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Analyzing an Experiment Gone Awry: A Unique Application of Bacon's Corrective Model to the First Amendment Protection of Essential Rights and Liberties

Promising both academic enrichment and challenging provocation, John Witte, Jr.[1] accomplishes both purposes by carefully tracing the history of the establishment and free exercise clauses of the Constitution and, through uncharted territory, analyzing their historical and current application in terms of the effectiveness of this American Experiment.[2] *Religion and the American Constitutional Experiment: Essential Rights and Liberties*[3] examines the religious freedom clauses as the "fair" and "novel experiment" which Thomas Jefferson and the framers contemplated in the context of Francis Bacon's corrective paradigm for experimental methods gone awry. In an inventive and refreshing survey, Witte ultimately calls for a new form of a more integrated framework of religious liberty, born primarily of the recognition that the nature of the First Amendment is grounded in "theological visions and values." Refusing to strip the clauses of their necessarily personal and moral implications, Witte recognizes a set of basic principles which must, woven together, form an "interlocking and interdependent shield of religious liberties and rights for all."

Latching on to the Bacon's three correctives to propose a remedy for the experimental defects of the religion clauses, Witte provides a welcome roadmap to guide both the constitutional novice and expert through the historical base of the clauses, their implementation, and the perceived breakdown of that implementation. Witte heeds Bacon's instructions for correcting defects:

First, said Bacon, we must "return to first principles and axioms," reassess them in

1. Jonas Robitscher Professor of Law and Ethics; Director, Law and Religion Program, Emory University. Professor Witte, a Harvard Law School graduate, is author or editor of over 10 books and over 60 articles and book chapter, with many forthcoming.

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

3. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000).

> light of our experience, and "if necessary refine them." Second, we must assess "our experience with the experiment" in light of these first principles, to determine where "the experiment should be adjusted." Third, we must "compare our experiments" and experiences with those of fellow scientists, and where we see in that comparison "superior techniques," we must "amend our experiments" and even our first principles accordingly.

By analyzing the clauses under this model, the reader may more easily navigate the waters that theological and political movements left murky on the eve of constitutional drafting. Detailing six first principles that he perceives prominent in these movements, Witte explains the failings of the applications of the clauses today and proposes remedy to the extent that he contemplates it exists.

I. RETURNING TO FIRST PRINCIPLES

Pursuant to Bacon's model, *Religion* promises to return to the first principles upon which the framers articulated the clauses, reassess these principles in light of our experience with their effectiveness, and refine them as needed. Witte commences this process by outlining the major precedent for religious freedom as envisioned by the American Experiment. His conclusion that these principles were not in themselves unique but rather were implemented in a unique way through our experiment helps the reader to appreciate both the value of the principles as cornerstones in theological movements and the novelty of the American implementation of those principles in the constitutional experiment.

In a somewhat obvious but certainly appreciated gesture, Witte reminds the reader that to limit the American experiment to the parameters of the First Amendment provisions would sketch only the outer limits of our plight for protecting religious liberties. Instead, he describes the influential "'canopy' of opinions," comprised of the theological Puritanical and Evangelical views, as well as the political thought of the Enlightenment thinkers and the Civil Republicans, concluding that in the interplay of these principles lies the elusive "original understanding" of the founders. He enumerates the "essential rights and liberties" of religion: (1) liberty of conscience; (2) free exercise of religion; (3) religious pluralism; (4) religious equality; (5) separation of church and state; and (6) disestablishment of religion. However, by tying the four theological and political views to the sacrosanct "essential rights and freedoms" he envisions underlying the protective canopy, Witte unfortunately corners these ideals within the formulaic parameters of these schools of thought.[4] Surely the ideals that are the essential rights and liberties are more grounded in who we are as a people, as he previously

4. Though Witte reasons that no one school of thought lies at the base of the founder's understanding, but rather in the interplay between the theological Puritanical and Evangelical views and the political views of the Enlightenment and Civil Republicans, the reader is a bit confounded as to why these four principles should be considered prime while others are not addressed.

asserted by claiming that the American constitutional experiment is, to large extent, mere implementation of age-old morals and personal theology. Witte would be well served by revisiting his assertions. The line he draws between the theological and political views and the essential rights and liberties is an important one, but his failure to remind the reader of the additional lines which we must draw to gain a balanced picture undercuts his message that two phrases in our Constitution do not fully contemplate the American experiment, its influence, and its power.

His forgetfulness in not reminding the reader to regard these essential rights and liberties in light of the relevant history is certainly more accurately described as oversight of not remembering his audience than as failure to accurately portray the essence of the clauses. Witte characterizes the religious liberty envisioned by the framers crafting the First Amendment under these principles as designed "to provide an interwoven shield against repressive religious establishments" and to be "mutually supportive and mutually subservient to the highest goal of guaranteeing 'the essential rights and liberties of religion' for all." Witte conveys beautifully the necessary nature of the these principles to achievement of rights he heralds as essential to both "individual flourishing and social cohesion." Furthermore, by tracing the twenty drafts of the clauses, the reader is able to understand the frustration the framers felt in trying to convey their intent and, in a parallel sense, the frustration of today's judges, professors, attorneys, students, and all of society in attaching a meaning to these clauses that does not compromise or undermine that illusive intent. Having prepared us historically, the reader may then take Witte's hint and understand that the reason for the present confusion may well be the current concentration on the language of the clauses themselves, overshadowing the guarantee of essential rights and freedoms at the heart of the framers' efforts to draft a truly protective amendment which was careful to not enumerate so greatly that what was omitted could be disregarded.

II. ASSESSING THE AMERICAN CONSTITUTIONAL EXPERIMENT

Under the Bacon model, Witte spends the next five chapters analyzing the experiment under the second prong of the test, which requires an examination of the experiment under the first principles out of which the experiment was created to determine appropriate areas for adjusting the experiment. In light of the state constitutions adopted in the period before 1947, most states were not concerned that these rights might not be preserved. Largely, the availability of the frontier instead made the plight of religious liberty more realistic, because each religious group was able to separate itself geographically and socially from other religions. Witte explains well the ramifications of the closing frontier. As space to form new religious communities decreased, so did tolerance for other ideologies among any specific religion. Those not conforming were denied rights they otherwise could

have enjoyed under the Framer's conception of essential rights and liberties. Such injustice under the true meaning of essential rights and liberties led dissenters to federal court to raise their claim of unconstitutional practice.

Witte assesses the Supreme Court rulings regarding the First Amendment separately–those before the 1940s and those after, with the 1940 *Cantwell v. Connecticut*[5] and 1947 *Everson v. Board of Education of Ewing Tp.*[6] decisions as the dividing line. He draws this helpful line between the cases, emphasizing the heightened degree of First Amendment scrutiny to which the more modern line of cases must rise, occurring after the incorporation of the First Amendment to the states. Witte attacks the daunting task of tracing the history of these cases with a grace which, though not simplifying their significance, presents the cases so that the novice may understand and be intrigued by the current state of religious law and the expert is compelled to ask again the questions–and likely with a new perspective--which he can only hope to answer through a lifetime of study.[7] Witte's suggestions as he navigates through the history of free exercise and disestablishment law are well taken and his thorough analysis of the breakdown which the interpretation of these clauses suffered, removing them from their grounding in the essential rights and liberties, sobers the constitutionally vigilant reader with the understanding of how far we have strayed as a nation from the intent of these clauses.

Witte aids the reader greatly with his summary of First Amendment case law from the early Supreme Court on polygamy, pacifism, and funding. Against this backdrop, *Cantwell* and *Everson* assume greater significance for the shift they imposed on constitutional law practice. With rare ease, authority, and clarity, Witte maps the modern free exercise doctrine, differentiating between the case-by-case[8] and definitional balancing[9] methods of resolving conflicts between government power and free exercise rights.[10] Examining modern free exercise law, Witte

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5. 310 U.S. 296 (1940). *Cantwell* marked the first time that the Court applied the free exercise clause to the states, invalidating the application of a statute which prohibited, among other things, evangelizing. *See id.* at 301-03, 311.

6. 330 U.S. 1 (1947). The *Everson* Court held that a state statute allowing local school districts to make laws, one of which provided bussing of children to both public and parochial schools, was constitutional. Witte describes *Everson* as "an open invitation to litigation. *See id.* at 3-5, 18.

7. Witte reports that for the first 150 years, the Court decided 32 cases regarding religious liberty. Additionally, over the last 60 years, more than 150 cases have been heard before the Court, most of them regarding incorporation of the doctrine to the states and specifically addressing application of the First Amendment to state and local governments.

8. This method produces clusters of cases with similar fact patters or other characteristics which bind their reasoning and holding together.

9. This method involves application of different levels of scrutiny, as the Court has mandated, from strict scrutiny to intermediate scrutiny to the rational basis standard of review.

10. Finding that these two are the primary techniques used by the Court in resolving the conflict, Witte also recognizes alternative forms embraced by the Court when wandering from these techniques, including its wanderings away from "the common logic of a factual cluster," its brief abandonment of a general standard of review, and its formulation of categorical holdings.

skillfully explains that the cases reflect both a constitutional battle extending beyond the facts of the cases themselves and the application of the first principles of religious liberty. With this background, the constitutional novice will be genuinely disheartened when realizing that these concerns are modernly reduced to a neutrality standard.

Witte next carefully analyzes the transition from the cases of the 1940s, which provided what he characterizes as multi-layered protective shield of First Amendment religious rights, to the modern trend since the 1980s, in which the "single and simple principle of neutrality" reigns, replacing the previous emphasis on what he refers to as the founding principles of First Amendment law.[11] With this understanding, Witte's assertion that modern claimants must now seek remedy for such conflict in the free speech clause of the First Amendment and in federal and states statutes is better understood. Furthermore, though the reader is easily convinced by Witte that these alternative protections are inferior and insufficient, the significance of other available remedy is certainly appreciated as the reader begins to contemplate the deficiencies of the current experiment.

Revisiting the Court's refusal in *Employment Division v. Smith*[12] to view the clause under the Founders' understanding and incorporate the "essential rights and freedoms" for which Witte has argued so convincingly, the reader becomes indignant over the loss of this constitutional protection. By the end of his survey of the Free Exercise cases, the reader listens in earnest to Witte's plea that these alternative protections be pursued for the moment, while the fight continues to remove the "sting" inflicted by *Smith*. Witte's application of the second phase of Bacon's model to the Free Exercise cases thus draws to a close, but leaves the reader a bit bewildered. Though making this final suggestion in his conclusion, Witte leaves the reader wanting, with no real understanding of whether and how the Court will alter the current experiment so that it yields accurate and appropriate results. Though the immediate solution of pursuing alternative protections is practical enough to encourage implementation, the reader waits in quiet anticipation of a non-existent simple solution to the constitutional dilemma.

Moving on the disestablishment cases, Witte explains that challenges to the establishment clause occur when the claimant encounters a law which establishes religion. He argues that disestablishment law is moving in the opposite direction from the law evolving under the free exercise clause, evidenced by the apparent

11. These principles include freedom and equality of religious expression, liberty of conscience, separation of church and state, and religious pluralism.

12. 494 U.S. 872, 879 (1990).

lack of clear standard for adjudication.[13] Under a group of three traditional and four modern approaches, Witte's explanation is refreshingly clear, though the complex nature of solving such conflict is not lost on the reader, who is now wary of oversimplification of these principles per Witte's admonition. Juxtaposing the four modern approaches, the reader is appropriately frustrated by the muddied state of the law.[14] Finally, Witte traces the reasoning of the *Everson* Court, which erected the "wall of separation between church and state," in a way surely never contemplated by Thomas Jefferson. This unfortunate misnomer stirs the reader, who now recognizes the degree to which this qualification on the First Amendment renders the essential rights and liberties, once inextricable from the Founders' contemplation of disestablishment, void.

Focusing on the affect on public education, the role of the government in religious education, and religion in the public square, even the constitutional law student, familiar with the relevant case law, is relieved when Witte summarizes the trend of strict separation between church and state in our recent past and the current turn back, now providing at last the same protection and benefits to religious and nonreligious groups.[15] Though Witte commends the Court for recognizing in *Everson* the first principles as manifested in disestablishment law, the reader remains disappointed, as is Witte, by the Court's grand failing to remain consistently true to those principles in applying the First, by adopting a standard to ensure constitutionality.

Witte educates the reader so his distrust for the Court's application of the Establishment Clause is not unhealthy or cynical, but rather grounded in fact and understanding. Witte calls the reader to a healthy fear for the future of our constitutional rights and encourages us also to earnestly seek separation of church and state only in pursuit of protecting these rights which are *essential*. Witte convinces the reader that insisting on this separation as it pertains to *essential* rights and liberties differs greatly from insisting the same with regard to *unessential* rights and liberties. Reaching those "unessentials" with this analysis, Witte argues, will both trivialize religion's place in public and private life and, more importantly, "trivialize[] the power of the Constitution, converting it from a coda of cardinal principles of national law into a codex of petty precepts of local life." Surely, it is at this point that disestablishment would impede the free exercise of religion–in the ultimate constitutional contradiction of purpose.

Witte analyzes the tax exemption of religious property in an effort to illustrate

13. Witte argues that the free exercise clause is currently experiencing a transition from a multi-principled to a single-principled reading (peaking out at total neutrality) while the establishment clause is undergoing the opposite transition, moving from a single-principled to a multi-principled reading.

14. The modern approaches include O'Connor's endorsement test, Kennedy's coercion test, Souter's neutrality test, and an equal treatment analysis, which largely parallels neutrality.

15. Witte reminds us that the Establishment Clause was supposed to complement the Free Exercise Clause under the Framers' view. The Establishment Clause outlawed prescription of religion while the Free Exercise Clause outlawed the proscription of religion.

the modern movement of the religious liberty doctrine, discussing the tension between state and federal religious liberty law, the tension between the free exercise and establishment clauses, and the difficulty of defining religion at law and remaining consistent in interpreting that definition. He argues persuasively for the constitutionality of tax exemption, advocating a "self-imposed ethic of moderation and modesty," under which auxiliary properties, not required for the ministry of a given religion, would not be subject to tax exemption, unless used for charitable purposes.[16]

III. COMPARISON WITH INTERNATIONAL NORMS OF RELIGIOUS RIGHTS AND LIBERTIES

Under the third instruction in Bacon's model, the vigilant scientist must now compare his experiment with the experiments and experiences of other scientists, looking for superior techniques which call him to amend his own. Witte undertakes this portion of assessment by comparing the American experiment to relevant international religious rights and liberties norms. Though he concludes that international human rights norms "are no panacea to the current constitutional confusion," he skillfully excises those characteristics of this body of law that enable it to more adequately protect religious rights and to advocate affirmative state action. Applying lessons learned thereby, he calls for a unified approach to adjudicating First Amendment religious freedom. Ultimately, he envisions a "more integrated approach," which "incorporates the first principles of religious rights and liberties on which the American experiment was founded and integrates them into the resolution of specific cases."

Assessing three international instruments, Witte analyzes current American law under the principles of these agreements.[17] He suggests that we might learn from the international application of laws which we embrace or neglect, concluding that the norms "confirm and prioritize" the essential rights and liberties, at least to some extent. Under these international instruments, Witte concludes that, like America, the international community protects pluralism, promotes a strict scrutiny

16. Witte's argument is certainly intriguing. However, his analysis is problematic in that it provokes more questions than it answers. Under Bacon's model, we should be discovering ways to refine our experiment, but this inquiry simply illustrates the vast insufficiencies of the current experiment, in so many areas of application that they appear too numerous to tackle.

17. Witte relies on the International Covenant on Civil and Political Rights (1966); the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981); and the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989) in assessing international law norms.

standard for free exercise claims, endorses a noncoercion standard for establishment clause claims, advocates equal access and equal treatment, would uphold indiscriminate treatment of religious and nonreligious groups, and would approve of cases which protect religion generically. Conversely, Witte concludes that the international norms conflict with the American cases punishing religious polygamy practices, allowing discriminatory treatment of religious minorities, and permitting governmental resolution of private religious affairs. Most importantly, Witte urges the Court adopt, as the international community has, a definition of religion which would establish boundaries of protection, thereby enabling the Court to extend the protection the essential rights and liberties compels it to extend. The merits of this argument are obvious: a definition would certainly ensure more accurate and consistent application of First Amendment law, while enabling the Court to return to the first principles upon which the experiment began.

IV. CONCLUSION

Through his detailed but absolutely comprehensible tracing of the history of the essential rights and liberties and the Framers' manifestation of their understanding of those rights in drafting the First Amendment, Witte thrusts the reader's mind fully into the free exercise and establishment clauses, thereby inspiring us all to question the theory under which current cases are decided and how the movement of cases has swept the current law away from the ideals to which the framers fought hard to cling. Those rights and liberties endorsed by both the Framers and Witte are convincingly essential and the failure of our current law to hold to that intent resounds within the reader's constitutional conscience as he recognizes, through Witte's perceiving eyes and then through his own, how the American constitutional experiment has gone awry and how to force it home, to fully embrace those rights for which it was first enacted. Though the method in which we engage in that embrace is uncertain, Witte's enthusiastic advocacy of constitutional reform encourages and inspires the reader that realization of an experiment which provides effective protection of our essential rights and liberties is on the horizon. Most effectively, Witte causes the reader to reflect on our current First Amendment law and contemplate a restoration to those ideals under which the Framers enacted the free exercise and establishment clauses.

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