

**Mark Douglas McGarvie.** *Law and Religion in American History: Public Values and Private Conscience.* New Histories of American Law Series. Cambridge: Cambridge University Press, 2016. xxix + 273 pp. \$29.99, paper, ISBN 978-1-316-60546-2.

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Mark Douglas McGarvie's contribution to Cambridge University Press's New Histories of American Law series is an important, ambitious effort. Synthesizing a history of this topic requires expertise in (at least) three different subfields: the history of American law, the history of American religion, and American intellectual history. Given the contentiousness surrounding the question of freedom of religion today, we surely have need of such a work.

McGarvie's argument is twofold. First, he maintains that the founders created a private sector of individual rights into which government was precluded from intruding, and this sector included all rights of conscience, religion among them. Second, he argues that in the last quarter century, Christian groups unhappy with the banishment of religion from the public square have banded together to mount a defense of religion in public as requiring the protection of minority rights. Getting his argument right, and ensuring that it is balanced and fair, is a major challenge for the author. How the establishment clause relates to the protection of religion is a political hot potato. If McGarvie is going to take sides, and I think he does, it is crucial for him to give appropriate voice to the side of the argument he rejects.

But I don't see it here. From the first, he privileges a Jeffersonian perspective on religious freedom as true and correct, despite his awareness that a significant number of people and groups at the time understood the First Amendment to mean only that the federal government could not establish a confessional religion. State and local governments exercised enormous power throughout the long nineteenth century, and the Bill of Rights was initially understood as applying only to the federal government. Indeed, only by the 1940s did the augmentation of power of the federal government, along with interpretation of the due process clause of the Fourteenth Amendment applying First Amendment restrictions to the states as well to the federal government, transform a number of issues that had formerly been the prerogatives of the states into federal ones. In other words, for much of the nation's history, any wall of separation between church and state that existed did so only at the federal level.

After World War II, moreover, the courts increasingly dealt with cases of individuals who claimed violations of civil rights as a result of membership in minority groups that were the objects of discrimination. Litigation of cases alleging systematic bias on the basis of union membership, race, gender, and sexual orientation (among

other categories) ushered in a civil rights revolution. Much of the arbitration of those cases took place at the federal level. The door thereby opened to claims by members of the religious Right that as a minority community in a secular nation, its members suffered religious discrimination through law that required adherence to statutes that violated their beliefs.

McGarvie is confronted with a dilemma here. He implies that the Jeffersonian perspective on religious pluralism, though sometimes honored more in the breach than the observance, endured until the “the Court [began] conceiving of rights and government power as integrated forces serving the public interest” (p. 124). Does it follow that reliance on the courts to strengthen civil rights during the twentieth century was a mistake? Or are religious groups whose hegemonic status is fading somehow exempt from claiming that the law can violate the rights of conscience of their members?

The author is persuasive in showing what a thorny issue church-state relations has been over the last half century but falls short of being convincing as to why. Hampered by a bibliography that is sometimes out of date, McGarvie not only overrates consensus among the founders but also neglects the counter-pressures of state and local perspectives in shaping a far more complicated view of the relation between church and state than appears here. The lines between public and private, religious and secular, and legal and moral have never been as distinct as McGarvie would like us to think.

Enlightening and stimulating, this book also made me want to argue back at every turn. Sometimes that’s the mark of a good book. Sometimes it’s an indicator of a topic worth discussing but flawed in the execution.

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