., 1970); John T. Noonan, Jr., *On the Priority of Life*, in *THE PASTORAL VISION OF JOHN PAUL II* (Joan Bland ed., 1982); John T. Noonan, Jr., *Responding to Persons: Methods of Moral Argument in the Debate over Abortion*, 24 THEOLOGY DIG. 291 (1973); John T. Noonan, Jr., *The Catholic Church and Abortion*, 12 NATURAL L. FORUM 85 (1967); Cf. JOHN T. NOONAN, JR., *HOW TO ARGUE ABOUT ABORTION* (1974) (handbook detailing arguments against abortion); JOHN T. NOONAN, JR., *ABORTION IN OUR CULTURE* (1980) (criticizing foundations of contemporary acceptance of abortion).

5. See John T. Noonan, Jr., *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, 35 TRADITIO 145 (1979); John T. Noonan, Jr., *Who Was Rolandus?*, in *LAW, CHURCH, AND SOCIETY: ESSAYS IN HONOR OF STEPHAN KUTTNER* 21 (Kenneth Pennington & Robert Somerville eds., 1977); John T. Noonan, Jr., *The True Paucapalea*, in *THE CRITICAL STUDY OF SACRED TEXTS* 179 (Wendy Doniger O'Flaherty ed., 1979); John T. Noonan, Jr., *Paucapalea*, in *DICTIONARY OF THE MIDDLE AGES* 466 (1982). Cf. John T. Noonan, Jr., *Catholic Law School A.D. 1150*, 47 CATH. U. L. REV. 1189 (1998) (reviewing legal method utilized in twelfth century universities).

6. See John T. Noonan, Jr., *The Natural Law Banner*, in *NATURAL LAW AND CONTEMPORARY PUBLIC POLICY* 380 (David F. Forte ed., 1998); John T. Noonan, Jr., *The Metaphors of Morals*, in *RIDING TIME LIKE A RIVER: THE CATHOLIC MORAL TRADITION SINCE VATICAN II* 35 (William J. O'Brien ed., 1993); John T. Noonan, Jr., *Three Real Relations*, 66 PROC. AM. CATH. PHILOS. ASS'N 73 (1992); John T. Noonan, Jr., *Stars of the Order: Brilliance, Diversity, Reflecting and Reflected Light*, 41 SPIRITUALITY TODAY 101 (1990); John T. Noonan, Jr., *The Role and Responsibility of the Moral Philosopher*, 56 PROC. AM. CATH. PHILOS. ASS'N 1 (1982); John T. Noonan, Jr., *Masked Men: Person and Persona in the Giving of Justice*, 48 PROC. AM. CATH. PHILOS. ASS'N 228 (1974); John T. Noonan, Jr., *Making One's Own Act Another's*, 27 PROC. CATH. THEOLOGICAL SOC. OF AMERICA 32 (1972); John T. Noonan, Jr., *The Existentialism of Étienne Gilson*, 24 NEW SCHOLASTICISM 417 (1950). Cf. John T. Noonan, Jr., *Intoxicated by God*, N.Y. TIMES, July 25, 1999, § 7, at 9 (reviewing GARY WILLS, SAINT AUGUSTINE); John T. Noonan, Jr., *To Be Better, Think Harder*, N.Y. TIMES, February 25, 1990, § 7, at 28 (reviewing STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE).

7. See John T. Noonan, Jr., *Renan's Life of Jesus: A Re-examination*, 11 CATH. BIBLICAL Q. 26 (1949); John T. Noonan, Jr., *Hegel and Strauss: The Dialectic and the Gospels*, 12 CATH. BIBLICAL Q. 136 (1950); John T. Noonan, Jr., *The Devious Employees*, COMMONWEAL (1977); John T. Noonan, Jr., *No Room at Travelodge*, COMMONWEAL (1978).

8. See John T. Noonan, Jr., *Celibacy in the Fathers of the Church*, in *CELIBACY: THE NECESSARY OPTION* 138 (George H. Frein ed., 1968).

and world Catholicism,⁹ general issues in canon law,¹⁰ and the development of moral doctrine.¹¹ Noonan's conclusions in these areas of scholarly investigation have helped shape Catholic debate for the last three decades.¹²

As a Harvard-trained lawyer and federal judge, Noonan also has authored a large number of works of more general interest to an American legal audience. He has written important studies of legal and judicial ethics,¹³ judicial and legal biography,¹⁴ the privilege against self-

9. See JOHN T. NOONAN, JR., *MAGNA EST VERITAS: "GREAT IS TRUTH: IT PREVAILS"* (1986); JOHN T. NOONAN, JR., *WHAT IT MEANS TO BE A CATHOLIC IN THE UNITED STATES IN THE YEAR 1991* (1991); John T. Noonan, Jr., *The Catholic Community at Harvard*, 59 NEW OXFORD REV. 4 (March 1992); John T. Noonan, Jr., *The Bishops and the Ruling Class: The Moral Formation of Public Policy, in RELIGION, SCIENCE, AND PUBLIC POLICY* 138 (Frank T. Birtel ed., 1987); John T. Noonan, Jr., *If I Were Pope, in IF I WERE THE POPE* (Candida Lund ed., 1987); John T. Noonan, Jr., *The Moral Life of Catholics: Motionless, Declining, Improving, or Merely Different*, CATH. COMM'N ON INTELL. AND CULTURAL AFF. ANN. 14 (1982); John T. Noonan, Jr., *American Catholics and the Intellectual Life*, 31 CROSS CURRENTS 433 (1981).

10. See John T. Noonan, Jr., *Public Judgment in the Church*, in JUDGMENT IN THE CHURCH 96 (William W. Bassett & Peter Huizing eds., 1977); John T. Noonan, Jr., *Canon Law in the United States: A Time of Ferment*, in LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES 61 (John N. Hazard & Wenceslas J. Wagner eds., 1970); John T. Noonan, Jr., *Human Rights and Canon Law*, in RENÉ CASSIN AMICORUM DISCIPULORUMQUE LIBER IV: MÉTHODOLOGIE DES DROITS DE L'HOMME 105 (1972).

11. See John T. Noonan, Jr., *Development in Moral Doctrine*, 54 THEOLOGICAL STUDIES 662 (1993) (studying the ways fundamental doctrines change over time); John T. Noonan, Jr., *On the Development of Doctrine*, 180 AMERICA 6 (April 13, 1999).

12. See e.g., Richard A. McCormick's review of *Contraception*, in 114 AMERICA 174 (January 29, 1966) ("The ambition of this book . . . is simply staggering"). See also Peter M. Huizing, 59 CATH. HIST. REV. 509 (1973) (reviewing *Power to Dissolve*); William W. Bassett, 32 JURIST 419 (1972) (reviewing *Power to Dissolve*).

13. See JOHN T. NOONAN JR. & RICHARD W. PAINTER, *PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER* (1997); JOHN T. NOONAN & KENNETH I. WINSTON, *THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS* (1993); John T. Noonan, Jr., *Choice of a Profession*, 21 PEPP. L. REV. 381 (1994); John T. Noonan, Jr., *Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227 (1981); John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966). Cf. JOHN T. NOONAN, JR., *BRIBES* (1984) (addressing the problem of the corrupt judge).

14. See JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976); John T. Noonan, Jr., *Bias and Biographers: A Tribute to Gerald Dunne*, 34 ST. L. U. L. REV. 725 (1990); John T. Noonan, Jr., *Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119 (1987); John T. Noonan, Jr., *The Catholic Justices of the United States Supreme Court*, 67 AM. CATH. HIST. REV. 369 (1981); John T. Noonan, Jr., *Ordered Liberty: Cardozo and the Constitution*, 1 CARDOZO L. REV. 259 (1979). Cf. John T. Noonan, Jr., *Sitting in Judgment*, N.Y. TIMES, June 21, 1998, § 7, at 7 (reviewing Andrew Kaufman's biography of Benjamin Cardozo); John T. Noonan, Jr., *Master of Restraint*, N.Y. TIMES, May 1, 1994, § 7, at 7 (reviewing Gerald Gunther's biography of Learned Hand).

incrimination,¹⁵ American slave law,¹⁶ capital punishment,¹⁷ abortion,¹⁸ the legal and moral dimensions of physician-assisted suicide,¹⁹ the use of the constitutional convention as a means of amending the Constitution,²⁰ marriage and family law,²¹ the emergence and development of an anti-bribery ethic,²² law reviews,²³ legal philosophy,²⁴ the Judiciary Act of

15. See John T. Noonan, Jr., *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311 (1955).

16. See JOHN T. NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* (1977).

17. See John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011 (1993); John T. Noonan, Jr., *Should State Executions Run on Time?* N.Y. TIMES, April 27, 1992, A, at 17.

18. See JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* (1979); John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984); John T. Noonan, Jr., *The Akron Decision: A Pragmatic Politician's Parody of Solomon*, 9 HUM. LIFE REV. 5 (1983); John T. Noonan, Jr., *The Hatch Amendment and the New Federalism*, 6 HARV. J. L. & PUB. POL'Y 93 (1982); John T. Noonan, Jr., *The Experience of Pain by the Unborn*, 7 HUM. LIFE REV. 7 (1981); John T. Noonan, Jr., *The Right of Abortion Funding*, 7 HUM. LIFE REV. 52 (1981); John T. Noonan, Jr., *The Supreme Court and Abortion: Upholding Constitutional Principles*, 10 HASTINGS CENTER REP. 14 (1980); John T. Noonan, Jr., *The Abortion Power*, 5 HUM. LIFE REV. 16 (1979); John T. Noonan, Jr., *Abortion: The Case for a Constitutional Amendment*, 45 NEW OXFORD REV. 4 (1978); John T. Noonan, Jr., *The American Consensus on Abortion*, 4 HUM. LIFE REV. 60 (1978); John T. Noonan, Jr., *Abortion in the American Context*, 3 HUM. LIFE REV. 29 (1977); John T. Noonan, Jr., *The Constitutionality of the Regulation of Abortion*, 21 HASTINGS L. J. 51 (1969); John T. Noonan, Jr., *Amendment of the Abortion Law: Relevant Data and Judicial Opinion*, 15 CATH. LAW. 124 (1969).

19. See John T. Noonan, Jr., *Dealing with Death*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 387 (1998).

20. See JOHN T. NOONAN, JR., *THE BALANCED BUDGET: THE STATES CALL FOR A CONVENTION* (1982); John T. Noonan, Jr., *Convention Method of Constitutional Amendment: Its Meaning, Usefulness, and Wisdom*, 10 PAC. L. J. 641 (1979).

21. See John T. Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U. L. REV. 255 (1973); John T. Noonan, Jr., *Sexual Freedom and the Three Functions of Law*, in *SEXUALITY: A SEARCH FOR PERSPECTIVE* 153 (Donald L. Grummon and Andrew M. Barclay, eds., 1971); John T. Noonan, Jr., *Freedom to Reproduce: Cautionary History, Present Invasions, Future Assurance*, PROCEEDINGS OF THE CIVIL LIBERTIES UNION (1970); John T. Noonan, Jr. and M.C. Dunlop, *Unintended Consequences: Laws Indirectly Affecting Population*, in *ASPECTS OF POPULATION GROWTH POLICY* (Robert Parke, Jr. & Charles F. Westoff, eds., 1972).

22. See NOONAN, *Bribes*, *supra* note 13. See also John T. Noonan, Jr., *Bribery*, 2 NOTRE DAME J. L. ETHICS & PUB. POL'Y 741 (1987); John T. Noonan, Jr., *Bribery in John of Salisbury*, PROCEEDINGS OF THE SEVENTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 197 (Peter Linehan ed., 1988); John T. Noonan, Jr., *Agency, Bribery, and Redemption in Thomas Aquinas*, 49 RECHERCHES DE THÉOLOGIE ANCIENNE ET MÉDIÉVALE 159 (1982); John T. Noonan, Jr., *Bribery and the Boycott: The Responsibility of American Lawyers*, 62 A.B.A. J. 1607 (1976).

23. See John T. Noonan, Jr., *Law Reviews*, 47 STAN. L. REV. 401 (1995).

24. See John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768 (1998); John T. Noonan, Jr., *The Relation of Words to Power*, 70 ST. JOHN'S L. REV. 13 (1996); John T. Noonan, Jr., *Cannibalism and the Common Law*, 63 TEX. L. REV. 749 (1984); John T. Noonan, Jr., *The*

1789,²⁵ and political affairs and theory.²⁶ For example, his study of the American Colonization Society, the organization responsible for the settlement of Liberia in the years before the Civil War, reveals the mixed motives of this association's founders.²⁷ Likewise, his examination of the Magna Carta reveals the misapprehensions regarding that document, under which generations of Anglo-American lawyers have labored.²⁸ More recently, Noonan has turned his attention to problems arising from the relationship between religious believers and the state, producing two books and a number of articles on the subject.²⁹ Furthermore, he has helped decide a number of important

Law as Teacher, 3 HUM. LIFE REV. 8 (1977); *From Social Engineering to Creative Charity*, in KNOWLEDGE AND THE FUTURE OF MAN: AN INTERNATIONAL SYMPOSIUM 179 (Walter J. Ong ed., 1968); John T. Noonan, Jr., *Value References in the Teaching of Negligence*, 8 J. LEGAL EDUC. 150 (1955). Cf. John T. Noonan, Jr., *Hercules and the Snail Darter*, N.Y. TIMES May 25, 1986 § 7 at 12 (reviewing Ronald Dworkin's *Law's Empire*).

25. See John T. Noonan, Jr., *Judicial Impartiality and the Judiciary Act of 1789*, 14 NOVA L. REV. 123 (1989).

26. See John T. Noonan, Jr., *Catholicism and Liberalism*, 126 COMMONWEAL (March 25, 1994); John T. Noonan, Jr., *Reagan, Ronald*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1516 (Leonard W. Levy, et al. ed., 1986); John T. Noonan, Jr., *Liberal Laxists*, 6 HUM. LIFE REV. 32 (1980); John T. Noonan, Jr., *The Protestant Philosophy of John Locke*, in PHILOSOPHICAL STUDIES IN HONOR OF THE VERY REVEREND IGNATIUS SMITH, O.P. 92 (John K. Ryan ed., 1952).

27. See John T. Noonan, Jr., *The Selfish as well as the Disinterested Affections of the Heart: The Case of the American Colonization Society*, in PHILANTHROPY AND AMERICAN SOCIETY 109 (Jack Salzman ed., 1987).

28. See John T. Noonan, Jr., *Curia Romana and the Story of Magna Carta*, in FORSCHUNGEN ZUR REICHS-, PAPST- UND LANDESGESCHICHTE: PETER HERDE ZUM 65. GEBURTSTAG 291 (Karl Borchardt & Enno Bunz, eds., 1998).

29. See NOONAN, THE LUSTRE OF OUR COUNTRY, *supra* note 1; JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE (1987); John T. Noonan, Jr., *Religious Liberty at the Stake*, 84 VA. L. REV. 459 (1998); John T. Noonan, Jr., *The Heart of a Catholic Law School*, 23 U. DAYTON L. REV. 7 (1997); John T. Noonan, Jr., *The Tensions and the Ideals: Religious Human Rights in the United States*, 10 EMORY INT'L L. REV. 183 (1996); John T. Noonan, Jr., *The Tensions and the Ideals*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 593 (Johan D. Van der Vyver & John Witte, Jr., eds., 1996); John T. Noonan, Jr., *The Secular Search for the Sacred*, 70 N.Y.U. L. REV. 642 (1995); John T. Noonan, Jr., *Religious Law Schools and the First Amendment*, 20 J. C. & U. L. 43 (1993); John T. Noonan, Jr., *The End of Free Exercise*, 42 DE PAUL L. REV. 567 (1993); John T. Noonan, Jr., *A Catholic Law School*, 67 NOTRE DAME L. REV. 1037 (1992); John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, U. ILL. L. REV. 713 (1988); John T. Noonan, Jr., *The Constitutional Protection of Individual Rights: The Real Role of the Religion Clauses*, 49 U. PITT. L. REV. 717 (1988); John T. Noonan, Jr., *'Quota of Imps,' in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 171 (Merrill D. Peterson & Robert C. Vaughan eds., 1988); John T. Noonan, Jr., *Principled or Pragmatic Foundations of Freedom of Conscience?*, 5 J.L. & RELIGION 203 (1987); John T. Noonan, *The Oblique View*, 14 ME. B.J. 69 (1999).

cases, including *Harris v. Vasquez*,³⁰ a California death penalty case, and *Compassion in Dying*,³¹ an assisted suicide case.

Despite Noonan's wide range of interests, he has maintained an essential unity in his scholarship. First, he has an underlying concern with contextualizing the principles, rules, and doctrines that he is analyzing. This is illustrated, for instance, in his treatment of contraception issues: by locating the origins of St. Augustine's thoughts on the goods of marriage in his early experiences with Manichean dualism and his later polemic against that belief system, and by explaining twelfth century Catholic teaching on contraception as part of a polemic against Catharism, Noonan contextualizes the foundations of the Church's prohibition of contraception.³² Similarly, Noonan's concern for contextualization is evidenced by his examination of the history of religious liberty: by identifying the factors that influenced James Madison to break with a legal tradition that had sanctioned the use of legal coercion against religious dissenters in colonial America, Noonan contextualizes Madison's decision to champion religious liberty.³³

Closely related to Noonan's desire to contextualize is his desire to particularize. Noonan understands the development of doctrine and rules to take place historically, through the interaction of persons with the larger tradition. As one commentator observed, "Noonan's insistence upon situating moral concepts not only in rough social context, but even more precisely within the lives of particular persons, bespeaks an epistemological commitment to historical specificity which surpasses even that of [Alasdair] MacIntyre."³⁴ Noonan engages in exact and detailed historical analysis precisely to explore the intricacy of human the response to the demands of morality and law.³⁵ In his

30. 943 F.2d 930 (9th Cir. 1990).

31. *Compassion in Dying v. Washington*, 49 F.3d 586 (1995), rev'd 79 F.3d 790 (9th Cir. 1996) (*en banc*), *en banc* decision rev'd, *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997).

32. See NOONAN, CONTRACEPTION, *supra* note 2, at 107-39 (contextualizing Augustine) and 171-99 (contextualizing Catharism).

33. See NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 59-91.

34. See M. Cathleen Kaveny, *Listening for the Future in the Voices of the Past: John T. Noonan, Jr. on Love and Power in Human History*, 11 J. L. & RELIGION 203, 206 (1994-95). Cf. ALASDAIR MACINTYRE, AFTER VIRTUE (1981).

35. Indeed, Noonan argues that the use of case-law, when used educationally, must be understood as part of an historical process: "[C]ases must be rooted in the historical process to contribute to the moral education essential to the professional preparation of lawyers, who are to be formed less as social engineers than as the charitable creators of value." NOONAN, PERSONS AND MASKS, *supra* note 14, at xi.

writings, humans are neither plaster saints nor monsters, but some admixture of the two.³⁶

In less competent hands, a preoccupation with context and the particular might collapse into a welter of disparate detail, lacking organizational principle. Noonan, however, forestalls such collapse by steadily keeping his focus on the unfolding over time of basic principles of law and morality. In the case of usury, this involved the abandonment of a literal understanding of Jesus's injunction "to lend freely, expecting nothing in return."³⁷ In the case of slave law, what was required was the recognition of the humanity of the person held in bondage,³⁸ while in the case of bribery, an ideal of non-reciprocity in public decision-making is seen to unfold gradually from the time of the Hebrew Bible to our own.³⁹

Noonan, however, does not see such an unfolding as a necessary event. Happily missing from his work is even the intimation of some Hegelian dialectical process invisibly shaping the development of human morality and law. Rather, he finds much "backsliding" and occasionally even the temporary abandonment of particular ideals.⁴⁰ Noonan's argument, simply stated, is that the trajectory of human experience over 3,500 years of recorded history has favored the development of certain moral principles and practices while rendering others non-functional or even immoral.

The purpose of this Article is to examine Noonan's historiography of religious liberty. He locates the basic ingredients of modern religious liberty as far back as the Ten Commandments, although these elements were not assembled into a coherent doctrine of religious freedom until

36. See Kaveny, *supra* note 34 at 208-09. Kaveny gives the example of Samuel Pepys, the seventeenth century Englishman chiefly responsible for the building of the modern British navy, and a central figure in Noonan's *BRIBES*, *supra* note 13. Pepys exploits his position for sexual and monetary favors, but he is not caricatured:

Insisting that we recognize the ambiguity which characterized each human heart, Noonan forestalls our initial instinct to recoil against Pepys and his corruptions as repulsive, alien, and therefore irrelevant to us. Rather, we are absorbed by Pepys' rationalizations and are led to wonder under what circumstances we ourselves might have done the same thing.

Kaveny, *supra* note 34, at 208.

37. See Noonan, *Development in Moral Doctrine*, *supra* note 11, at 662-63.

38. See *id.* at 664-67.

39. See generally, NOONAN, *BRIBES*, *supra* note 13; see also Noonan, *Bribery*, *supra* note 22.

40. See, for example, Noonan's account of gift-giving and receiving in the days of St. Columba's Ireland. See NOONAN, *BRIBES*, *supra* note 13, at 125-26.

the seventeenth and eighteenth centuries and not given full judicial recognition by the United States Supreme Court until the middle of the twentieth century. But Noonan does not simply trace in a straight line the building up of the elements that have gone into making religious liberty. Western conceptions of religious freedom have emerged from debris of a thousand-year experiment in close church-state cooperation especially with regard to the oppression of religious dissenters. Perhaps in order to ward off any possibility of returning to the old ways, Noonan constructs in meticulous detail the logic and experience of ecclesiastical and secular interpenetration and religious persecution. Woven into this narrative, one also finds a deep and subtle exploration of the various ways the individual believer's conscience has been asserted and suppressed in the course of Western history. Against this backdrop, Noonan tells the story of the birth and adoption of the First Amendment's commitment to religious liberty.

In building his historiography, Noonan presents a case for broad recognition of religious liberty, culling both historical and theological components. He contends that the drafting and adoption of the First Amendment's protection of religious liberty must not be seen as the triumph of a tolerant secular world view over an intolerant religious one: James Madison—who was chiefly responsible for articulating the ideals embodied in the First Amendment—was a religious believer who sought to enshrine his peculiar religious insights in the Constitution of the United States. Thus, Noonan maintains that the First Amendment's protection of religious liberty was itself the product of theological insight and reflection.

II. OLD-WORLD FOUNDATIONS

A. *The Hebrew and Christian Scriptures*

*The Believer and Powers That Are*⁴¹ begins auspiciously by quoting in full the Ten Commandments.⁴² Noonan singles out the importance of the Ten Commandments in shaping belief in a law higher than the state's, which could be used to criticize rulers who failed to live up to the

41. It must be stressed that Noonan has an expansive view of what ought to constitute a casebook and legal education generally believing a sound education provides instruction in "values," by which he means "the good, what is desirable." See Noonan, *Value References*, *supra* note 24, at 150. A major part of *Value References*, in fact, is concerned with the evaluation of "the presentation of values" in casebooks. *Id.* at 162. Much of what follows in Section II of this Article is a study of the value references of *Believer and the Powers That Are*, *supra* note 29.

42. See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 3-5.

high ideals embodied in these divinely uttered commands.⁴³ He follows this text with an excerpt from *Deuteronomy* stressing the impartiality of God's judgment and the need to show mercy to the "orphan and the widow,"⁴⁴ and he continues with the opening lines of the Book of *Isaiah*.⁴⁵ *Isaiah* in particular denounces the rulers of Judah as "rebels, confederate with thieves . . . [who] do not give the orphan his rights, and the widow's cause never comes before them."⁴⁶ Noonan rounds his excerpts from the Old Testament with the account of the Jewish woman in the Book of *Maccabees* who lost seven sons to martyrdom on the same day.⁴⁷ Each of the sons had been ordered to eat pork by the Greek king, and each refused.⁴⁸ The last of the seven, although promised high office if he would eat pork, likewise refused, declaring, "I will not submit to the king's command; I obey the command of the law given by Moses to our ancestors."⁴⁹

In choosing these passages for inclusion, Noonan has exercised a clearly discernible principle of selection: the implications of each of these passages for the future development of the principle of religious liberty are stressed. Noonan does not emphasize that part of the Ten Commandments which requires the People of Israel to worship the Lord God alone and not to have strange gods before Him.⁵⁰ Nor does he select for consideration passages that were interpreted by later Christian exegetes as authority for religious persecution. There is no mention of

43. See *id.* at 4. Near the beginning of the religious traditions that were most to influence America, the commandments recognized a Lawgiver above the nation, law based on God's will, and a sanction that depended on obedience to Him. Life, property, truth, marriage, and worship of God were given special status by the Ten Commandments. Permanent criteria for judging human enterprises, including governments, came into written existence.

44. *Id.* at 5 (quoting *Deut.* 10:12-19).

45. See *Id.* at 6-7 (quoting *Isaiah* 1:1-23).

46. *Id.* at 7 (*Isaiah* 1:23). *Isaiah* continues to serve as inspiration for radical criticisms of the state. See DANIEL BERRIGAN, *ISAIAH: SPIRIT OF COURAGE, GIFT OF TEARS* (1996).

47. See *id.* at 7-8 (2 *Maccabees* 7:20-31).

48. See *id.* at 7.

49. *Id.* at 8 (2 *Maccabees* 7:30).

50. See MOSHE WEINFELD, *THE ANCHOR BIBLE: DEUTERONOMY 1-11* (1991) 284-93 (detailing the prohibition on the worship of strange gods). Cf. *Exodus* 20:23 ("gods of silver you shall not make for yourself"); *Exodus* 23:24 (you shall not bow down [to their gods] or serve them"); *Leviticus* 19:4 ("[molten gods] you shall not make for yourselves"); *Leviticus* 26:1 ("you shall not make idols for yourselves"). Moshe Greenberg writes: "[F]ollowing Philo, Josephus, and Rabbi Ishmael . . . the First Commandment should be defined as the imperative to recognize the LORD as the sole God" See Moshe Greenberg, *The Decalogue Tradition Critically Examined*, in *THE TEN COMMANDMENTS IN HISTORY AND TRADITION* 83, 99 (Ben-Zion Segal & Gershon Levi eds., 1985).

Elijah's massacre of the false prophets in the Book of *Kings*.⁵¹ Indeed, there is a pronounced emphasis on passages—as in the excerpts from *Isaiah* and *Maccabees*—that stress fidelity to principle over loyalty to the state. What is thus being presented is a theological argument that locates, at the very commencement of the Judeo-Christian tradition, grounds for religious liberty.⁵²

A similar process of selection can be discerned in the New Testament passages Noonan singles out for inclusion. The texts included are among the classical citations. Noonan begins with *Romans* 13:1-8,⁵³ a text that "became perhaps the most influential part of the New Testament on the level of world history."⁵⁴ In this passage, Paul asserts that believers should be subject to their rulers, because "there is no power except by God."⁵⁵ This excerpt is followed by Jesus's admonition, as recorded in *Mark*, that "[w]hat are Caesar's give back to Caesar and what are God's to God,"⁵⁶ Peter's response to the Sanhedrin's prohibition on teaching in Jesus's name that "[w]e must obey God rather than man,"⁵⁷ and Jesus's declaration to Pontius Pilate that "[m]y kingdom is not of this world."⁵⁸

But again, what is omitted is another set of classical references used by the authorities of the patristic age and the high and late middle ages to justify the suppression of dissenting belief. The classic text used by Augustine⁵⁹ and Thomas Aquinas,⁶⁰ among others, the "*compelle*

51. See 1 *Kings* 18:40-4. Cf. St. Augustine, *Letter 44 (to Eleusis and others)*, in *THE POLITICAL WRITINGS OF ST. AUGUSTINE* (Henry Paolucci ed., 1962) (using this text to justify religious persecution).

52. In later work, Noonan asserts that what was created by these texts was "[a] split of authority." See *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 43. He continues: "The split provided space in which liberty of conscience appeared." *Id.* While Hebrew did not have a word for conscience, it did have the concept. *Id.* Christianity would subsequently synthesize this Hebrew background with the Stoic notion of conscience as "an inner judge," witness to the truth and "voice of God." *Id.* at 44.

53. See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 9.

54. Ernst Bammel, *Romans 13*, in *JESUS AND THE POLITICS OF HIS DAY* 365, 365 (Ernst Bammel and C.F.D. Moule eds., 1984).

55. *Romans* 13:1.

56. *Mark* 12:17 (quoted in NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 9).

57. *Acts* 5:29 (quoted in NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 10).

58. *John* 18:36 (quoted in Noonan, NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 10).

59. See EMILIEN LAMIRANDE, *CHURCH, STATE, AND TOLERATION: AN INTRIGUING CHANGE OF MIND IN AUGUSTINE* (1975) at 51-58; see *infra* notes 65-66.

60. See Aquinas Aquinas, *Summa Theologiae*, *Secunda Secundae*, Q. 10, art. 8.

intrare" passage in the Gospel of *Luke*,⁶¹ goes unmentioned, as do other frequently cited texts.⁶² Again, Noonan identifies and stresses elements that might be constructed into a theology of religious liberty.⁶³

B. St. Augustine

St. Augustine (354-430), prolific theologian and bishop of the North African community of Hippo,⁶⁴ wrote frequently on the relationship of church and state during his career.⁶⁵ He wrote not as a disinterested academic, but as a participant in affairs, actively seeking to prevail in the rough-and-tumble political world of the early fifth century.⁶⁶ Augustine waged a steady battle with dissenters from the Catholic faith throughout his career, particularly the Donatists and the Pelagians.⁶⁷ His views

61. *Luke* 14:21-24 ("And the lord said unto the servant, 'Go out unto the highways and the hedges, and compel them to come in [*compelle intrare*] that my house may be filled. For I say unto you, that none of those men which were bidden shall taste of my banquet.'")

62. See e.g., *Titus* 3:10-11 ("A man that is a heretic, after the first and second admonition, avoid: knowing that he, that is such a one, is subverted.")

63. Noonan states:

By the first century A.D. there is in the Mediterranean world a religion, which will spread widely in the West, that carries the concepts of a God, living, distinct from and superior to any human being, society, or state; of obligations to that God, distinct from and superior to any society or state; of authorized teachers who can voice these obligations and judge any society or state; of an inner voice of reason that is one way God speaks as well as by His authorized teachers. According to these concepts as taught by this religion, each person, individually and not as part of a family, tribe, or nation, will have to account to God as Judge for every thought and deed. Collectively, these concepts are at the core of liberty of conscience and liberty of religion.

NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 44-45.

64. On Augustine's life, see PETER BROWN, *AUGUSTINE OF HIPPO: A BIOGRAPHY* (1967).

65. On Augustine's views of church and state, see HERBERT A. DEANE, *THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* (1963) at 172-220; ROBERT MARKUS, *SAECULUM: HISTORY AND SOCIETY IN THE THEOLOGY OF ST. AUGUSTINE* 133-53 (1970). Cf. Peter Brown, *St. Augustine's Attitude To Religious Coercion*, 54 J. ROMAN STUDIES 107 (1964), reprinted in PETER BROWN, *RELIGION AND SOCIETY IN THE AGE OF SAINT AUGUSTINE* 260-78 (1972).

66. See BROWN, *AUGUSTINE OF HIPPO*, *supra* note 64, at 226-30.

67. The Donatists had their origin in the fourth century, in the wake of the last great persecutions, as a sort of purifying movement, suspicious of permitting back into the fold those Christians who had compromised or "lapsed" during time of persecution. They remained a powerful dissenting voice in the North African church through the fifth century. See W.H.C. FREND, *THE DONATIST CHURCH: A MOVEMENT OF PROTEST IN ROMAN NORTH AFRICA* (1952); Cf. JOHN ANTHONY CORCORAN, *AUGUSTINUS CONTRA DONATISTAS* (1997) (detailing Augustine's campaign against the Donatists). Pelagius was a British layman who challenged traditional teaching on original sin and took an optimistic view of human nature. See PAUL JOHNSON, *A HISTORY OF CHRISTIANITY* 117-22 (1976).

changed with time, and the historian who wishes to understand his work must accept an inevitable dynamism, and sometimes even evident contradiction, between the younger and older Augustine.⁶⁸

Noonan selects for inclusion excerpts from four of Augustine's letters.⁶⁹ These letters reflect both the complexity of Augustine's thought and the general trajectory it followed from a more tolerant position to one supporting the active coercion of religious dissenters. But, they also reflect Augustine's position on the proper behavior of Christian office-holders in the new Christianizing Roman Empire. For Noonan, the relationship of the believer to the powers that are is a two-way street: believers might sometimes be oppressed by state power, but now, as the Roman Empire christianizes, they also may need guidance in its proper exercise.

Letter 133 to Marcellinus deals with the punishments to be meted out to some Donatist radicals who had attacked and mutilated members of the Catholic clergy.⁷⁰ Augustine advises Marcellinus not to show the radicals the full harshness of the law.⁷¹ The duty of the Christian judge is to "fulfill the office of a father. Be angry at wickedness in such a way that you take care to remember humanity."⁷² Augustine is not above invoking the authority of his office to ensure that Marcellinus show the requisite gentleness: "If you do not hear a friend asking, hear a bishop

68. Peter Brown, indeed, cautions that Augustine's thought is simply too fluid and responsive to circumstances to be summarized in terms of a "doctrine" of church and state. *See generally* Brown, *St. Augustine's Attitude*, *supra* note 65. Rather, Brown wishes to speak of Augustine's "attitude," a term which captures both the flexibility in Augustine's thought on church and state but also its deep foundations in his views on necessity and free will and the prophetic nature of the Old Testament. *See id.*

69. These include Letters 133 and 138, both to Marcellinus, a representative of the emperor in attendance at a conference of Donatist and Catholic bishops held at Carthage in 411; Letter 153, to Macedonius, governor of Africa, written in 414; and Letter 185, written to a second governor of Africa, Boniface, on the coercion of the Donatists.

70. *See* Letter 133, translated and excerpted in NOONAN, *THE BELIEVERS AND THE POWERS THAT ARE*, *supra* note 29, at 12-13.

71.

I have been filled with the greatest worry that Your Highness judge that they be struck with such severity of law that they suffer the kind of things that they have done. By this letter I beg the faith which you have in Christ that, through the mercy of Christ the Lord, you do not do this nor permit it to be done under any circumstances.

Id. at 13.

72. *Id.*

advising."⁷³

Letter 138, also to Marcellinus, expands upon themes struck in the earlier letter. Marcellinus, a sincere Christian, asked Augustine to help him reconcile the seemingly extreme demands of Christianity—"to him who strikes us we must offer the other cheek and give our coat to him who takes our shirt, and walk twice as far with him who makes us go"—with the demands of statecraft.⁷⁴ Augustine first responds by pointing out to Marcellinus that not even the authors of Scripture intended these sayings to be taken in their total literalness: when Jesus's interrogators struck him, he did not offer them his other cheek, but asked why they struck him.⁷⁵ What is important to Augustine about these admonitions is the role they should play in shaping our interior dispositions.⁷⁶ Again, Jesus's example is instructive: while he did not offer the other cheek, he ultimately forgave those who persecuted him.⁷⁷ With the proper inward disposition, Augustine continues, it is even permissible for Christians to wage war.⁷⁸

The third letter Noonan excerpts, Letter 153 to Macedonius, also considers the duties of a Christian judge. Again we find Augustine exercising his teaching role, appealing to the conscience of a Christian governor to show mercy in meting out punishment to criminals. Augustine's fear is that Macedonius might fail to give the condemned the opportunity to repent before execution. Augustine assures Macedonius that he is "compelled by charity for humankind to intercede

73. *Id.* Augustine continues: "Since I speak to a Christian, especially on such a matter, I shall say without arrogance: it is appropriate for you to hear a bishop commanding, Excellent and Deservedly Distinguished Lord and Very Dear Son." *Id.*

74. *Id.* at 14.

75. *See id.* at 15.

76. *See id.*

Finally, these commandments relate more to the preparation of the heart, which is within, than to the deed which is done openly. . . . These commandments of patience are therefore always to be kept in the heart, and benevolence is to be fulfilled in the will, so that evil is not returned for evil. But many things are to be done with those who are unwilling, beating them with a certain kindly severity and taking into account not their will but what is useful for them.

Id.

77. *See id.*

78. *See id.* at 15-16. Cf. LOUIS SWIFT, THE EARLY FATHERS ON WAR AND MILITARY SERVICE 110-49 (1983); Louis Swift, *Search the Scriptures: Patristic Exegesis and the Ius Belli, in PEACE IN A NUCLEAR AGE: THE BISHOPS' PASTORAL LETTER IN PERSPECTIVE* 48, 59-68 (Charles J. Reid Jr. ed., 1986); David Lenihan, *The Just War Theory in the Work of Saint Augustine*, 19 AUGUSTINIAN STUD. 37 (1988).

for the guilty, so that they do not so finish this life by punishment that when it is finished they cannot finish the punishment."⁷⁹ Augustine also stresses that he is moved to act out of affirmative religious commandment.⁸⁰

Finally, in the fourth excerpt, Noonan arrives at Augustine's arguments for the coercion of religious dissenters.⁸¹ The emperors had now converted to Christianity. The time was ripe to bring to bear state power on behalf of religious orthodoxy.⁸² In this context, Augustine analogizes the position of the heretic to that of an adulterer: they have both broken faith, but the heretic has committed the more serious act: "Why, since free will has been divinely given to man, are adulteries punished by the laws and sacrileges permitted? Is it a lighter matter for a soul not to keep faith in God than for a woman not to keep it with her husband?"⁸³ Compulsion, Augustine argues, has been proven by experience to work.⁸⁴ Indeed, the Apostle Paul was only converted because Christ brought force to bear against him on the road to

79. See NOONAN, *THE BELIEVERS AND THE POWERS THAT ARE*, *supra* note 29, at 17. Augustine's point is that if the guilty show sufficient repentance before being put to death, they may not be compelled to undergo further punishment in the world to come.

80. *See id.*

Do not doubt that this my duty arises from religion. God "with whom there is no iniquity," whose power is supreme, who *Sees* not only how each one is but also how each one will be, who alone cannot slip in judging because He cannot be deceived in judging, nevertheless as the Gospel says, "makes his sun rise upon the good and the bad, and rains upon the just and the unjust." Of His wonderful goodness, I am an imitator.

Id. at 17.

81. *See* Letter 185, translated and excerpted in NOONAN, *THE BELIEVERS AND THE POWERS THAT ARE*, *supra* note 29, at 19-20.

82. *See id.*

Those who refuse to have just laws enacted against their impieties say that the Apostles did not seek such things from the kings of the earth. They do not consider that the time then was something else and that all things are done at their own times. Then there was no emperor who believed in Christ, no emperor who would serve Him by passing laws in favor of religion and against impiety Not yet was time was to which the psalm says, "And now, kings, understand: learn you who judge the earth, serve the Lord in fear and rejoice in Him with fear."

Id. at 19.

83. *Id.*

84. *See* Noonan, *Principled or Pragmatic Foundations?*, *supra* note 29, at 204.

Damascus.⁸⁵ Augustine thus concludes:

Hence the Lord Himself first commands the guests to be brought to his great wedding feast, but afterward has them compelled; for when the slaves cried, Lord it is done as you command, he said, Go out into the highways and hedges and whomever you find compel them to enter Therefore if the power which the Church has received by divine gift through religion and faith in the time of kings is exercised as it should be, those who are found in the highways and hedges that is, in heresies and schisms are compelled to come in.⁸⁶

What is seen by the close of this set of excerpts is a treatment of "church and state" markedly different than the standard textbooks. In arranging these selections, Noonan shows less concern for those matters that textbook writers have traditionally focused on—institutional arrangements or the proper allocation of power between Pope and the secular power⁸⁷—than for defining the sorts of claims the religious conscience can make upon the state. Augustine, as a Christian bishop, may properly call upon a Christian office-holder to bring to bear

85. *See id.* at 20.

86. *Id.* Noonan observes, concerning this letter: "The letter reflects a distinct evolution in Augustine's thought. The Donatists are to be driven into the Church by force. He still retains the notion of mild force expressed in the letter . . . to Marcellinus." *See supra* notes 71-72, and accompanying text. "He still harbors the view, also expressed to Marcellinus, that the infliction of moderate punishment can be paternal and medicinal." *See supra* notes 71-72, and accompanying text.

Scourging is not execution. But embracing in principle the use of coercion against schismatics and heretics, he lays a general foundation for religious persecution. True, the death penalty would run counter to his rationale as well as to his repeated pleas for mercy; but it was to prove impossible to draw his nice line between the severe and lenient infliction of pain.

Id. at 19.

87. *See e.g.* HUGO RAHNER, CHURCH AND STATE IN EARLY CHRISTIANITY 39-183 (Leo Donald Davis, trans., 1992) (discussing and quoting extensively from documents establishing the institutional arrangements of church and state in the fourth and fifth centuries); PAGANISM AND CHRISTIANITY, 100-425 C.E. 261-89 (Ramsay MacMullen & Eugene N. Lane, eds., 1992) (reviewing power-sharing arrangements between Christians and pagans and the issue of forced conversions); CHURCH AND STATE IN THE MIDDLE AGES 23-41 (Bennett D. Hill ed., 1970) (considering the political implications of St. Augustine's *City of God*); *see generally* THE EARLY CHURCH AND THE STATE (Agnes Cunningham ed., 1982) (reviewing and excerpting from the writings of leading theologians on the allocation of institutional authority between church and state).

Christian principles in deciding cases. The religious office-holder may properly shape his or her inner disposition by reference to Christian love. Noonan's editorial judgment is here sharply focused on the subject of his book's title, the relationship of the believer and governmental power. But these excerpts also make clear that certain boundaries should not be crossed. Augustine's argument in favor of compelling the Donatists back into the fold subsequently "provides the charter of the Inquisition" and furnishes a license to 1,000 years of religious persecution.⁸⁸ Eventually, the experience of persecution and reflection upon the mandates of Scripture would demonstrate the error behind this justification,⁸⁹ but not until much blood was shed.

C. Prelates, Princes, and Persecution: Christendom, 1160-1555

The fifth-century collapse of Roman secular authority in the Western Empire caused the whole relationship of institutional Christianity and secular authority to fundamentally change. Within central Italy, the papacy came to assume secular powers simply in order to "fill[] a vacuum of power."⁹⁰ The papacy shouldered the responsibility of converting the Germanic tribes that had moved into Western Europe, and eventually, in the eighth century, struck an alliance with the Franks, the most powerful of the tribal kingdoms that emerged from the wreckage of the old empire.⁹¹ In turn, the collapse of the Frankish kingdom in the ninth century subjected the church in many parts of Europe to the rule of local kings and warlords who treated ecclesiastical grounds and goods as so much personal property.⁹² However, bishops and other ecclesiastical leaders also were forced to assume a wide variety of traditional secular responsibilities throughout many parts of Europe.⁹³ Indeed, in light of this co-mingling of

88. NOONAN, THE BELIEVERS AND THE POWERS THAT ARE, *supra* note 29, at 19.

89. See *infra* notes 154-171, 219-248 and accompanying text.

90. See BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE, 1050-300, 16 (1964).

91. See *id.* at 16-19.

92. See *id.* at 24.

93. See E.N. JOHNSON, THE SECULAR ACTIVITIES OF THE GERMAN EPISCOPATE 919-1024 (1932). Under separate headings, Johnson discusses bishops as guardians of the frontier, civil servants, soldiers and builders, and economic administrators. See *id.* The German episcopate continued to exercise significant military responsibilities in the twelfth century and was the subject of satire questioning whether a German bishop could ever achieve salvation. See Timothy Reuter, *Episcopi cum sua militia: The Prelate as Warrior in the Early Staufer Era*, in *WARRIORS AND CHURCHMEN IN THE HIGH MIDDLE AGES: ESSAYS PRESENTED TO KARL LEYSER* 79-80 (Timothy Reuter ed., 1992) The canon law prohibition on participating in judgments of blood also prohibited clerical participation in warfare. See *infra* notes 116-19.

responsibilities, kings came to appoint bishops and entrust them with the symbols of their ecclesiastical office.⁹⁴

In the closing years of the eleventh century, under the impetus of an ecclesiastical reform movement, this arrangement blew apart in what has become known as "the papal revolution."⁹⁵ The battle cry of the revolutionary party became *libertas ecclesiae*—"the liberty of the Church"⁹⁶—although, in practice, the more extreme among them sought to exalt the spiritual authority of the church above the temporal authority of merely secular powers.⁹⁷ In fact, however, neither side could prevail completely,⁹⁸ and of necessity, a whole series of compromises were struck apportioning authority between "church" and "state."⁹⁹ It is in the aftermath of these compromises, in the twelfth

94. See TIERNEY, CRISIS OF CHURCH AND STATE, *supra* note 90 at 24-25.

95. See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 85-113 (1983).

96. *Id.* at 94.

97. See *id.* at 94-99 (discussing the claims of Pope Gregory VII (1073-1085), leader of the papal revolution). The proper relation of the spiritual and the temporal power remains the central defining question of medieval political history from the eleventh century to the Reformation.

98. See Brian Tierney, *Religious Rights: An Historical Perspective*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 17, 24 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

99. Brian Tierney has observed: "Because neither side could make good its more extreme claims, a dualism of church and state persisted in medieval society and eventually was rationalized in many works of political theory." *Id.* at 24. Efforts to reach a *modus vivendi* are also evident in many areas of private law. To take England as an example, Crown and Church each had exclusive competences, the Crown over such matters as feudal property transactions among laypersons, and the Church over matters like marriage and domestic relations law. See JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 255-282 (3d ed. 1990) (discussing the the English law of feudal relations); RICHARD H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND (1974) (discussing ecclesiastical competence over marriage); Richard H. Helmholz, *Infanticide in the Province of Canterbury During the Fifteenth Century*, 2 HIST. OF CHILDHOOD Q. 379 (1975) (treating ecclesiastical competence over infanticide); Richard H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 10 VA. L. REV. 431 (1977) (discussing the role of ecclesiastical courts in ordering child support in bastardy proceedings). In some instances, such as informal contracts and violations of the usury prohibition, royal and ecclesiastical jurisdiction overlapped. See Richard H. Helmholz, *Assumpsit and Fidei Laesio*, 91 L.Q. REV. 406 (1976); Richard H. Helmholz, *Usury and the Medieval English Church Courts*, 61 SPECULUM 364 (1986). Writs of prohibition were available from the king where jurisdictional boundaries had been transgressed, although the Church also had procedural devices by which it might retain technically prohibitable actions. See Richard H. Helmholz, *The Writ of Prohibition to Court Christian Before 1500*, 43 MEDIAEVAL STUD. 297 (1981); Richard H. Helmholz, *Writs of Prohibition and Ecclesiastical Sanction in the English Courts Christian*, 60 MINN. L. REV. 1011 (1976). Cf. Norma Adams, *The Writ of Prohibition to Court Christian*, 20 MINN. L. REV. 272 (1936); G.B. Flahiff, *The*

century England of Henry II and Thomas Becket, that Noonan takes up again the thread of his story.

1. Interpenetration

"Interpenetration" is the term David Knowles used to describe the relationship of Church and Crown in twelfth-century England,¹⁰⁰ and it is one Noonan borrows to tell the story of the relationship between these two powers in the twelfth and thirteenth centuries.¹⁰¹ Noonan offers two complementary vantage points. He begins, conventionally enough, by looking at power-sharing arrangements in the twelfth and thirteenth century worlds. Using England as his case study, Noonan opens with excerpts illustrating the struggle between Henry II and Thomas Becket,¹⁰² followed by selections pertaining to the drafting of *Magna Carta* and its ultimate repudiation by Pope Innocent III.¹⁰³ In providing these selections, Noonan makes the important point that it is anachronistic to speak of a "Church versus State" conflict.¹⁰⁴ Henry II and King John were both Christians who took oaths upon coronation to work for the Church of God and the whole Christian people.¹⁰⁵ But in the context of twelfth- and thirteenth-century power relations, they were unafraid to risk ecclesiastical censure to defend royal rights. Both Henry and John were opposed as well as assisted in their efforts by ecclesiastical officials.¹⁰⁶ The interpenetration was indeed

Writ of Prohibition to Court Christian in the Thirteenth Century, Part I, 6 MEDIAEVAL STUDIES 261 (1944); G.B. Flahiff, *The Writ of Prohibition to Court Christian in the Thirteenth Century, Part II*, 7 MEDIAEVAL STUDIES 219 (1945).

100. DAVID KNOWLES, THOMAS BECKET 59 (1976).

101. See NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 21.

102. See *id.* at 22-27.

103. See *id.* at 27-31.

104. *Id.* at 27.

105. Bracton's *Treatise* states that the king was required to swear:

First, that he will command, and as his strength allows work, that for the Church of God and for the whole Christian people true peace be observed in all his time. Second, that he will prevent rapacity and all wickedness to men of every degree. Third, that in all judgments he will command equity and mercy, so that a clement and merciful God may grant him mercy and by his justice all may enjoy a firm peace.

Id. at 35.

106. Henry's chief opponent was, of course, Becket. See *id.* at 22-27. Early in John's reign, he and Pope Innocent III locked horns over filling the vacant See at Canterbury, with Innocent finally prevailing with the selection of Stephen Langton. See *id.* at 28. After his installation, Langton continued to take a hard line against the King, and was one of the leading forces behind the drafting of *Magna Carta*: "On June 15, 1215, the bishops of

"thoroughgoing."¹⁰⁷

But again, Noonan also offers a less conventional vantage point by supplying a series of excerpts from Bracton's treatise, *On the Laws and Customs of England (De legibus et consuetudinibus Angliae)*.¹⁰⁸ The authors, William Raleigh and, to a lesser extent, Raleigh's clerk, Henri de Bratton, were clerics as well as royal judges and their work was saturated with religious imagery.¹⁰⁹ In the excerpts Noonan provides, Raleigh and Bratton assert that the ultimate sanction of the unjust judge is divine retribution of the most fearful sort.¹¹⁰ The king himself, the treatise continues, "ought to be under no man but under God and under the law; for the law makes the king."¹¹¹ Furthermore, "Because [the king] ought to be under the law since he is the vicar of God, he is clearly close to the likeness of Jesus Christ, whose vice-regent he is on earth."¹¹² Judges themselves—because they exercise a divine office—are not to receive gifts from litigants lest they become "corrupted by defilements."¹¹³

England, led by Langton, a party of barons, and the papal legate Pandulf secured John's consent at Runnymede to the document that was to be celebrated as 'The Great Charter.'"
Id. However, John outmaneuvered the proponents of the Charter. *See id.* He had previously taken the step of conveying England to the Pope and received it back to be governed as a papal fief. *See id.* John then appealed to the Pope to invalidate the Charter as a violation of both royal and ecclesial rights. *See id.* The Pope obliged, declaring the Charter invalid by reason of force and fear. *See id.* at 30-31. John's successor, Henry III, ultimately promulgated the Charter after Innocent's death. *See id.* at 29.

107. KNOWLES, *supra* note 100, at 59.

108. *See* NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 31-35. *Cf.* HENRY DE BRATTON, ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne trans., 1968).

109. William Raleigh, the principal author of Bracton's treatise, served as the law clerk of the royal judge Martin de Pateshull. *See* NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 32. Raleigh became a royal judge in 1234 and, in a further manifestation of interpenetration, was subsequently elected Bishop of Winchester. *See id.* The treatise passed upon William's death to Henri de Bratton, Raleigh's young assistant, who himself made only a few changes in the text. *See id.* De Bratton became royal judge in 1245 and died in 1268. *See id.* De Bratton's heirs subsequently circulated the text, and the work was misattributed to him when it was printed in 1569. *See id.*

110. NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 33-34.

111. *Id.* at 34.

112. *Id.*

113. *Id.* at 35. Regarding the divine nature of the judicial office and the avoidance of gift-taking judges must observe, Raleigh and de Bratton state:

It is said: "Look at what you do, for you do not exercise the judgment of man but of God, and that which you judge shall redound upon you. Let the fear of the Lord be with you and do everything with care. For with our Lord God there is no wickedness nor taking up of persons nor desire for offerings which blind the eyes of

But while Raleigh and Bratton read into English law theological principles and canonistic doctrines, they also "tacitly ignored areas where canon law clashed with English custom," especially the subject of clerical participation in the death penalty.¹¹⁴ The Fourth Lateran Council forbade clerics from pronouncing or executing a capital sentence, or even from being present when such punishment was carried out.¹¹⁵ "Raleigh, like many other bishops, enacted the prohibition in legislation for his own diocese of Norwich."¹¹⁶ Although Raleigh and Bratton assuredly knew of the prohibition, as royal judges they must have been required "to pronounce it many times."¹¹⁷ Perhaps uneasy with their dual responsibilities, Raleigh and Bratton omitted from their treatise mention of this canonical prohibition.¹¹⁸

In these selections one sees interpenetration to the point of permeation; one sees the deep debt that contemporary Anglo-American law owes its canonistic roots. *Magna Carta* itself was influenced by ecclesiastical participation in its drafting.¹¹⁹ Bracton's treatise, famous for its declaration that the king is under God and the law,¹²⁰ is seen to be part of an intellectual universe steeped in religious belief and theological reasoning. Again, however, Noonan does not let go of his subject without considering—obliquely in this instance—the believing office

the wise and twist the words of the just," as is read in Ecclesiasticus, Chapter 20: "Courtesy-presents and gifts blind the eyes of judges."

He who said gifts or offerings meant every kind of offering: (1) an offering from the hand—that sort of thing is something corporeal that is offered; (2) an offering from the tongue, which is a flattering and fawning petition, a public proclamation of praise, a symphony celebrating vain glory; (3) an offering from obedience, which is service bestowed and received in return for which the straightness of judgment is twisted.

Id. at 34.

114. *Id.* at 32.

115. See Fourth Lateran Council, c. 18, in DECREEES OF THE ECUMENICAL COUNCILS I at 244 (Norman P. Tanner ed., 1990).

116. NOONAN, THE BELIEVER AND THE POWERS THAT ARE *supra* note 29, at 33.

117. *Id.*

118. See *id.*

119. See *id.* at 27-31. For further analysis of canon-law influence on *Magna Carta*, see R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297 (1999); NOONAN, *Curia Romana*, *supra* note 28; Brian Tierney, *Religion and Rights: A Medieval Perspective*, 5 J.L. & RELIGION 163 (1987).

120. Bracton's recognition of the king's subjection to God and law has been cited in leading constitutional cases into the middle of this century. See e.g. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 655 n. 27 (Jackson, J., concurring).

holder's conscience: Ralegh and Bratton were royal as well as ecclesiastical officials who, as part of their royal duties, imposed the sentence of death on miscreants although in so acting they violated the mandates of canon law. Relieving themselves of the tension of inconsistency, they banished from their treatise on English law mention of their responsibility at canon law to avoid judgments of blood.

2. The Logic of Persecution

In the closing years of the twelfth century, after some brief experimentation in dealing with heretics "charitably,"¹²¹ the church began to construct a set of legal mechanisms to enforce orthodoxy in its ranks.¹²² In succeeding decades, these mechanisms were considerably refined. Ecclesiastical officials were empowered to investigate charges of heresy, and were to turn over to the secular arm for execution heretics found to have relapsed.¹²³ Theologians, philosophers, and lawyers all offered justifications for the new system.¹²⁴

Noonan singles out Thomas Aquinas for the lucidity of his work.¹²⁵ Aquinas, who was the most influential of the medieval schoolmen,¹²⁶ was also known as the "Angelic Doctor." But, Noonan notes, Aquinas's teaching "on religion and governmental power is far from angelic."¹²⁷ Aquinas was a forceful exponent of the alliance between church and state for the enforcement of orthodoxy. Central to Aquinas's thought is the idea of heresy as a breach of faith. Noonan observes:

[*F*]ides—faith—is the central value Aquinas is defending....
Modern translators translate *fides* in a feudal relation as fealty.

121. See EDWARD PETERS, HERESY AND AUTHORITY IN MEDIEVAL EUROPE 165-66 (1980) (describing the way of *caritas*).

122. In the decree *Sicut ait beatus Leo*, the Third Lateran Council pronounced anathema on a number of heretical movements. See *Decrees Of The Ecumenical Councils*, *supra* note 115 at 224-25. The decree *Ad abolendam*, issued by Pope Lucius III in 1184, authorized Catholic princes to wage war on a variety of named heretical movements. See X. 5.7.9. An English translation of this document is found in *Peters*, *supra* note 121 at 170-73.

123. See NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 45.

124. See ALBERT C. SHANNON, THE MEDIEVAL INQUISITION at 48-72 (2d ed., 1991); BERNARD HAMILTON, THE MEDIEVAL INQUISITION 31-39 (1981).

125. See NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 36.

126. Demonstrating Aquinas's continuing influence, Noonan notes that the 1917 Code of Canon Law "prescribed that all priests were to be educated 'according to the method, doctrine, and principles of the Angelic Doctor.'" See *id.* at 37. Cf. CODE OF CANON LAW, ch. 1366, sec. 2 (1917).

127. *Id.* at 36.

They translate *fides* in marriage as fidelity. They translate *fides* in religion as belief. They lose the triple tie that binds the analogues of the concept together. Aquinas is for keeping faith to an overlord, faith to a spouse, faith in God. The same principle that justifies the Church in making the married or members of a religious order keep their vows justifies making those who have accepted the faith keep it. The *infidelis*—the infidel, the unfaithful—is to be forced back into the fold.¹²⁸

Aquinas's logical exposition of the necessity of compulsion is inexorable. He begins expansively by asking: "are infidels to be forced to the Faith?"¹²⁹ Good scriptural authority is cited for the proposition that "infidels are in no way to be forced to the faith."¹³⁰ However, Augustine's exegesis of *compelle intrare* overcomes contrary texts as Aquinas concludes that "some are to be forced to the faith."¹³¹

Aquinas goes on to discuss the offenses of "heresy, a sin committed by those 'professing the faith of Christ,' and 'apostasy,' a sin committed by one 'withdrawing from the faith.'"¹³² As with infidelity generally, Aquinas musters with heresy scriptural texts that could have supported a policy of tolerance.¹³³ Again, however, Aquinas rejects these passages

128. *Id.*

129. *Summa Theologiae, Secunda secundae*, q. 10, art. 8 (translated in NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29 at 37).

130. *Id.* Aquinas cites *Matthew* 13:28 (noting Jesus's instruction not to gather the tares lest in doing so the wheat is torn up), and the statement in the Book of *Ezekiel* 18:23 that God does not will the deaths of sinners. *See id.* at 38.

131. *Id.* at 37. Aquinas distinguishes broadly between two types of *infideles*, those who have never received the faith and those who have broken with the faith. *See id.* Only those who have broken with the faith are to be compelled to return. *See id.* Regarding the treatment those who have not received the faith should receive, Aquinas states:

It must be said that some infidels have not received the faith, such as the gentiles and the Jews; and such are in no way to be forced to the faith so that they believe, because to believe depends on the will. They are nonetheless to be forced by the faithful, if they can, not to impede the faith by blasphemies or evil persuasions or open persecutions. And on this account the faithful of Christ frequently wage war against infidels, not to force them to believe . . . but on this account, to force them not to impede the faith of Christ.

Id. at 38. Regarding those infidels who have broken with the faith, Aquinas states: "But there are other infidels who once received the faith and professed it, such as heretics and every apostate; and such are to be forced physically to hold to what they once received." *Id.*

132. *Summa theologiae, Secunda secundae*, Q. 11, art. 1 (quoted in NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 410).

133. Aquinas cites 2 *Timothy* 2:24 ("The servant of God must be mild, correcting with

in favor of a reading of Scripture that favors persecution of heretics.¹³⁴ Heretics, Aquinas argues, are like counterfeiters who break faith and corrupt the currency by which temporal life is conducted.¹³⁵ If the prince may execute counterfeiters, how much more may he put to death one who corrupts immortal souls?¹³⁶ Relapsed heretics especially deserve execution:

If returning heretics were always received so as to be preserved in their lives and other temporal goods, this could be to the prejudice of the solution of others; both because if they relapsed again they would infect others, and because if they escaped without punishment, others would more securely lapse again into heresy. . . .¹³⁷

Finally, apostates are subject to excommunication, and apostate princes are not to be obeyed by their subjects.¹³⁸

One might object to Aquinas's line of reasoning: heretics and apostates clearly took their stances by reason of conscience. Does conscience offer any independent foundation for religious liberty? It

modesty those who resist the truth so that God may grant them repentance and they will know the truth and escape the snares of the devil."); 1 *Corinthians* 11:19 (asserting that because Paul declares heresies necessary in order to know truth, the Church might be obliged to tolerate heresies as something necessary to ecclesial life). At *Summa theologiae, Secunda Secundae*, q. 2, art. 11, Aquinas considers and accepts a pragmatic foundation for the tolerance of heretics in circumstances where their forcible suppression could lead to greater evils:

But the rites of other infidels, which bear nothing true or useful, are not to be tolerated . . . except perhaps to avoid some evil, to wit, scandal or a division that could arise from this or an obstacle to the salvation of those who would gradually be converted to the faith if they were tolerated. On this account, the Church has sometimes tolerated the rites of even heretics and pagans when there was a great multitude of infidels.

See NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 39. Noonan elsewhere observes that this teaching provided the Catholic Church with a pragmatic foundation for religious toleration from the sixteenth through the mid-twentieth centuries. See Noonan, *Principled or Pragmatic Foundations?*, *supra* note 29, at 206.

134. Decisive for Aquinas is *Titus* 3:10: "After the first and second correction, avoid the heretical man. You know that one of this sort is perverted." NOONAN, BELIEVER AND THE POWERS THAT ARE, *supra* note 29 at 39 (quoting *Summa Theologiae, Secunda Secundae*, Q. 11, art. 3).

135. See NOONAN, BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 40.

136. See *id.*

137. *Id.*

138. *Id.* at 41.

would seem so. While commenting upon a decree of Pope Innocent III,¹³⁹ the canon lawyer Bernard of Parma—author of the influential ordinary gloss to the Decretals of Gregory IX—taught that "no one ought to act against one's conscience. One ought rather to follow one's conscience than the judgment of the Church, where one is certain."¹⁴⁰

The question of the obligatory force of the erroneous conscience was also much debated by the thirteenth century scholastic philosophers.¹⁴¹ Aquinas himself takes up this issue in the excerpts Noonan provides.¹⁴² "Conscience," Aquinas asserted, "is a certain application of knowledge to some action."¹⁴³ Because conscience is based on knowledge, which itself is derived from reason,¹⁴⁴ it might fall into error because reason can be flawed.¹⁴⁵ For instance, reason might mistakenly teach one that to follow Christ is bad, even though one thereby repudiates a good necessary to salvation.¹⁴⁶ But even though the erring judgment has proposed that what is good is actually bad, "it is proposed by erring reason as true."¹⁴⁷ Because this is the case, the will is obliged to follow reason or act against its perception of what is good.¹⁴⁸

Aquinas's defense of the erring conscience has been recognized as an important step for the subsequent development of a right to religious liberty.¹⁴⁹ Aquinas, however, subverted the force of this doctrine when

139. See X.5.39.44.

140. See Bernard of Parma, *Glossa ordinaria*, X.5.39.44, *casus*. Brian Tierney has called attention to the importance of this development: "We are not dealing here with a right to religious liberty but with a duty to obey one's conscience. Still, an emphasis on the primacy of the individual conscience was an important element in later theories of religious rights." See Tierney, *Religious Rights*, *supra* note 98, at 25.

141. See 2 ODON LOTTIN, *PSYCHOLOGIE ET MORALE AUX XIIE ET XIIIIE SIÈCLES* 354-406 (1948).

142. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29 at 42-5.

143. See *id.* at 42 (quoting *Summa theologiae, Prima Secundae*, q. 19, art. 5, 3).

144. See *Id.*

145. "[N]ot only that which is indifferent can accidentally take on the character of good or bad, but that which is good can take on the character of bad, or that which is bad can take on the character of good because of the apprehension of the reason." NOONAN, *BELIEVER AND THE POWERS THAT ARE*, *supra* note 29 (quoting *Summa theologiae, Prima secundae*, q. 19, art. 5, 3).

146. See *id.*

147. *Id.* Aquinas continues: "Consequently [even erring reason] is derived from God, from Whom is every truth." *Id.*

148. "But when erring reason proposes something as the commandment of God, then it is the same thing to flout the dictate of reason and the commandment of God." *Id.*

149. See Tierney, *Religious Rights*, *supra* note 98, at 24-5; JOSEPH LECLER, *TOLERATION AND REFORMATION* 1, 99 (1960). Noonan observes: "Taken seriously, this doctrine carried the seed of religious liberty." See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 41.

he taught that one whose conscience has fallen into error might be held morally responsible for that error where it is the result either directly . . . or indirectly . . . of negligence"¹⁵⁰ But Aquinas also conceded that error might be "involuntary," arising from "ignorance . . . apart from any negligence"¹⁵¹ In this respect, Aquinas's argument opened an important pathway, explored by later generations of writers, to an expanded notion of freedom of conscience.¹⁵²

3. Joan of Arc

In February 1429, with the continued political survival of the French King Charles VII of Valois threatened by English and Burgundian military victories, a teenage peasant girl named Joan from the village of Domrémy presented herself at the royal court, claiming that voices she regularly heard had sent her on a mission to save the throne for Charles.¹⁵³ After being subjected to rigorous theological scrutiny, Joan was allowed to lead men into battle for the French cause and won important victories at Orléans and elsewhere.¹⁵⁴ Her victories ultimately led to Charles's coronation at Rheims,¹⁵⁵ but also to her capture by Burgundians fighting for the English, who in turn ransomed her to the English.¹⁵⁶ The English, convinced that Joan must have been in league with the devil, put her on trial for witchcraft and heresy, among other charges.¹⁵⁷

The trial, held before an ecclesiastical tribunal, was actually conducted to advance the English cause. Here, interpenetration caused ecclesiastical interests to be subordinated to raw political interests. The presiding judge, the Bishop of Beauvais, Pierre Cauchon, "was not quite sixty, an accomplished diplomat, whose patron in promotion to office had been the duke of Burgundy and whose services had been used

150. See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note, 29 at 44 (quoting *Summa theologiae*, *Prima secundae*, q. 19, art. 6).

151. *Id.*

152. See LECLER, *supra* note 149, at 99-100.

153. See JOHN HOLLAND SMITH, *JOAN OF ARC* 46-55 (1973) (discussing Joan's mission to the king) Joan has been the subject of numerous and important literary studies. See, e.g.: JULES MICHELET, *JEANNE D'ARC* (1890); MARK TWAIN, *PERSONAL RECOLLECTIONS OF JOAN OF ARC* (1899); GEORGE BERNARD SHAW, *SAINT JOAN: A CHRONICLE PLAY IN SIX SCENES AND AN EPILOGUE* (1930); HILAIRE BELLOC, *JOAN OF ARC* (1949).

154. See SMITH, *supra* note 153, at 55-79.

155. See *id.* at 71-79.

156. See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 45.

157. The records of Joan's trial have been published as *PROCÈS DE CONDAMNATION DE JEANNE D'ARC* (Pierre Tisset & Yvonne Lanhers eds., 1960), 3 vols.

before by [King] Henry VI of England."¹⁵⁸ Convicted of heresy in May 1431, Joan was sentenced to perpetual imprisonment and found five days later to have relapsed when, denied the opportunity to wear women's clothes, she was forced instead to resume wearing men's attire.¹⁵⁹ On the morning of May 30, 1431, Cauchon remitted Joan to the executioners, and she was promptly burnt at the stake.¹⁶⁰ In 1449, Charles VII ordered an inquiry into the validity of the trial, and in 1456 the inquiry responded by renouncing the original verdict.¹⁶¹ In 1920, Joan was canonized as a Catholic saint.¹⁶²

Noonan draws his sources from the inquiry Charles launched in 1449, and edits and arranges his excerpts as a sort of medieval morality play, exploring how a system dedicated to the promotion of religious faith could end in the execution of one later found to be a saint.¹⁶³ As Noonan explains, lawyers and theologians who had played a role in Joan's judicial murder tried to present their behavior more favorably. One man, Ysambert, who had helped to find Joan guilty,¹⁶⁴ later recalled that he advised Joan to appeal to the Council of Basel as a means of removing the action from the court of the Bishop of Beauvais.¹⁶⁵ Others cast doubt on the procedure used to convict Joan: Jean Toutmouille and Martin Ladvenu recounted Joan's declaration to the Bishop of Beauvais that she was to be put to death because of the mistreatment she suffered at the hands of the English,¹⁶⁶ while the notary Guillaume Manchon recounted English efforts to corrupt his attempt at keeping an honest record.¹⁶⁷ Jean Massieu remembered that Joan was "set up," forced to wear men's clothes by her English jailers who were looking for an

158. NOONAN, *BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 46.

159. *See id.* at 45.

160. Although the law required the Church to abandon the heretic to the secular arm which would then pronounce the judgment of death, it seems that the secular authority simply omitted the formality of pronouncing its own condemnation in Joan's case. *See* SMITH, *supra* note 153, at 172-73. Joan's death would be at the hands of the ecclesiastical authorities.

161. *See* NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29 at 45-46. The results of the inquiry can be found in P. DONCOEUR & Y. LANHERS, *LA RÉHABILITATION DE JEANNE LA PUCELLE. L'ENQUÊTE ORDONNÉE PAR CHARLES VII* (1956).

162. *See* Henry Ansgar Kelly, *Joan of Arc's Last Trial: The Attack of the Devil's Advocates*, in FRESH VERDICTS ON JOAN OF ARC 205 (Bonnie Wheeler & Charles T. Wood eds., 1996)(discussing the canonization process).

163. *See* NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 45-51.

164. *See id.* at 46.

165. *See id.* at 46-47.

166. *See id.* at 47-48.

167. *See id.* at 48-49. To relieve his guilty conscience, Manchon bought a missal with the payment he received for the trial, in order to pray for Joan's soul. *See id.* at 49.

excuse to put her to death.¹⁶⁸ Beaupère, professor of theology at the University of Paris and an expert at Joan's trial, repeated his belief that Joan's voices were not supernatural, but criticized the conduct of the trial.¹⁶⁹

Throughout his explication of these events, Noonan unites some of the themes he has been exploring: Augustine's doctrine of state-enforced religious orthodoxy had been given further logical rigor by Thomas Aquinas and other scholastics and had been codified into canon law by generations of lawyers. The lawyers and philosophers, in good scholastic fashion, advanced arguments based on Scripture and the obligation to follow one's conscience that pointed toward a more tolerant position. But these arguments were never more than strawmen, fit only to be knocked down. The interpenetration of the ecclesiastical and the secular led to its own abuses. Ecclesiastical involvement with state affairs could corrupt the religious conscience, as it did with Raleigh and Bratton. Indeed, the church could even become the handmaiden of the state, as it did in the trial of Joan of Arc, where a politicized bishop, currying favor with English secular authorities, engineered the martyrdom of a saint. Noonan thus comprehensively makes the point that the system had failed. However, a revolution was needed to uproot it.

D. New Doctrines of Tolerance

In 1517, Martin Luther, by traditional account, nailed to the door of Wittenberg Cathedral his 95 Theses challenging papal authority on a number of subjects¹⁷⁰—an act that led to the fracturing of an already brittle Christian unity.¹⁷¹ Luther's defiance, Noonan observes, "did not bring religious toleration but increased religious persecution."¹⁷² Much of Europe plunged into intermittent warfare that would endure for over a century. France erupted from 1559 to 1598 into a series of civil wars known collectively as the "Wars of Religion."¹⁷³ Protestant England and

168. *See id.* at 50-51.

169. *See id.* at 51. Beaupère believed that Joan was ill-served in the advice she received: "In my opinion, if Joan had had wise and frank directors, she would have spoken many words useful for her justification and not spoken several which made for her condemnation." *Id.*

170. *See* 95 THESES, WITH THE PERTINENT DOCUMENTS FROM THE HISTORY OF THE REFORMATION (Kurt Aland ed., 1967).

171. The opening phase of the Reformation is the subject of countless works. One recent and important account is CARTER LINDBERG, *THE EUROPEAN REFORMATIONS* 56-90 (1996).

172. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 61.

173. *See* R.J. KNECHT, *THE FRENCH WARS OF RELIGION, 1559-98* (2d ed. 1996). These

Catholic Spain engaged in intermittent warfare in the late sixteenth and early seventeenth centuries,¹⁷⁴ and most of Central Europe, including the majority of present-day Germany, was laid to waste from 1618 to 1648 during the Thirty Years' War.¹⁷⁵ Indeed, it was only with the Treaty of Westphalia in 1648 that the European states agreed to refrain from interfering in the religious affairs of other states.¹⁷⁶ The European states also continued to repress dissenters within their boundaries during the sixteenth and early seventeenth centuries.¹⁷⁷ Focusing on England, Noonan gives the example of the succession of Catholic and Protestant martyrs executed during the reigns, respectively, of King Henry VIII and Queen Mary.¹⁷⁸

wars were brought to a close by the Edict of Nantes, which "gave the Huguenots [dissenting Protestants] a large measure of toleration . . . [but] fell far short of what many Protestants would have liked" given the restrictions on worship it continued to impose. *Id.* at 80-81.

174. Cf. WILLIAM BROWN PATTERSON, *KING JAMES VI AND I AND THE REUNION OF CHRISTENDOM* (1997).

175. See Robert Bireley, *The Thirty Years' War as Germany's Religious War*, in *KRIEG UND POLITIK 1618-1648: EUROPÄISCHE PROBLEME UND PERSPEKTIVEN* 85 (Konrad Repgen ed., 1988) (discussing the religious character of the Thirty Years' War). Cf., GEOFFREY PARKER, *EUROPE IN CRISIS 1598-1648* (1980); *THE THIRTY YEARS' WAR* (Geoffrey Parker ed., 1984) (including two important general treatments of the conflict).

176. Leo Gross observes: "The Peace of Westphalia consecrated the principle of [religious] toleration by establishing the equality between Protestant and Catholic states and by providing some safeguards for religious minorities. To be sure, the principle of liberty of conscience was applied only incompletely and without reciprocity." Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 21-22 (1948).

177. Several Catholic countries established or enhanced state-run inquisitorial apparatus in order to investigate the new "heretical" Protestant beliefs. For example, the Netherlands vigorously prosecuted Lutherans and Anabaptists in the first half of the sixteenth century; the Spanish inquisition, originally established in 1478, inquired into the loyalties of converted Jews; a Portuguese inquisition based on the Spanish model was established in the late 1530s; and the Roman inquisition, supervised by a standing committee of six cardinals, was charged with the responsibility of uprooting heresy in the papal states. See E. William Monter, *Inquisition*, 2 OXFORD ENCYCLOPEDIA OF THE REFORMATION 317-319 (Hans Hillerbrand ed., 1996). Protestants also persecuted dissenters. In a famous case, Michael Servetus, an anti-trinitarian polemicist, was executed in Calvinist Geneva in 1553. See Jerome Friedman, *Servetus, Michael*, 4 OXFORD ENCYCLOPEDIA OF THE REFORMATION 48-49. England saw the forcible suppression of Catholics. Other Catholic martyrs include St. Thomas More, St. John Fisher (1535) and St. Edmund Campion (1581).

178. Noonan quotes from a letter Thomas More wrote to his daughter Margaret, about April 17, 1534, to explain to her why he had refused to sign the oath Henry VIII required his subjects to swear to signify their acceptance of the Act of Submission which declared invalid Henry's marriage with Catherine of Aragon and promising obedience to the offspring of Henry and his new bride, Anne Boleyn. Failure to take the oath amounted to "misprision of high treason" and carried with it the death penalty. Thomas More declared to his daughter: "[A]s for myself in good faith my conscience so moved me in the matter that though I would not refuse to swear to the succession, yet unto the oath that there was offered me I could not swear without the risking of my soul to perpetual damnation." NOONAN, *THE BELIEVER AND THE POWERS THAT*

But while the Reformation did not embody within itself the principle of religious tolerance, Noonan finds three factors related to the events of the Reformation responsible for its gradual development: smaller religious sects, such as the Mennonites, found it strategically advantageous to assert a strict separation of worldly and spiritual authorities;¹⁷⁹ the religious wars had been fought largely to stalemates, causing the authorities to view the stalemates as "reasonable";¹⁸⁰ and the spread of the belief that the Christian life itself demanded the "rejection of unspiritual means for the protection of the spiritual kingdom."¹⁸¹

Noonan thus explores the various arguments made on behalf of religious tolerance. Menno Simons is presented as defending strict discipline within the community of believers, but as simultaneously asserting that worldly authorities were entirely disabled from using force to support religious orthodoxy.¹⁸² Baruch Spinoza, for his part, is seen to have defended an essentially non-religious doctrine of religious toleration.¹⁸³ Secularizing the concept of natural rights,¹⁸⁴ Spinoza argued that "no one can transfer to another his own natural faculty of reasoning freely and judging about everything whatsoever; nor can he be compelled to do so."¹⁸⁵ Further, if the individual may not cede his

ARE, *supra* note 29, at 54-55. At trial, More defended himself with "the commanding argument that human law could not judge what Thomas Aquinas called '*interioribus motibus* and Christopher St. German described as 'inward things.'" See PETER ACKROYD, *THE LIFE OF THOMAS MORE* 400 (1998). More was executed in 1535. Noonan follows his account of Thomas More with an account of the executions of Nicholas Ridley and Hugh Latimer. In 1553, Mary, daughter of Henry and his first wife, succeeded to the throne and attempted to return England to the Catholic fold by forcibly suppressing Protestants, thereby proving that "Catholics had not yet learned anything from More's martyrdom." NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 57. Noonan's excerpt is taken from John Foxe's *Book of Martyrs*, and demonstrates the bravery with which Ridley and Latimer approached their executions.

179. See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 61.

180. *Id.*

181. *Id.*

182. Menno's reply to Gellius Faber states: "I would say... if the magistracy rightly understood Christ and His kingdom, they would in my opinion rather choose death than to meddle with their worldly power and sword in spiritual matters which are reserved not to the judgment of man but to the judgment of the great and Almighty God alone." See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 63.

183. See *id.* at 71-75.

184. On the twelfth and thirteenth century origins of natural rights in canon law, see BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW 1150-1626* (1997); Charles J. Reid, Jr., *Thirteenth-Century Canon Law and Rights: The Word ius and Its Range of Subjective Meanings*, 30 *STUDIA CANONICA* 295 (1996); and Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 *B.C. L. REV.* 37 (1991).

185. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 72.

judgment to the state, neither does the state possess the absolute capacity to oppress its citizens.¹⁸⁶ Indeed, Spinoza asserts, the "ultimate end" of the commonwealth is "liberty."¹⁸⁷

Noonan, however, focuses his analysis on the contributions of Roger Williams and John Locke. A strict Puritan "separatist" who rejected the ties the Massachusetts colonial establishment continued to retain with the Church of England, Williams had continual difficulty with political and religious establishments both in the New and the Old Worlds.¹⁸⁸ He eventually established the colony of Rhode Island as a refuge for separatists like himself and for members of other religious denominations, including Jews.¹⁸⁹ Williams's writings on the separation of church and state have been frequently used and misused by the judiciary, and also seen by American legal scholars as a foundation stone of contemporary church-state law.¹⁹⁰

Noonan particularly emphasizes the religious foundation of Williams's thinking on religious liberty.¹⁹¹ Williams insisted on a sharp line between church and state; indeed, he sought a "wall of separation between the garden of the church and wilderness of this world."¹⁹² The wall was intended to protect the true church from the corruption of the

186. *See Id.* at 73.

187. *Id.* On the freedom to believe as one wishes, Spinoza wrote:

If, therefore, no one can yield his freedom of judging and feeling what he wishes and if everyone by the greatest law of nature is master of his own thoughts, it follows that never in a commonwealth, except with unhappy results, can it be attempted to have human beings, who think diverse and contrary things, speak only what is prescribed for them by the Supreme Powers.

Id.

188. *See* EDMUND S. MORGAN & ROGER WILLIAMS: THE CHURCH AND THE STATE 3-27 (1967).

189. Noonan notes regarding Jews in Rhode Island that "[t]here were traces of Jewish life in the seventeenth century, and by 1763 there was a synagogue and a Jewish community equal to about 1 percent of the population of this town of 6,000. . . . But in Rhode Island, Jews were denied both office and the vote." NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 98.

190. A summary of judicial and scholarly treatments of Roger Williams may be found in TIMOTHY HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 1-15 (1998).

191. Noonan states: "On the foundation of the teaching of Jesus Christ, Williams proclaimed a gospel of liberty of religious belief." NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 67.

192. NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 65 (quoting Letter of Roger Williams to John Cotton).

outside world.¹⁹³ But the wall's breaking, Williams continued, made the garden "a wilderness as at this day."¹⁹⁴ The civil and spiritual authorities have fundamentally different competencies, and where they are intermingled, Christian believers are put at great risk.¹⁹⁵

In his *Bloudy Tenent of Persecution*, Williams acknowledged that his commitment to religious freedom could have radical implications for the relationship between the state and the believer, but asserted that God Himself requires liberty:¹⁹⁶

[I]t is the will and command of God, that (since the coming of his son the Lord Jesus) a permission of the most paganish, Jewish, Turkish, or antichristian consciences and worships be granted to all men in all nations and countries: and they are to be fought against with that sword which is only (in soul matters) able to conquer, to wit, the sword of God's spirit, the word of God.¹⁹⁷

Noonan gives further heed to the attention Williams paid to the individual conscience by excerpting a letter to John Endecott, the Governor of Massachusetts, in which Williams declared:

I speak of Conscience, a persuasion fixed in the mind and heart of a man, which enforceth him to judge . . . and to do so and so, with respect to God, His worship, etc. . . . This conscience is found in all mankind, more or less, in Jews, Turks, Papists, Protestants, Pagans, etc. . . .¹⁹⁸

193. See *id.* at 66–67.

194. *Id.* at 66.

195. See *id.* at 67.

196. "[A]ll civil states with their officers of justice in their respective constitutions and administrations are proved essentially civil, and therefore not judges, governors, or defenders of the spiritual or Christian state and worship." (quoted in NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 67.)

197. *Id.* Williams distinguished between two types of laws "respecting religion," those that "concern the acts of worship and the worship itself, the ministers of it, their fitness or unfitness, to be suppressed or established; . . . for such laws we find no footing in the New Testament of Jesus Christ." *Id.* at 69. The second category are those that "merely concern the civil state," such as the granting of "immunity and freedom from tax and toll [which] may be granted to the people of such or such a religion, as the magistrate pleaseth." *Id.*

198. *Id.* at 70. Conscience, however, was not limitless: Williams acknowledged that there might be no room allowed for conscientious objection to military service where the survival of the commonwealth was at stake. See *id.* at 71.

Freedom of conscience, subordinated by Thomas Aquinas to the need to enforce orthodoxy and prosecute heresy, now became the cornerstone of a different vision of Christianity—one that sought to protect the true believers from aggressive state power.

Noonan sees John Locke — like Roger Williams — as a religious thinker whose theological investigations colored all he did.¹⁹⁹ In his proof of God,²⁰⁰ his defense of the freedom of the will,²⁰¹ his endorsement of natural law,²⁰² and many other matters, Locke advanced traditional religious, often scholastic, arguments. Locke is seen today as a secular political philosopher, Noonan asserts, "only because modern interests have been less theological than his."²⁰³

Locke, as Noonan presents him, sought to ground his arguments less on the inviolable sanctity of conscience than on a theory of the limited competencies of the ecclesiastical and civil powers. The church, as much as the state, in Locke's estimation, was a voluntary joining of persons for certain, limited ends.²⁰⁴ He is quite prepared to argue scripture with

199. Noonan observes:

[Locke] was a master theologian with his own view of revelation and its exposition, with his own very clear, very moderate, very persuasive vision of the essentials of Christianity free from the dogma and the controversies, the elaborations, and, as he thought, the quibbles that had marred that exposition up to his time.

NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 76.

200. See Noonan, *Protestant Philosophy of John Locke*, *supra* note 26, at 95–7.

201. See *id.* at 100–01.

202. See *id.* at 101–02.

203. NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 76.

204. In his definition of "church," Locke states:

Let us now consider what a church is. A church, then, I take to be a voluntary society of men, joining themselves of their own accord in order to the public worshipping of God in such manner as they judge acceptable to Him, and effectual to the salvation of their souls. I say it is a free and voluntary society. Nobody is born a member of any church

NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 81 (quoting Locke, *A Letter Concerning Toleration*). The problem with this definition is simply that many churches do not consider themselves to be voluntary societies. This was as true in Locke's day as it is in ours. Thus Jews see themselves as "the chosen people, to whom God revealed the Jewish tradition on Mount Sinai." See Michael Broyde, *Proselytizing and Jewish Law: Inreach, Outreach, and the Jewish Tradition* 7 (typescript). The Jewish tradition avoids proselytism and discourages conversion. See *id.* at 1–2. Furthermore, "[t]here is no right of exit in the Jewish tradition." *Id.* at 2. The 1983 Code of Canon Law, binding upon Latin-rite Catholics, also greatly restricts the capacity to leave the Church. While the law recognizes that individuals might fall away from their

those who disagree.²⁰⁵

Locke's purpose in writing "is to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other."²⁰⁶ "Toleration," he begins, "[is] the chief characteristic mark of the true Church."²⁰⁷ Locke furthermore sees the church as having only a limited purpose or "end," which is "the public worship of God and, by means thereof, the acquisition of eternal life."²⁰⁸ He continues, "[a]ll discipline ought, therefore, to tend to that end, and all ecclesiastical laws to be thereunto confined."²⁰⁹ Missing entirely is any notion of a church as a community of believers seeking to transform the world.

The civil power, for its part, also is seen to possess only limited powers and purposes: "The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests. Civil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like."²¹⁰ While the civil magistrate is obliged to "the impartial execution of equal laws,"²¹¹ he can never

belief, "it retains the tradition in law that those who have come into full communion with the Catholic Church are never able to withdraw from the Church's law, even if they do cease to be in full communion." CODE OF CANON LAW: A TEXT AND COMMENTARY 129 (James A. Coriden et al. eds., 1985).

205. This is evident, for instance, in Locke's rejection of those who argue that apostolic succession and the office of bishop are necessary features of the true church:

Some, perhaps, may object that no such society can be said to be a true church unless it have in it a bishop or presbyter, with ruling authority derived from the very apostles, and continued down to the present times by an uninterrupted succession.

To these I answer: In the first place, let them show me the edict by which Christ has imposed that law upon the Church. And let not any man think me impertinent, if in a thing of this consequence I require that the terms of that edict be very express and positive; for the promise He has made us, that 'whosoever two or three are gathered together' in his name, He will be in the midst of them (Mt. 18:20) seems to imply the contrary.

NOONAN, THE BELIEVER AND THE POWERS THAT ARE, *supra* note 29, at 82 (quoting Locke, *A Letter Concerning Toleration*).

206. *Id.* at 80.

207. *Id.* at 78.

208. *Id.* at 83.

209. *Id.*

210. *Id.* at 80.

211. *Id.*

exercise "the care of souls," even if the people attempt to consent to it.²¹² This is because God has conferred on no one "such authority . . . over another as to compel anyone to his religion."²¹³

Taking a narrow view of the competence of the civil magistrate, Locke is unwilling to concede that one might conscientiously disobey a lawfully constituted command.²¹⁴ Locke is also unwilling to tolerate certain types of religious believers in his commonwealth. Unlike Williams, who expressed a willingness to permit both "papists" and "Turks," Locke is unwilling to allow either.²¹⁵ Finally, Locke is entirely unwilling to concede any room to non-believers.²¹⁶ In identifying beliefs that were not to be tolerated, Locke effectively undercuts his claim that the civil magistrate is never to exercise compulsion over matters of conscience.

E. Observations

In his historical introduction to the relationship between the believer

212. *Id.*

213. *Id.*

214. But some may ask:

What if the magistrate should enjoin anything by his authority that appear unlawful to the conscience of a private person? I answer that, if government be faithfully administered and the counsels of the magistrates be indeed directed to the public good, this will seldom happen. But if, perhaps, it do so fall out, I say, that such a private person is to abstain from the action that he judges unlawful, and he is to undergo the punishment which it is not unlawful for him to bear. For the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation.

Id. at 88.

215. Locke indirectly challenges the status of Catholics, fearing that they intend "to seize the Government and possess themselves of the estates and fortunes of their fellow subjects;" *Id.* at 89. He also asserts that "Mahometans," who are bound in "blind obedience to the Mufti of Constantinople . . . [and] the Ottoman Emperor" are not to be tolerated because of allegiance to a foreign prince. *Id.*

216.

Lastly, those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all; besides also, those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration.

See id. at 89-90. Locke fails to consider that while the atheist lacks "religion," he or she still has conscience and might feel himself conscientiously compelled to his atheistic stance. *See id.*

and governmental power, Noonan explores with an artist's attention to detail the many dimensions of this relationship. He locates at the very beginning of the tradition the Ten Commandments and the Hebrew and Christian scriptures—the building blocks of a theology of religious liberty. In passages like those drawn from *Isaiah* and *Maccabees*, one sees the claims of a higher law being advanced against state authority. But conscience need not always be in opposition to state power. In his depiction of St. Augustine, Noonan considers the advice the leading Christian theologian of his time dispensed to Christian office-holders on proper behavior in office.

However, St. Augustine was also the first to offer a systematically argued polemic in favor of the persecution of religious dissenters. The justifications Augustine put forward took deep root and led to the excesses seen in the trial of Joan of Arc. Only after the fratricide associated with the Reformation had run its course did religious believers develop a theology that tolerated groups of believers with views different from their own. Among those believers, Williams and Locke were particularly important for American developments because of their influence on American thinkers of the eighteenth century. Noonan emphasizes that both Williams and Locke grounded their doctrines of toleration in theology: Williams understood "separateness" as essential to the welfare of the true Church, while Locke used Scripture and theological disputation as means by which he fashioned a doctrine of limited toleration.

Williams and Locke, however, still belonged to a world in which religious persecution thrived in England and in her transatlantic colonies. Much more would have to happen to change the legal regime by which the interests of established churches were favored and dissenters punished.

III. THE CREATION OF THE NEW WORLD

Conscience, Noonan relates, could be as badly violated in the New World as in the Old. In seventeenth century colonial America, believers were put to death for daring to carry out the demands of their consciences. There was nothing inevitable about the eventual recognition of religious liberty. Indeed, Noonan demonstrates, the protection for free exercise of religion found in the Bill of Rights is largely the result of the insight of one man, James Madison, who drew upon a background shaped by theological and historical reflection and the experience of having witnessed first-hand the persecution of

religious dissenters. Madison's insight, preserved in the First Amendment, would serve in the first years of the American Republic to soften religious conflict and to set a standard by which official action infringing the believer's conscience, whether at federal or state level, could be criticized.

A. Continued Persecution

While one sees in the late seventeenth century the emergence of theorists willing to challenge the commitment of state power to the enforcement of religious orthodoxy, these writers by no means represented the mainstream of thought. Baruch Spinoza was excommunicated by the Dutch synagogue to which he belonged and had his work condemned by the Synod of Delft.²¹⁷ Williams was in continual trouble with authorities on both sides of the Atlantic.²¹⁸ Even Locke felt compelled to anonymously publish *An Essay on Toleration*, to which he never publicly acknowledged authorship.²¹⁹

To be sure, the mainstream continued to belong to the advocates of persecution. This was as true in Europe as in colonial America. The Massachusetts Bay Colony, whose Puritan founders viewed it as "a city upon a Hill" set up as an example to the world,²²⁰ took steps early in its history to ensure religious orthodoxy.²²¹ The Puritan establishment, being Congregationalist and therefore lacking a strong central hierarchy, found it necessary to rely upon the civil magistracy "to maintain and promote uniform religious practice."²²² Leading New England thinkers developed a theology to justify such close cooperation.

In 1632, a "devout, grace-oriented man of God,"²²³ the Cambridge-educated Puritan pastor John Cotton (1584-1652), was forced to flee to

217. See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 71-72.

218. A precocious youth who enjoyed the patronage of Sir Edward Coke, Williams experienced recurrent trouble with authorities during much of his life. These are detailed at many points in EDWIN S. GAUSTAD, *LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA* (1991).

219. See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 77.

220. *Id.* at 64 (quoting Sermon of John Winthrop, 1630).

221. "New England Puritans sought liberty to create a holy commonwealth, and those who partook of their vision could be partakers of the same liberty. But the only freedom guaranteed by the Puritans to religious dissenters was, as Nathaniel Ward put it succinctly, the freedom 'to keep away from us.'" See HALL, *SEPARATING CHURCH AND STATE*, *supra* note 190, at 55-56 (quoting NATHANIEL WARD, *THE SIMPLE COBLER OF AGGAWAM IN AMERICA*).

222. THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 6 (1986).

223. EVERETT EMERSON, *JOHN COTTON* 4 (rev. ed. 1990).

the Massachusetts Bay Colony to escape persecution by King Charles I and Archbishop William Laud.²²⁴ Quickly establishing himself as a preeminent religious authority in New England, Cotton participated in Williams's banishment²²⁵ and was himself a target of Williams's polemic, *The Bloudy Tenent*.²²⁶ He answered Williams most comprehensively in *The Bloudy Tenent Washed, and Made White in the Bloud of the Lambe*.²²⁷

Cotton distinguished between an "inward peace of the Church [which is] spiritual and heavenly" and an "outward peace" which princes and magistrates would do well to enforce.²²⁸ Indeed, Cotton asserted, "[i]t is a matter of just displeasure to God, and sad greife of heart to the Church, when Civil States look at the estate of the Church, as of little, or no concernment to themselves."²²⁹ Cotton conceded that it was improper to punish one who had "an erroneous and blinde conscience,"²³⁰ but taught that the appropriate remedy was "once or twice Admonition." If the dissenter still persisted "in the error of his way," he "[was] not persecuted for cause of conscience, but for sinning against his Conscience."²³¹ While Cotton believed that ecclesiastical sanction was sufficient where heretics were concerned,²³² he endorsed the imposition of severe civil sanctions against "Apostate Seducers, and Idolaters, and Blasphemers."²³³

224. See *id.* at 1–4; See also IRWIN H. POLISHOOK, ROGER WILLIAMS, JOHN COTTON AND RELIGIOUS FREEDOM: A CONTROVERSY IN OLD AND NEW ENGLAND 14-15 (1967).

225. See EMERSON, *supra* note 223, at 104–05.

226. See PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 74-101 (1953).

227. See JOHN COTTON, *THE BLOODY TENENT WASHED, AND MADE WHITE IN THE BLOOD OF THE LAMB* (reprint 1972) (1647).

228. *Id.* at 13.

229. *Id.* at 12.

230. *Id.* at 26.

231. *Id.* at 26-27.

232. See *id.* at 27.

233. *Id.* at 138. The "due punishment" of these three categories of offenders, according to Cotton, had the following beneficial effects:

First, it putteth away evill from the people, and cutteth off a Gangrene, which would spread to further ungodlinesse Second, it driveth away Wolves from worrying, and scattering the Sheep of Christ. For false Teachers be Wolves Thirdly, such Executions upon such evill doers causeth all the Country to heare and feare, and doe no more such wickednesse Fourthly, the punishments executed upon false Prophets, and seducing Teachers, doe bring downe showers of Gods blessings upon the civil State Fifthly, it is an honour to Gods Justice, that such Judgements are executed

It is in this context that Noonan resumes his narrative. The Society of Friends, or Quakers, "born at the tag end of that great seventeenth century religious revival of which Puritanism itself had been the mainstay, created a furious turbulence on both sides of the Atlantic."²³⁴ Radically challenging the religious establishment of its day,²³⁵ Quakers began to infiltrate New England in the mid-1650s.²³⁶

The response of the leaders of the Massachusetts Bay Colony was to enact a series of anti-Quaker laws:

Alien Quakers were to be apprehended, jailed, whipped, and deported. Ship captains bringing in Quakers were to be fined 100 pounds. . . . Anyone harboring a Quaker was also to be fined and imprisoned. The importation of Quaker literature became criminal. By 1658 it was also criminal to propose Quaker doctrine at a church meeting or to approve of any known Quaker or the Quaker's tenets. The penalties were a fine and a whipping. Security had to be given not to repeat the offense. If security were not given, the offender was to be banished, any return to the colony subject to the penalties provided for the return of deported stranger Quakers.

Return was a particular problem. In 1657 the General Court prescribed for banished male Quakers who came back that they should lose one ear, a second time the other ear; females were to be severely whipped. On a third return, they should have their tongues bored through with a hot iron. A year later, on October 19, 1658, the ultimate penalty, death by hanging, was provided for banished Quakers who returned.²³⁷

Id.

234. CURRY, *supra* note 222, at 21.

235. Curry observes:

Quakers not only provoked and heroically endured persecution, but actively sought it. By obstreperous or shocking behavior, such as interrupting church services to testify against false worship or going naked to symbolize the condition of their opponents' spiritual state, they drove the authorities, especially in America, to paroxysms of rage that begot savage punishment.

See *id.* at 21; see generally Carla Gardina Pestana, *The City Upon a Hill Under Siege: The Puritan Perception of the Quaker Threat to Massachusetts Bay, 1656-61*, 56 NEW ENG. Q. 323 (1983).

236. See Pestana, *supra* note 235, at 323-25.

237. See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 51.

In the years 1656 to 1661, at least forty Quakers from England, Rhode Island, and Barbados "filtered into the Bay Colony to witness against Congregationalist New England."²³⁸ The Puritan establishment responded forcefully. "The milder penalties such as flogging were inflicted on men and women alike."²³⁹ Two children were sold into bondage "when their Quaker parents were unable to pay a fine."²⁴⁰ "By 1661, two Englishmen, one woman from Rhode Island, and a man from Barbados had been hanged, and Boston jail was full of Quakers."²⁴¹ Even though the English government ordered a halt to the executions in 1661,²⁴² the imposition of lesser sanctions on Quakers continued for another twenty years, and the death penalty was not actually repealed by the Massachusetts legislature until 1681.²⁴³ This persecution, Noonan asserts, was "successful": "Quakers came to avoid Massachusetts; Quaker societies did not flourish in the commonwealth."²⁴⁴

The persecution of Quakers, Noonan emphasizes, is an important part of the story of religious liberty: it shows "[t]hat neither the soil of America, nor the experience of having suffered persecution, nor explicit belief in freedom of conscience were sufficient in themselves to prevent men [from] carrying out persecution on account of religion."²⁴⁵ While other colonies did not engage in the violent repression of religious dissent, no colony ever permitted "complete religious freedom."²⁴⁶ The steps that led to the adoption of the First Amendment's protection of religious liberty resulted not from a logically necessary unfolding of events, but from the interplay of singular insight and experience with historical opportunity.

B. James Madison's Theology of Religious Liberty and Its Constitutional Significance

Architect of the First Amendment, James Madison was born into a religious family and baptized into the Christian faith in March 1751.²⁴⁷

238. Pestana, *supra* note 235, at 323.

239. NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 51.

240. *Id.* at 52.

241. Pestana, *supra* note 235, at 325.

242. See CURRY, *supra* note 222, at 22.

243. See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 53.

244. *Id.* at 54.

245. *Id.*

246. *Id.* at 55.

247. See RALPH KETCHAM: JAMES MADISON: A BIOGRAPHY 9 (1971).

His father, James Madison, Sr., was a prominent tobacco planter, slave holder, and vestryman in the Anglican Church.²⁴⁸ In June 1762, at the age of eleven, Madison was enrolled in the school run by Donald Robertson.²⁴⁹ There he learned Latin and was exposed to works of Christian piety like Thomas à Kempis's *Imitation of Christ*.²⁵⁰ Beginning at the age of sixteen, he was tutored for two years by Reverend Thomas Martin, a member of the Anglican Church and a recent graduate of the College of New Jersey who lived in the Madison household.²⁵¹

In 1769, Madison enrolled in the College of New Jersey,²⁵² which would later become Princeton University, but was then a Presbyterian college dedicated both to the training of Christian ministers for the New World²⁵³ and to the promotion of a Presbyterianism that could be "a vital, personally felt force in the lives . . . of laymen."²⁵⁴ Madison was introduced to the College's theology,²⁵⁵ which drew deeply from the English dissenting tradition²⁵⁶ and stressed the importance of "free enquiry" and "private judgment" in arriving at religious truth.²⁵⁷ Following graduation, in the fall of 1771, Madison stayed on at

248. See IRVING BRANT, JAMES MADISON: THE VIRGINIA REVOLUTIONIST 51-52 (1941). Brant describes the duties of a vestryman:

The church at that time was part of the established government, and the vestry served as an ecclesiastical police court and tax-levying body. It was part of the official duty of the elder Madison and other vestrymen, through the churchwardens, to See that nobody save physicians rode a horse on a Sunday except to church, to punish the use of profane language, to arrest the rector himself if he drank too much on court day (as happened occasionally in some parishes) and to put Baptists in jail fore preaching without a license. The last apparently was left by Madison to others.

Id. at 51-52.

249. See KETCHAM, *supra* note 247, at 19-20.

250. See NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 64.

251. See KETCHAM, *supra* note 247, at 21.

252. See *id.* at 25-28. Madison's decision itself must have been rooted in religious belief, given his father's status as vestryman in the Church of England and the prominence of the College of William and Mary in the life of Virginia. See BRANT, *supra* note 248, at 67-68.

253. See *id.* at 31.

254. *Id.* at 28.

255. Ketcham records that "religious instruction was incessant, especially on Sunday." *Id.* at 30. Elsewhere, Ketcham adds: "The other foundation stone [in addition to training in the Greek and Latin classics] of learning in Madison's day, and of his education, was the Christian tradition. Down through his graduation from college every one of Madison's teachers . . . was either a clergyman or a devoutly orthodox Christian layman." *Id.* at 46.

256. See *id.* at 28-29.

257. *Id.* at 31 (quoting SAMUEL BLAIR, AN ACCOUNT OF THE COLLEGE OF NEW JERSEY (1764)).

Princeton some months more, studying the Hebrew language with John Witherspoon,²⁵⁸ president of the College and a preeminent Christian thinker.²⁵⁹ Madison returned home to the Virginia Piedmont region of his family in early 1772 to recuperate from illness and to ponder the choice of careers. During this time he also engaged in "serious study of the Scriptures and theology."²⁶⁰ Although Madison ultimately spent his life in public affairs, a leading biographer believes these early religious experiences shaped his thinking to the end of his days.²⁶¹

Noonan stresses the importance of this background in explaining an exchange of correspondence between Madison and his closest friend from the College of New Jersey, William Bradford.²⁶² Bradford, who was trying to decide upon a career path, wrote to Madison to seek his advice.²⁶³ However, Bradford had admonished Madison that whatever advice he gave, he must not recommend the ministry.²⁶⁴ Disappointed that the Church would thereby lose "a fine genius and persuasive Orator," Madison advised his friend that whatever his choice of careers, he should "always keep the Ministry obliquely in view."²⁶⁵ In this way,

258. See *id.* at 51.

259. Witherspoon's biographer notes that "Witherspoon had been selected to preside over a college which, though not a seminary, would train Presbyterian ministers. Neither a speculative man nor one given to playing with ideas, he saw his commission as turning students directly to the truth as Presbyterians of the time saw it." MARTHA LOU LEMMON STOHLMAN, JOHN WITHERSPOON: PARSON, POLITICIAN, PATRIOT 75 (1989). In the area of church-state relations, Witherspoon drafted a *Form of Government* for the American Presbyterian Church that declared that "the rights of private judgment, in all matters that respect religion, [is] universal and inalienable," and second, that the "civil power" should not assist "any religious constitution . . . farther than may be necessary for protection and security." James Hastings Nichols, *John Witherspoon on Church and State*, 42 J. PRESBYTERIAN HIST. 166, 169 (1964) (citation omitted). A Madison biographer notes that throughout the 1770s and 1780s "[t]he personal relationship between Madison and Witherspoon was unusually strong." Ralph L. Ketcham, *James Madison and Religion—A New Hypothesis*, 38 J. PRESBYTERIAN HIST. SOC. 65, 71 (1960). Ketcham also notes that Witherspoon and Madison served together in the Confederation Congresses of 1781 and 1782 and that Witherspoon, on behalf of Princeton University, spoke warmly of Madison in conferring on him an honorary degree following the Constitutional Convention. See *id.*

260. Ketcham, *James Madison and Religion*, *supra* note 259, at 73.

261. Ketcham stresses that Madison was deeply influenced by the Scottish "common-sense" philosophy of Witherspoon, which "appealed to the 'common sense' of mankind for 'proof that there was a God in Heaven and a moral order on earth.'" *Id.* at 70. Ketcham goes on to trace Madison's commitment to religious freedom to his religiously-grounded insight that because human reason was finite freedom had to prevail in the area of religious inquiry. See *id.* at 76.

262. See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 65–66.

263. See Letter of James Madison to William Bradford, September 25, 1773, in 1 PAPERS OF JAMES MADISON 95, 96 (William T. Hutchinson & William M.E. Rachal eds., 1962).

264. See *id.*

265. *Id.* at 66.

Bradford might give effective witness to Christ:

I have sometimes thought there could not be a stronger testimony in favor of Religion or against temporal Enjoyments even the most rational and manly than for men who occupy the most honorable and gainful departments and are rising in reputation and wealth, publicly to declare their unsatisfactoriness by becoming fervent Advocates in the cause of Christ and I wish you may give in your Evidence that way. Such Instances have seldom occurred, therefore they would be more striking and would instead of a Cloud of Witnesses.²⁶⁶

Thus, at a turning point in his life, as he prepared himself for a career in public service, Madison advised his good friend from college to be an effective witness to Christ in his own career. This advice, Noonan stresses, would also color Madison's career, especially with respect to the free exercise principle of the First Amendment.²⁶⁷

Madison's commitment to religious liberty was, however, shaped by more than his early education and desire to witness to Christ in public affairs. It also was molded by the revulsion he felt at observing firsthand the misery of persecution.²⁶⁸ The Separate Baptists, religious dissenters who maintained an austere way of life apart from the established Anglican Church of Virginia, had come to be seen in the late 1760s and early 1770s as a threat to the social order.²⁶⁹ At about the

266. *Id.* Noonan explains the reference to the "Cloud of Witnesses":

The closing allusion was to the Epistle to the Hebrews 12:1-2: "With a cloud of witnesses to faith around us, we must throw off every encumbrance, every sin to which we cling and run with resolution the race for which we are entered, our eyes fixed on Jesus." To follow Jesus in public life was to keep the ministry obliquely in view.

See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 66.

267. See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 67. In an important study of the religious context of the drafting and ratification of the First Amendment, Harold Berman called attention to the religious origins of Madison's commitment to religious liberty: "Madison derived the principle of religious liberty not primarily from its political utility in a pluralist society but also, and more immediately, from God's own will." Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 785 (1986).

268. NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1 at 67-8.

269. On the Separate Baptists and the threat they posed, see generally Sandra Rennie, *Virginia's Baptist Persecution, 1765-1778*, 12 J. RELIGIOUS HIST. 48 (1982); Rhys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765*

same time, the established church, with the support of civil authorities, began a campaign that featured elements of class conflict and religious oppression.²⁷⁰ Laws requiring preachers to obtain licenses and making attendance at Anglican services mandatory were enforced in such a way as to make the Baptists outlaws.²⁷¹

A particularly striking event occurred in 1771 when an Anglican clergyman stopped a preaching Baptist by shoving a horsewhip in his throat, marching him into a field, and flogging him.²⁷² This act prompted a large outpouring of support for the Baptists. A crowd of 4,000 to 5,000 Baptists gathered in Orange County—James Madison's home county—to protest this outrage and show their support for the free preaching of the Gospel by declaring that their license came from "King Jesus," not from any temporal authority.²⁷³ Madison, Noonan surmises, "could not but have known of the flogging and of the local reaction."²⁷⁴

to 1775, 31 WM & MARY Q. 345 (3d series, 1974).

270. See Rennie, *supra* note 269, at 51–59.

271. See Rhys Isaac, "The Rage of Malice of Old Serpent Devil": The Dissenters and the Making and Remaking of the Virginia Statute for Religious Freedom, in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 139, 140–41 (Merrill D. Peterson & Robert C. Vaughan eds., 1988); cf. Rennie, *supra* note 269, at 50–51.

272. See Isaac, *Rage of Malice*, *supra* note 271, at 141–42.

273. See *id.* at 142. This gathering was "[p]robably . . . the biggest mass gathering ever assembled in Virginia to that date." *Id.*

274. NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 67. Madison wrote to Bradford to discuss in general terms religious persecution in Virginia:

I have indeed as good an Atmosphere at home as the Climate will allow but have nothing to brag of as to the State and Liberty of my Country. Poverty and Luxury prevail among all sort: Pride ignorance and Knavery among the Priesthood and Vice and Wickedness among the Laity. This is bad enough. But it is not the worst I have to tell you. That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their own Quota of Imps for such business. This vexes me the most of any thing whatever. There are at this [time] in the adjacent County not less than 5 or 6 well meaning men in close Gaol for publishing their religious Sentiments which in the main are very orthodox. I have neither patience to hear talk or think of any thing relative to this matter, for I have squabbled and scolded abused and ridiculed so long about it, [to so lit]tle purpose that I am without common patience. So I [leave you] to pity me and pray for Liberty of Conscience [to revive among us].

1 PAPERS OF JAMES MADISON, *supra* note 263, at 106. Cf. NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1 at 68. Analyzing this letter, Noonan writes:

Madison is as serious as the Separate Baptists in seeing the old serpent's malice. What is sacred, whose liberty must be safeguarded, is the faculty by which right is

Taking these ideas and events as a foundation for an understanding of Madison's conception of religious liberty, Noonan analyzes Madison's contributions to constitutional history. He closely considers three events: (1) Madison's participation in the drafting of the Virginia Declaration of Rights; (2) his drafting of the *Memorial and Remonstrance* of 1785; and (3) his leading role in the drafting of the First Amendment during his term of office in the First Congress. Throughout, Noonan focuses on the impact Madison's theology had on the shaping of constitutional law.

In the spring of 1776, after a year of hard fighting between the forces of colonial rebellion and British troops, the separate states had begun to frame constitutions for themselves. Madison was one of two representatives chosen by the freeholders of Orange County to draft a constitution for the new Virginia government.²⁷⁵ After reporting to the Convention, he was assigned to the committee charged with preparing a Declaration of Rights for the new commonwealth, where he served with such luminaries as Patrick Henry and George Mason.²⁷⁶

Mason prepared a draft on religious tolerance that retained Anglicanism as the established Church, but also acknowledged "that all Men shou'd enjoy the fullest Toleration in the Exercise of Religion"²⁷⁷ Madison rewrote Mason's draft, substituting the phrase "full and free exercise of [religion]" for "fullest Toleration," stressing that the

discerned from wrong, and by which God speaks to each—the conscience. . . . Madison ends with a prayer or request for a prayer. Against the background of his piety, his words are not to be read flippantly or as an expression of futility.

Id.

275. See KETCHAM, *supra* note 247, at 68. Virginia's convention, like those of other states, were summoned in response to the Second Continental Congress's call to the colonies to "draft constitutions that would 'establish some form of government' independent of the Crown." See Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J. L. & HUMANITIES 311, 325 (1992).

276. See KETCHAM, *supra* note 247, at 71.

277. Mason's full statement read:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate unless, under colour of religion, any man disturb the peace, the happiness, or safety of society. And that it is the mutual duty of all to practice Christian forbearance, love and charity, towards each other.

See 1 PAPERS OF JAMES MADISON, *supra* note 263, at 173.

right of free exercise was what "all men are equally entitled to," and inserting language that had the effect of throwing into question the Anglican Church's establishment.²⁷⁸ "The free exercise of religion," to use Madison's vocabulary, was understood as derived from the duty all persons have in conscience to worship the Creator of the universe.²⁷⁹ Noonan looks in particular to the aged Madison's interpretation of this document—who declares in his *Autobiographical Notes* that "freedom of conscience was 'a natural and absolute right'"—as evidence that Madison understood questions of religion as "beyond the civil power."²⁸⁰ Indeed, as Madison subsequently made plain in his *Memorial and Remonstrance*, the state has no choice but to recognize the priority of the believer's freedom if it is to retain its legitimacy.²⁸¹

The *Memorial and Remonstrance* was prepared in 1784 and 1785 in response to Patrick Henry's efforts to obtain legislative approval for his

278. Two versions of Madison's draft revisions are found in his PAPERS. Version 1 states:

That Religion or the duty we owe to our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are equally entitled to the full and free exercise of it accordg to the dictates of Conscience; and therefore that no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges; nor subjected to any penalties or disabilities under etc.

1 PAPERS OF JAMES MADISON, *supra* note 263, at 174-75.
Version 2 states:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, that all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, Unless the preservation of equal liberty and the existence of the State are manifestly endangered; And that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

1 PAPERS OF JAMES MADISON, *supra* note 263, at 174-75.

279. In both versions of Madison's draft revisions, the "free exercise of religion" is derived from "Religion or the duty we owe to our Creator, and the manner of discharging it" *Id.*

280. NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 70. Madison's biographer, Irving Brant has registered a similar conclusion: "To Madison . . . goes the undisputed credit for converting a very ordinary pronouncement on religious toleration into a ground-breaking declaration on the sanctity of the rights of conscience." See BRANT, *supra* note 248, at 243. Brant continues: "Madison looked upon liberty of conscience as the fundamental factor in freedom of religion, and religious freedom, to judge from the concentrated attention he gave, as the fundamental freedom." *Id.*

281. See *infra* notes 289-99 and accompanying text.

"bill establishing a Provision for Teachers of the Christian Religion."²⁸² The bill began by boldly declaring its purpose as providing for "the general diffusion of Christian knowledge . . . to correct the morals of men, restrain their vices, and preserve the peace of society."²⁸³ Introducing his bill in the fall of 1784, Henry "schedule[d] the third and final reading of the bill for Christmas Eve, a kind of extraordinary present to the churches."²⁸⁴ Madison, however, succeeded in postponing consideration of the bill until the new year and put into publishable form the notes he had prepared for the floor debate.²⁸⁵ Appearing in pamphlet form under the title of *Memorial and Remonstrance Against Religious Assessments*,²⁸⁶ Madison's work was circulated anonymously at the end of June 1785.²⁸⁷ Intended to crystallize public opinion, the *Memorial and Remonstrance* was signed by over 1,500 persons belonging to a variety of denominations. It substantially contributed to the defeat of Patrick Henry's bill in the fall of 1785.²⁸⁸

In the *Memorial and Remonstrance*, Madison asserted that the right of religious liberty is "unalienable" both because the nature of mankind required such freedom²⁸⁹ and because religious worship was of higher priority than loyalty to the State. Indeed, Madison asserted, religious liberty is a right among men, but one that rests upon the duty all owe to the Creator:²⁹⁰ "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."²⁹¹ For this reason Madison maintained that "in

282. See KETCHAM, *supra* note 247, at 162-63.

283. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 105

284. NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 72.

285. Madison's notes from the December, 1784, debate are reprinted in NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1 at 61-64; the redaction of these notes to publishable form is discussed at page 72. See *id.* at 72 (discussing the redaction of those notes to publishable form).

286. The text of the *Memorial and Remonstrance* is found at 8 *THE PAPERS OF JAMES MADISON* 298-304 (Robert A. Rutland & William M.E. Rachal eds., 1973).

287. See *id.* at 296. Madison did not formally acknowledge his authorship of the *Memorial and Remonstrance* until 1826. See *id.* at 296-97.

288. See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 74.

289. Thus, Madison argued that religious liberty was an unalienable right "because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men." See *Memorial and Remonstrance*, *supra* note 286, at 299.

290. See *id.* ("[Religious liberty] is unalienable also, because what is here a right towards men, it is a duty towards the Creator").

291. *Id.* Madison continues:

Before any man can be considered as a member of Civil Society, he must be

matters of religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."²⁹²

Madison's subsequent claims flowed from this premise. If civil society is subordinate to the duty owed to one's Creator and if religious duties do indeed trump the demands of civil society, then legislative authority over religion is non-existent:

Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from they derive their authority, and are Tyrants.²⁹³

Madison went on to establish to his satisfaction that all men "are . . . to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates of Conscience,'"²⁹⁴ that the civil magistrate ought never to be considered "a competent Judge of Religious Truth,"²⁹⁵ and that the history of the Christian religion demonstrates that it flourished most vigorously in the days before it became the established faith of the Roman Empire.²⁹⁶ In making these arguments, Madison

considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Id.

292. *Id.*

293. *Id.* at 299-300.

294. *Id.* at 300 (quoting from Article XVI of the Virginia Declaration of Rights).

295. *See id.* at 301.

296. *See id.* at 301.

To say that [the Bill establishing a Provision] is [necessary for the Christian faith], is

drew deeply from Protestant theology.²⁹⁷ He closed with a prayer that the "Supreme Lawgiver of the Universe, by illuminating those to whom [the *Memorial and Remonstrance*] is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, . . . and on the other, guide them into every measure which may be worthy of his [blessing]" ²⁹⁸

Noonan concludes:

Concede what Mr. Madison's theology assumes: there is a God living and distinct from every human creature; this God is the Creator and the Lawgiver and the Governor of the world; he is a 'he'; he takes an interest in, and satisfaction from, the homage humans render him and he will condignly punish humans who neglect to observe the commands that he communicates through conscience. Then on what basis can a mere human or mere association of humans intrude their regulations to prevent an individual from obeying God?

a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy.

During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry, and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy.

Id.

297. Harold Berman has observed:

The covenant between God and man, Madison said, requires free exercise of religion, and that covenant takes precedence—both in order of time and degree of obligation—over the social contract. This statement of Madison makes implicit reference to the Lutheran doctrine of Two Kingdoms—the heavenly kingdom of grace and the earthly kingdom of law—as well to the Calvinist doctrine of two covenants, one between God and man, the other between government and people.

Berman, *Religion and Law*, *supra* note 267, at 787.

298. 8 PAPERS OF JAMES MADISON *supra* note 286, at 304.

For every upholder of the supremacy of the state, Madison's defense of free exercise is a scandal, a stumbling-block. The 'great Barrier' stands against the sovereignty of the state. Each individual's religion 'wholly exempt' from social control? No qualifications whatever on the right and duty to pay homage to God as one sees fit? Surely, in the heat of battle, JM exaggerates! No, his theological premises compel these radical conclusions.²⁹⁹

In 1787, Madison served as a delegate to the Convention assembled in Philadelphia for the purpose of preparing a Constitution for the newly independent states.³⁰⁰ The new Constitution prohibited test oaths for government office, but omitted any affirmative protection for the rights of conscience.³⁰¹ In a letter to Jefferson, Madison explained that he "has always been in favor of a bill of rights; provided that it be so framed as not to imply powers not meant to be included in the enumeration."³⁰² Madison was fearful that "the rights of Conscience, in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power" and so favored their omission from a Bill of Rights.³⁰³

Madison soon had occasion to rethink his position. Having failed in an attempt to win election to the Senate from Virginia, he tried his luck at winning a seat in the new House of Representatives. In a close election, which he believed he might lose due to manipulation by Patrick Henry of the composition of congressional districts, Madison struck an alliance with local Baptist leaders, including the influential John Leland, author of *The Rights of Conscience*.³⁰⁴ Madison assured the Baptists of his support for a "specific provision" on "the Rights of Conscience," and

299. NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 75.

300. See generally WILLIAM LEE MILLER, *THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING* (1992). Cf. JAMES H. HUDSON, *RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC* 78 (1998) (assessing Madison's contributions to religious liberty in 1788 and 1789).

301. See NOONAN, LUSTRE OF OUR COUNTRY *supra* note 1, at 75-76.

302. See Letter of James Madison to Thomas Jefferson (17 October 1788), in 11 *THE PAPERS OF JAMES MADISON* 297 (Robert A. Rutland & Charles F. Hobson eds., 1977).

303. *Id.*

304. See NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 78. On the importance of Leland to the cause of religious liberty, see ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 12-13 (1998).

was rewarded by a close victory over James Monroe.³⁰⁵ As Noonan observes: "With the aid of these dedicated evangelicals, by the active intervention of the preachers in politics, Mr. Madison became the spokesman for religious freedom in the Congress that was to begin the government of the United States."³⁰⁶

Almost immediately after being seated in the new House, Madison embarked on a campaign to amend the Constitution by a Bill of Rights. His great concern was the damage that could be done to fundamental rights by an unrestrained majoritarian principle.³⁰⁷ In notes he prepared for floor debate on the Bill of Rights, he labeled two rights—speech and conscience—as natural rights the protection of which was the object of the Bill of Rights.³⁰⁸

Noonan details the progress of Madison's efforts to secure protection for these rights. Madison initially proposed an amendment to Article I, Section 9 of the Constitution, which would have declared the federal government incompetent in matters of religion.³⁰⁹ He followed with a proposal that omitted reference to the free exercise of religion, but instead would have protected "the rights of conscience" and banned a nationally established church.³¹⁰ A subsequent draft ambiguously suggested that the amendment's protection of the religious conscience might be binding on the states, a position from which Madison had to retreat.³¹¹ Yet another proposed amendment was intended to confer constitutional protection to conscientious objectors

305. See NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 78.

306. *Id.*

307. In his letter to Jefferson, Madison wrote:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.

Letter of James Madison to Thomas Jefferson, *supra* note 302, at 298.

308. See NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 79.

309. The proposed text read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or under any pretext infringed." Quoted in NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 79.

310. *Id.* at 80. For a history of the successive drafts, see MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY at 85-88 (1996).

311. See NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 80.

in time of war.³¹² After much legislative give and take, a congressional committee, of which Madison was a member, produced the language that we commonly—but mistakenly—call the Religion Clauses of the First Amendment.³¹³

As finally ratified, Noonan asserts, the First Amendment's protection of religion results from a specifically religious view of political society:

In the ultimate and absolute relation of each individual to God lies the limitation on civil society and civil government on which [Madison] insists. Without that relation, why should the individual not be absorbed by the community, why should a society be constrained to respect conscience? With that relation to a Creator, Governor, Judge in existence for each individual, with that personal responsibility to a personal God, a government of human beings must be a government of limited powers. The theology underwrites the political theory on the competencies of government. The great Barrier which defends the rights of the people, that barrier central to [Madison's] theory of government, depends upon the people having other business than the ordering of the temporal society, its goods and goals. By their consciences the people relate to God. The faith that there is a governing God is fundamental.³¹⁴

312. See Noonan, *Religious Liberty at the Stake*, *supra* note 29, at 463. Cf. Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367 (1993-94).

313. See Noonan, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 80-81. Noonan explains what he understands the Amendment to have accomplished:

In two prepositional phrases (not clauses) the job was done. The first phrase assumed that establishments of religion existed as they did in fact exist in several of the states; the amendment restrained the power of Congress to affect them. The second phrase was absolute in its denial of federal legislative power to inhibit religious exercise. Succinct, the amendment referred to religion twice but used the term only once: no room to argue that the term changed its meaning in the second reference. Pleonastically the practice that could not be prohibited was denominated "free."

Id. at 81.

314. *Id.* at 89. John Witte has observed: "The American founders revolutionized the Western tradition of religious liberty. But they also remained within this Western tradition, dependent on its enduring and evolving postulates about God and humanity, authority and liberty, church and state." JOHN WITTE, JR., *ESSENTIAL RIGHTS AND LIBERTIES* 27 (typescript) (forthcoming). Witte continues:

C. Noonan's Madison: An Assessment

An important essay by Irving Brant, a leading Madison biographer, notes that "[t]o James Madison . . . freedom of religion was the fundamental item on which all other forms of civil liberty depended."³¹⁵ Brant, however, treats the foundations of this belief in cursory fashion. Regarding Madison's experiences at Princeton, Brant proposes that "[t]here is more reason to believe that hostility to church establishment led Madison to Princeton, than that the choice of a school fixed his principles."³¹⁶ Brant notes that "Madison was not a church member,"³¹⁷ and that "[i]n college he traveled with a slightly impious crowd—impious by eighteenth-century standards—the sophisticated American Whigs as opposed to the devout and fervent Ciosophists."³¹⁸ When considering Madison's theological formation, Brant takes no notice of Madison's close studies with Witherspoon, or Madison's advice to Bradford. He never explains why Madison considered religious freedom the foundation of all other civil liberties.

Brant is not alone in his view. Although they fail to define the term, Arlin Adams and Charles Emmerich describe Madison—together with Thomas Jefferson and Thomas Paine—as an "Enlightenment Separationist."³¹⁹ Adams and Emmerich concede that Madison was more conventional in his beliefs than either Jefferson or Paine.³²⁰ They also acknowledge that "Madison regarded liberty of conscience as the most sacred inalienable right," although, like Brant, they never explain the origin of this preoccupation or why it should matter.³²¹ Adrienne

This Western pedigree of the American experiment in religious liberty might be a source of comfort to modern skeptics who see in it a betrayal of the classic ideals of Western Christendom. This Western pedigree of the American experiment might also be a source of warning to modern enthusiasts who see in it a universal formula of the good life and good society to be enforced throughout the world.

Id. at 27-28.

315. Irving Brant, *Madison: On the Separation of Church and State*, 8 WM. & MARY Q. 3 (3d series, 1951). Brant continues: "Its maintenance [religious liberty] would not automatically preserve the entire liberty of the citizen. But without it the other rights were sure to be destroyed." *Id.*

316. *Id.* at 4.

317. *Id.* Brant adds that Madison "attended church (regardless of denomination) with regularity . . ." *Id.*

318. *Id.*

319. ADAMS & EMMERICH, *supra* note 304, at 22.

320. *See id.* at 22 ("Madison, while circumspect about his religious beliefs, adhered to views closer to traditional Christian doctrine [than Jefferson or Paine]").

321. *Id.* at 25.

Koch, for her part, observes that Madison believed religion to be "exempt from the authority of society," but never explicates the theological foundation of this belief.³²² Her James Madison was essentially a secular man taking a brave stand against "spiritual tyranny."³²³ Unsurprisingly, another biographer observes that in his youth, "Madison's political feelings were most aroused, oddly enough, not by the imperial issues of trade and taxation, but by the repressions and abuses of the Anglican Church in Virginia."³²⁴

Noonan criticizes this dominant interpretation of Madison by attacking the habit of mind that lies at its core: the desire to fit together under the single rubric of "Enlightenment" as many of the diverse personalities and thinkers who peopled the American Founding as possible.³²⁵ In truth, the term "Enlightenment" as applied to America is of recent vintage and does not reflect the actual experiences of the Founding generation: "prior to World War II scholars generally confined the use of the term 'Enlightenment' to the eighteenth century German movement known as *die Aufklärung* ['enlightening']";³²⁶ "Fifty years ago neither French nor English possessed an equivalent term to *Aufklärung*."³²⁷ Lacking proper historical grounding, the term has

322. ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 29 (1950).

323. *Id.* Koch's essentially secular interpretation of Madison is revealed even more clearly in ADRIENNE KOCH, *MADISON'S 'ADVICE TO MY COUNTRY'* (1966). Ignoring Madison's religious background, she explains his commitment to religious freedom in terms of his anthropology:

Freedom of religion is essential because of the nature of man and the nature of human thought. Men are reasonable creatures who inquire before they believe. To *compel* them to believe, without respect for what appears to them to be sufficient or convincing evidence, will perhaps exact outward obedience but it will not produce belief.

Id. at 21. She explains Madison's choice of Christian language in the *Memorial and Remonstrance* as a rhetorical tactic designed to appeal to an audience that was "almost entirely Christian believers of various sorts." *Id.* at 22.

324. THE FOUNDING FATHERS: JAMES MADISON, A BIOGRAPHY IN HIS OWN WORDS, I, 26 (Merrill D. Peterson ed., 1974). Other efforts to explain the foundations of Madison's concern for free inquiry by using a secular frame of reference have similarly gone astray. Thus one recent work attempts to wed Madison's regard for the rights of conscience to, of all things, a neo-Lockean concern for the ownership of one's conscience. See ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 103 (1996).

325. See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 85-86.

326. Berman, *The Impact of the Enlightenment*, *supra* note 275 at 311, n.1.

327. John Lough, *Reflections on 'Enlightenment' and 'Lumières'*, in *L'ETÀ DEI LUMI: STUDI*

expanded to the point of actually distorting historical understanding.³²⁸ Noonan accepts this line of reasoning when he describes "Enlightenment" as "[a] catchword and a catchall [that] embraces every extoller of reason from [John] Locke to Voltaire."³²⁹ The term has come to "encompass such a spectrum of religious convictions that the verbal convergence is not helpful in discerning the lines of division."³³⁰

When Madison is seen on his terms, rather than through the prism of a superimposed "Enlightenment," more reflective of twentieth-century rather than eighteenth-century preoccupations, Noonan argues, the religious foundations of his public thought are illuminated. Explicating the *Memorial and Remonstrance*, Noonan writes:

[Madison's] central public testimony to his religious beliefs is the *Memorial and Remonstrance*. Here the only question, as his notes have it, is are Relig. Estabts. necessary for Religion? not Is Rel. necessary? The answer comes from the Christian Religion itself. That religion is not invented by human policy. That religion is this precious gift. That religion is, in the most positive and pervasive metaphor of the age, a light. The metaphor, used by a Christian, echoes the first chapter of the Gospel according to John: Christ is the true light which lights everyone entering the world. Hence, JM speaks interchangeably of the light of Christianity the light of revelation. This religion is to prevail not by force, which is repudiated by every page of the religion, and not by unchristian timidity, but by evidence and example. By these means Truth will make its victorious progress to be imparted to the whole race of mankind.

STORICI SUL SETTECENTO EUROPEO IN ONORE DI FRANCO VENTURI 36 (R. Ajello et al. eds., 1985) (quoted in Berman, *The Impact of the Enlightenment*, *supra* note 275, at 311, n.1). (Sixty-five years ago, measured from today).

328.

In recent decades, "Enlightenment" has been used indiscriminately to refer to philosophies and times as far apart from each other as those of the early seventeenth-century France of Descartes and the mid-eighteenth-century France of Diderot, as well as the England of John Milton or Matthew Hale and the England of Thomas Paine or Jeremy Bentham over a century later. Indeed, some American historians have even spoken of an "American Enlightenment," which is surely a distortion.

Berman, *The Impact of the Enlightenment*, *supra* note 275, at 311-12.

329. NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 86.

330. *Id.*

Public argument is not the same as personal conviction. But public argument that employs religious belief for its own ends, that makes an Engine of religion, precisely parallels the exploitation of religion by government that JM denounced in the *Memorial* as wickedness. If he himself had made religion instrumental in this fashion it would make him the hypocrite no one believes he is. In the *Memorial* JM addresses Christians as a fellow Christian; he speaks as a believer in Christianity's special light; his argument looks to the evangelization of the world.³³¹

If biographers of Madison have misunderstood their subject by failing to account for the theological foundations of his commitment to religious liberty, so have American courts and constitutional historians. Noonan's unitary interpretation of the First Amendment's origins and scope—seeing a single religion clause aimed at conserving the good of liberty of conscience in religious affairs—particularly challenges those who have singled out the "Establishment Clause" as embodying the First Amendment's governing principle where religion is concerned.

Such an approach had its genesis with the case of *Everson v. Board of Education*.³³² In that case, Justice Black, writing for the Court, wrote of an "establishment of religion"³³³ clause which served to erect "a wall

331. *Id.* at 87.

332. 330 U.S. 1 (1947).

333. *Id.* at 15. Noonan chides Justice Black's choice of words in an imaginary dialogue between a newly appointed federal judge, Samuel Simple, and his clerks:

I would have thought respecting an establishment meant taking into account an establishment—in other words, the phrase in the Bill of Rights assumed that religious establishments existed and instructed Congress not to take any establishment into account, either by endowing a state-established church or by penalizing one. Am I being too simple?

"You're being pretty perceptive," said Boaltman, a second law clerk, "but you're a bit out of date. Everyone's now agreed that 'respecting an establishment' now means 'establishing.' They call it the 'Establishment Clause.' It'd be sheer pedantry to stick to the original language. In any case, the original language didn't seem to refer to anything once the states disestablished their churches. So to give the Establishment Clause a function, you had to read it in a kind of revised way."

"I thought I once heard that at least Justice Black was a great stickler for reading the Constitution literally," Simple observed. "When it said 'No law,' for example, he said it meant 'no law.'"

"He was a stickler when it suited his purposes," Harvardman replied, "which wasn't all the time."

of separation between church and State"³³⁴ and which "must be kept high and impregnable."³³⁵ Both Black and Justice Wiley Rutledge, in a dissent that in tone and substance resembles Black's majority analysis, made use of Madison's *Memorial and Remonstrance*.³³⁶ Rutledge claimed, based on his reading, that "for [Madison,] religion was a wholly private matter" ³³⁷ Missing entirely from both majority and dissent is recognition of the religious roots of Madison's belief that religion must be exempt from state control because it represents a loyalty prior to the state, and that protection of free inquiry in religious matters is the only secure means by which the truth of faith is propagated and accepted, and the world thereby is evangelized.³³⁸

The Black-Rutledge reading of Madison introduced into constitutional jurisprudence a strand of thought, grown more pronounced in recent years, to see the First Amendment as protecting society from religion.³³⁹ Thus in *Edwards v. Aguillard*, the Supreme Court considered evidence of religious motivation on the part of state legislators as decisive to its application of the *Lemon v. Kurtzman* test.³⁴⁰ Not surprisingly, scholars and commentators have also begun to

NOONAN, LUSTRE OF OUR COUNTRY, *supra* note 1, at 182-83.

334. 330 U.S. at 16.

335. *Id.* at 18.

336. *See id.* at 12 (Black, J.); 37-39, 63-72 (Rutledge, J., dissenting).

337. *Id.* at 39 (Rutledge, J., dissenting). This of a man who urged a correspondent, a future attorney general of the United States, to keep the ministry obliquely in view and to allow his Christian calling to serve as a "cloud of witnesses!"

338. The historical premises of the *Everson* case have been thoroughly scrutinized and found to be flawed. *See* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987). Bradley concludes that "the justices should confess their [historical] sin and embark at the earliest opportunity on the path first forsaken in 1947." *Id.* at 135.

339. This is a criticism voiced by Mark De Wolfe Howe. *See* MARK DE WOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 136-39 (1965).

340. *See Edwards v. Aguillard*, 482 US 578 (1987). In dissent, Justice Scalia wrote:

It is important to stress that the purpose forbidden by *Lemon* is the purpose to "advance religion." . . . Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated, but for the religious beliefs of the legislators, the funds would not have been approved.

Id. at 614-15 (Scalia, J., dissenting).

question the philosophical³⁴¹ and constitutional³⁴² bases of religiously motivated political participation.

Noonan repudiates these developments as unfaithful to the guiding principle of the First Amendment's protection of religious liberty. He concedes "[t]he great ambiguity of the First Amendment":³⁴³

What free exercise meant to Mr. Madison it had not meant to [George] Mason, [Patrick] Henry, and the assembly that adopted the Declaration of Rights, and what free exercise meant to Mr. Madison was not what it meant to the First Congress that petitioned the president to set a day of thanksgiving to God; created chaplaincies; and made grants of public property for the support of religion.³⁴⁴

But despite these different understandings, Noonan, following Madison, finds the core of free exercise to be "no government interference with the obligation of conscience."³⁴⁵ Noonan, furthermore, is willing to extend the requirement of governmental noninterference with the demands of conscience to protect the political activities of religious believers.³⁴⁶ Noonan's reading of the First Amendment's Religion Clause thus seems to come closer to the view articulated by the Court in *Cantwell v. Connecticut* than the views found in the progeny of

341. See, e.g., KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988) (arguing that religious believers should ordinarily avoid recourse to religiously-based arguments and should instead rely on publicly-accessible ones); Jeremy Waldron, *Religious Contributions in Public Deliberations*, 30 SAN DIEGO L. REV. 817 (1993) (criticizing reliance on religiously-grounded arguments in making public policy).

342. See, e.g., Richard H. Jones, *Concerning Secularists' Proposed Restrictions on the Role of Religion in American Politics*, 8 BYU J. PUB. LAW 343 (1994) (critiquing secularist constitutional arguments).

343. See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 82.

344. *Id.*

345. *Id.* at 82.

346. In justifying political activity by Catholics, Noonan has written:

[I]t is the duty of every citizen and every officeholder to obey the dictates of his conscience. If a Catholic voter or officeholder forms his conscience by consulting the teaching of the Church, he does no more or less than any conscientious citizen or politician who consults the sources of truth he holds in highest regard. Every conscientious person, acting according to his conscience, imposes his values on the community.

See Noonan, *The Bishops and the Ruling Class*, *supra* note 9, at 141.

Everson.³⁴⁷ Indeed, Noonan recognizes that American history has been deeply enriched by periodic religious crusades—against slavery,³⁴⁸ against Mormon polygamy,³⁴⁹ against alcohol,³⁵⁰ and in favor of civil rights.³⁵¹ Even where these crusades ultimately failed, as in the case of Prohibition, the American people benefited from the experience.³⁵²

Finally, it must be noted that Noonan elevates Madison and his role in the creation of the American doctrine of religious liberty at the expense of Thomas Jefferson. Although Jefferson receives fairly complete treatment in *The Believer and the Powers that Are*,³⁵³ he is

347. The *Cantwell* Court declared, regarding both the "establishment" and "free exercise" aspects of the Religion Clause of the First Amendment:

The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. . . . The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940). Cf. HOWE, *supra* note 339, at 137–38 (comparing the treatment of "establishment" by the *Cantwell* and *Everson* Courts).

348. See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 250–52.

349. *Id.* at 252–54.

350. *Id.* at 254–55.

351. *Id.* at 256–58.

352. Noonan has written:

Crusades do, when successful, establish as the law of the land what begins as the religious perception of a moral requirement. Employing religion as a political institution, they mold the morals of the country. They lead to the enactment into law of religious-moral discourse. At the same time they flourish because of the First Amendment. The government is not empowered to restrain them. They respond to imperatives that transcend the secular state. They are expressions of the demands of conscience. They have played a major part in the American experiment of Free Exercise.

Id. at 259–60.

353. See NOONAN, *THE BELIEVER AND THE POWERS THAT ARE*, *supra* note 29, at 98–104.

subordinated to Madison in *The Lustre of Our Country*.³⁵⁴ To be sure, Noonan acknowledges that Madison owed a considerable debt to Jefferson, but Noonan's focus is on the First Amendment and the principles that informed its drafting. These principles, Noonan argues persuasively, were Madisonian and religious in character, not Jeffersonian and deist.

D. "Quota of Imps"³⁵⁵

It has been contended that many members of the Congress that approved the First Amendment believed the Religion Clause to be jurisdictional; that it declared Congress incompetent in religious matters because legislative supervision of religion was the prerogative of the several states.³⁵⁶ Certainly, it is the case that, for the most part, the relationship of the states to religion remained much as it had during colonial times.³⁵⁷

The New England states, with the exception of Rhode Island, continued to maintain their old colonial establishments, although they also agreed to tolerate dissenting sects. Connecticut, for instance, retained its Congregationalist establishment, although after 1784 state law provided:

[members of] all denominations of Christians differing in their religious Sentiments from the People of the established Societies

354. See NOONAN, *LUSTRE OF OUR COUNTRY*, *supra* note 1, at 69–72, 74–77.

355. John T. Noonan, Jr., *Quota of Imps*, *supra* note 29. The "quota of imps" originates in a letter from James Madison to William Bradford, responding to the latter's concern about religious persecution. Madison writes:

I have indeed as good an Atmosphere at home as the Climate will allow: but have nothing to brag of as to the State and Liberty of my Country. Poverty and Luxury prevail among all sort: Pride ignorance and Knavery among the Priesthood and Vice and Wickedness among the Laity. This is bad enough But It is not the worst I have to tell you. That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business.

Letter of James Madison to William Bradford (January 24, 1774), in 1 PAPERS OF JAMES MADISON 104, *supra* note 263, at 106.

356. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 18–34 (1995).

357. See NICHOLAS TROTT, *THE LAWS OF THE BRITISH PLANTATIONS IN AMERICA RELATING TO THE CHURCH AND THE CLERGY, RELIGION AND LEARNING (1771)* (providing a comprehensive overview of colonial legislation).

in this State, whether of the Episcopal Church . . . Separates . . . or Baptists, . . . or Quaker, or any other denomination . . . who attended and supported the gospel ministry could have a certificate signed by an officer of their own church and be exempted from the support of the established ministry.³⁵⁸

Although members of faiths other than the Protestant Christians specified by statute were still required to pay taxes to support the established ministry, Zephania Swift, one of the leading lights of post-colonial jurisprudence, argued "that Jews, Mahomedans, and others enjoyed perfect religious freedom in Connecticut, on the ground that they could practice their religion there even if they had to pay for the support of the Christian one."³⁵⁹

Vermont³⁶⁰ and New Hampshire, for their part, although explicitly eschewing establishment, nevertheless provided public support for religion.³⁶¹ The case of *Muzzy v. Wilkins*³⁶² raised the issue of the New Hampshire establishment. Jeremiah Smith, another leading light of New England justice, defended the proposition that "[n]o human government has a right to set up a standard of belief, because it is itself fallible."³⁶³ Even so, Smith continued, no one could maintain "'that the civil magistrate may not lawfully punish certain offences against the unalterable and essential principles of natural and revealed religion' such as 'blasphemy, reviling religion, profanation of the Sabbath, etc.'"³⁶⁴

358. CURRY, *supra* note 222, at 181. Cf. WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630-1883: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* II 962-84 (1971) (discussing in detail the Connecticut situation).

359. CURRY, *supra* note 222, at 184.

360. The Vermont Constitution of 1786 attempted to reconcile both religious liberty and state involvement in the support of Christian observance:

[N]o authority can, or ought to be vested in, or assumed by any power whatsoever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship: Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L. J. 1085, 1100, n.57 (1995).

361. See CURRY, *supra* note 222, at 189.

362. JEREMIAH SMITH, *DECISIONS OF THE SUPERIOR AND SUPREME COURTS OF NEW HAMPSHIRE* 3 (1879).

363. MCLOUGHLIN, *supra* note 358, at 864.

364. *Id.*

Noonan's own concern is with the progress of the establishment of the Commonwealth of Massachusetts.³⁶⁵ Article II of the Massachusetts Constitution of 1780, authored by John Adams, spoke of the right and duty "of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and preserver of the Universe."³⁶⁶ Article III, however, which Adams did not write but did vote for in Convention, provided for what one leading scholar has termed an "institutional establishment" that furnished substantial aid and comfort to Congregationalist religious establishment.³⁶⁷

Noonan begins his analysis of the Massachusetts establishment with the use of the criminal law, particularly the law of blasphemy, to enforce broad acceptance of biblical truths, and considers the case of Abner Kneeland.³⁶⁸ In sometimes scatological language, Kneeland questioned the Virgin Birth and challenged Unitarian Universalists on the consistency of their beliefs.³⁶⁹ Charged with violating the Massachusetts Act against Blasphemy,³⁷⁰ Kneeland sought at trial the protection of the

365. See Noonan, 'Quota of Imps,' *supra* note 29.

366. John Witte, Jr., 'A Most Mild and Equitable Establishment of Religion:' John Adams and the Massachusetts Experiment, 41 J. CHURCH & STATE 213, 235 (1999).

367. See *id.* at 242-50 (discussing the drafting of Article III, and the criticisms and defenses offered of its establishment of religion).

368. Noonan, *Quota of Imps*, *supra* note 29, at 171-75. Cf. LEONARD W. LEVY, *BLASPHEMY IN MASSACHUSETTS: FREEDOM OF CONSCIENCE AND THE ABNER KNEELAND CASE* (1973) (providing a complete documentary record of Kneeland's prosecution).

369. Kneeland was indicted in 1833 for having declared in December of the previous year that:

1. Hottentots cut off one testicle; a Frenchman believes in two; but 'that same Frenchman . . . firmly believes that Jesus Christ was born without any testicles at all.
2. God is in "a curious and strange predicament" because of "the heterogenous mass of contrariety he has to hear and answer every day."
3. Universalists believe in a god which I do not. . . . Universalists believe in Christ, which I do not; but believe that the whole story concerning him is as much a fable and a fiction, as that of the god Prometheus. . . . Universalists believe in miracles, which I do not; but believe that every pretension to them can either be accounted for by natural principles or else is to be attributed to mere trick and imposture. Universalists believe in the resurrection of the dead, in immortality and eternal life, which I do not, but believe that death is an eternal extinction of life to the individual who possesses it, and that no individual life is, ever was, or ever will be eternal.

Noonan, *Quota of Imps*, *supra* note 29, at 172.

370. The Act of Blasphemy provided:

That if any person shall wilfully blaspheme the holy name of God, by denying,

Commonwealth's Declaration of Rights.³⁷¹ Lemuel Shaw, writing for the majority of the Supreme Judicial Court, focused his analysis on Kneeland's denial of Universalist principles.³⁷² He omitted consideration of Kneeland's attacks on the Virgin Birth, or miracles, or

cursing, or contumeliously reproaching God, his creation, government or final judging of the world, or by cursing or reproaching Jesus Christ, or the Holy Ghost, of by cursing or contumeliously reproaching the holy word of God, that is the canonical scriptures, contained in the books of the Old and New Testaments, or by exposing them, or any part of them, to contempt and ridicule; which books are as follows [the books are named], every person so offending shall be punished by imprisonment, not exceeding twelve months, by sitting in the pillories, or by sitting on the gallows, with a rope about the neck, or binding to the good behaviour, at the discretion of the Supreme Judicial Court before whom convictions may be, according to the aggravation of the offense.

Noonan, *Quota of Imps*, *supra* note 29 at 171.

371. The *Declaration of Rights* provided in part:

And no subject shall be hurt, molested, or restrained in his person, liberty or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious professions or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Id. at 172.

372. Shaw wrote:

The sentence quoted is this; "Universalists believe in a god which I do not." It was contended by the defendant that from the use of a small letter in the word god, and from the punctuation, the grammatical construction was, that it was used in a peculiar sense, as the creed, or tenets, or form of belief, of the Universalists, as we speak of the god of Mahomedans, or Hindoos, or Chinese, the being understood, conceived and apprehended by the Mahomedans or Pagans respectively, and that the same form of words was not infrequently used among different sects of Christians. The opinion expressed by the Court was, that in its obvious grammatical construction, it was equivalent to a denial of his belief in the existence of any God, that is, any God other than the material universe; . . . The Court are of opinion, that this construction was correct.

Commonwealth v. Kneeland, 37 Mass. 206, 223-24. The Court concluded:

And we think, from a fair construction of the report, that [the trial judge] instructed the jury that a wilful denial of God, his creation, etc., that is, a denial with the injurious, unlawful intent, to impair and destroy the veneration due to him, as an intelligent creator, governor, and final judge of the world, implied in the word *wilful*, did constitute the offence intended to be prohibited and punished by the statute, although no words of malediction, reproach, or contumely towards God, Jesus Christ, or the Scriptures, were coupled with it.

Id. at 225.

God's response to prayers.³⁷³ Denial of Universalist tenets, however, amounted to a violation of the blasphemy act.³⁷⁴

But while the outcome in *Commonwealth v. Kneeland* kept alive the law on blasphemy, in other respects the religious establishment came under more effective challenge in the opening decades of the nineteenth century. The Constitution of 1780 had required of office-holders not only a general affirmation of their Christian beliefs, but had also demanded abjuration of loyalties to foreign powers—both to Great Britain and to the claims of spiritual jurisdiction advanced by the pope.³⁷⁵ Through the cooperation of leading Protestants and Jean Cheverus, the first Catholic bishop of Boston, these requirements were abolished in 1820.³⁷⁶

The 1780 Massachusetts Constitution, as enforced, also made provision as well for the financial support of "public teacher[s]" who were "the equivalent of 'ordained Protestant clergy[men].'"³⁷⁷ Enforcement of this provision eventually became a weapon in the hands of Congregationalists and Unitarians seeking control of the parish churches of Massachusetts.³⁷⁸ Rejection of this system by constitutional amendment in 1834 still left the Protestant churches of the state greatly enriched by its abolition.³⁷⁹

373. See Noonan, *Quota of Imps*, *supra* note 29, at 174.

374. Noonan concludes:

Shaw was a Unitarian and Unitarianism was then the religion of many of the ruling elite of Massachusetts. It was a good deal more rationalistic than the Trinitarian Congregationalism from which it had emerged, but it could not have reduced to a mere utilitarianism or a humanism detached from Christianity. It was a scriptural religion. Unitarians were "fervently biblical" and wrestled "with every verse of St. Paul." An Emerson could step out of "the Morgue" of Unitarianism and with legal impunity translate Christianity into a set of lofty ideals and vague metaphors. Kneeland's Voltairean skepticism was different; it was in fact deeply disturbing to the peace of those who had balanced Scripture and modern thought and had made for themselves a mental universe they found intelligible and Christian.

Id. at 174–75.

375. See *id.* at 175–76.

376. See *id.* at 178–79; see also generally CHARLES P. HANSON, NECESSARY VIRTUE: THE PRAGMATIC ORIGINS OF RELIGIOUS LIBERTY IN NEW ENGLAND (1998) (discussing the conflict between Catholics and Protestants and occasional areas of cooperation in the revolutionary era).

377. See Noonan, *Quota of Imps*, *supra*, note 29 at 180.

378. See *id.* at 185–87.

379. See *id.* at 187 ("In the jargon of today's corporate world, the Unitarian and Congregationalist churches received 'golden handshakes' on parting with tax support. They were

Finally, Noonan discusses Harvard College, which had been founded for the purpose of providing education in religion and had been dedicated *Christo et Ecclesiae*—"to Christ and the Church."³⁸⁰ Harvard was to be governed by two authorities: a Board of Overseers, which "reflected in some ways the distinctively scriptural sanctions and theories of what the College was for the Bay Colony theocracy";³⁸¹ and the Corporation, which exercised the more traditional offices of collegiate governance.³⁸² Efforts by Daniel Webster and Joseph Story in the Constitutional Convention of 1820 to disestablish the College proved unsuccessful.³⁸³ Noonan observes that "[o]nly in 1865 was there a substantial separation of this child of the church from the Commonwealth of Massachusetts."³⁸⁴

Early nineteenth century legal reasoning was frequently saturated with religious content and imagery. Indeed, the United States Supreme Court declared in 1844 that Christianity was a part of the common law, at least in the "qualified sense, that its divine origin and truth are admitted."³⁸⁵ Noonan, however, is concerned with the ways in which the principle undergirding the First Amendment's protection of religious liberty began to take root in this environment. Madison's doctrine helped shape legal reasoning and helped condition public opinion.³⁸⁶ The "multiplicity of sects," which Madison viewed as crucial for mitigating religious conflict,³⁸⁷ contributed to the partial

on their own, but with handsome endowments.").

380. *Id.* at 189.

381. George Huntston Williams, *Religion, Law and Revolution in the Shaping of Harvard College, 1636-1708*, in *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION (A TRIBUTE TO HAROLD J. BERMAN)* 123, 133 (John Witte, Jr. & Frank S. Alexander eds., 1988).

382. *See id.* at 133, 138-49.

383. *See Noonan, Quota of Imps, supra* note 29, at 190.

384. *Id.*

385. *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 198 (1844). The *Vidal* Court was explicating the law of Pennsylvania and subsequently cited to the Pennsylvania case of *Updegraff v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824). An important study of the role Christianity played in early constitutional commentaries is Daniel L. Dreisbach, *'In Search of a Christian Commonwealth': An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927 (1996).

386. *See Noonan, Quota of Imps, supra* note 29, at 192.

387. Madison wrote in 1788:

Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious belief in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.

disestablishment that Noonan sketches. One could witness in Massachusetts the slow beginning of a trajectory away from the religious establishments that had characterized much of western history and toward a greater religious liberty for all.³⁸⁸

IV. CONCLUDING OBSERVATIONS

Starting from the premise that "religion is a private matter,"³⁸⁹ Leo Pfeffer, writing in 1953, proposed a historiography of church and state that can best be described as Manichean. On the one hand, he finds the forces of state coercion: theocratic Israelite princes and prophets,³⁹⁰ coercive Roman emperors both Christian and pagan,³⁹¹ popes who sought worldly supremacy,³⁹² and Protestant reformers who sought the extirpation of heresy.³⁹³ On the other hand, he finds bold voices for tolerance, even religious liberty, who were "centuries in advance of [their] age."³⁹⁴ The adoption of the principle of separation of church and state was, in Pfeffer's judgment, largely the result of rationalist and enlightenment ideas.³⁹⁵ He finds it "paradoxical" that the enlightenment idea of separation had to strike an "alliance [with] the theological

James Madison, *General Defense of the Constitution*, 11 PAPERS OF MADISON 130.

388. However, Noonan cautions his readers that we could easily become members of another establishment. Alluding to Madison's characterization of defenders of religious establishment as the devil's imps, Noonan observes:

Our own measure today is Madison's: discrimination against any denomination does strike as reprehensible. Persecution, we know, is perverse. But believers as we all are in religious freedom "to the utmost," perhaps we should stop before we embrace Madison's theological characterization of the champions of the establishment. We too may be part of an establishment. Our faults may be no more manifest to ourselves than were those to themselves of John Adams and the other imps who made Massachusetts.

Noonan, '*Quota of Imps*,' *supra* note 29, at 192-93.

389. LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 3 (1953).

390. *See id.* at 4-8.

391. *See id.* at 9-14.

392. *See id.* at 14-18.

393. *See id.* at 20-25.

394. *Id.* at 18. Pfeffer here is writing of Marsilius of Padua, the fourteenth-century defender of the rights of the northern Italian cities against the Pope. *See id.* The anachronism inherent in labelling certain historical figures as friends of progress and others as enemies of progress has long been discredited among professional historians as "whig history." *See generally* HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1931).

395. *See* PFEFFER, *supra* note 392, at 92-93.

orthodoxy of the Great Awakening" in order to prevail.³⁹⁶

By contrast, the corpus of Noonan's work stands in elegant refutation of this sort of simple dualism. Noonan sees within the earliest layers of the Judeo-Christian tradition elements that helped shape the doctrine of religious liberty as well as elements that contributed to a thousand years of religious persecution. He is sensitive to the cross-currents at play in the thought of St. Augustine, who advised Christian judges to show mercy and who justified coercion of heretics as an act of charity. He is aware also of the important, though subordinate, role conscience played in the thought of Thomas Aquinas. These two thinkers helped both to construct the conceptual apparatus used to justify the suppression of dissent, but also raised the sorts of questions that led ultimately to the undermining of the system.

Noonan also refutes those who believe that the birth and development of religious liberty in the New World was an inevitable process. He reminds us that Quakers were hanged on Boston Common and that the mainstream of colonial thought very much favored religious establishment and the forcible suppression of dissenters. The ultimate success the advocates of religious liberty enjoyed in seeing the enactment of the First Amendment's Religion Clause was very much the product of singular insight and opportunity.

Noonan similarly confronts those who see the development of legal protections for religious liberty as a product of "Enlightenment" ideas. Pfeffer's paradox—the alliance between enlightenment and faith that produced the First Amendment—is resolved in Noonan's scholarship. The First Amendment's protection of religion, Noonan establishes, is the product of theological insight. Additionally, its enactment into law owes much to the involvement of religious persons in politics. After all, James Madison was elected to the First Congress with the support of John Leland and the Baptists of the Piedmont.

Furthermore, the constitutional protection of the First Amendment favors the religious believer in his or her relationship to the state. James Madison exempted religious belief from the authority of the state because belief in a deity represented a loyalty prior to the state. Freedom of conscience, in Madison's estimation, was a right conferred by nature. The state is thus essentially incompetent in religious matters. The fundamental principle at work is the protection of the believer's freedom to believe as his or her conscience demands, to live out that

396. *Id.* at 92.

belief in the arena of the world, and to evangelize by word and deed. This much, Noonan makes clear in his narrative account of the Western experience of the relationship between believer and state power, is the lesson of history.

