ity of wealth more than in allocating beneficial interests under a trust. The challenges entertained against modern jurors in England and America echo the objections allowed against judges in earlier times, and Stephen of Tournai's discussion of the guilty will suggests a heavy influence upon the later law relating to conspiracies and attempts.

The description on the back cover of the paperback edition of this work rightly asserts that this is a unique, fascinating and thought-provoking book, which Professor Evans deserves both thanks and admiration for having accomplished. Given what is expected of the reader in advance of tackling the work and the need for some wariness with regard to the treatment of some of the legal issues, your reviewer is not so convinced that it is a suitable introduction.

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THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD, by RUSSELL HITTINGER, Wilmington, Delaware: ISI Books, 2003, xlvi+334, ($24.95) ISBN 188-92682 X

Russell Hittinger is well-known as a Roman Catholic legal philosopher, and I read the opening chapters of *The First Grace* with a mounting sense of excitement. However—and this is perhaps one of the disadvantages of having an already excellent reputation—by the end of the book I was rather disappointed. What had promised to be a comprehensive restatement of constitutional theology turned out to be still fragmentary.

As Hittinger explains, the 'First Grace' refers to the natural law, and Section One of the book, 'Rediscovering the Natural law', is a sustained and powerful critique of the modernist attempt to build natural law on non-theistic foundations. In chapter 1 ('Natural Law and Catholic Moral Theology'), the author argues that modern natural law discourse is anti-theological, that correct natural law theory cannot be divorced from a doctrine of God, and that as a consequence Christians should be wary of buying into current natural law discourse. In chapter 2 ('Natural Law as Law') Hittinger supports his thesis by pointing out that modern natural law theory has great difficulties in establishing the law-like nature of its subject-matter; a problem which the existence of a divine legislator resolves. Chapter 3 ('Natural Law in the Positive Laws') disentangles philosophical questions about the existence and effect of natural law from political and constitutional questions about the proper scope of judicial power. This is particularly necessary in the American context, in which natural law theory is too often associated with judicial supremacism. This is, of course, a *non sequitur*, and a mistake British readers are less likely to make. The final chapter in this section, 'Authority to Render Judgment' goes into the judicial role in the face of unjust laws in more depth, concluding that 'the higher law might obligate the judge not to render judg-

ment' but he is not 'entitled to plough ahead and substitute his own law for that of the legislator' (page 112).

I had some difficulties with that fourth chapter. Problems of the judicial interpretation and invalidation of unjust laws cannot be dealt with quite as straightforwardly as Hittinger suggests. If a judge refuses to follow one law, the effect might be to uphold background laws with questionable effect. Law is complex and multilayered. Distinctions between 'not rendering judgment' and law-making are far from clear in practice. But as a programmatic statement of the broad difference between adjudication in the individual case and general law-making the point is well made.

The next three chapters left me wondering where the book was going. Chapter 5 criticises the modern tendency to constitutionalise under-specified rights. Hittinger is particularly critical of the Supreme Court's discovery in *Planned Parenthood v Casey* (1992) of a supposed 'right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life' capable of justifying abortion. Chapter 6 tackles the case law on assisted suicide, and chapter 7 the 'arbitrary and whimsical view of religion' (page178) displayed in the no-establishment and free-exercise jurisprudence. The critique is vigorous and well made, but it was hard to connect to the earlier discussion. Particularly odd, in the light of the earlier critique of modernist natural law theory, was the appeal to Locke and the Federalist Papers. This was fair enough as an apologetic device, but where was the theologically informed critique flagged up in Section One? I wonder too whether Hittinger is not overly hostile to the concept of *prima facie* rights which require limitation, an approach to rights more familiar in the European context. A right to define one's own existence is indeed a right to do as one pleases, but this may mean no more (as it does, for example, in Germany) than that the Government must always act for a rational purpose. One can worry about the extent of constitutional review this opens up, but the idea is not obviously wrong. Indeed, one might think it a fundamental of the Rule of Law that Governments should always act for rational purposes.

Chapter 8 ('A Crisis of Legitimacy') began to tie things together. Hittinger's thesis is that the effect of the Supreme Court's case law over the last ten years has been to create a 'new constitutional regime' which is profoundly anti-democratic. It turns the Supreme Court from the ultimate arbiter of disputes to the supreme voice of the people, whether or not the people agree with it. In the light of the earlier chapters, his case made a lot of (worrying) sense. At this point, I was expecting a positive alternative constitutional ideal grounded in Scripture and tradition, as hinted at in Section One. However, the final three chapters only contain some elements of such an ideal. Chapter 9 discusses *Dignitatis Humanae* and the proper scope of the civil liberty of the Church; chapter 10 (in almost apocalyptic terms) the impact of increasing technological sophisitication on the possibilities for liberal society; and, finally, chapter 11 the role of

'intermediate associations' in a flourishing civil society. The last chapter is effectively a critique of Ernest Gellner's *Conditions of Liberty: Civil Society and its Rivals* (1994).

What was missing was a final chapter pulling Section Two together and charting the way forward, at least in outline. Perhaps one should not be too negative about the overall coherence of a collection of essays. Taken as individual pieces they are illuminating and enjoyable. Moreover, the book is beautifully produced. But for one minor flaw (the noticeably erratic setting of spaces after punctuation) it was aesthetically pleasing to read. One can only hope that the full constitutional implications of Hittinger's political theology will soon be stated more fully, and as powerfully and attractively.

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RELIGIOUS FREEDOM: HISTORY, CASES AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT, by JOHN T NOONAN Jnr and EDWARD McGLYNN GAFFNEY Jnr, New York, Foundation Press, 2001, xlv + 998 pp. ($80) ISBN 1-56662-962-4

The area of study that United States constitutional lawyers call Church-State is rich and diverse and—in view of the relative paucity by comparison of the religious liberty jurisprudence of the European Convention on Human Rights—has some valuable lessons for United Kingdom lawyers. Noonan and Gaffney's book is the second edition of an established collection of materials for use in teaching religious liberty in American university law schools.

Part One of the book (the first one hundred and fifty pages or so) contains a wealth of historical material on law and religion from primary sources, which will be of general interest. The first five chapters gather materials from the biblical period, the Establishment of the church under Constantine and the Donatist controversy, the contest between church and state in twelfth century England, the mediaeval period, and the Reformation and Counter-reformation struggles over religious liberty (taking in, for example, Locke, Spinoza and Roger Williams). This is a real feast of historical material brought out by judicious selection of original documents and helpful explanatory comments.

Equally useful is Part Three, which occupies two-thirds of the 929 pages of main text. This contains extracts from the contemporary United States case law and scholarly critique across the range of Church-State issues. The range is as diverse as the imagination of US constitutional litigators. Familiar issues such as school prayer, conscientious objection, battles over evolution and creation, and abortion protests feature alongside less well-known legal controversies such as those over taxation or animal sacrifices.