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BOOK REVIEW

FREE EXERCISE! FOLLOWING CONSCIENCE, DEVELOPING DOCTRINE, AND OPENING POLITICS

*Patrick McKinley Brennan**

That religion has caused many acts of violence and perpetuated many hatreds is a datum of history. So has sex. Humankind cannot do without sex; sex cannot be eliminated in order to eliminate its attendant evils. No more so can religion. For the evils, at least for most of the evils that religion brings, a sovereign remedy exists—free exercise!

Free exercise—let us Americans assert it—is an American invention.¹

INTRODUCTION

“Free exercise”—not mere prudential toleration of religious liberty by government, but written into fundamental law a principled guarantee that the exercise of religion will be free from government prohibition—appeared first in America. That guarantee, though written into the First Amendment of the American Constitution, has been only slowly but gradually realized. The idea of religious freedom served by the guarantee of “free exercise” has spread from America to other parts of the world. These, one might say, are John Noonan’s three theses in *The Lustre of Our Country: The American Experience of Religious Freedom*.

* Associate Professor of Law, Arizona State University. Work on this Book Review was begun under the support of a research grant from the College of Law, Arizona State University. Jack Coons discussed the substance of the Review with me as I wrote, and then improved both the substance and the style of what I had produced. David Kader thoroughly vetted that product, prompting sometimes substantial changes (which I am afraid still do not meet all of his trenchant criticisms). Jeff Murphy, Fernando Tesón, and Michael White also provided helpful criticism, both specific and general. For the remaining errors, of course, I alone am responsible.

¹ JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 2 (1998).

The book is grounded, as Noonan's work always is, in broad and deep learning. Its historical analysis advances, as Noonan's work always does, by undoctrinaire argument and fresh grasp of perennial issues. The book upsets expectations, as Noonan's work always does, by how it embraces the new to perfect the old.² What Noonan has produced is a history—as rich as it is fresh—of the emergence of the American *idea* of religious liberty, of the American *experience* under the constitutional guarantee of “free exercise,” and of the *influence* of the American idea elsewhere.

In addition to the three theses argued, there is a premise operative in *The Lustre of Our Country*—a premise that allows the history to shade into celebration. Noonan un.masks it at the outset of his study:

For God must enter any account of . . . religious freedom. On that point you cannot be neutral. . . . For my part, I approach this most difficult and fundamental of subjects not without diffidence and doubt but with the belief that religion is a projection (for who could deny the freight of human desires that every religion has borne?), and that religion is also a response to another, an other who is not a human being, an other who must have an intelligence and a will and so be, analogously, a person. Heart speaks to heart, says Newman with poignant lucidity. There is a heart not known, responding to our own. Such is human experience. Religion is ineradicable because of this other and greater to whom we relate and respond. . . .

. . . [R]eligion is a relationship to God; God is not a category; and categorization misses the living communication between believer and God that is the heart of the matter. In the end, categories must yield to empathy and its necessary ingredient, imagination.³

Noonan does not treat “free exercise” simply as the citizen's accumulation of another negative liberty, a “principled” toleration. Rather, Noonan *celebrates* it as the opportunity for the *exercise* of religion, which Noonan understands as the human person's free response to a personal god.⁴ “[R]eligion itself requires religious

2 The phrase was originally used (aspirationally) by Pope Leo XIII in the late nineteenth century, and later taken up as a personal motto by Bernard Lonergan: *augere et perficere vetera novis* (to add to and perfect the old with the new).

3 NOONAN, *supra* note 1, at 1–2.

4 See JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 19 (1996) (“[F]reedoms allow us to engage in certain kinds of actions that are particularly valuable. The law leaves us free to do x because it is a good thing to do x . This might seem pretty obvious. But notice that it inverts the first principle of liberalism—the idea that the right is prior to the good”); cf. JESSE CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 11 (1995) (“Although it may be that a per-

freedom. Heart speaks to heart, spirit answers Spirit, freely."⁵ This is the theological judgment that serves as the premise of Noonan's celebration of religious freedom. It has consequences.

For the believer, such as Noonan, free *exercise* is what creation is for. But "free exercise," as Noonan is the first to acknowledge, is hard to manage juridically, and sometimes believers and nonbelievers alike conclude that the game isn't worth the candle. And so, Noonan reminds ominously, "[T]he words safeguarding religious freedom in the Constitution must be applied in order to achieve that end,"⁶ for not to pay the sometimes huge price "free exercise" demands is juridically to block the human response to a sovereign summons to fellowship with the divine. The theological *premise* brooks no compromise.

Noonan's three theses and premise are advanced through three Parts, enclosed between a Prologue and an Epilogue (which I shall describe below). Part One is entitled "History," and in its five chapters Noonan manages to trace the cramped, pre-American western stance on religious liberty, to rehabilitate James Madison as the intellectual impetus behind the movement from mere religious toleration to the idea of religious freedom, and then to create a vibrant impression of the American "experience" of religious freedom through presentation of several extended American vignettes.⁷ Part Two, entitled "Problems," is composed of three chapters. The first shows the "pilgrim process" by which, Noonan argues, the religion language of the First Amendment is given effect by the judiciary. Part Two's remaining two chapters raise a question about America's "civic religion," which Noonan answers with a theory about the public place of *moral*

ceptive observer's conclusion that 'liberty is the end, the goal, and the entire rationale of what the First Amendment says about religion' is an overstatement, there is general—it is fair to say nearly universal—agreement that the paramount concern of both Religion clauses is to protect religious liberty: the freedom to pursue (or not to choose) a religious faith.") (footnote omitted).

5 NOONAN, *supra* note 1, at 358.

6 *Id.* at 357; cf. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 523 (1991) ("[W]hat has blocked the development of a consensus on some such approach [to free exercise] is the same problem that is responsible for the disarray of establishment law: the lack of a clear judicial sense of the purpose and meaning of the Constitution's religion language.").

7 For example, religious experience and rhetoric in the mid-nineteenth century are exposed through a chapter of excerpts from the charismatic Boston preacher, Theodore Parker, one of his critics, and his eulogist. See NOONAN, *supra* note 1, at 119–37. For another example, religious experience and the judicial handling of it in the mid-twentieth century are revealed through a chapter describing and analyzing the notorious *Ballard* litigation that twice passed through the Ninth Circuit Court of Appeals, on which Noonan now sits, on its way to the Supreme Court. See *id.* at 141–76.

imperatives religiously conceived. In Part Three, called “Influences,” Noonan argues for the real but different impact of the Madisonian-American idea of religious freedom on the legal-doctrinal treatment accorded religion in France, Japan, the former Soviet Union, and the Catholic Church.

In this Book Review I undertake to identify and to probe the epistemological presuppositions of *The Lustre of Our Country* and to assess the epistemic warrant of the claims made on behalf of “free exercise.” Such a project recommends itself for several, related reasons. In the course of arguing his three theses, Noonan makes much of *how* the idea of “free exercise” was conceived, developed, and defended. More specifically, this book, like many of Noonan’s earlier works, does a sophisticated sort of history—tracking the development of an idea through careful consideration of how and why a specific idea captures the attention of specific humans in specific contexts. Noonan’s work is intellectual history that attempts to describe and explain the development of ideas, not by treating them as self-generated and spontaneously mutative but, rather, by understanding what humans were and are doing with ideas, and why. In *The Lustre of Our Country*, Noonan makes strong and clear claims about the intellectual process by which James Madison arrived at the idea⁸ “free exercise,” and some of the book suggests that the American and some European experience with religious freedom since then has been an *experiment* testing Madison’s idea.

But an experiment presupposes a hypothesis, the gathering of data, and a metron; and much of the time Noonan seems committed to the proposition that Madison’s idea, because of its epistemic status, is beyond challenge or verification. Conscience, the pivot of Madison’s and Noonan’s analysis, sometimes assumes superhuman stature. At other times, however, Noonan treats “free exercise” as a hypothesis, and provides a metron for testing it. But the proffered metron, variously described as persons working out the consequences of an idea or empathy or the imitation of Christ, is unsatisfying. Noonan has focused on the role persons have in working out the idea of religious freedom but has stopped short, I shall argue, of identifying precisely how that intellectual advance does and ought to occur. This failure, I shall further argue, leads Noonan to provide not a reason, but merely a brute experience, to justify “free exercise.” The unanalyzed—the brute—starting point of heart speaking to heart

8 I deliberately use the term “idea” to avoid introducing out of context the specific epistemological term “insight” that Noonan uses to identify Madison’s cognitive achievement.

leads to a doctrine of free exercise that one can only *believe in* or reject.

In what follows, then, I begin, in Part I, by setting out Noonan's epistemological perspective in a general way. In Part II, I summarize Noonan's splendid account of Madison's contribution to the conception of the American idea of "free exercise," with a view toward pinpointing the nature and scope of the claims Madison makes, and Noonan makes for Madison, for what religious liberty is and why it should be guaranteed. With that in place, in Part III I work through Noonan's account of what he calls the "incorporation" of Madison's idea by the Catholic Church at the Second Vatican Council. From there I turn, in Part IV, to an analysis of the epistemological claims Noonan has made with respect to Madison and the American Jesuit, John Courtney Murray, who more than any other person brought the American idea to Vatican II and its Catholic doctrine. Here I argue that while Madison and Murray (and the post-Vatican II Catholic Church, to the extent that it followed Murray) doubtless stand in favor of a legal guarantee of religious liberty, they do so on very different grounds. More specifically, I argue that Murray has given a *reason* for religious liberty where Madison, as understood by Noonan, merely invokes the experience of an inner oracle called conscience. In the last Part, I briefly situate Noonan's Madisonian position in the current debate, led by John Rawls, about the tenability of shaping public life in conformity of what Noonan calls "moral imperative[s] religiously conceived." Here I argue that while Rawls's account must be rejected, Murray comes vastly closer than Noonan's Madison to providing an account of why and to what extent "moral imperative[s] religiously conceived" may be given governmental effect without violating the ban on establishment Madison thought necessary to "free exercise."

I. EMPATHY AND PERSPECTIVE: THE MINDS THAT ANIMATE THE RULES

*Indispensable but insufficient to the legal process, living only in the minds of persons and applied only in the interaction of persons, rules cannot be the sole or principal object of legal study, legal history, and legal philosophy.*⁹

To name the person who has written this book about the idea and experience of religious freedom is at once to make a point dear to Noonan and to silence the other voices the author himself animates in the new book bearing only the name John T. Noonan, Jr. Noonan the person wrote the book and would hide behind no mask. Specifically disavowing the pretense to disinterestedness, Noonan begins

9 JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 17 (1976).

with a Prologue that gives “my perspective.”¹⁰ Thereafter he employs “a variety of forms to express the variety of perspectives that bear on reading our national experience [of free exercise] and the paradoxes it contains.”¹¹ Thus, for several examples of these multifarious forms of presentation: a summary of the condition of religious liberty before the American Revolution is rendered in the question-and-answer form familiar to *Baltimore Catechism* Catholics; James Madison speaks first through his own notes for debate on Patrick Henry’s bill establishing religion in Virginia; Alexis de Tocqueville’s familiar account of religion in America is complemented by a cento of the language of Angélique, his more uncompromising older sister; the judiciary’s experience in trying to deliver the promise of “free exercise” is set out in a first person narrative (“The Pilgrim’s Process”) that features such interlocutors as Simple and Light, as well as law clerks Harvardman, Boaltman, and Yalewoman.

“The chosen forms,” Noonan notes, “are my inventions, the views expressed real.”¹² But even the other voices are not, according to Noonan, entirely other: “No doubt my own opinions breathe beneath these masks.”¹³ The book ends with an Epilogue, the last Noonan invention: Ten Commandments (which provide an almost inspired resumé of the book). The First Commandment makes the perspectival point that Noonan adjudges foundational to his work on religious liberty:

You shall conclude that the genealogy, the domestic environment, the educational exposure, the intellectual adventures, the friendships, and the professional life of anyone treating this topic influence the treatment; and you shall suspect that the spiritual life of the writer is relevant as well; and you shall know that no person, man or woman, historian or law professor or constitutional commentator or judge, is neutral in this matter.¹⁴

Noonan’s Prologue provides the picture of his perspective he thinks the reader requires; it cannot be summarized. Noonan’s own encapsulation catches the drift, however: “I grew up in a church that formally denied free exercise and live now in the same church that

10 NOONAN, *supra* note 1, at 3.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 357. That interpreters of language must always—and not exclusively in the context of religion—be attentive to when an author is biased, Noonan almost certainly would agree. It is perhaps a function of how Noonan’s account of how religious understanding differs from other understanding, an issue discussed *infra*, that makes Noonan especially alert to the problem in this context.

has come to champion it. This whole book is a reflection on the experience."¹⁵ A Catholic growing up in the Boston where once Congregationalists—believers in the liberty of conscience—had beaten Baptists and executed Quakers for their wrong beliefs, Noonan was interested in religious liberty. Repelled by the Catholic doctrine that the state should repress heretics, Noonan traveled to talk with Father John Courtney Murray, S.J., whose scholarship urged a change in the Catholic doctrine on religious liberty. Noonan saw the appeal of a change but knew that he and Murray lived in a Church which claimed that her doctrine was always and everywhere the same—*semper et ubique eadem*. "I put the question aside as not a practical one: after all, every Catholic accepted American democracy and liberty of religion today."¹⁶

But soon Noonan found himself inquiring into the possibility of change in Church doctrine and discovered that changes had occurred. The fact proved the possibility. Noonan's attention had been captured by "a much larger question, the relation of history to the teaching of the Church, the question to which I have returned again and again."¹⁷ Noonan ended up devoting much of his academic career to identifying what differentiates development from declension. Each of Noonan's magisterial studies—as of usury, contraception, bribery, abortion—pivots on what changed and what stayed the same, and why. Noonan has not been afraid to identify change in Catholic doctrine. "[W]hy should believers in Christ have such a fear [of doctrinal change]? The Spirit guides the Church."¹⁸ Doctrine's catholicity rests for Noonan on a foundation firmer than verbal continuity. "More facts," as Robert Rodes has written, "[were] to be a major distinguishing quality" in Noonan's work.¹⁹ But for Noonan those facts do not lead to a universe of dizzying particulars. The facts are ultimately in service of the question of whether doctrine conforms to the person of Christ, which Noonan has identified as the only valid principle of continuity.²⁰

15 *Id.* at 3.

16 *Id.* at 29.

17 *Id.*

18 John T. Noonan, Jr., *Development in Moral Doctrine*, 54 THEOLOGICAL STUD. 662, 677 (1993).

19 Robert E. Rodes, Jr., *An Overview of the Scholarship in Law and Religion of Judge John T. Noonan, Jr.*, 12 J.L. & RELIGION 533 (1995–96). More biographical data on Noonan are provided in Kevin Start, *Judge John T. Noonan, Jr., A Brief Biography*, 11 J.L. & RELIGION 151 (1994–95).

20 See Noonan, *supra* note 18, at 676.

The giver of Commandment One has transformed “the temptation to commit religious autobiography”²¹ into a duty upon this author, for the reader who would keep Noonan’s First Commandment must know something about me, too. Not one for supererogation, I shall keep it brief. I was Judge Noonan’s law clerk in 1993-94 when *The Lustre of Our Country* was in the works. When Judge Noonan hired me, he quipped that his one reservation about having me as a clerk was that I was more of a Thomist than he.²² I am not sure why that was relevant. We talked about philosophy and religion occasionally that year, but mostly Judge Noonan’s law clerks provide him modest assistance in the cases that come before him as a United States Circuit Judge. Noonan notes in his Acknowledgments that “Patrick Brennan did an initial investigation on the material on Russia”²³ for the work in progress. True, but Patrick Brennan spent much more of the time not researching cases sopping up the community Noonan created in chambers among his staff. One of my co-clerks savored cuisine as much as the other relished history; one of Noonan’s two wonderful secretaries is rumored to have once wished him an innocent “Happy Good Friday.” We all enjoyed and learned from each other.

I was the Catholic in the group Noonan had assembled—a Catholic born after Vatican II but the beneficiary of several years in Christian Brothers and Jesuit boarding schools. Brother Columban, F.S.C., introduced me to John Henry Newman when I was twelve. Half-a-dozen years later in a Yale seminar on the idea of God in modern philosophy, Louis Dupré gave me a skeptical introduction to Chapters 19 and 20 of Bernard Lonergan’s *Insight* (reading later described to me—by a leading American law professor who was a student of Lonergan and greatly admires Lonergan’s work—as the stuff of purgatory). I’ve been reading Lonergan ever since, including the years I spent studying Aquinas, Scotus, and Ockham in the Pontifical Institute of Mediaeval Studies at Toronto. From mediaeval philosophy I made a half turn toward law and have spent the last half-dozen years working with John Coons on a study of the (American) idea of human equality and its roots in an emergent theory of conscience; John Courtney Murray, Bernard Lonergan, Alphonsus Liguori, and Semi-Pelagius are among the heroes of the book. I teach and write about criminal law, federal courts, administrative law, jurisprudence, and legal history.

21 John E. Coons, *Confessions of a Semi-Pelagian*, in *WHY I AM STILL A CATHOLIC* 211 (Kevin & Marilyn Ryan eds., 1998).

22 See Patrick M. Brennan, *The Standard (of Review) in Judge Noonan’s Judging*, 12 *J.L. & RELIGION* 553, 563-64 (1995-96).

23 NOONAN, *supra* note 1, at Acknowledgements.

"Let each one addressing this theme say where he or she comes from, and goes."²⁴

II. THE IDEA OF *FREE EXERCISE* AT THE FOUNDING: IN THE MIND OF MADISON

*Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offense against God, not against man . . .*²⁵

Some legal scholars approach the problematic of American religious freedom by reading judicial opinions as conduits of the United States Constitution's meaning.²⁶ Others approach the same problematic by reading the Constitution as a document that in its entirety sets out a plan for government and which in that context speaks to the issue of religious freedom.²⁷ Noonan makes his approach by looking first to a person. "Words alone do not do the trick."²⁸ The person from whom comes the American idea of religious freedom is, in Noonan's judgment, James Madison.

James Madison [is] the man primarily responsible for religious freedom becoming the first of our liberties. Of course, Madison did not act alone. Of course, he had critics and opponents. Of course, he had his own intention—documents are not drafted unintentionally. Of course, he succeeded only because he incorporated ideas already common currency, only because he accepted ambiguities understood differently by different factions, and only because he diluted the clarity of his intention with compromising phrases. But to follow Madison is to catch the quintessence of the drive, at once

24 *Id.* at 3.

25 JAMES MADISON, MEMORIAL AND REMONSTRANCE ¶ 4.

26 See NOONAN, *supra* note 1, at 5.

27 Mary Ann Glendon contrasts such an approach with one in which constitutional law is reduced to an inquiry into someone's prized interpretations of the Constitution—something like looking at the Elgin Marbles with no regard for the Parthenon. See Mary Ann Glendon, *Comment* to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 111 (1997). See also Glendon & Yanes, *supra* note 6 (urging the Court to adopt a holistic, common law-like approach to interpretation of the Constitution's religion language). Noonan's analysis in *The Lustre of Our Country* is calculated to unsettle the lawyerly recourse to interest "balancing" when one of those interests is the personal duty to honor the divine. See NOONAN, *supra* note 1, at 374.

28 NOONAN, *supra* note 1, at 3.

deeply religious and deeply political, for more than religious tolerance—for free exercise itself.²⁹

“Overshadowed by Jefferson, Madison was the better workman.”³⁰ But Noonan’s Madison thus is not only an able workman, the generator not merely of constitutional words, but of an “insight”³¹ into religious freedom—legal enactment of which Madison thought “‘promised a lustre to our country.’”³² Noonan’s *The Lustre of Our Country* identifies that “insight,” traces its appropriation in America and abroad, and approves it. “It is Madison whom American experience has vindicated.”³³

We can pick up Noonan’s fleshing out of Madison in the fall of 1773, when James Bradford wrote to Madison for advice about his calling. Bradford’s options, as we would say today, were law, medicine, and merchandising. Bradford opted for law, to Madison’s disappointment. Madison acceded to the choice but wrote to Bradford:

I cannot however suppress [this] much of my advice on that head that you would always keep the Ministry obliquely in View whatever your profession be. This will lead you to cultivate an acquaintance occasionally with the most sublime of all Sciences and will qualify you for a change of public character if you should hereafter desire it.³⁴

What he meant by “‘keep[ing] the Ministry obliquely in view,’” Madison clarified in his next sentence: “by becoming fervent Advocates in the cause of Christ.”³⁵ Noonan summarizes Madison’s exhortation to Bradford: “To follow Jesus in public life was to keep the ministry obliquely in view.”³⁶

Of many ministers, however, Madison wrote to Bradford in early 1774 to complain in the bitterest of terms:

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 fur-

29 *Id.* at 3–4.

30 *Id.* at 4.

31 *Id.* at 90.

32 *Id.* at 4.

33 *Id.*

34 *Id.* at 65–66.

35 *Id.* at 66.

36 *Id.*

nish their Quota of Imps for such business. This vexes me the worst 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 the 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 little purpose that I am without common patience. So I [must beg you] to pity me and pray for Liberty of Conscience to all."³⁷

Noonan has this to say about Madison's words to Bradford:

Theology, or theological metaphor, to the fore. The agents of religious repressions are not comical elves but imps: in the lexicon of the day puny or subaltern devils, as in the preacher's phrase "imps of Satan." The principle on which they act comes from Hell—a dark ascription; there is no evidence that it is less than seriously asserted. . . . What is sacred, whose liberty must be safeguarded, is the faculty by which right is discerned from wrong, and by which God speaks to each—the conscience. What distresses Mr. Madison most is the clergy's part in persecution Mr. 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. Prayer in these circumstances was JM's earnest response to perceived evil.³⁸

Every person has a sacred right to follow his conscience, violation of which right by government—even or especially on religious grounds—is an evil. This is the "insight" with which Noonan credits Madison. "Insight" is Noonan's term, not Madison's. Noonan does not define it. Is it a bright idea? A hypothesis? A correct idea? An intuition? Some other sort of experience? Noonan poses an ambiguous dichotomy and leaves his explicit treatment of the issue at that:

Mathematicians, it is believed, have their insights young, when their purely intellectual powers are at their height. They need no experience to see into the world of numbers. Statesmen, at least Plato thought, need experience. JM was either a mathematician or his experience, supplied vicariously by history, had come early.³⁹

Conceptually, Noonan's epistemology includes the fact, and thus the possibility, of something called "insight." Functionally, Noonan's epis-

³⁷ *Id.* at 68. The language in square brackets is supplied from *THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON* 298 (S. Padover ed., 1965).

³⁸ NOONAN, *supra* note 1, at 68. The author often refers to James Madison as "JM"; his convention will be retained herein.

³⁹ *Id.*

temology here seems to resolve into Platonic ideas or brute experience—neither of which would be capable of being tested. But what Noonan's Madison had generated and possessed has been, in Noonan's own judgment, susceptible of experiential vindication. "At twenty-two, using the Philosopher's stone of divinity, he had formed and had articulated the insight that in revolutionary America would carry the day for the free exercise of religion."⁴⁰

The day came quickly, first in Virginia. The year was 1776. Madison was on the committee charged with drafting the Declaration of Rights for the new commonwealth. George Mason produced a draft, extending tolerance of religion beyond the bounds of English law. But Madison "had thought about government and religious liberty," observes Noonan. Though conscious that "he was 'young and in the midst of distinguished and experienced members,'"⁴¹ Madison re-drafted the text. According to Noonan, "The 'fullest Toleration' disappeared and the 'full and free exercise of [religion]' replaced the stricken term. Tolerance, out; free exercise, in—a decisive move. Moreover, free exercise was what 'all men are equally entitled to.' Mr. Mason's draft had said nothing about human equality."⁴²

The claim of equality had a purpose; it served as a springboard. With what Noonan calls "peculiar daring,"⁴³ Madison added a phrase that eliminated Mason's continuation of the establishment of the Church of England, thereby equalizing the operational bases of the faiths. Mason and the committee approved. A delegate managed to have the establishment language restored, but the statement on equality survived. "Slightly altered in the final round, the Madisonian text prevailed. The cardinal change from Mr. Mason's draft was that for 'Toleration' Mr. Madison had substituted a phraseology recognizing in effect that freedom of conscience was," as Madison put it a half century later, "a *natural* and absolute right."⁴⁴ Noonan interprets Madison's emphasis: "The 'absolute,' unitalicized crowns the emphasized 'natural.'"⁴⁵

Still, more remained for Madison to do for free exercise in Virginia. In 1784 Patrick Henry proposed a bill "Establishing a Provision for Teachers of the Christian Religion." The state was to support ministers' teaching of the gospel, though each taxpayer was to be able to choose the Christian church to which his tax would run. Nonetheless,

40 *Id.* at 68–69.

41 *Id.* at 69.

42 *Id.*

43 *Id.*

44 *Id.* at 70.

45 *Id.* at 75.

"[t]he key term," in Noonan's judgment, "was 'establishing.' The establishment of religion was to return."⁴⁶ Madison went to work. The product is his *Memorial and Remonstrance Against Religious Assessments*—that panegyric to the good of the free exercise and the evils of establishment of religion. The establishment of religion is not to be permitted because—wrote Madison, twice quoting the Virginia Declaration of rights—it

violates the equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of conscience."⁴⁷

With fateful consequence, Madison had rooted the right to religious liberty in *conscience*.

Henry's bill was soundly defeated, but that was not all. The ancient common law "penalties and incapacities"⁴⁸ for religious opinion or religious teaching had survived the Virginia Declaration of Rights. Now Madison pushed a bill (earlier introduced by Jefferson but defeated) that ended them. The bill's preamble (or "enacting clauses") had it that "Almighty God hath created the mind free"⁴⁹ and from that concluded that it was not to be influenced by the forces of human association. There were to be no temporal burdens on conscience.⁵⁰ "Conscience, not church, became by law established," Noonan observes, and continues: "With unusual optimism Mr. Madison wrote Mr. Jefferson that the enacting clauses 'have in this Country extinguished for ever the ambitious hope of making laws for the human mind.'"⁵¹

Virginia was only the beginning. The federal union had been formed by a Constitution that prohibited religious tests for public office but that gave no guarantee that government would not deny religious freedom; not only had Madison of course had a hand in drafting and defending that Constitution, Madison himself had opposed the inclusion of a bill of rights. Among Madison's reasons for urging

46 *Id.* at 72.

47 2 JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 186 (Gaillard Hunt ed., G.P. Putnam's Sons 1901).

48 NOONAN, *supra* note 1, at 74.

49 *Id.*

50 *See id.* at 71, 74–75.

51 *Id.* at 75.

against constitutionally staying the federal government's hand with respect to religion was a newly developed distrust of "parchment barriers."⁵² To this was added a conviction, captured in *The Federalist No. 51*, that the only sure source of protection for the exercise of religion was the diversity of sects that in fact obtained in America: "[T]he security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects."⁵³ But without repudiating the point about the empirical effect of the multiplicity of sects, Madison—under Jefferson's influence—recovered some confidence in the power of parchment.⁵⁴ There should be a federal bill of rights, and Madison would push for it.

Elected to the House of Representatives following a campaign that promised his support for a "specific provision" on "the Rights of Conscience," Madison became, in Noonan's words, "the spokesman for religious freedom in the Congress that was to begin the government of the United States."⁵⁵ Madison proposed two amendments to the Constitution. The first was to be added to Article I, section 10, among the existing restrictions on the states: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."⁵⁶ The second was to be inserted between clauses 3 and 4 of Article I, section 9, among the limitations upon the powers of Congress: "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."⁵⁷ "Conscience," as Noonan notes, was made "the centerpiece. The equality of the rights of conscience was emphasized, as in Virginia. A national established religion was banned."⁵⁸ To follow upon the more primordial right to conscience and religious freedom, moreover, Madison proposed an amendment guaranteeing liberty of speech and press.⁵⁹

The Senate killed Madison's amendment disabling the states from violating the rights of conscience. Nor did the Senate simply accept the House's language on the federal power with respect to reli-

52 *Id.* at 76.

53 *Id.* at 77 (quoting THE FEDERALIST NO. 51 (James Madison)).

54 *See id.* at 77. To be sure, Madison came to favor the creation of an entire federal bill of rights for the political purpose of seeing the Constitution ratified.

55 *Id.* at 78.

56 *Id.* at 79.

57 *Id.*

58 *Id.* at 80.

59 *See id.*

gion. From the House had emerged language that "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."⁶⁰ The Senate proposed another version: "Congress shall make no law establishing articles of faith or a mode of worship prohibiting the free exercise of religion."⁶¹ The discrepancies between the House and the Senate provoked a conference, Madison among the six conferees.⁶² From the conference issued the final text that was ratified by the states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁶³

Noonan surveys the result:

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."⁶⁴

Noonan evaluates Madison's performance:

Imperfect, cautious, exact—peculiarly the triumph was Mr. Madison's. At twenty-two he had seen what government and religion required—seen it in the transparent clarity with which a brilliant mathematician perceives a new relationship of numbers. For over fifteen years he had worked to have his idea incorporated into fundamental law⁶⁵—worked not singlemindedly, not as though it was the purpose of his life, but as for an ideal he knew to be sound, of importance, and plausibly attainable Always he had counted votes. He was ready to compromise to gain his end. He was not wedded to words. He was conscious that words alone would not work, although it was by words, after all, that the doctrines of religious establishment and religious persecution had been forged. By words they might be exorcised. Patient, flexible, persevering, he prevailed. He dared to believe that time would sanctify and public sentiment would incorporate the ideal put in words.

60 *Id.*

61 *Id.*

62 *See id.* at 81.

63 *Id.* . . .

64 *Id.*

65 Though sustainable, this analysis has to cope with the fact that Madison first opposed a federal bill of rights.

JM had triumphed.⁶⁶

"Or had he?," asks Noonan. Madison had lost the restriction on state establishments of religion; the religion language of the First Amendment would not be applied against the states until 1940.⁶⁷ Madison had lost any reference to equality, "to his mind a significant reinforcement of religious liberty."⁶⁸ Madison had lost, moreover, his clear ban on federal establishments of religions; the enacted language arguably only prevented Congress from interfering with the state establishments that spanned the eastern seaboard.⁶⁹ "What survived the Senate," Noonan notes, "was the ban on legislation prohibiting, that is, denying or even restricting, free exercise."⁷⁰ The Congress that passed the First Amendment then promptly established chaplaincies and made public grants of property for the support of religion.⁷¹ "The great ambiguity of the First Amendment opens wide."⁷²

Madison had had a different view about the proper relation between government and religion. "Free exercise" meant for Madison no government interference with the obligation of conscience, and that meant *no* government aid to any religion, lest government honor one person's conscience more than another's.⁷³ The equality of

66 NOONAN, *supra* note 1, at 81.

67 See JOHN T. NOONAN, JR., *THE BELIEVERS AND THE POWERS THAT ARE* xiii (1987) ("Prior to 1940 the Supreme Court of the United States had never upheld a claim of free exercise of religion, had never found any governmental practice to be an establishment of religion, and had never applied the religion clauses of the First Amendment to the states."). In 1940, the Court decided *Cantwell v. Connecticut*, 310 U.S. 696 (1940), "obliging the states to respect free exercise." NOONAN, *supra* note 1, at 34.

68 NOONAN, *supra* note 1, at 82.

69 *See id.*

70 *Id.*

71 *See id.*

72 *Id.* "And that the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased inquirers into the history of its origin and adoption." Letter from Madison to Henry Lee (June 25, 1824), *quoted in* 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 464 (M. Farrand ed., 1966).

73 Noonan writes:

Free exercise in itself was incompatible with establishment. So [Madison] had thought in 1776 in Williamsburg; so he had argued in 1785 in the Memorial and Remonstrance; so he had answered Patrick Henry in 1788; so he observed nearly a half century later, responding to a minister who asked his opinion "on the relation of [Christianity] to Civil Govt." "The rights of Conscience," he then wrote, were "not included in the surrender implied by the social State" and were "more or less invaded by all religious Establishments." It was his consistent, coherent, bold proposition. If Mr. Madison had been a lawyer, it would be questioned as a lawyer's too close reading of language. Cognizant of legal argumentation, JM maintained his view on a stronger ba-

human consciences forbade all establishments. The exigence of that, Madison's "insight," lay in the religious conviction of Madison the man. "[R]adical separation is, JM declares, 'a just and a . . . truly [Christian] principle.' It is Mr. Madison's principle as a [Christian]."74 Noonan's Madison is a devout adherent of Christianity. Wishing "to be enrolled 'in the Annals of Heaven,'"75 Madison had kept "the Ministry obliquely in View"76 and had sought to imitate Christ in public life. Though quiet about his faith, Noonan's Madison was forever in Christ's service. Madison, in his own words, had "spared no exertion" to keep Baptist prisoners from imprisonment and to secure their release.77 Madison, in his own words, had acted from "a mere duty prescribed by conscience." In Noonan's words,

The mere duty carried JM all his way. The duty was mere; the prescribing authority was supreme. It was supreme because it was not just an inner tickle, a subjective unease: it was for JM the actual voice of another, a communication, a command. The ultimate fact—the ultimate paradox if one likes—is that for the Father of Free Exercise the rightness of the doctrine is rooted in his own faith, a faith conventional in its day but for all that palpably alive, a faith stupendous in modern eyes, the faith that God in us speaks to us.

The radicalness of JM—should we say the madness of Madison?—was to suppose that each individual has a zone in which he or she responds to the voice of God, a zone beyond political authority.78

Noonan's Madison knew that there were risks entailed in his position (people do strange things, not always obviously good for the collectivity as such, in the name of religion)79 but was willing to run them, "without discussing them," because he was

sis than legal dialectics. That basis was his religious conviction from the beginning that free exercise of religion excluded any governmental support of religion.

....

. . . The sweep of what JM disapproves is striking. Separateness for him means no public support for a church; no incorporation; no tax exemption.

NOONAN, *supra* note 1, at 82–83, 84.

74 *Id.* at 88.

75 *Id.* at 86.

76 *Id.* at 87.

77 *Id.* at 88.

78 *Id.* at 88–89.

79 Noonan writes:

How could Mr. Madison, practical politician, constitutional architect, wise statesman, have imagined that that [a zone beyond political authority]

confident that the difficult cases would be rare and de minimis—confident, after all, that the voice of God would not often be heard in distorted or eccentric ways. A modern reading of free exercise notes that the First Amendment forms part of a constitution; it cannot be isolated from the structure to which it is attached; its interpretation, like the interpretation of every right, requires a “balancing.” JM could scarcely have disagreed with the structural considerations; but he does set out “the great Barrier” as an absolute, an absolute that, like a mathematician, he was willing to see asymptotically approached.

In the ultimate and absolute relation of each individual to God lies the limitation on civil society and civil government on which JM insists. Without that relation, why should a society be constrained to respect conscience? . . . The theology underwrites the political theory on the competencies of government By their consciences the people relate to God. The faith that there is a governing God is fundamental.⁸⁰

Madison’s *faith* is fundamental: “his theological premises compel these radical conclusions.”⁸¹

This then is Noonan’s Madison: possessor and propagator of the “insight” that men and women have a sacred duty and right to follow the god that speaks within, a right that is compromised by establishment—including *any* government support—of religion. Madison’s “insight” sprang from his personal faith in a personal, the Christian, God. But the Christian churches themselves lacked Madison’s “insight”; indeed, the Catholic Church of Madison’s day and Noonan’s youth favored its own establishment, repression of heresy by the state. Nearly two centuries after Madison’s Archimedean moment about free exercise, the Catholic Church was asked, at the Second Vatican Council (1962–65), to “incorporate the insight which James Madison had so precociously articulated and asked his country to experiment with[.]”⁸²

would work? It was not merely that A’s conscience might lead him to injure B, it was that A’s conscience might lead him to scandalize B (if Mr. Madison knew any history at all, he knew that Quakers had on occasion in the past walked naked into church); it was that A’s conscience might lead to refusal to cooperate in the common defense of the community (Mr. Madison was well aware of his conscientious-objector constituents).

Id. at 89. Perhaps it is relevant, however, that Madison thought it “a safe calculation that in this [case of religious freedom] as in other cases of excessive excitement, Reason will gradually regain its ascendancy.” 9 MADISON, *supra* note 47, at 487.

80 NOONAN, *supra* note 1, at 89.

81 *Id.* at 75.

82 *Id.* at 331.

III. THE IDEA OF *FREE EXERCISE* AT VATICAN II: IN THE MIND(S) OF THE MAJORITY

The Catholic Church, once a defender of the repression of heresy, became in 1965 a champion of religious liberty on the grounds of both revelation and natural law. A principal draftsman of the new stand was an American Jesuit.

... [T]he American experience has been communicated. In each instance the idea of free exercise has been dependent on the conditions in which it has been received. Like religion itself free exercise is culture-bound. Yet there is a direction in which the nations have moved. The American experience has lighted up the skies.⁸³

Noonan tells the incorporation story with the enthusiastic nuance of someone who was present. No one had ever seen a Church council before. What people had were images—images of robed white males hovered over by a dove representing the Holy Spirit.⁸⁴ What Noonan and others found “was a legislature in action . . . with a right, a center and a left.”⁸⁵ Its members, most of them bishops, met in the great basilica of St. Peter’s—itself an architectural tapestry like the documents that were to be thrashed out there to issue in the name of the Council. These bishops drank espresso at the basilica’s side altars turned into coffee bars for the Council; there they engaged “in argument with other participants” that often continued into the streets and neighboring buildings.⁸⁶ For Noonan,

The experience of the Council was the experience of a demythologized church. Those experienced in biblical studies knew that in the documents gathered in Scripture God spoke through human tongues in human voices. Now the same phenomenon was observed in the flesh, as it were. The Council was the work of human beings. Faith would accept its conclusions as the will of God. But the conclusions did not come in a disembodied voice from heaven or carved on stone tablets.⁸⁷

Again Noonan starts not with texts but with persons.

Noonan focuses on one person in particular, another JM: John Courtney Murray. Murray exercised a great influence at the Council, but the story doesn’t begin with his touching down in the Eternal City. Murray, the world’s foremost authority on the traditional Catholic teaching about the correct governmental stance vis-a-vis religious lib-

83 *Id.* at 8–9.

84 *See id.* at 338.

85 *Id.*

86 *Id.* at 338.

87 *Id.*

erty, almost didn't get invited to be a Vatican II *peritus* (expert). Between the 1940s, when Noonan first traveled to meet him, and the 1960s, the value of Murray's stock in Catholic circles had fluctuated. As it generally rose in the states, it came under attack at Rome. The head of the Holy Office, Alfredo Cardinal Ottaviani, had a personal interest in the subject of religious liberty, and indeed in 1948 had published a book personally restating the traditional view at exactly the same time Murray was attacking that position.⁸⁸ Murray then heard from Pope Pius XII's Jesuit secretary that Ottaviani's views were not necessarily the Holy Father's, news which Murray publicly interpreted as the Pope's siding with Murray against Ottaviani. Ottaviani took umbrage, and Murray's apology came too late (assuming it ever could have worked). In 1954 a Jesuit censor in Rome interdicted Murray's attempt to publish on church and state.⁸⁹

The American assistant to the general of the Jesuits added, as he communicated this verdict: "It seems to me a mistake to wish to carry on with that controverted question under present circumstances." Murray replied, thanking him for his "delicate way of saying, 'You're through.'" The American assistant promptly answered, "You are far from through, I hope." Murray came back: "It was kind of you to say, 'You are far from through, I hope.' I do not share that hope." He had returned all the books on church and state to the library. Ottaviani . . . had won hands down Twice again he tried—in 1958 and 1959—and twice again his articles were rejected by the Roman censors. He remained silent or, rather, silenced on the subject for a total of nine years.⁹⁰

In 1958 Pius XII was succeeded by John XXIII, and in early 1959 the new pope announced that he was convening an ecumenical council, the second Vatican. The world's bishops were canvassed for subjects that the Council might consider. Archbishop Cushing of Boston called for consideration of religious liberty, and the Father General of the Jesuits did the same.⁹¹ In preparation for the Council the subject was committed to the newly formed Secretariat for the Promotion of Christian Unity. Noonan comments favorably upon what it produced for the Council's consideration: "The . . . draft stressed tolerance as a virtue and, beyond tolerance, Christian charity . . . , and it discarded

88 See *id.* at 332.

89 See *id.* at 331–32; see also DONALD E. PELOTTE & JOHN COURTNEY MURRAY: THEOLOGIAN IN CONFLICT 46–51 (1975).

90 NOONAN, *supra* note 1, at 332–33.

91 See *id.* at 334.

the ideal of a Catholic state as the enforcer of orthodoxy. It was a good beginning, made exclusively by moderate Europeans."⁹²

Noonan's explanation of how the broad European mind of the Secretariat should have advanced so far from the Ottaviani position, "assisted only by a diffuse glow from America,"⁹³ involves yet another JM: Jacques Maritain—French Thomist, "the leading Catholic philosopher of his age," a man who "taught at Princeton but did not declare himself a Madisonian."⁹⁴ Dislodged from more abstract philosophical work by Europe's experience of totalitarianism—Fascism, Nazism, Communism—in the 1930s and '40s, Maritain undertook to deepen the Catholic understanding of the person and her relation to the state.⁹⁵ Maritain's work is subtle, as Noonan notes; in it lay the ballast of the Thomist tradition, reunderstood and reinvigorated.⁹⁶ New conclusions were educed from old principles. Relevantly, Maritain had "translated into the language of person the traditional claims of conscience"⁹⁷ Maritain's judgment was that though the state had responsibilities not just to the material but also to the spiritual dimensions of the person, coercion to belief would run afoul of the reality of personhood. Noonan captures the point brilliantly: "Who says 'person' says freedom."⁹⁸ Maritain's deepening of the Catholic understanding of personhood was assisted by, and itself assisted, the work of popes Pius XI and Pius XII, who in the 1930s and '40s increasingly opposed totalitarianism on personalist grounds.⁹⁹ Maritain's was a powerful voice. When Maritain claimed the significance of the American constitutional apparatus, he carried "conviction at the Vatican."¹⁰⁰ He observed and approved the American constitutional arrangement under which religion was not to be by government established and free exercise was not to be by government prohibited. He even quoted Murray.¹⁰¹

Asks Noonan: "If the Church's leading philosopher, if recent European experience, if common political discourse all pointed in the same direction, was it not obvious that the Second Vatican Council

92 *Id.*

93 *Id.*

94 *Id.* at 336.

95 *See id.*

96 *See id.* at 335–36.

97 *Id.* at 336.

98 *Id.*

99 *See id.* at 334–36.

100 *Id.* at 336.

101 *See id.*

should bring the Church itself up to date?"¹⁰² It was becoming obvious, but still more had to happen. The Theological Commission, watched over by Ottaviani, was also to study the church-and-state question and create a draft for the Council's consideration. Its product not surprisingly "took the hard line of the past and put it forward as theologically true."¹⁰³ As time passed the question reduced to this: which draft would the Council consider? Noonan tells a story of jurisdictional wrangling that lasted, through different phases, from 1959 until 1965. But Noonan also identifies the psychological source of the opposition even to the consideration of possible alteration in the teaching on religious toleration. These conservative men, of whom many like Ottaviani were curialists, "[w]ith all their hearts . . . did not want change. With all their hearts they feared what change in one doctrine implied for the stability and certainty of all doctrines."¹⁰⁴ To avoid countenancing even the consideration of the possibility of change in doctrine, the well-placed conservatives plied the levers of power to keep the question from coming to the Council. And the popes respected the bureaucracy the curialists had created for the Council.¹⁰⁵

But eventually the momentum forward became too great. In April of 1963 Pope John XXIII issued an encyclical, *Pacem in terris*, which not only raised, but ambiguously resolved, the question the conservatives were bent on avoiding. The encyclical insisted on the right of the human person to act according to an "upright conscience," and referred to "the dignity of the human person" more than thirty times.¹⁰⁶ The stage was set. "Almost simultaneously with the issue of *Pacem in terris* came an official notice from Rome: Murray was designated an expert of the Council and invited to participate in its proceedings."¹⁰⁷ The wrangling continued, indeed intensified. But Murray was there, and the American "insight" into religious freedom had a voice. And in due course it had adherents, receiving conciliar expression in the "Declaration on Religious Liberty," *Dignitatis humanae personae*—the first words of the Declaration picking up the linguistic pivot of *Pacem in terris*—that was passed by the Council on December 8, 1965, by a vote of 70 no; 2,308 yes.¹⁰⁸

102 *Id.* at 337.

103 *Id.*

104 *Id.* at 337-38.

105 *See id.* at 339.

106 *Id.*

107 *Id.* at 340.

108 *See id.* at 348 ("Among those subscribing their names to the final text was Alfredo Ottaviani.").

The Cardinal who would become Pope John Paul II had preferred that the document bear the title "Doctrine" rather than "Declaration." But as a slight concession to the conservatives, and perhaps as appropriate for a document directed not only to Catholics but to the whole world, *Dignitatis humanae* was a Declaration:¹⁰⁹

The Vatican Council declares that the human person has a right to religious freedom. Freedom of this kind means that all men should be immune from coercion on the part of individuals, social groups and every human power so that, within due limits, nobody is forced to act against his convictions nor is anyone to be restrained from acting in accordance with his convictions in religious matters in private or in public, alone or in associations with others.¹¹⁰

What followed, as Noonan notes, was "crucial: the basis for recognizing this right."¹¹¹

The Council further declares that the right to religious freedom is based on the very dignity of the human person as known through the revealed word of God and by reason itself

. . . .

The Declaration of this Vatican Council on man's right to religious freedom is based on the dignity of the person, the demands of which have become more fully known to human reason through centuries of experience. Furthermore, this doctrine of freedom is rooted in divine revelation, and for this reason Christians are bound to respect it all the more conscientiously. Although revelation does not affirm in so many words the right to immunity from external coercion in religious matters, it nevertheless shows forth the dignity of the human person in all its fullness

. . . .

. . . One of the key truths in Catholic teaching, a truth that is contained in the word of God and constantly preached by the Fathers, is that man's response to God by faith ought to be free, and that therefore nobody is to be forced to embrace the faith against his will. . . . God calls men to serve him in spirit and in truth. Consequently they are bound to him in conscience but not coerced. God has regard for the dignity of the human person which he him-

109 See *id.* at 348–49.

110 *Declaration on Religious Liberty: On the Right of the Person and Communities to Social and Civil Liberty in Religious Matters*, in VATICAN COUNCIL II: THE CONCILIAL AND POST CONCILIAL DOCUMENTS 799, 800 (Austin Flannery, O.P. ed., 1980) [hereinafter *Declaration on Religious Liberty*]; see also NOONAN, *supra* note 1, at 349.

111 NOONAN, *supra* note 1, at 349.

self created; the human person is to be guided by his own [judgment] and to enjoy freedom.¹¹²

Noonan criticizes the document for “[t]hree large inadequacies.”¹¹³ First, he points out that as a review of history, *Dignitatis humanae personae* failed badly.

It referred to slips in conduct but not in teaching. It mentioned only the freedom traditionally accorded the nonbaptized. It never acknowledged the long record of coercing the baptized when they were considered to be in heresy. . . . Even the lapses in coercing the act of faith were noted in oddly impersonal terms as if “the vicissitudes of human history” were explanation and apology enough for acts of persecution urged and undertaken by responsible Christians in the name of the Church.¹¹⁴

Second, the Declaration was vague in the way all juridical efforts to identify the civic bounds of religious freedom have been. Free exercise could be limited to preserve a “just public order,” but “[n]o attempt was made to specify what constituted a just public order.”¹¹⁵ Third, on one interpretation of the Declaration, an establishment (“a special civil status”) might be permitted the Catholic Church, “[g]iven the particular circumstances of a people”¹¹⁶ Noonan asks, “Was it really possible to have an established church and no religious discrimination?” and answers, “The Council went in two different directions.”¹¹⁷ Noonan thus respects Madison’s “insight,” against the Council, that if there is to be free exercise, government can favor no church.

Noonan finds the deficiencies disappointing but the result a substantial accomplishment.

However characterized, this act of a world assembly of the bishops of the Catholic Church had set a new course for that body as the champion of religious freedom everywhere for everyone. The demand of human nature for such freedom had been affirmed

112 *Declaration on Religious Liberty*, *supra* note 110, at 800, 806, 807. In a document whose publication accompanied that of *Dignitatis humanae*, the Council added that “it often happens that conscience goes astray through ignorance which it is unable to avoid, without thereby losing its dignity.” *Pastoral Constitution on the Church in the Modern World (Gaudium et spes)*, in VATICAN COUNCIL II, *supra* note 110, at 903, 916–17 [hereinafter *Pastoral Constitution*]; see also JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT 205 (forthcoming April 1999) (final page proofs on file with the author).

113 NOONAN, *supra* note 1, at 351.

114 *Id.* at 350.

115 *Id.*

116 *Id.* at 351.

117 *Id.*

The quibbles and the qualifications of the text paled in the light of the central contention that linked freedom to the search for truth. "The truth shall make you free," John's Gospel taught. In freedom only shall you reach the truth, the Council added.¹¹⁸

When the Catholic Church abandoned the ideal of the Catholic state as the enforcer of orthodoxy and the idea of prudential toleration where necessary, it did not embrace "principled" toleration but, instead, a principle of true religious liberty.

Noonan is aware that for some—including Murray and Noonan himself—the Church came embarrassingly late to a question that nearly everyone had earlier answered in favor of some form of religious freedom:

If an unkind critic should remark that the Declaration was as inevitable—and of as little significance—as a declaration that modern plumbing is preferable to a world without bathrooms, he or she would have to be answered that what now seems inevitable came close to not happening, and that far from merely registering the obvious, the Declaration was dynamic in its implications for the future of a large spiritual society.¹¹⁹

Finally, Noonan is clear that a unique concatenation of contingencies alone made possible the Church's conversion. The Church had to learn:

The learning had been largely from the United States: from its Constitution of such extraordinary importance praised by Maritain and from the Virginia Declaration pointed to by Pavan [the Jesuit ghost-writer of John XXIII's *Pacem in terris*]; from its bishops who kept the issue alive as "the American issue" in the Council; from its theologian John Courtney Murray, who poured his energy and insight into the shaping of the new teaching. Impossible without the recent European experience and the support of the bishops from around the world and the receptivity of Italian popes, the Declaration on Religious Freedom would not have come into existence without the American contribution and the experiment that began with Madison.¹²⁰

IV. THE IDEA *IN MENTIBUS*: FROM MADISON TO MURRAY

[I]nsights are a dime a dozen. Any insight, by itself, is quite inadequate. Only the cumulative fruit of the self-correcting process of learning is significant. The really brilliant idea, the stroke of genius, seems to be simply the

118 *Id.* at 352.

119 *Id.*

120 *Id.* at 353.

*occurrence of a final insight that closes a long, slowly acquired, interlocking series of insights. Not only must insights be very numerous but also they alone never constitute human knowledge. They presuppose experience. They must be subjected to testing and judgment. Such testing varies with the matter in hand.*¹²¹

In the sections of *The Lustre of Our Country* that I have been discussing, Noonan means to show that from Madison through *Dignitatis humanae* an idea—an “insight”—was going forward or being tested (or both). If Noonan meant by that no more than that through Murray’s (and others’) agency, the Catholic magisterium at Vatican II embraced some version of the American proposition about religious freedom (which Noonan traces to Madison), Noonan’s position would be largely uncontroversial; by now it is accepted that, for better or worse, Vatican II baptized some version of the American idea about the civil treatment of religion pushed by Murray the American.¹²² But Noonan’s project is not just a history but a defense and celebration of religious liberty. It therefore involves epistemological issues of the sort I first flagged in his attribution to Madison of an “insight.”

In this section I ask as to the grounds and nature of the right to religious freedom, what kind of knowledge did Madison have? did Murray have? did the Council have? could anyone have? What does it mean to say that an “insight” went forward from Madison to Murray?¹²³ to say that Murray facilitated the development, rather than the corruption, of Catholic moral doctrine? to say that Madison’s “insight” has been subject to an experiment? What, in a word, is the epistemic warrant of the claim for religious liberty?

My answer is that Noonan seems to celebrate a right to religious liberty rooted in a Madisonian epistemology that finds little quarter in Murray’s work. Indeed, the rationale for religious liberty embraced by Madison and then by Noonan would be, to Murray’s mind, *unreasonable* in exactly the sense that it rests—and rests purposely—on an epistemically indefensible ground, an incorrigible “insight.” Murray

121 Bernard Lonergan, *Theories of Inquiry*, in *A SECOND COLLECTION* 33, 36–37 (W. Ryan & B. Tyrrell eds., 1974).

122 See PELOTTE, *supra* note 89, at 115–36, 141; see also MICHAEL DAVIES, *THE SECOND VATICAN COUNCIL AND RELIGIOUS LIBERTY* 120 (1992) (“Father Murray was determined to ensure that Church teaching was brought into line with the American Constitution.”).

123 Though it is beyond dispute that Murray exercised a strong influence on the formation of *Dignitatis humanae*, in this part I confine my attention to Murray’s Catholic rationale(s) for religious liberty and do not explore the extent to which it (or they) prevailed in *Dignitatis humanae*.

preferred to rest the incomparably important right to free exercise in reason.

Reason has always enjoyed only an equivocal role in rooting rights in America. The drafters of the Preamble of the Declaration of Independence were aware that they were laying down broad principles for government. Jefferson flirted with exceeding reason and calling them "sacred and undeniable" but settled on "self-evident,"¹²⁴ itself an argument-stopper. "There is," after all, "no truth that can be more useful to a politician than an allegedly self-evident or undeniable truth when he is trying to win an argument . . ."¹²⁵ The purposes of the framers of the Constitution and of the drafters of its First Amendment differed from the purpose of the Declaration's drafters—to lay out not principles but a workable plan for a national government; the Constitution announces no self-evident principles. But on Noonan's reading, for Madison the religion language of the First Amendment confers a right in order to give expression to an "insight."

As I observed above, Noonan never defines "insight." But *what* an insight is matters to how we should treat it. If by an insight Noonan means what philosophers more often call an intuition, then what Madison had was the incorrigible product of some sixth sense—neither the result of, nor confirmable or impeachable by, ordinary empirical experience; what Jefferson might have meant by "sacred and undeniable." This possibility is suggested by Noonan's likening Madison's "insight" to the Platonist's seeing an otherworldly form or a mathematician's seeing an analytic truth. Indeed, for Noonan, the Platonic-mathematical possibility is more than metaphor or simile. "JM was either a mathematician *or* his experience, supplied vicariously by history, had come early."¹²⁶

Frequently in Noonan's analysis, Madison's contribution has the cognitional status of a mathematician's achievement. Also frequently, but without Noonan's making the disjunct into a conjunct, Noonan has Madison remitting his mathematician's "insight" to experience.¹²⁷ Madison was, as Noonan explains, creating in the religion language of

124 MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 31–34, 212 (1987); *see also* COONS & BRENNAN, *supra* note 112, at 3–4, 19.

125 WHITE, *supra* note 124, at 34.

126 NOONAN, *supra* note 1, at 68 (emphasis added).

127 *Cf.* United States Dep't of Interior, Bureau of Indian Affairs v. Federal Labor Relations Authority, 887 F.2d 172, 176 (9th Cir. 1989) (Noonan, J.) ("It is a Pickwickian or Alice in Wonderland idea that what is a factual matter should be negotiated—somewhat like the idea that you negotiate the sum of two and two.").

the First Amendment an *experiment* to test an "insight."¹²⁸ Noonan's linguistic hook for this appraisal is Madison's assertion (in a letter to Frederick Adams) that "on this question [whether the Christian religion, "the best and purest religion," ought not to be financially provided for rather than left, as other religions, to voluntary support] experience will be an admitted Umpire"¹²⁹

Whether that passage can bear the weight Noonan assigns it is hard to say, particularly in light of another of Noonan's claims about Madison's epistemology. Noonan observes, quoting without reservation Morton White's study of the epistemology of the founders and their documents, that "JM had a Lockean epistemology that led him to believe that his belief was 'a self-evident proposition or one that could be derived from a self-evident proposition.'"¹³⁰ What this means, Noonan does not elaborate, unless implicitly in his mathematicization of Madison's cognitional process. White does explicitly elaborate, however:

[Madison's] belief in the undeniability of quasi-mathematical moral principles which asserted that men have these rights was at least part of his reason for defending them so adamantly against invasion, even if an invasion of them were to promote the public good. . . . He rested his case [in the *Memorial and Remonstrance*] for religious freedom on an undeniable principle of natural law the violation of which could not be justified by *any* appeal to the whole society's interests, however well supported by the relevant evidence. In other words, he was not prepared to surrender the right to religious freedom by relying on an experimental statement about what would make the people happy, partly because that statement could not be as certain as the self-evident or demonstrable principle of natural law which expressed man's right to religious freedom. Because *no* experience could overturn a true principle of justice, whereas *some* experience could overturn a statement that the public good would be served by action, Madison seemed more inclined to favor the principle of justice.¹³¹

128 See Noonan, *supra* note 1, at 7, 90–91, 209–10, 331.

129 9 MADISON, *supra* note 47, at 485.

130 NOONAN, *supra* note 1, at 368 (quoting WHITE, *supra* note 124, at 28).

131 WHITE, *supra* note 124, at 221; *see id.* at 33 ("Madison's *Memorial and Remonstrance* therefore fortifies the view presented in the previous chapter that a statement which attributes an unalienable natural right to every man was not construed by Madison as a statement in experimental science as conceived by Hume. On the contrary, Madison regarded it as a statement in the abstract science of morality as viewed by Locke, derivable from intuitively known and allegedly self-evident primary truths.")

Madison may have been inconsistent, an inconsistency mirrored in Noonan's account. But if on occasion Madison remitted his precocious "insight" to the umpire that is experience, Madison's background epistemological assumption seems to have been that the civil treatment of religion he advocated was the exigence of a natural right, a self-evident truth, a sacred and undeniable proposition. Madison's seemingly was a claim of knowledge—unimpeachable knowledge deduced from *ideas* about God and man.

But however much Madison's Lockean allegiance drove—allowed—him to regard his conclusions as self-evident and unimpeachable, what Madison and then Noonan have to say about conscience cannot be squeezed into or out of Locke's Way of Ideas. Madison's and Noonan's commitment to "free exercise" proceeds, rather, from their celebration of *conscience* in very un-Lockean terms—as an inner voice or, rather, as the *vox Dei* within. Madison's claims for the supremacy of conscience depend on its being not an internal barometer of merely human preferences but, instead, "the actual voice of another, a communication, a command."¹³² But what is this thing *conscience* to which we, like Madison and Noonan, make such easy reference without ever having seen one? Where in human experience can this postulated faculty be verified?¹³³ Is conscience not a human faculty at all but, instead, purely an extrinsic voice interiorly audible? Madison's commitment to religious freedom for conscience is "rooted," Noonan captures the paradox, "in his own faith . . . the faith that God in us speaks to us"¹³⁴ as conscience.

There is here a tangle that needs untying, and Noonan would agree. Conscience is a concept with a long history and equivocal meanings. Noonan devotes the better part of a chapter to identifying the notion(s) of conscience that "inhabited"¹³⁵ the mind of Madison and the minds of those whom he addressed. Noonan begins the story with the Hebrew concept, continues with the early Christian contribution and, following his account of Cicero's embellishment of the idea, concludes: "Witness, judge, reason, voice of God, conscience enters the moral consciousness of Christians."¹³⁶ The tangle is ancient. By the time of Thomas Aquinas, some clarification was obtained. Thomas taught that conscience was to be followed because it was, ex-

132 NOONAN, *supra* note 1, at 89.

133 *See id.* at 68 ("What is sacred, whose liberty must be safeguarded, is the faculty by which right is discerned from wrong, and by which God speaks to each,—the conscience.").

134 *Id.* at 89.

135 *Id.* at 58.

136 *Id.* at 44.

actly, the judgment of reason about what was to be done, and all reason was derived from God.¹³⁷ God can *speak*, according to Thomas, as he is believed to have spoken on Mt. Sinai and at John's baptism of Jesus in the Jordan, for example. Conscience, however, is not the *voice* of God but the functioning of (divinely created) human reason. Thomas need not, and should not, be read as postulating a distinct *faculty* that is conscience.¹³⁸

This truncated taxonomy of notions of conscience puts Madison's notion in relief. Whereas for Aquinas conscience is the functioning of human reason, for Madison conscience is the human's hearing the voice of God within. For Madison the operation of conscience, then, as Noonan emphasizes, involves an act of *faith* in God. That act of faith, furthermore, professes not an external revelation subject to group interpretation and judgment, but a commanding divine whisper audible only within.

Madison's "insight" amounts not to a claim of knowledge, then, but to an incorrigible act of faith that God speaks—and should be allowed to speak—authoritatively within each person. The "insight" at the root of Madison's fight for religious liberty is the belief that the state must not interfere with a person's hearing and acting on the

137 See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* Ia-IIae, Q. 19, art. 5. Quoting and commenting upon this text, Noonan writes:

In the Christian rationalism of Thomas Aquinas, conscience is "in a certain way the dictate of reason, and what is proposed by reason is proposed as true" and therefore "as derived from God, from Whom is every truth." In this account, conscience can be mistaken; it is not an intuition of God or the voice of God speaking within. But conscience must be obeyed because what conscience proposes is what reason says is right, and "it is the same thing to flout the dictate of reason and the commandment of God."

John T. Noonan, Jr., *The Tensions and the Ideals, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 593, 594–95 (J. van der Vyver & John Witte, Jr. eds., 1996) (footnotes omitted).

138 This bears emphasis inasmuch as it differentiates Aquinas's intellectualist position from what is perhaps the most celebrated—and influential—philosophical account of conscience, the more nearly intuitional faculty portrayed by Bishop Butler (1692–1752):

There is a superior principle of reflection or conscience in everyone, which distinguishes between the internal principles of our heart, as well as our external actions: which passes judgment upon ourselves and them; pronounces determinatively some actions to be in themselves just, right, good; others to be in themselves evil, wrong, unjust.

Bishop Butler, *Fifteen Sermons, in* 1 BRITISH MORALISTS 1650–1800, at 351 (D. Raphael ed., 1969). Madison was acquainted with the School of Moral Sense of which Butler was a member, and Madison's teacher, John Witherspoon, had read Butler. See WHITE, *supra* note 124, at 107–08.

interiorly audible voice of God.¹³⁹ Noonan does not shrink from the point: "The ultimate fact—the ultimate paradox if one likes—is that for the Father of Free Exercise the rightness of the doctrine is rooted in his own faith, . . . the faith that God in us speaks to us."¹⁴⁰ Madison has rooted the Constitution's guarantee of free exercise beyond reason, in faith.¹⁴¹

For John Courtney Murray, the rationale for requiring a civil guarantee of religious liberty is altogether different.¹⁴² Or, more accurately, among the many defenses of religious liberty advanced and probed by Murray over thirty years (including after Vatican II), none approximates Madison's. Murray spent three decades trying out arguments for a principled guarantee of religious freedom, and (probably) never finally rested in any one of them.¹⁴³ Murray believed that religious liberty was right, but he struggled to show why. Murray thought that there should be a principled guarantee of "free exercise," but that was a bright idea he was at work defending until he died of a heart attack in a New York City taxi cab. Though itself not unified or always internally consistent, Murray's methodology is altogether different from Madison's. Murray had no mathematician's incorrigible "insight." Murray, like Noonan's Madison, had an *insight* about religious liberty, but whereas Noonan's Madison "justifies" religious liberty by merely pointing to the (invisible) object of his faith (the voice of God), Murray was committed to giving *reasons*—not faith—to justify his insight about religious liberty. Indeed, Murray was committed to religious liberty in order to open for people, including the Church, the space in which to search for and find the truth.

During the 1940s and most of the '50s, Murray began from the sense or observation that civilized peoples postulate a human right to religious liberty, and then tried to educe support for that conclusion from the inherited Catholic premises on the subject. The failure of those arguments, to Murray's mind, has been masterfully recounted elsewhere.¹⁴⁴ Eventually Murray began to question the contemporary

139 See NOONAN, *supra* note 1, at 89.

140 *Id.*

141 Noonan reckes the risk and implicitly acknowledges the error in Madison's "insight." See Noonan, *supra* note 137, at 600 ("To hold that religion is truly excepted from all political authority is more mad than Madisonian.").

142 Murray forcefully opposes justifying the religion language of the First Amendment in the terms propounded by "theologians of the First Amendment." JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 48-56* (1988):

143 See generally J. LEON HOOPER, S.J., *THE ETHICS OF DISCOURSE: THE SOCIAL PHILOSOPHY OF JOHN COURTNEY MURRAY* (1986).

144 See *id.* at 10-50.

relevance of the inherited statements on the topic, and by some time in the late 1950s Murray had come under the influence of the work of his fellow Jesuit, Bernard Lonergan. Murray adopted many of Lonergan's terms and concepts, and generally aligned his methodological commitments with what he took to be Lonergan's.¹⁴⁵ The pivot of that method, which requires some elaboration if we are to understand the epistemic warrant of Murray's argument for religious liberty, is the fact of history and historical consciousness.¹⁴⁶

Murray's conservative opponents marshalled an arsenal of sentences, mostly from nineteenth-century papal pronouncements, which—they claimed—ruled out the possibility that the state should protect religious liberty.¹⁴⁷ Murray agreed that the encyclicals opposed religious liberty of a certain kind, but he insisted that they must be read in their historical situation, in the context of the specific evils at which they were aimed. The problem, according to Murray, was that the old concepts in force were rooted in political realities no

145 For the most sensitive treatment of Murray's reliance on Lonergan, see generally HOOPER, *supra* note 143. How much of Lonergan's work Murray was familiar with, and how deeply he understood it, are apt questions, not here in need of answers.

146 See *id.* at 137–39, 155, 246, 248–49; Bernard J.F. Lonergan, S.J., *The Transition from a Classicist World-View to Historical Mindedness*, in A SECOND COLLECTION, *supra* note 121, at 1–11. For a critical analysis of Murray's reliance on Lonergan, see KEITH J. PAVLISCHEK, JOHN COURTNEY MURRAY AND THE DILEMMA OF RELIGIOUS TOLERATION 173–79 (1994). Murray “play[ed] down” the political theories of the founders, such as Madison, who sometimes brought to the constitutional issues of religious freedom the “‘a priori demands’ of a doctrinaire blueprint.” *Id.* at 121.

147 Noonan provides this summary of the nineteenth century papal treatment of “religious liberty”:

The unanimity of the [twentieth century conservative] theologians was no accident. They were united because they followed what Gregory XVI had taught in *Mirari vos*, what Pius IX had taught in *Quanta cura*, what Leo XIII in the wake of his predecessors had proclaimed in *Immortale Dei*. In *Mirari vos* Gregory XVI had responded to the efforts of Felicite de Lamennais to make the church a champion of religious liberty. The pope assailed “indifferentism,” described as the doctrine that anyone could obtain eternal salvation, whatever his beliefs, provided he lived a decent moral life. “From this most foul font of indifferentism,” Gregory XVI went on, “flows that absurd and erroneous opinion, or, rather, madness, that freedom of conscience must be affirmed and defended for everyone.” In *Quanta cura* Pius IX repeated Gregory XVI's attack on “the madness that freedom of conscience and of worship is the proper right of every human being and ought to be proclaimed by law and maintained in every rightly-constituted society.” . . . Read outside the broader context of Christian teaching [on the rights of conscience], the encyclicals stood like boulders barring recognition of the universal freedom of conscience.”

NOONAN, *supra* note 1, at 27.

longer in force.¹⁴⁸ Murray insisted that the words and concepts, even of papal documents, must be given only the force required by the context of their utterance.¹⁴⁹ How religious liberty should be handled by government is, for Murray, a question that *is* asked—and therefore must be answered—in the present. The answer could be the same only if the question were the same in all its implications.

To Murray's mind, moreover, the questions *had* changed. When he heard people ask about religious freedom, they had new things in mind. It is here that the bite of Murray's historical method is at its deepest. The requirement of religious freedom is, to Murray's mind, a *new discovery*.

The notion of religious freedom as a human and civil right, personal and corporate, is not to be sought in theologians of the nineteenth century, since it is explicitly the product of a twentieth-century insight into the exigencies of the personal and political consciousness. The link between religious freedom and limited constitutional government, and the link between the freedom of the Church and the freedom of the people—these were not nineteenth-century theological-political insights. They became available only within twentieth-century perspectives, created by the "signs of the times." The two links were not forged by abstract deductive logic but by history, by the historical advance of totalitarian government, and by the corresponding new appreciation of constitutional government Today, religious freedom, as a human and civil right, personal and corporate, which requires the protection of a legal institution, has emerged as an exigence of the personal and political reason. As such, it claims the sanction of Catholic doctrine.¹⁵⁰

Murray's position, then, is not only that past language must be read in light of its historical context; Murray also holds that human consciousness is historical, growing in its grasp of political and theological truth. We know today what we didn't—and couldn't have—known in

148 See *id.* at 334.

149 See John Courtney Murray, *The Problem of Religious Freedom*, 25 THEOLOGICAL STUD. 503 (1964). Murray wrote:

[I]n judging all past or present realizations of the Catholic state, so called, the historical situation needs to be considered. The historical institutions of establishment and intolerance are to be judged *in situ*. They might well be judged valid *in situ*. The function of law, said the Jurist, is to be useful to the people. These institutions might well have been useful to the people, in the condition of the personal and political consciousness at the time. This was Leo XIII's judgment. It would be anachronistic to question it.

Id. at 569-70.

150 *Id.* at 568, 570. Murray himself, then, does not find his own insight in Madison's "insight" of two centuries earlier.

the past. Nor is the Church herself exempt from the exigence of learning through time.¹⁵¹ The Church does—and indeed must—learn historically.¹⁵²

It was this very rocky issue, of whether Catholic doctrine can develop, on which the fathers at Vatican II repeatedly ran aground. During the last of many hiatuses contrived by the conservatives to delay the Council's vote on the text of *Dignitatis humanae*, Murray wrote: "[R]eligious freedom is not the most important issue before the Council, nor the most difficult, except insofar as it raises the issue of development of doctrine, which is *the* issue underlying all issues at the Council."¹⁵³ The fathers of Vatican II did not founder on that issue. "The meaning of Vatican II," it pleased Lonergan to observe, "was the acknowledgement of history,"¹⁵⁴ and with that acknowledgment—and in part because of it—came the acknowledgment of the right to religious liberty. The pivot was the acknowledgment that humans, even constituted as the holy Catholic Church, come to the truth in time. The forms of that acknowledgment were not uniform, and sometimes were grudging and unclear.¹⁵⁵ But *Dignitatis humanae* itself began with the observation that "Contemporary man is becoming increasingly conscious of the dignity of the human person" and "demanding" constitutional limitations on governmental power in order that man might responsibly exercise his freedom, including his freedom to search for God, and then explained its method:

This Vatican Council pays careful attention to these spiritual aspirations and, with a view toward declaring to what extent they are in accord with truth and justice, searches the sacred tradition and teaching of the Church, from which it draws forth new things that are always in harmony with the old.¹⁵⁶

Not as candid an admission as one might have hoped; certainly not Murray's bald insistence that the requirement of religious liberty is a twentieth-century discovery. But even the suggestion that "new

151 See NOONAN, *supra* note 1 at 349 ("In this area of political morality an evolving human consciousness was made a collaborator of the Church.").

152 See Murray, *supra* note 149, at 573–74.

153 John Courtney Murray, *This Matter of Religious Freedom*, AMERICA, Jan. 9, 1965, at 43.

154 Bernard Lonergan in Conversation (March 28, 1980), in CURIOSITY AT THE CENTER OF ONE'S LIFE: STATEMENTS AND QUESTIONS OF R. ERIC O'CONNOR 426 (J. Martin O'Hara 1987) (quoting Lonergan).

155 See NOONAN, *supra* note 1, at 351; see, e.g., *Dogmatic Constitution on Divine Revelation (Dei verbum)*, in VATICAN COUNCIL II, *supra* note 110, at 750, 754 ("There is a growth in insight into the realities and words that are being passed on.").

156 *Declaration on Religious Liberty*, *supra* note 110, at 799.

things" might be educed from the old reduced the conservatives to their precatory knees.¹⁵⁷

The deep difficulty was the spectre of doctrine that develops. If Catholic doctrine is not *semper et ubique eadem*, what is to guarantee that in its next form it will still be Catholic? The Council's documents never ask and answer the question squarely. Noonan educes the "theory of development" he takes the Council "implicitly" to have adopted.¹⁵⁸ First, the Council conceded that the Church learns from human experience. Second, the Council postulated the need for psychological freedom in reaching the truth, and its corollary, "free and open debate." Third, the Council in all of its teaching pointed to the pedagogy of Christ, thus "show[ing] that development of Christian doctrine meant a deeper, more faithful response to Christ."¹⁵⁹ Faithful Catholics, according to Noonan, will accept the teachings of the Council as the will of God, in the belief that "[t]he Spirit guides the Church."¹⁶⁰

But one might ask, as Murray did, what the *intelligible* path was from the nineteenth-century denunciations of religious liberty to its embrace in *Dignitatis humanae*. A growth in historical consciousness, yes; but not every one of those a new doctrine makes.¹⁶¹ In the explanatory document (*relatio*) with which he accompanied *Dignitatis humanae* at Vatican II, Murray himself confessed to not knowing:

Some Fathers affirm that the Declaration does not sufficiently show how our doctrine is not opposed to ecclesiastical documents up till the time of the Supreme Pontiff Leo XIII. As we said in the last *relatio*, this is a matter for future theological and historical studies to bring to light more fully.¹⁶²

Murray made the same confession in his introduction to his English translation of *Dignitatis*, this time fully in context:

The notion of development, not the notion of religious freedom, was the real sticking-point for many of those who opposed the Declaration even to the end. The course of the development between the *Syllabus of Errors* (1864) and *Dignitatis Humanae Personae* (1965)

157 Noonan calls attention to "the difficulty of abandoning past precedents without appearing arbitrary and the difficulty of departing from one's ancestors without denouncing them." NOONAN, *supra* note 1, at 351.

158 *Id.* at 352.

159 *Id.* at 352-53.

160 Noonan, *supra* note 18, at 677.

161 See HOOPER, *supra* note 143, at 155 ("After the Council, . . . [Murray] himself understood the need to frame an argument . . . which would be more than a recognition of a contingent social fact.").

162 DAVIES, *supra* note 122, at 200 (quoting Murray).

still remains to be explained by theologians. But the Council formally sanctioned the validity of the development itself¹⁶³

This ignorance was for Murray no cause for skepticism, however:

The theological task is to trace the stages in the growth of the tradition as it makes its way through history. . . . The task is to discern the elements of the tradition that are embedded in some historically conditioned synthesis that, as a synthesis, has become archaic. The further task is to discern the "growing end" of the tradition; it is normally indicated by *the new question* that is taking shape under the impact of the historical movement of events and ideas.¹⁶⁴

The "growing end"—something already real—is reassuringly invoked as the locus of an active continuity.

Fixing on Murray's "growing end" language, Noonan opines that "[i]nto a theological system that stressed continuity a dynamism was introduced."¹⁶⁵ Correct. But Noonan continues, "The key concept reflected the language of Bernard Lonergan"¹⁶⁶ Not quite, and the difference is dispositive of what, for Murray, is the intelligible ground of religious liberty. It is here that Murray parts company with Noonan and Noonan's Madison.

Dynamism is indeed at the root of Lonergan's philosophy. For Lonergan, however, that dynamism is not external (the "growing end" of a tradition). Rather, it is internal—the active eros of the human mind for correct understanding—Murray's "the new question." Each rational person, Lonergan avers, is always already propelled by a dynamic desire for understanding to ask questions of her experience, to formulate interpretations of her experience, and then to decide—to judge—whether that interpretation is true. For Lonergan, the sole criterion of true judgment, including judgment that makes doctrine, is whether it meets the demands of dynamic human intelligence asking all of the relevant questions of data.¹⁶⁷

163 John Courtney Murray, *Introduction to Religious Freedom*, in THE DOCUMENTS OF VATICAN II 673 (Walter M. Abbott, S.J. ed., 1966).

164 Murray, *supra* note 149, at 569 (emphasis added).

165 NOONAN, *supra* note 1, at 344.

166 *Id.* Noonan describes Lonergan's book *Insight* as a "masterful treatment of theological method in general." Noonan, *supra* note 1, at 344. In fact, Lonergan's *Method in Theology* is his contribution to that subject, for which *Insight*, a study of human understanding in general, was propaedeutic. See generally BERNARD LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* (1957) [hereinafter LONERGAN, *INSIGHT*]; BERNARD LONERGAN, *METHOD IN THEOLOGY* (1972).

167 Lonergan writes that the dynamic desire to know is a self-assertive spontaneity that demands sufficient reason for all else but offers no justification for that demanding. It arises, fact-like, to generate

What Lonergan calls "insight" is the interpretation of the data. The insight is not itself knowledge. Insights are a dime a dozen, as Lonergan liked to quip. They are bright ideas that have to be tested. Some turn out to be true, others probable, still others false. Insights give way to judgment when the subject commits herself to the insight's being true, probable, or false. Judgments occur, and then immediately are in the past, answers to old questions asked of old data. In the present, the subject dynamically asks questions of fresh data, and must answer accordingly. Those answers are what Lonergan would mean by *conscience*. For there is, to Lonergan's mind and to Murray's, no high road, such as an intuitional faculty or audible divine voice, to knowledge.¹⁶⁸

This phenomenology of knowing and the resulting reconception of conscience, which ground Murray's justification of religious liberty, stand in sharp contrast to Madison's position and what Noonan takes its epistemic warrant to be. As I mentioned in first adverting to Noonan's deployment of the term "insight," Noonan formally posits for Madison mutually exclusive and jointly exhaustive methods of knowledge: "insight," which turns out to be a subject's grasp of a Platonic form or self-evident truth or sacred object of belief; or, experience. Though Noonan then repeatedly indicates that the "insight" can be vindicated by experience, never does Noonan identify the cognitive moment or method by which, for Madison, the "insight" or the experience is evaluated or judged—or how experience is judged to vindicate the insight. Indeed, as for "insight" of the intuitional sort, the very

knowledge of fact, to push the cognitional process from the conditioned structures of intelligence to unreserved affirmation of the unconditioned.

LONERGAN, INSIGHT, *supra* note 166, at 332.

168 See *id.* at 600. Lonergan summarizes his own position in *Cognitional Structure*, in 4 COLLECTED WORKS OF BERNARD LONERGAN 205–21 (F. Crowe & R. Doran eds., 1988). For a masterful, clarifying exposition of Lonergan's position, see JOSEPH FLANAGAN, *QUEST FOR SELF-KNOWLEDGE: AN ESSAY IN LONERGAN'S PHILOSOPHY* (1997); for a succinct statement of Lonergan's basic stance, see Patrick McKinley Brennan, *Discovering the Archimedean Element in (Judicial Judgment)*, 17 L. & PHIL. 177–92 (1998) (review essay).

It bears emphasis that I do not here offer a defense of Lonergan's epistemology. Lonergan became explicitly relevant because of Murray's reliance on him, a reliance noted and explained by Noonan. Lonergan then became important to the analysis because on the methodological/epistemological issues that separate Murray from Madison, Murray was largely following Lonergan. Because of his relevant differences from Madison, moreover, Murray succeeds in a justification of religious liberty that is closer to satisfying both the terms of Noonan's own method and the terms of public justification set by John Rawls (among others).

point of it is that it is beyond question or evaluation;¹⁶⁹ it is to be a last word—which is why remission of it to experience seems a non sequitur. And while being an argument-stopper may not be the *point* of “experience” as invoked by Noonan’s Madison, it comes close, or at least appears to come close, to functioning that way. “JM was either a mathematician or his experience, supplied vicariously by history, had come early.”¹⁷⁰ Noonan never makes clear what, according to Madison, the human mind does to know (or test) “experience.” On Madison’s terms, as understood by Noonan, “free exercise” is never justified by more than an untuitional “insight” or brute experience. “Free exercise” issues from, and thus licenses, the oracular.

Sometimes Noonan’s own epistemic stance seems Madisonian. But Noonan’s own epistemology in fact is richer than the intuitional insight-experience dilemma imputed to Madison, because it attends to and tries to make sense of the fact that the human mind tests ideas.¹⁷¹ But Noonan never does identify the *cognitive* occurrence by which experience and its interpretation are tested. Instead of a cognitive act (such as judgment), Noonan leans on the heart, as had John Henry Newman; *Cor ad cor loquitur* are the words of Newman’s motto that appear on the first page of *The Lustre of Our Country*. Reacting against a doctrine of tradition that allowed for the possibility of development only where the “new” conclusion was a *logical* inference from what had been inherited from the beginning, Newman identified the “the whole

169 Cf. LONERGAN, *INSIGHT*, *supra* note 166, at 366 (“Platonism is magnificent in its devotion to the pure desire to know. But its failure to grasp the nature of judgment resulted in a deviation from the concrete universe of fact to an ideal heaven.”).

170 NOONAN, *supra* note 1, at 68.

171 Noonan writes:

[T]he process has been one in which an idea or set of ideas have had their implications worked out, with the basic or dominant idea gradually driving out ideas incompatible with that dominant idea’s mastery; or to put it in less patriarchal or Hegelian terms, human beings in conflict have come to see that commitment to certain basic principles excludes accommodations and deviations once accepted as normal.

Id. at 5; see also JOHN T. NOONAN, JR., *POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA xvii* (1972) (“Magic, the whisking away of difficulties by a nod, the replacement of reality by illusion, is, however, but one step away from creativity, the transformation of a situation by energetic innovation. Like magic, creativity connotes spontaneity and freedom from iron law, but it also implies labor and increase by organic development.”).

Noonan distances himself from Madison’s epistemology with the cryptic observation that “[t]he contradiction, or the paradox, of truth as one, plurally perceived, had yet to be resolved or completely accepted.” NOONAN, *supra* note 1, at 91. It has yet to be accepted, moreover, by those, such as Lonergan, who deny that truth can be reached (“perceived”) without an act of judgment on the part of the subject.

man," rather than logic, as the organ of *change*.¹⁷² For Newman, and for Noonan,

The development then of an idea is not like an investigation worked out on paper, in which each successive advance is a pure evolution from a foregoing, but it is carried on and through and by means of communities of men and their leaders and guides; and it employs their minds as its instruments, and depends upon them while it uses them. . . . It is the warfare of ideas under their various aspects striving for the mastery.¹⁷³

But if the ideas are using the mind, they do so in search of ever better expression to what has already been felt; for Newman, the feelings that issue from the *intimus sensus* are primordial.¹⁷⁴ And in this, Noonan seems to follow him: empathy, as observed at the outset, is what Noonan requires.¹⁷⁵ When God enters as a premise, argument about God's place becomes practically irrelevant.

To be sure, Noonan postulates a process—and in his many studies of specific moral doctrines, traces the workings of the process—of moral actors' distinguishing core values from transitory expressions. To be sure, Noonan postulates the person of Christ as the metron of such development. "The consistency to be sought is consistency with Christ."¹⁷⁶ But what is the metron Noonan applies to the evaluation of experience, including the experience believers have of Christ? When one goes to Christ with questions, how can one know that one leaves with answers, not illusions? Is Christ accessible to individuals by infallible intuition? I have no reason to think that this is Noonan's judgment, though Noonan does have the believer "seeing" what the nonbeliever cannot.¹⁷⁷

But if Noonan stops short of identifying the intellectual metron that is the measure of epistemic claims, including those about God, still he—unlike the Madison he shows us—puts the person and her intellectual desire at the center of the analysis. Noonan predicts that "[t]he human desire for mental repose is not to be satisfied in this

172 See OWEN CHADWICK, *FROM BOSSUET TO NEWMAN* 123 (2d ed. 1987).

173 JOHN HENRY NEWMAN, *An Essay on the Development of Christian Doctrine*, in CONSCIENCE, CONSENSUS, AND THE DEVELOPMENT OF DOCTRINE 31, 74 (1992); see also NOONAN, *supra* note 1, at 209; Noonan, *supra* note 18, at 672.

174 See CHADWICK, *supra* note 172, at 149–60, 180, 186, 191, 194–95.

175 See *supra* text accompanying note 3; NOONAN, *supra* note 1, at 334 ("[T]he development of Christian doctrine requires spiritual discernment.").

176 Noonan, *supra* note 18, at 676.

177 See NOONAN, *supra* note 1, at 352. ("[A] believer would see [in *Dignitatis humanae*] a development of the kind that is organic and that can as easily be reversed as an oak can be restored to the acorn from which it came.").

life,"¹⁷⁸ and certainly on that point everyone from Augustine through Lonergan is in agreement¹⁷⁹ (notwithstanding the static claims of a petrified Scholasticism exemplified in such as Ottaviani). But from that it does not follow that questions—specific desires that the mind rest in judgment—cannot lead to repose. On the contrary, as I have been suggesting, for Lonergan (and Murray with him), when a question is satisfactorily answered in a judgment, the mind has reached a point of momentary rest—a cognitive and personal commitment to a claim about the real. Promptly, curious minds will ask new questions of fresh and of inherited data, and those questions will call for their own answers. What is consistent is the subject's being under the demand of the dynamic desire to know, the subject's being at liberty to reach a judgment only by satisfying that desire. The subject—not Ottaviani's abstract principles—is at the center, but solipsism and relativism are avoided because the subject, by her desire to know, is always already called out of herself to affirm the real and the good.

This, then, amounts to an extension of Noonan's focus upon the person, a specification of the contribution the person makes to conceiving and testing doctrine. In the place of Newmanesque ideas working themselves out through human minds stand the human minds themselves in their intentionality. Specifically, the subject emerges as someone who experiences, understands, and judges—fallibly and always without the help of intuitional certainty. Insights—such as Madison's bright idea—occur, but they must be tested, as Madison's in fact has been. Insights build on prior judgments.¹⁸⁰ The testing and learning process works through not just one mind, but through shared experience and understanding and judgment—the discourse of the community through time.

To claim that knowledge is reached through a recurrent pattern of operations throughout a community creates no problem for the possibility of a Catholic magisterium so long as no enduring conflict emerges between insights advanced "within" and "without" the Church. It has generally been Noonan's judgment, according to Professor Kaveny, that there is "no ultimate conflict between the best in-

178 NOONAN, *supra* note 18, at 676.

179 See ERIC VOEGELIN, *THE NEW SCIENCE OF POLITICS* 122 (1987) ("Uncertainty is the very essence of Christianity.").

180 Noonan's own method, though not the one he imputes to Madison, is in fact quite close to Murray's and Lonergan's because Noonan acknowledges the operation of experience, understanding, and judgment. He differs, however, by never explaining their operational integration and by assigning the function of judgment to the heart and not the head.

sights of humanity and those of the Church”¹⁸¹ The issue, I think, might be reformulated: regardless of who advances an insight, who reaches judgment about it? For Noonan, the Catholic magisterium has “the mission,” and in faith therefore the wherewithal, “of determining what is only the projection of subjective feelings and what is an authentic response to Christ as revealed.”¹⁸² But how is the Church—the “demythologized church,”—to fulfill this mission? Insights are a dime-a-dozen, but they are necessary on the way to truth, and there is no a priori reason that they must come from “within” the Church; and recent experience has shown that some come from “without.” The question, for the believer, is who, on matters of the faith and morals, makes the judgment about which insights are true? Might the magisterium judge even a most celebrated secular insight to be inconsistent with the understood data of faith?¹⁸³ For the believer, the question cannot be answered except in terms of where God has promised his grace,¹⁸⁴ a promise likely obscured by the inside-outside metaphor. Nor, for the believer, can the answer not reflect the fact that in discovering the right to religious freedom as it did, the Church

181 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, 224 (1994–95).

182 Noonan, *supra* note 18, at 673.

183 See Pope John Paul II, *Ad tuendam fidem* (apostolic letter *motu proprio*), (May 18, 1998) (“*Ad tuendam fidem Catholicae Ecclesiae contra errores insurgentes ex parte aliquorum christifidelium, praesertim illorum qui in sacrae theologiae disciplinas studiose incumbant, pernecessarium visum est Nobis, quorum praecipuum munus est fratres suos in fide confirmare (cfr Lc 22, 23), ut in textum vigentium Codicis Iuris Canonici et Codicis Canonum Ecclesiarum Orientalium addantur normae, quibus expresse imponatur officium servandi veritates definitive ab Ecclesiae Magisterio propositas, addita mentione in sanctionibus canonicis ad eandem materiam spectantibus.*”).

184 Sin too, then, must enter the account. Noonan tells us unfortunately little about his understanding of the operation of grace in human nature. Though acutely conscious that humans have worked great harms (sometimes in the name of religion), Noonan seems sure that somehow humans can create and manage religious freedom. A more Augustinian analysis would be quicker to see a need for governmental restraint. ’s own position is ambiguous: “The traditional ethic, which asserts the doctrine of the rule of reason in public affairs, does not expect that man’s historical success in installing reason in its rightful rule will be much more than marginal. But the margin makes the difference.” MURRAY, *supra* note 142, at 289. See HOOPER, *supra* note 143, at 210–13 (discussing the “deinstitutionalization” of grace in Murray’s later work). Michael White has counseled a more limited purpose for politics, in the dark light of Augustine’s understanding of the human condition. See MICHAEL WHITE, PARTISAN OR NEUTRAL: THE FUTILITY OF PUBLIC POLITICAL THEORY 168–72 (1997). But if in Vatican II’s understanding of politics the Augustinian strain of thought is little discernible, this should not surprise: “Catholics have been rewriting Augustine for centuries—by silent omission” COONS & BRENNAN, *supra* note 112, at 317 n.93.

made human experience and insights necessary collaborators in its mission to know and teach the truth.

We have come a long way from Madison's postulation of "free exercise" as an exigence of a sacred voice that speaks in the individual. It is in that auditory moment, which Noonan describes as an "absolute relation," that Noonan discerns the sole reason for freedom of religion. "Without that relation," asks Noonan, "why should a society be constrained to respect conscience?"¹⁸⁵ Murray's answer would be that reason itself—not the intrusion of an otherworldly voice—requires it.¹⁸⁶ The foundation of religious freedom, in Murray's mature view, is the exigence of the subject and the community, including the ecclesial community, to work together to understand the real.¹⁸⁷ Murray roots religious liberty in an un-Madisonian epistemology. Rather than postulating the mutually exclusive and jointly exhaustive disjunction of an incorrigible insight or brute experience, or even "conscience," as foundation for religious liberty, Murray roots the right to religious liberty in a dynamically unified, recurring pattern of experience, understanding, and judgment, with questions leading the subject from experience to insight to a personal commitment—in judgment—that her bright idea is true, probable, or false. Murray would root religious liberty in reason, but in reason understood not as the passive receptor of timeless truths but, instead, as the dynamic human desire to know the truth working itself out through experience, understanding, and judgment. Religious liberty is not only the consequence of how humans come to the truth but also the necessary condition of their coming to it.

Noonan is right: there has indeed been an American "experiment" with the metes and bounds and grounds of the right to religious liberty. But that experiment has been necessary exactly because the question about religious liberty, its extent and justification, never was settled by a mathematician's "insight."¹⁸⁸ Instead, Madison's bright idea about religious liberty has been clarified and tested

185 NOONAN, *supra* note 1, at 89.

186 Cf. LONERGAN, *INSIGHT*, *supra* note 166, at 632 ("Is everyone to use force against everyone to convince everyone that force is beside the point?").

187 Which may include the divine.

188 See John Witte, Jr. & M. Christian Green, *The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES*, *supra* note 137, at 497–557; see also *supra* note 141. Murray himself denied that the American proposition as he understood it represented a timeless, ideal instance of government's relation to religion. See PELOTTE, *supra* note 89, at 159. To have held otherwise would have violated his commitment to "historical consciousness." *Id.*

through a complex communal experience over centuries, as Noonan himself concedes outside of the justification for religious liberty allowed by the reductive epistemology he imputes to Madison. The justification of religious liberty proffered by Noonan's Madison appears occult in light of the alternative approach that takes its stand upon a phenomenology of human knowing rather than a pure act of faith.

V. AN IMPLICATION OF THE IDEA: AVOIDING ESTABLISHMENT BY ESTABLISHMENT?

*Before these bursts of religious belief, infiltrating the society, capturing the organs of government, the Durkheimian theory withers. These eruptions are not the worship of society but its reformation. They do confirm Bellah's insight that America wants to be under judgment. They are a call to judgment in the name of an authority above the state, and the state responds, subject to a sovereignty not its own.*¹⁸⁹

James Madison makes zero establishment of religion a necessary condition of the realization of "free exercise" and true religious liberty. Noonan, for his part, approves this aspect of Madison's "insight" and interdicts all establishment. In this final Part, I wish to explore what it would mean for Noonan for there to be *no* establishment of religion. Noonan's analysis upsets expectations, for though Noonan opposes all government support of churches as an illicit establishment, Noonan judges government action based on "moral imperative[s] religiously conceived" not only consistent with, but necessary to avoid the violation of, the ban on establishment of religion.

Noonan observes, uncontroversially, that "free exercise" has become an American ideal beyond challenge; also uncontroversially, Noonan notes that in practice that ideal has been imperfectly honored.¹⁹⁰ Establishments have been made. Noonan adduces the standard and some slightly nonstandard examples—from government provision of military chaplains to the courts' deciding which segment of a church in schism is authentic and thus entitled to church property.¹⁹¹ Noonan concludes: "Religion is entangled with government. Will ultimately free exercise work itself free, so to speak, and end all the entanglements, or will free exercise coexist, and even require coexistence, with them?"¹⁹² Noonan raises these questions but leaves

189 NOONAN, *supra* note 1, at 260.

190 *See id.*

191 *See id.* at 7, 196–97, 199–203, 228–30.

192 *Id.* at 7. Noonan suggests, again and again, that zero establishment may be impossible to achieve. "The freedom of religion from the state depends upon the judgment of the state." *Id.* at 6.

them without final answers: "The experiment goes on. Final answers are premature. Marred by occasional persecutions, halting in its progress, the experiment to date has not produced perfection; but it has succeeded."¹⁹³ Noonan's Madisonian hope that government will cease to promote religion will be welcomed by those who agree with Justice Black's observation (for the Supreme Court) that the establishment provision "means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . ."¹⁹⁴

But as for the rest of Justice Black's—and thence the Court's intermittent—understanding of the purposes of the "Establishment Clause," that "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state,'" there is no support to be found in Noonan's work. For Noonan, as for Noonan's Madison, religiously conceived morality is to be given governmental effect. Madison was imitating Christ in public.¹⁹⁵ Madison's industry on behalf of religious liberty was, if Madison's own language in the *Memorial* is to be believed, a thoroughly Christian project. His long efforts on behalf of "free exercise" sprang from a respect for free *exercise*. In the *Memorial*, which Noonan shows to be typical of Madison's treatment of the subject, the right to free exercise springs from the sacred and therefore unalienable duty to worship God; the sacred and unalienable quality of the human right springs from the quality of the duty.¹⁹⁶ Free exercise and the right to it are a *theological* exigence for Madison. The constitutional restriction—or, ideally, the elimination—of establishment stems from "the Christian religion itself."¹⁹⁷ Madison remonstrates against the Virginia bill establishing religion because it is "adverse to the diffusion of the light of Christianity."¹⁹⁸

Noonan is alert to a risk that in fashioning a civic sanctuary for free exercise, Madison was violating the very ban on establishment he himself thought necessary to religious liberty.¹⁹⁹

193 *Id.* at 7.

194 *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

195 *Cf.* Kaveny, *supra* note 181, at 215 ("Noonan conceives Christian ethics as fundamentally a matter of *imitatio Christi*").

196 *See* 2 MADISON, *supra* note 47, at 184–85.

197 *Id.* at 187; *see* NOONAN, *supra* note 1, at 187.

198 2 MADISON, *supra* note 47, at 189.

199 In putting the point this way, I do not mean to obscure the fact that the religion language of the First Amendment is implicated only when there is "state action." The question I pursue in this Part is the extent to which legislators' passing legislation for what might be called "religious purposes" runs afoul of the ban on establishment. I also have occasion to say something about the related but distinct point that "polit-

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.²⁰⁰

According to Noonan, “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.”²⁰¹ Noonan approves: “Free Exercise authorizes full mobilization on behalf of a *moral imperative religiously conceived*. Free Exercise stands against any takeover of the government by a church.”²⁰²

Indeed, according to Noonan, the personal freedom to seek society’s and the state’s reform, even for a “moral imperative religiously conceived,” is exactly what is necessary to avoid the worst possible establishment—government’s establishing a religion that is the state’s worship of itself. Noonan makes the point with Emile Durkheim’s definition of religion as “‘a unified system of beliefs and practices relating to sacred things, that is to say, things set apart and forbidden, beliefs and practices which unite into a single moral community, called a Church, all those who adhere to them.’”²⁰³ Though Durkheim’s definition imagines an ecclesial community, the functional components of the definition make it applicable to any social body united by beliefs and practices about what is set apart and forbidden.²⁰⁴

Such an establishment is not as farfetched as it might at first appear. Noonan devotes a chapter to detailed examples of the state’s sacralization of its own interests.²⁰⁵ Taxes, the military, the exigence that the judiciary act on a case involving questions of religion, the United States flag—they are all areas in which Noonan finds government trying, often successfully, to put its own interests ahead of believers’ claims on behalf of their free exercise of religion. From a rich harvest of examples, Noonan draws the conclusion that “the interests of the nation regularly trump religious claims in the nation’s courts.

ical liberalism” (as understood by John Rawls) may make it politically objectionable for citizens to shape public life in conformity with religious reasons even where the effect is not the establishment of a church as such.

200 NOONAN, *supra* note 1, at 87.

201 *Id.*

202 *Id.* at 259 (emphasis added).

203 *Id.* at 213.

204 *See id.* at 214.

205 *See id.* at 211–37.

The untouchable domain is defined by the national interest."²⁰⁶ A national religion, within Durkheim's definition as expanded by Noonan, is established; the nation worships itself, at the price of individuals' claims to free exercise.²⁰⁷

"The dilemma is plain: we must abandon our national practices or abandon our pretense that Free Exercise is our principle, unless there is other evidence to be considered and a different analysis that can displace Durkheim."²⁰⁸ Different analysis, other evidence; Noonan has them both. "I prefer . . . an approach not focused on the institutional but on the individual."²⁰⁹ "Civil religion" is a construct that explains some American practices. It "obscures the place of persons in creating the practices,"²¹⁰ however. "Nations do not worship, persons do."²¹¹ Persons make up and perform parts in collectivities. They are not reduced to collectivities; they have their own intentions. Sometimes those intentions are religious, as were Franklin D. Roosevelt's in his prayer with the nation on June 6, 1944:

Almighty God: Our sons, pride of our nation, this day have set upon a mighty endeavor, a struggle to preserve our Republic, our religion, and our civilization and to set free a suffering humanity.²¹²

President Roosevelt was functioning within and for the collectivity, but he fused his personal piety and his public activity. He shaped public life and government action in accord with his moral vision religiously conceived. Noonan's "in-between believers," such as Roosevelt, abound,²¹³ and they do not offend by "establishing" religion.

Noonan proffers still stronger evidence supporting his different analysis. The nation is not only saved from sacralization and self-worship by the personal intentions of its "in-between believers." Noonan identifies two other kinds of barriers to national self-worship, the first of which is a singleton: the "martyrdom" of the Jehovah's Witnesses.

206 *Id.* at 236.

207 To pick just one of Noonan's examples: Though Congress had exempted religious universities from income tax, when Bob Jones University sought an exemption, the IRS refused to go along, and ultimately the Supreme Court held for the IRS. Bob Jones's allegedly scripturally inspired policy was held to encourage racial discrimination. The Court called it a religion "so at odds with the community conscience" that taxes had to be paid. The nation's interest in revenue, concludes Noonan, is sacred. *See id.* at 219; *see generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

208 NOONAN, *supra* note 1, at 237.

209 *Id.* at 246.

210 *Id.*

211 *Id.*

212 *Id.* at 213

213 *See id.* at 244-49.

Noonan tells that in the 1930s and '40s Jehovah's Witnesses were persecuted in Nazi Germany and in the United States for their refusal to salute the flag. Unwilling to worship a graven image that would effectively make the state supreme, the already unpopular Witnesses were subject to beatings, shootings, forced drinking of castor oil, and castration.²¹⁴ They were also subject to the Supreme Court's 1940 judgment, in *Minersville School District v. Gobitis*, that "national unity," "an interest inferior to none in the hierarchy of values," required that the flag be saluted when the law demanded it.²¹⁵ "Planned by no central authority, unintended by the Supreme Court, overshadowed by World War II, the legal and illegal persecution of Witnesses from 1941 to 1943 was the greatest outbreak of religious intolerance in twentieth-century America. Popular religion, the national religion one would be tempted to say, appeared triumphant."²¹⁶ It took the Supreme Court only three years to reverse the triumphalist course set in *Gobitis*. In *West Virginia State Board of Education v. Barnette*,²¹⁷ Justice Jackson for the Court subordinated the national interest in unity to another interest—the Witnesses' in acting in conformity with conscience.²¹⁸

Martyrs intend to defy the state, crusaders to change it. Noonan's crusaders wage

campaigns to change the laws of the country and thereby to change the conduct of the people of the country; campaigns waged with intense and explicit religious conviction, with the use of religious categories and symbols, citing sacred scripture; campaigns led by churchmen and organized by churches, employing prayer in their support and contending that the crusaders seek to enact the will of God.²¹⁹

Noonan identifies four completed crusades, three of which he thinks have left "indelible"²²⁰ marks on the United States: the abolition of slavery, the outlawing of polygamy, the prohibition of intoxicating liquor, and—of course—the eradication of unequal protection of the law in a movement led by the Reverend Martin Luther King in the most Christian terms. Noonan sums up:

That cool eighteenth-century rationalist, David Hume, had warned that religious zeal must be checked by governmental measures if disaster was to be avoided. Madison had read Hume and not

214 See *id.* at 242.

215 *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 595 (1940).

216 NOONAN, *supra* note 1, at 243.

217 319 U.S. 624 (1943).

218 See *id.* at 642; see also NOONAN, *supra* note 1, at 243–44.

219 NOONAN, *supra* note 1, at 250.

220 *Id.*

followed him: the cure was worse than the disease. Madison himself had never seen a crusade. The eruption of religion into politics that he had observed had carried him to Congress, but when he proposed the First Amendment the experience of crusades was not in the forefront of his thought. When the First Amendment was adopted, it was without cost to government. Crusades have demonstrated that Free Exercise is, in fact, expensive.²²¹

The nation has been reformed by crusaders who had moral purposes religiously conceived, sometimes prayed with the people they enlisted in their crusades, and even preached the gospel in summoning the crusade.

For Noonan, then, "free exercise" means no establishment; but it also means (the possibility of) "full mobilization on behalf of a moral imperative religiously conceived." Anything less would be partial exercise, and the absolutization of the state. "Conscience, not church," as we earlier saw Noonan say approvingly, "became by law established."²²² Short of establishing a church, action on behalf of a moral imperative religiously conceived is not only permitted by the religion language of the First Amendment as understood by Noonan; it is necessary to preempt the state's becoming its own ultimate—lost in wonder, love, and praise of itself as it interdicts citizens' own conscientious conduct.²²³

That alternative is no *imaginary* parade of horrors. The *doctrine* of the "politically reasonable" as recently propounded by John Rawls would proudly accomplish just this—a fundamental that is not faith, nor even reason. That, of course, is not what Rawls says. What Rawls says, at least these days, is that politics should concern itself only with what people already (at least implicitly) agree about. The scope of that agreement, *eo ipso* the scope of politics, is designated the "overlapping consensus" or "public reason." What citizens descriptively agree about becomes how they ought to live. "The idea of public reason as I understand it," writes Rawls, "belongs to a conception of a well ordered constitutional democratic society. The form and content of this

221 *Id.* at 258.

222 *Id.* at 75; see *supra* text accompanying note 51.

223 See NOONAN, *supra* note 1, at 75 ("For every upholder of the supremacy of the state JM'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.")

reason . . . is [sic] part of the idea of democracy itself."²²⁴ Democracy, then, is the starting point—the fundament, the fundamental; and what it establishes is this:

Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and when they agree to act on those terms, even at the cost of their own interests in particular situations, provided that other citizens also accept those terms.²²⁵

Citizens are unreasonable when they would speak and act outside their homes with reasons other than those views of political justice people already (at least implicitly) share. Rawls himself is eager to draw the conclusion for moral imperatives religiously conceived:

Of course, fundamentalist religious doctrines and autocratic and dictatorial rulers will reject the ideas of public reason and deliberative democracy. They will say that democracy leads to a culture contrary to their religion, or denies the values that only autocratic or dictatorial rule can secure. They assert that the religiously true, or the philosophically true, overrides the politically reasonable. We simply say that such a doctrine is politically unreasonable. Within political liberalism nothing more need be said.²²⁶

In the name of "liberal democracy" our collective sights are limited by and to public reason. The political values Rawls thinks people happen to hold become supreme. The normative power of the actual has been unleashed, generating a congeries of doctrinal manoeuvres that mask an argument whose circularity is—as Professor Campos has observed—"breathhtaking."²²⁷ The circularity is the result of the state's worshipping itself, a "secular fundamentalism":²²⁸

224 John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997).

225 *Id.* at 770.

226 *Id.* at 805–06; see also JOHN RAWLS, *POLITICAL LIBERALISM* 375 (paper ed. 1996) ("The central idea is that political liberalism moves within the category of the political and leaves philosophy as it is. It leaves untouched all kinds of doctrines—religious, metaphysical, and moral—with their long traditions of development and interpretation. Political philosophy proceeds apart from all such doctrines, and presents itself in its own terms as freestanding.").

227 Paul Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814, 1821 (1994); see also Patrick McKinley Brennan, *Political Liberalism's Tertium Quiddity: Neutral Public Reason*, 43 AM. J. JURIS. (forthcoming 1999) (review essay) (arguing that Rawlsian liberalism is intensely partisan and an affront to the demands of human intelligence).

228 Campos, *supra* note 227, at 1824; see generally Paul J. Weithman, *Taking Rites Seriously*, 75 PAC. PHIL. Q. 272 (1994) (critically analyzing Rawls' allowing citizens to

This variety of liberalism is properly understood as fundamentalist in the sense that it denies the possible legitimacy of deep political conflict in what it considers a just social order. The overlapping consensus of reasonable comprehensive doctrines is held to produce the authoritative (and authoritarian) voice of a public reason that speaks *ex cathedra*, thereby eliminating the possibility of true conceptual incommensurability and its discursive offspring, interminable moral disagreement.²²⁹

Rawlsian “public reason” is a creeping infallibilism that would make even the most virulent ultramontanist blush by association.

But whether this doctrine should make progress in men’s minds depends, among other things, upon whether it is epistemologically tenable. The Rawlsian proposes to install the politically *reasonable* instead of the “religiously true, or the philosophically true,” and in doing so he trades on the very epistemological confusion or conflation that has occupied much attention in this Book Review: the true that is exempt from the bar of reason. Raising our fears as he conjures “the religiously true, or the philosophically true”—the interiorly audible voice of God, intuition, brute experience, *intimus sensus*—Rawls ushers in, instead of the true, the reasonable. But on Murray’s analysis, following Lonergan, the dilemma is false. The true is exactly the reasonable, where “reasonable” means what meets the exigences of the dynamic human desire to know through judgment. When the true becomes coextensive with the reasonable, the adverbs—religiously, philosophically, politically—drop out. The true is what is reasonably affirmed. Period. There are no “grades” of truth.²³⁰

appeal to their comprehensive doctrines only “for the sake of the ideal of public reason”).

229 Campos, *supra* note 227, at 1824–25.

230 Rawls recently has adduced Murray as an ally. See RAWLS, *supra* note 226, at lvii n.33; Rawls, *supra* note 224, at 796 n.75, 799 n.83; see also Leslie Griffin, *Good Catholics Should Be Rawlsian Liberals*, 5 S. CAL. INTERDISC. L.J. 297, 347 (1997) (“No wonder Rawls suggests that *Political Liberalism* and this work [Murray’s *We Hold These Truths*] are ‘closely related.’”). But on the relevant issue it has to be said that Murray would be in deep disagreement with Rawls. Specifically, Murray understood that the purpose of religious liberty was the individual’s “prolong[ing], as it were, this action of the Church [on the individual’s conscience] into the temporal order, in all the matters in which Christian doctrine and law has implications for the life and law and government of society.” John Courtney Murray, *Contemporary Orientations of Catholic Thought on Church and State in the Light of History*, 10 THEOLOGICAL STUD. 177, 223 (1949). This is perhaps the place to observe the error in Rawls’ assertion that “Madison’s objections to Henry’s bill turned largely on whether religious establishment was necessary to support orderly civil society” RAWLS, *supra* note 226, at liv n.28.

This argument against “public reason” from the ground of the unity of human knowledge requires no resort to Lonergan. Larry Alexander, for example, reminds fellow liberals that “There are not two ways of ‘knowing,’ religious and secular/liberal”²³¹ Political liberals and religious people alike must proceed by the same fallible epistemological methods, for no more primordial, privileged epistemic path is available.²³² All truth claims compete before the bar of reason. Jeremy Waldron is in accord when he urges the opening of the process of political dialogue and decision to all those voices that have an intelligible contribution to make:

Even if people are exposed in argument to ideas over which they are bound to disagree—and how could *any* doctrine of public deliberation preclude *that*?—it does not follow that such exposure is pointless or oppressive. For one thing, it is important for people to be acquainted with the views that others hold. Even more important, however, is the possibility that my own view may be improved, in its subtlety and depth, by exposure to a religion or a metaphysics that I am initially inclined to reject. . . . The prospect of losing that sort of effect in public discourse is, frankly, frightening—terrifying, even, if we are to imagine it being replaced by a form of “deliberation” that, in the name of “fairness” or “reasonableness” (or worse still, “balance”) consists of bland appeals to harmless nostrums that are accepted without question on all sides. That is to imagine open-ended public debate reduced to the formal trivia of American television networks.²³³

Opening politics to all contributions to reasoned dialogue may or may not open politics to Noonan’s moral imperatives religiously conceived.²³⁴ Noonan’s clarification of that phrase’s meaning is mostly by way of his examples of “in-between-believers,” martyrs, crusaders, and, of course, James Madison himself. Madison, as Noonan has helped us

231 Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 790 (1993).

232 See *id.* at 768–70, 790.

233 Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817, 841–42 (1993); see also Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2077 (1992) (“Why doesn’t liberal democracy give everyone an equal right, without engaging in any version of epistemic abstinence, to make his or her arguments, subject, obviously, to the prerogative of listeners to reject the arguments should they be unpersuasive . . . ?”); Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J.L. & RELIGION 337 (1995–96) (arguing for dialogic politics open to every source of insight).

234 The tenability of a point somewhere between Madison and Rawls was brought home to me by KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICES* 30–84 (1988).

see, acted on a moral imperative religiously conceived. But in doing so, Noonan's Madison made a moral change on a ground not accessible to anyone else: the God within that speaks within. "The ultimate fact—the ultimate paradox if one likes—is that for the Father of Free Exercise—the rightness of the doctrine is rooted in his own faith, a faith conventional in its day but for all that palpably alive, a faith stupendous in modern eyes, the faith that God in us speaks to us."²³⁵ In evaluating Madison's performance, Noonan asks that one *concede* what Madison's theology *assumes*.²³⁶ When for Madison and Noonan, therefore, conscience became by law established, faith was empowered to control public life.

Murray's stance is different. Conscience, but not faith, reason, but not an oracle, is by law established. Murray, like Alexander and Waldron for their different but related reasons, would approve of giving governmental effect to moral imperatives religiously conceived but only where those imperatives can be understood and justified. For Murray, like Alexander and Waldron, that excludes the possibility of pointing to the deliverances of an internal oracle (even called "conscience") and then going it alone; it requires engaging in reasoned dialogue.²³⁷ Noonan's epistemological equivocations leave open the

²³⁵ NOONAN, *supra* note 1, at 89.

²³⁶ See NOONAN, *supra* note 1, at 83 ("Cognizant of legal argumentation, JM maintained his view on a stronger basis than legal dialectics. That basis was his religious conviction from the beginning."); see also *id.* at 75 ("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?").

²³⁷ A standard criticism of Madison's understanding of religion is that it is too individualistic—God and the individual conscience together in splendid isolation. The parallel criticism I have advanced is that Madison's "justification" of religious liberty is overly individualistic. The demands of the process of coming to truth, including the exigence of dialogue, would be the starting point for a theory and justification of religious liberty that are both personal and communitarian. For analyses of religious liberty that take the dialogic nature of human knowing as the starting point, see HOOPER, *supra* note 143, at 218; Angela C. Carmella, *Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion*, 73 NOTRE DAME L. REV. 1191 (1998); Leon Hooper, *A Closing Reflection on Our Academic Praxis*, in JOHN COURTNEY MURRAY & THE GROWTH OF TRADITION 41–59 (J. Leon Hooper, S.J., & Todd Davit Whitmore eds., 1996); Frederick G. Lawrence, *John Courtney Murray and the Ambiguities of Liberalism*, in JOHN COURTNEY MURRAY & THE GROWTH OF TRADITION, *supra*. Noonan only sometimes understands Vatican II as having rooted its theory of religious liberty, including the right to religious association, in a theory of the

possibility that on his analysis, legislators are permitted to shape public life on religious grounds purely privately accessible. To be suspicious of such an analysis, one need not have enthroned Rawlsian "public reason." One need only be living up to the demands of the dynamic human desire to understand.²³⁸

exigences of human cognition. Compare NOONAN, *supra* note 1, at 350-51 with *id.* at 352.

238 In his analysis of the origins of Free Exercise, following upon his quotation of the *Memorial and Remonstrance*, Michael McConnell observes unexceptionably:

Far from being based on the "respect for the person as an independent source of value," the free exercise of religion is set apart from mere exercise of human judgment by the fact that the "source of value" is prior and superior to both the individual and the civil society. The freedom of religion is unalienable because it is a duty to God and not a privilege of the individual. The free exercise clause accords a special, protected status to religious conscience not because religious judgments are better, truer, or more likely to be moral than nonreligious judgments, but because the obligations entailed by religion transcend the individual and are outside the individual's control.

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1497 (1990) (citation omitted). But, prescinding from McConnell's historical point about the reasons behind the First Amendment's religion language, I would add that the conditions that a human obligation be "transcend[ent]" and "outside the individual's control," and therefore worthy of government's accomodation, are satisfied where, as on Lonergan's analysis, the person is under an unalienable duty to seek to know the real and to act accordingly. For Lonergan, the exercise of "human judgment" (understood in Lonergan's technical sense) is not "mere" but, instead, the way humans reach out toward the real that includes the divine. Cf. Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 603 ("there is at bedrock only a gossamer line between 'rational' and 'supernatural' causation—the former really being little more capable of 'scientific proof' than the latter").