Reviews

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Book Reviews


Reviewed by David W. Louisell†

Lawyers and Justices have often resorted to history to explain the sixteen plain words of the establishment and free exercise clauses of the First Amendment. The books of the nonlawyers Morgan, associate professor of government at Bowdoin College, and Smith, professor of religious thought at Temple University, should help guide those who search beyond case reports for the meaning of the religion clauses. The two books also indicate how much this area of constitutional law can profit from further historical research.

Nonlawyer scholars should not hesitate to embark on free exercise and establishment waters simply because they must navigate through lawsuits. The waters may be befogged in professional mystique, but the clouds of jargon and methodology are penetrable. And certainly

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." U.S. CONST. amend. I.
3. E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES (1972) [hereinafter cited as SMITH].
4. It is no fault of the authors that their commentaries have been superseded before their ink was dry or at least before this reviewer could see how dry it was. Morgan's book takes us through the Amish case, hailed by the press as a great victory for religious liberty and proof that the Burger Court, too, could be liberal. Wisconsin v. Yoder, 406 U.S. 205 (1972). Since then, the Court has already struck down New York's attempts to contribute aid to nonpublic schools for expenses of mandated services, Levitt v. Committee for Pub. Educ. & Religious Liberty, 93 S. Ct. 2814 (1973), New York maintenance and repair grants to nonpublic schools, and tuition and tax assistance to parents whose children patronize them, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 93 S. Ct. 2955 (1973), and similar tuition assistance in Pennsylvania, Sloan v. Lemon, 93 S. Ct. 2982 (1973). It has upheld the legality of revenue bonds in religious colleges, Hunt v. McNair, 93 S. Ct. 2868 (1973). See also Tilton v. Richardson, 403 U.S. 672 (1971). Compare Levitt, Nyquist, Sloan, and Hunt, with Norwood v. Harrison, 93 S. Ct. 2804 (1973) (Mississippi textbook program which significantly aids private schools that might discriminate racially held unconstitutional).
5. See, e.g., Corwin, The Supreme Court as National School Board, 14 LAW & CONTEMP. PROB. 3 (1949).
neither legal scholars nor Supreme Court Justices have by their work earned the right to preempt discussion of the religion clauses. On these seas the Good Ship Constitutional Adjudication is not faring too well. If the leaks and faulty steering cannot be permanently repaired by some master lawyer-historian, we can at any rate all bail together.6

In eight brief chapters Morgan places in the contexts of social and religious history the formation of the First Amendment and the principal religion clauses cases, such as those concerning disposition of church property, flag salutes, proselytizing of Jehovah's Witnesses, parochial school aid, and public school prayer. Smith organizes his discussion of religious liberty in America around the separatist, Catholic, and American constitutional traditions. He treats American Catholic and Protestant religious history more comprehensively than does Morgan, but his insights into the development of religion are unfortunately insulated from his analysis of the concurrently developing case law.

Morgan has not shied away from clear statements on legal matters which a lawyer might have obfuscated with qualifications. Thus, he says, "The conclusion seems inescapable that Sherbert and Braunfeld cannot be reconciled." On another occasion he quotes Justice Douglas' concurrence in Lemon v. Kurtzman—"One can imagine what a religious zealot, as contrasted to a civil libertarian, can do with the Reformation or with the Inquisition"—and observes with trenchant sarcasm, "Only civil libertarians, apparently, are fit teachers to be paid from the common treasury."9

His conclusions after examining Court treatment of the religion clauses are three: The Court is right to preclude prayer in public schools. But it should not interpret the establishment clause to bar all aid to religious schools. And it should not interpret the free exercise clause so as to allow claims of minority religions to override

6. It would be most helpful if all writers who use judicial decisions as part of their data would conform to the standard method of citations of the law journals. Get a Blue Book of Citations! To cite a case by the docket number only is frustrating to the busy scholar. Some day perhaps all publishers can be induced to put footnotes on the pertinent pages, as in Smith. The constant shifting back and forth, as is necessary with Morgan, is annoying. For suggestions on bibliography, see Smith reviewed D. LeDuc, 66 LAW. LIB. J. 233, 234-35 (1973).


9. MORGAN 111.
government regulation of essentially secular matters. In general Morgan favors retreat from the “quite sweeping theory of separation articulated by Black in the early pages of his Everson opinion.” With apparent hope, Morgan adds that the Court might in the future adopt Philip Kurland’s suggestion that if “the primary purpose of the governmental program be secular and the legislative ends satisfy the public purpose requirement of the due process clause, governmental programs which provide substantial support to religious institutions are constitutional.”

One of Morgan’s greatest strengths, especially helpful in appraisal of Everson, Allen, and Lemon (and now of Nyquist, Levitt, Sloan and Hunt), and with hovering-in-the-background significance for McCollum, Zorach, Engel and Schempp is the candor with which he treats the reality of the anti-Catholic tradition in the United States. Morgan sketches with strokes too brief, but I think never inaccurate, the history of American antagonism toward Catholics. He begins with colonial intolerance and includes the burning of the Ursuline Convent in Massachusetts in 1834, the street fighting in Philadelphia ten years later, the exhortations of Lyman Beecher to resist the Pope’s plan to take over the Mississippi Valley, the American Protestant Association of the 1840’s, the Order of United Americans of the 1850’s, the Order of United American Mechanics which survived from the middle of the nineteenth to the middle of this century, the Know-Nothing party, the American Protective Association which counted one million secret members in the 1890’s, the Blaine Amendment, President Truman’s frustrated attempts to maintain a representative at the Vatican, and today’s Americans United.

The history of intolerance is all unpleasant recollection and observation, especially for Catholics; but neither scholarship nor truth is advanced by blinking at it. Perhaps the spirit of ecumenical cooperation following Vatican II and the election of a Catholic President have lulled Americans into believing that all is for the best.

10. MORGAN 206-10.
15. See note 4 supra.
20. MORGAN 46-52. Morgan might have mentioned Al Smith’s campaign for President in 1928. See SMITH 134-36.
in this best of all possible worlds of religious equality and freedom.21

Smith's book includes an informative narration of the American separatist and Catholic traditions of freedom of religion. The section on Catholic thought22 is particularly welcome because the subject is presented relatively infrequently and is here supplied without the distortions of subjectivity. Smith does mention the usual bugbears of Catholicism's critics—the Syllabus of Errors and the absolutist thought of such men as John A. Ryan. But he also discusses John Carroll and John England, nationalistic American Catholics of the late eighteenth and early nineteenth centuries; Archbishop John Hughes of New York, who in the 1840's struggled to obtain public funds for Catholic schools in his state; Isaac Hecker, who believed that Catholicism was precisely attuned to the American spirit; and John Ireland, who in the late nineteenth century sought public funds for the secular instruction offered in Catholic schools. Smith shows that American Catholics regarded funds for education as proof of their country's seriousness about religious freedom, rather than a means to insulate themselves from the rest of society. Rich as is Smith's treatment of the American Catholic tradition, one can only regret that he did not pay more attention to the European background of Catholicism's development. For example, Smith might have treated Bismarck's Kulturkampf and the French anticlericalism, in order to judge the papal pronouncements of the era. The final chapter in this middle section of the book is an excellent review of the work of the Jesuit John Courtney Murray, who helped advise the Second Vatican Council. Smith notes that Murray went beyond the rationale of public funding of secular instruction in private schools; he believed that religious schools, because of their religious instruction and character formation, were vital to the welfare of a varied culture.23

In the last third of his book Smith concludes, with little reference to his discussions of the Protestant and Catholic traditions in America, that, "Separation of church and state cannot mean either the abolition of religion from the purview of the law or state hostility to religion."24 It does mean25

22. Smith 156-244.
23. Id. at 239-40.
24. Id. at 362.
25. Id. at 363.
a system of laws that secures the dominance of the popular power in government as against any ecclesiastical power; that secures the freedom of religion against manipulation or oppression by government; that avoids the alienation that arises from the refusal of either church or state to take such cognizance of the other as their propinquity requires; and that avoids the injustice to a non-consenting populace that arises when the state patronizes religion.

In more practical terms Smith favors public aid to enterprises which do not engage in direct or indirect religious indoctrination but opposes, as an establishment clause violation, public aid to enterprises of “religious indoctrination or worship.”

The solutions recommended by Morgan and Smith for the modern problems raised by litigants claiming rights under the religion clauses are welcome additions to the literature on the subject. As histories, however, their books are somewhat disappointing. The historical background of the religion clauses has figured importantly in many Court interpretations of the Framers’ meaning in these sixteen words of the First Amendment. And the Court has often treated the historical bases of litigants’ free exercise or anti-establishment claims as indications of the merits of the claims.

26. *Id.*


The Court’s resort to history to interpret the religion clauses can well be criticized, see text infra, but the Justices have revealed in the Selective Service cases that they certainly need to look somewhere for guidance. Although the draft problem has been mooted by the expiration of the conscription legislation, the Smith and Morgan discussions of the important Selective Service cases illustrate the Court’s inability to apply the religion clauses with logical consistency.

The 1940 Selective Service Act exempted those who “by reason of religious training and belief” were opposed to participation in war. Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 889. Cases split over exemption claims which cited the promptings of an “inward mentor.” Compare United States v. Kauten, 135 F.2d 703 (2d Cir. 1943), with Berman v. United States, 156 F.2d 377 (9th Cir. 1946). In 1948 Congress sought to resolve the problem by exempting claims based on a belief in “a relation to a Supreme Being.” Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612-13.

In United States v. Seeger, 380 U.S. 163 (1965), the Court confronted the possibility that the 1948 Act unconstitutionally established religion by insisting on a belief in a relation to a Supreme Being. Defendant Seeger would only say that he preferred to leave the question of such belief open. The Court avoided the confrontation by a striking verbal pirouette:

> We believe that under this construction, the test of belief “in a relation to a Supreme Being” is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption . . . .

380 U.S. at 165-66.

In Welsh v. United States, 398 U.S. 333, 343-44 (1970), the Court heard a defendant who refused to claim any religious belief. He prevailed because, Justice Black wrote for the Court, his belief that taking life was morally wrong was held with a fervor equal to that of traditional religious convictions, and § 6(j) required no more.

Negre, a Catholic with the religious obligation to distinguish between “just” and “unjust” war and who conscientiously opposed the Vietnam conflict as unjust, might
But in his book Morgan tells us:28

[H]istorical materials themselves will not settle anything. The task of the judge is not the task of the academic historian—the judge is not concerned with the loving recreation of the past in all its diversity. The job of a constitutional Court is precisely to choose between conflicting traditions. The Justices of the Supreme Court must decide whether they think the establishment clause should serve a peace-keeping purpose independent of freedom of free-exercise of religion. If they do so decide they should tell us why . . . then use the available historical materials to legitimatize the choice.

Morgan, I submit, believes in a most unusual degree of judicial subjectivity. In principle, judges should not decide cases according to what Justice Jackson called their own “pre-possessions,”29 and then select freely among historical and case law precedents for justification. A Justice who believes, with William James, that “we and God have business with each other,”30 would otherwise automatically decide cases differently from one who thinks religion, and especially revealed religion, a mere vestige of superstition. The former will select Roger Williams,31 George Washington and John Adams as men whose philosophies underlie the First Amendment. And he will note that the Constitution itself is not wholly secular, as he calls attention to the exemption of Sundays as relevant days in limiting the presidential veto32 and the dating of the document “in the year of our Lord.”33 The nonbeliever may instead emphasize the absence of explicit obeisance to the Creator, which had characterized
the Declaration of Independence and is included still in many state constitutions. But the Court’s synthesis of history should not depend on the number of believers as against nonbelievers on the bench; rather the Justices need to choose between competing traditions according to which more truly reflects the meaning of the religion clauses. This is a job in part for a historian. A true “loving recreation of the past” must be made which can lay moral restraints on judicial uses of history and discipline subjective impulses.

Historians should, therefore, set themselves to criticize the Court’s uses of history. We are now told that the religion clauses mean that, “Neither a state nor the Federal Government . . . can pass laws which . . . aid all religions . . . .”34 Thus, one Justice has complained, it is an establishment of religion to let “those who want to say a prayer say it.”35 I believe the Court has reached its conclusions from these premises: (1) Among the Founders, Jefferson and Madison are of overwhelming importance; (2) These two great Virginians convinced their Commonwealth that radical separation, as described in Madison’s Memorial Remonstrance against Religious Assessments and Jefferson’s Virginia Act for Establishing Religious Freedom was desirable; (3) What they did for Virginia they did also for the Union by helping to write and pass the religion clauses of the First Amendment; (4) The establishment clause, therefore, is explicated by Jefferson’s “wall” metaphor. As Justice Black wrote for the Court in McCollum v. Board of Education: “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state.’”36

Without debating the wisdom of the Court’s selection of Jefferson and Madison as the Framers who define the religion clauses, a historian might argue that neither Virginian was as radical a separatist as the Court assumes. Morgan notes that church and state cannot be totally separate, that the “wall” is just a metaphor, and that Jefferson was not the only Founding Father, but he concludes that these ob-

36. If WRITINGS OF JAMES MADISON 183, reproduced in Everson, 330 U.S. at 63-72 (Rutledge, J., dissenting).
38. 333 U.S. at 211. Justice Black was quoting Jefferson’s Letter to the Danbury Baptist Association, see note 44 infra.

203
servations "do not alter one wit [sic] the radical separationism of the Third President or his vast influence in American thought." Smith emphasizes Madison's importance. He writes that Virginia was not necessarily asserting the total separation of church and state when it approved Madison's version of Article 16 of the Virginia Declaration of Rights of 1776 granting the right of "free exercise of religion." But Smith believes that "Virginia's approval of Madison's amended text exhibited full awareness that it was now insufficient solely to guarantee toleration and necessary to reach toward religious liberty. The action of 1776 formally launched the present epoch of American church-state relations."

No one wishes to dispute whether Jefferson was a separatist or whether Madison played an important role in launching American church-state relations. The vital historical question is whether Jefferson and Madison together launched a notion of establishment so "wooden" as, for example, to refuse children the right to say a prayer in a common school. The answer may lie in close examination of the content of the separatism of Jefferson and Madison. Such examination could reveal many lacunae in judicial recreations of the past. For instance, Thomas Jefferson's "wall of separation" was verbally constructed in a letter to the Danbury Baptist Association written January 1, 1802. On the same date he sent a copy of that letter to his Attorney General, Levi Lincoln, and noted in an accompanying message that he had condemned "alliance between Church and State." To ignore the latter in interpreting the former is com-

40. The full text of Article 16 is:
That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards the other.
Quoted at Smith 38. See pp. 206-07 infra.
41. Smith 39.
44. The Life and Selected Writings of Jefferson 332-33 (Koch & Peden eds. 1944).
This letter reads in part:
Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.
45. IX Works of Thomas Jefferson 346-47 (Ford ed. 1905). The note reads in part:
The Baptist address, now enclosed, admits of a condemnation of the alliance between Church and State, under the authority of the Constitution. It furnishes an occasion, too, which I have long wished to find, of saying why I do not proclaim
parable, say, to a future historian referring to a modern president's speech to a church group on the necessity of teaching children religious values, while disregarding this hypothetical president's letter sent the next morning to a Senate committee considering an aid-to-religious-schools proposal in which he qualified the generalities of the speech.

Twenty years later Jefferson, as Rector of the University of Virginia, wrote in his annual report to the President and Director of the Literary Fund (a report approved by the Visitors of the University, of whom one was Madison):

"[T]he relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences . . . ."

Pursuant to Jefferson's suggestions the university promulgated regulations providing that the various denominations could "establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect," and that if they did so the "students of the University will be free, and expected to attend religious worship . . . ." In contrast to all of the Supreme Court's uses of the "wall" metaphor, I recall only one reference to Rector Jefferson's report—that in Justice Reed's dissent in *McCollum*. Further evidence that the "wall" metaphor did not thoroughly represent Jefferson's concept of religious liberty is supplied in a letter he wrote to Madison from Paris, December 20, 1787, in which he disapproved of the ratification of the Constitution without a bill of rights:

"fastings & thanksgivings, as my predecessors did. The address, to be sure, does not point at this, & it's [sic] introduction is awkward. But I foresee no opportunity of doing it more pertinently. I know it will give great offence to the New England clergy; but the advocate of religious freedom is to expect neither peace nor forgiveness from them. Will you be so good as to examine the answer, and suggest any alterations which might prevent an ill effect, or promote a good one among the people? You understand the temper of those in the North, and can weaken it, therefore, to their stomachs: it is at present seasoned to the Southern taste only."

I will now add what I do not like. First, the omission of a bill of rights, providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trial by jury in all matters of fact triable by the laws of the land and not by the laws of nations.

Historians must carefully consider if it is significant that in this important letter Jefferson did not mention a “wall of separation” but simply advocated freedom of religion.

Madison's stand on the issue is equally open to argument. When the First Amendment was pending in Congress in substantially the form adopted, it was reported that Madison said “he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.” This certainly seems history of different import and as much interest to the Court as Jefferson's Letter to the Danbury Baptists.

Moreover, even assuming that Jefferson and Madison desired, sought, and obtained for Virginia a degree of separatism accordant with the most extreme of the Court's decisions, it does not necessarily follow that they sought or obtained for the Union the same measure of separatism in the First Amendment. Virginia was dissatisfied

50. 1 ANNALS OF CONGRESS 758 (Gale & Seaton eds. 1834), quoted in McCollum, 333 U.S. at 244 (Reed, J., dissenting). The statement seems to accord with Madison's position on Virginia law, expressed in his famous Memorial and Remonstrance against Religious Assessments. See note 36 supra. A careful rereading of the Remonstrance shows its stress on free exercise of religion and freedom from preferential treatment by reason of any establishment. The question so often quoted in support of the extremities of today's establishment holdings—"That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever"—seems on its face a plea against preference for any one religion, whether Christianity itself, or any denomination thereof. Moreover, in view of the pronounced and repeated reverential regard for God expressed throughout, it seems strained indeed to interpret the Remonstrance to spell out opposition to voluntary religious observances in schools or aid for the secular education of those whose religiously predicated consciences cause them to attend nonpublic schools. Cf. Jefferson's Virginia Bill for Religious Liberty, note 37 supra, which ensued upon the Remonstrance. For the Court's latest summary of the Virginia historical precedents, see Committee for Pub. Educ. & Religious Liberty v. Nyquist, 93 S. Ct. 2955, 2964 n.28 (1973).

51. The assumption that Jefferson and Madison were always as one on church-state matters is an oversimplification, a point that Smith makes clear. Madison objected strongly to a proposal of Jefferson in 1783 that ministers along with army officers, felons, and certain others be ineligible for election to the Senate or House of Delegates of Virginia. SMITH 60-61.

52. There is the additional question as to the applicability of the religion clauses to the states. On this issue the original intention of the Framers is clear: The religion clauses were to bind only the federal government. Madison's proposal to extend to
along with other states over the absence of a bill of rights from the Constitution, and it wanted to procure a guarantee of religious liberty beyond Article VI's preclusion of religious tests for federal officers. The state therefore formally requested this amendment:

That Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men shall have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of their conscience, and that no particular sect or society ought to be favored or established, by law, in preference to others.

On its face, this acknowledgment of obeisance to the Creator and the outlawry of favoritism or preference seems a far cry from the Court's proscription of all aid in Everson and McCollum. A historian's expertise would be especially helpful in resolving the threat this language seems to pose to the Court's premises stated above.

Morgan and Smith have written books of such interest and value to the religion clauses' interpreters that I am encouraged to conclude by inviting them and all scholars in similar areas to sail boldly into the latest storm on First Amendment seas: the Court's discovery of the "divisiveness" problem. We are now told by the Burger Court that the religion clauses mean that a community must not be divided along religious lines. To the extent that a legislative proposal for a relationship between the state and nonpublic schools applies to religious education, that proposal may be constitutionally intolerable. And if such a proposal becomes statute, it may be struck down

the states a guarantee of religious freedom and separation of church and state found no favor among the delegates to the Constitutional Convention. Morgan 23.

Quaere, whether there has ever been a satisfactory Supreme Court rationale— as distinguished from an ipse dixit—as to why and how the due process clause of the Fourteenth Amendment absorbs the establishment, as distinguished from the free exercise, clause. Compare Everson, 330 U.S. at 8, with Murdock v. Pennsylvania, 319 U.S. 105 (1943), and Cantwell v. Connecticut, 310 U.S. 296 (1940). The hardest attempt to state such a rationale is probably that of Justice Brennan in Abington School Dist. v. Schempp, 374 U.S. 203, 254-58 (1963) (Brennan, J., concurring), but it is more a critique of the strong criticisms of the absorption doctrine rather than an affirmative showing of how and why the absorption took place. In the end, the justification seems only to be that the absorption is necessary to fulfill the modern purposes of the First Amendment, as pronounced by the Court. Until repudiated, this has to be reason enough for judges and lawyers, but certainly not for scholars, especially historians.


55. Lemon, 403 U.S. at 616-20.
if it is deemed the product of a political contest among religiously-
motivated persons.\textsuperscript{56}

The prohibition of divisiveness may, I suggest, lead to limitations on the free exercise of religion,\textsuperscript{57} freedom of speech and press,\textsuperscript{58} and the right to assemble peaceably and petition for a redress of grievances. It also substitutes judicial hostility toward religion for the promise in \textit{United States v. Ballard} that, “The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.”\textsuperscript{59} Moreover, a corollary of the anathematization of religious controversy seems to be that a state must not single out “a class of its citizens for a special economic benefit.”\textsuperscript{60} But will the Court adhere to its position to the extent of invalidating the welfare legislation seemingly condemned by this rule? Perhaps the corollary only applies when the class is defined in part by religion; if so, free exercise may be restricted and divisiveness enhanced. Finally, it seems to me that citizens’ honest, religiously-motivated entrance into the political arena in order to seek legislation for social and also religious ends may be socially and politically less divisive to the community than judicial condemnation of such successful legislative efforts. In short, might not the Court cause more religious controversy by holding public aid to religious education unconstitutional than was caused by those obtaining the aid? I outline these critiques\textsuperscript{61} of the divisiveness question in the hope that scholars (perhaps psychologists) may analyze this problem for the legal profession, including hopefully the Justices.

Morgan and Smith have helped the profession by indicating some of the general uses of history in interpreting the religion clauses. Their books reveal the large continuing role historians and other scholars might play in the effort to explain and preserve in its manifold manifestations the elusive freedom of religion in the United States.

\textsuperscript{56} Nonlawyer scholars, this is not a law professor’s brainteaser! \textit{Lemon}, 403 U.S. at 622-23; \textit{Nyquist}, 93 S. Ct. at 2977.

\textsuperscript{57} Such a limitation may contradict the statements of the Court in \textit{Sherbert} and \textit{Yoder}; cf. \textit{West Virginia State Bd. of Educ. v. Barnette}, 319 U.S. 624 (1943) (compulsory flag salute unconstitutional).

\textsuperscript{58} Judicial condemnation of controversy because it involves issues arguably religious is hard to reconcile with the reaches of the Court’s protection of freedom of expression in nonreligious areas, \textit{e.g.}, \textit{Cohen v. California}, 403 U.S. 15 (1971) (“Fuck the draft” may be written on jacket worn in courthouse corridor).


\textsuperscript{60} Sloan v. Lemon, 93 S. Ct. 2982, 2986 (1973).

\textsuperscript{61} Compare Freund, \textit{Public Aid to Parochial Schools}, 82 \textit{Harv. L. Rev.} 1660 (1969), an impressionistic piece expressing primarily the author’s subjective value judgments, yet much relied upon by the Court (see, \textit{e.g.}, \textit{Lemon}, 403 U.S. at 622), with the comprehensive and profound study of Choper, \textit{The Establishment Clause and Aid to Parochial Schools}, 56 \textit{Calif. L. Rev.} 260 (1968).

Reviewed by Walter B. Slocombe†

The SALT agreements signed in Moscow in May 1972¹ perhaps initiated the substitution of negotiation for confrontation in the nuclear arms race between the world's two supreme powers, the United States and the Soviet Union. If so, SALT is a true jewel in the Nixon Administration's otherwise increasingly pasty-looking diadem of first-term accomplishments. The "historic essence" of the agreements, according to John Newhouse's descriptive biography of the negotiations,² is the American-Soviet agreement not to develop a significant defense against the other's nuclear missile forces, each thereby leaving itself open to retaliation by the other—and by third parties.

The abjuration of missile defense is embodied in the treaty's limitation of each side to only two widely-separated anti-ballistic missile (ABM) sites consisting of not more than 100 interceptor launchers at each. The number of large phased-array radars, the crucial elements of an ABM system, is also limited; thus the potential for expansion of the ABM data processing and command system is controlled.³ Due to President Nixon's insistence, the agreements include offensive limitations as well.

Significant elements of the parties' strategic arsenals are unrestricted. Thus, although offensive missile numbers are frozen at July 1972 lev-

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¹. The Moscow SALT Agreements comprise the Treaty on the Limitation of Anti-Ballistic Missile Systems and the Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, with an associated Protocol. These documents, along with "Agreed Interpretations" and "Unilateral Statements" interpreting certain provisions of the Treaty and Agreement, the transmittal messages of the President, and the letter of submittal of the Secretary of State are reprinted in S. Exec. Doc. L, 92d Cong., 2d Sess. (1972) [hereinafter cited as DOCUMENT L]. See also Treaties and Other International Acts Series No. 7503 (1973) (Limitation of Anti-Ballistic Missile Systems) and No. 7504 (1973) (Limitation of Strategic Offensive Arms: Interim Agreement and Protocol) [hereinafter cited as T.I.A.S. 7503 & T.I.A.S. 7504].


³. Of potentially great importance for further arms control is the agreement that neither side will interfere with efforts to verify by "national technical means" the other side's compliance with the treaty. Article V, T.I.A.S. 7504, at 4; Article XII, T.I.A.S. 7503, at 9-10. Such means include satellites and other nonintrusive intelligence-gathering methods. DOCUMENT L, at xii.

209
els,\textsuperscript{4} there are no limits on the number, size, or accuracy of warheads.\textsuperscript{5} As a result the United States may retain and the USSR may develop multiple independently-targetable reentry vehicles (MIRV's).\textsuperscript{6} These defects in the offensive limitations, however, are far less significant than the ABM Treaty, which effectively bars creation of a real ABM capability by either side. In the paradoxical world of nuclear strategy, defensive ability is a greater source of concern than offensive potential, and ability to defend cities is the most dangerous capability of all. The key to deterring nuclear war is the maintenance of an arsenal of sufficient size and invulnerability to survive a first strike and deliver a nevertheless devastating retaliatory blow.

Defensive, rather than offensive, capability poses the greatest threat to meeting this "assured destruction" criterion. No presently foreseeable ABM system could defend against a first strike, but an ABM system with significant capability to defend population centers would arouse fear that it could defend against a reduced and possibly ill-coordinated second strike.

Moreover, ABM's exacerbate the problem of the "persuasive brief": Those who propose a first strike to the political leaders of a nation must demonstrate that they could deal with any surviving retaliatory force. The leaders of a nation not possessing ABM's would attack first only if they were willing to risk near-certain national suicide. If ABM's exist in sufficient number and quality, however, the advocates of a first strike may claim with a semblance of plausibility that

\begin{itemize}
\item[4.] The United States and the Soviet Union are allowed to deploy the number of intercontinental ballistic missiles (ICBM's) and submarine launched ballistic missiles (SLBM's) treated as operational or under construction on May 26, 1972, that is, 1,710 for the United States and an estimated 2,358 for the USSR. \textit{Letter of Submittal, DOCUMENT L, at xv-xvi.} There is also a special "sub-limit" on large ICBM's, intended to control the Soviet SS-9 which can deliver a 25-megaton warhead. \textit{Id. at xv.} One megaton equals one million tons of TNT or roughly fifty times the power of the Hiroshima bomb.
\item[5.] In addition, heavy bombers, of which the United States has many more than the Soviet Union, are not restricted. Over Soviet objections, the agreement does not cover "forward-based systems," \textit{i.e.,} American tactical aircraft based overseas which could reach the USSR. Conversely, the United States abandoned its initial insistence on limits on the Soviet intermediate- and medium-range missiles which threaten American NATO allies.
\item[6.] The American MIRV's already mounted on Poseidon SLBM's and Minuteman ICBM's gave the United States at the time of the agreement an edge of 3,400 to 2,000 in the number of warheads deliverable by missile. \textit{Hearings on Military Implications of the Treaty on the Limitation of Anti-Ballistic Missile Systems Before the Senate Comm. on Armed Services, 92d Cong., 2d Sess. 164 (1972) (Defense Department estimates, as of July 1972).} That gap will grow for at least a few years as American MIRV programs continue. It was reported in August 1973 that the Soviets had just begun testing MIRV's, \textit{N.Y. Times, Aug. 17, 1973, at 1, col. 8;} but the Soviet Union can ultimately reverse the balance because it has a large advantage in missile payload, eventually convertible into MIRV numbers exceeding American levels.
\end{itemize}
they have a defense which makes first strike a reasonable course of action. Indeed, the fear that one side is willing to so rely on its ABM capability could, in a crisis, counsel the other toward preemptive attack rather than restraint. The problem, in short, is that ABM's, by eroding confidence in second strikes, endanger stability, particularly in crisis situations. By restricting ABM's to essentially ineffectual levels, the SALT agreements eliminate their destabilizing effect; this is the major accomplishment of the negotiations.

In his introductory chapter John Newhouse skillfully expounds the nature of the United States-Soviet nuclear relationship. His explanation of the nuclear strategists' doctrinal debates, aptly compared by him to the theological disputes of the early church fathers, provides a sense of the issues at stake in the complex negotiations set forth in the balance of the book. In his discussion of strategic doctrine, however, Newhouse repeats rather than validates the position of some Administration spokesmen that approximate equality in strategic nuclear forces "would confer on the Soviet Union hefty political and psychological advantages." In fact, the Soviet Union acquired an effective second-strike capability perhaps as early as 1962 and certainly not later than 1966; subsequent increases in forces have given the USSR no real additional military capability. If Western leaders believe, or say they believe, that the Soviet Union's redundant missile capacity gives it some political advantage, no rational refutation will dispel that self-fulfilling observation. There would appear, however, to be little reason for Americans, who have no interest in conferring unearned and nonexistent advantages on the Soviet Union in political crises, to repeat the proposition.

Newhouse's book, however, is not primarily an analysis of nuclear doctrine, but a narrative of a major event in recent political and diplomatic history: a grand negotiation between the world's two superpowers. Newhouse is by no means uncritical of the American role in the talks, but, perhaps because he has excellent government sources, he often seems to assume the perspectives of those in Washington who directed the American side of the negotiation, particularly Henry Kissinger. For example, he describes at length an essentially peripheral question in which Kissinger was directly involved—Soviet replacement of obsolete missiles on diesel submarines. He discusses much more briefly the negotiation of controls on the giant phased-array ABM

7. P. 166.
radars, a crucial issue which was left largely in the hands of Paul Nitze.\(^8\)

His emphasis on Kissinger's personal role does not prevent Newhouse from rendering a striking description of the labyrinthine bureaucratic processes behind the long negotiations. The principal American players were: the Arms Control and Disarmament Agency, headed by Gerard Smith, who was at once chief American negotiator at the talks and also the leader of the agency most strongly advocating arms control; the State Department, acting in the secondary role customary to it in the Nixon-Kissinger foreign policy establishment of the day;\(^9\) the Central Intelligence Agency, whose analyses of Soviet forces, unaffected by a bureaucratic need to justify weapons programs, tended to support those advocating arms limitations; the Joint Chiefs of Staff, whose cautious views (such as a preference for a simple, limited pact) often paralleled those of their Soviet counterparts; and the Office of the Secretary of Defense, divided but dominated by research and development types unsympathetic toward restraints on technological innovation. The American delegation at the talks largely mirrored these bureaucratic divisions, and much time was spent negotiating accommodations within that group. Over all of these presided Henry Kissinger and the National Security Council staff. And very much over Kissinger was the President himself, whose personal interest in the process and its success emerges clearly in Newhouse's account.\(^{10}\)

Of the Soviet bureaucracy's divisions Newhouse inevitably reveals

8. Nitze was a dominant figure in the American delegation. Initially both the Soviets and the American Joint Chiefs of Staff resisted any limitation on ABM-capable radars on the ground that the issue was too complex technologically to lend itself to negotiation and agreement. Nitze overcame these objections and won Soviet agreement to a bafflingly technical rule. See Agreed Interpretation (a)(D) (clarifying the limit on ABM radars contained in Article III of the Treaty), DOCUMENT L, 9, labelled Agreed Interpretation (a)F, T.I.A.S. 7503, at 25.

9. However, Ray Garthoff, a career Foreign Service officer who served as executive officer of the American delegation, played a key role in informally contacting equivalent members of the Soviet delegation in order to test out tentative positions and draft language implementing earlier general agreements. P. 213.

A striking sidelight of the whole SALT process as revealed in Cold Dawn is the major impact of a few relatively low-level officials in a negotiation with such political and strategic implications for the whole world. In Newhouse's view, Morton Halperin, then a twenty-eight-year-old Deputy Assistant Secretary of Defense in the waning days of the Johnson Administration, was instrumental out of all proportion to his age and rank in guiding the development of a Defense Department position permitting the Joint Chiefs of Staff to support the concept of SALT negotiations. Pp. 111-15, 126-30.

10. Further complicating the internal American relationships was the existence, unconcealed at least after May 1971, of a "back channel" for negotiations between Kissinger and the Soviet Ambassador to Washington which paralleled, but when employed clearly superseded, the "front channel" of the formal talks, held alternately in Vienna and Helsinki. According to Newhouse the exchange of information between front and back channels sometimes seemed better on the Soviet side than between Kissinger and the American delegation.
far less. Such divisions did exist and occasionally surfaced. Most ob-

Book Reviews

sibility of a significant ABM capacity died hard with the Nixon Admin-
istration; Safeguard was once, after all, the centerpiece of Nixon's nuclear strategy.

Finally, as a study in the dynamics of great international negotia-
tions, Newhouse's account highlights the importance of externally-
imposed deadlines, such as annual budgets, elections, Party Congresses, or summit meetings. Such deadlines help induce governments to make the political decisions necessary to move a major negotiation to its conclusions. It is no denigration of the accomplishment of the negotiators, nor of the risks of failure, to observe that the shape of the agreement could have been predicted with reasonable accuracy as soon as the SALT effort got seriously underway in the middle and late 1960's. Indeed, in 1968 the Johnson Administration reached consensus on a proposal which, although not specific on the crucial issue of the level of ABM's to be permitted, nevertheless matched the ultimate agreement in structure and many other specific features.¹²

No agreement could be reached, however, unless the top political leadership in each country forced their fractionated bureaucracies to accept concessions. It was fashionable at the time of the 1972 Moscow summit to criticize the Nixon Administration for suggesting in advance that the success of the conference would be measured by the conclusion of a SALT agreement. But without some such external constraint requiring that the myriad details be forced to resolution, the negotiations could have lasted, if not indefinitely, at least far longer. Such a postponement of actual agreement could have been fatal, for continuing Soviet ICBM and submarine programs might have generated strong pressure for new American programs in response.

Indeed, the great mystery of the SALT talks is what mixture of policy, politics, and analysis moved the leaders of the United States and the USSR to overcome domestic political and bureaucratic obstacles and reach agreement. In dealing with the motivations behind the major substantive decisions of the SALT parties, as contrasted with the tactics of the talks, Newhouse offers some important insights, but his sources, good as they are, cannot provide unequivocal answers.

On the surface the Soviets derived little advantage from the Moscow agreements. Their offensive missile buildup, despite lulls, appeared to be continuing. By contrast, the United States did not even have realistic plans to increase the number of its own offensive missiles.

¹² The proposal was never advanced because the Russian invasion of Czechoslo-
vakia in August 1968 prevented the commencement of summit and arms control talks with which Johnson wished to conclude his Presidency.
In fact, Newhouse recounts, a study directed by the National Security Council concluded that no additions could be made to the American missile force for a period of at least five years. Nonetheless the Soviets accepted a five-year interim moratorium on expanding their offensive missile force.

According to the Nixon Administration’s “bargaining chip” theory, the Soviet Union agreed to the offensive limits only because they wanted to halt the Safeguard ABM program. But, Newhouse notes, Safeguard was encountering resistance even in the Senate Armed Services Committee, once a pro-Pentagon stronghold. More broadly, there does not seem to be any strong reason for the Soviets to make major concessions in return for curtailment of Safeguard, since it could not defend well either cities or missiles. And although the Soviets might have feared the eventual deployment of a larger ABM system, the United States had not instituted such a program.

One explanation of Soviet eagerness to reach a SALT agreement, which Newhouse touches upon, is that the Soviets saw in the agreement a means of aligning the two superpowers against China. This theory is consistent with the quickly rejected Soviet proposal, revealed for the first time by Newhouse, for what would have amounted to a nuclear alliance of the United States and the Soviet Union against all other nuclear powers. However, concern over China is not in accord with the Soviet insistence on banning nationwide ABM systems. Newhouse writes that Kissinger fully expected the Soviets to insist upon the right to build a nationwide ABM system to defend against China. Yet they surprised Kissinger by making it clear quite early in the talks that they regarded a low ABM limit as an essential element in any agreement. The Soviets may have believed that a defense even against China's still-limited offensive force was not technically feasible, or they may have concluded that a nationwide ABM system would have a destabilizing effect on their strategic relationship with the United States and was therefore not worth whatever advantage it might give them against China.

Some, not including Newhouse, have contended that SALT is an elaborate Soviet trap: The Russians, having frozen their numerical superiority in launching vehicles, will now use MIRV's to build the capability, if not to carry out a completely successful first strike, at least to destroy all American fixed land-based missiles. This military advantage, it is said, will be exploited politically and diplomatically.

13. Pp. 188-89.
in ways as yet unknown. Proponents of this view argue that the ABM agreement is the vital step in the Russian strategy because it bars effective defense of land-based missiles.

This theory, apart from its unconvincing assertion of the political, much less the military, utility of a numerical superiority in missiles, cannot explain the Soviet concessions. Most important, a Soviet military establishment intent on creating a dominant first-strike force would not have acquiesced in the American demand for a separate sub-limit on very large land-based missiles like the Soviet SS-9.14 These high-payload missiles are crucial to a first-strike capability because they can deliver MIRV's with enough yield to destroy missile silos without requiring extremely high accuracy. One response to this observation is that the Soviets will develop light and highly accurate multiple warheads able to destroy silo-encased ICBM's. But a willingness to rely on such speculative technological virtuosity would be very much out of character with usual Soviet practices. In fact, at the time the SALT agreements were signed, the Soviets had not even tested a workable MIRV system for the SS-9. Only in August 1973 was there any official United States announcement that Moscow was testing a true MIRV. And in making that announcement Secretary of Defense James Schlesinger was careful not to say that the Soviet MIRV's being tested could be developed to the accuracy required for use against missile silos.15

Newhouse, finally, suggests that the Soviets came to share the view held by the bulk of the American strategic community—though not necessarily by Nixon and Kissinger—that mutual vulnerability to retaliatory attacks is the key to strategic stability in superpower relations and that such stability is the best strategic nuclear weapons can provide. The willingness of the Soviet leadership seemingly to abandon more ambitious political goals for Soviet strategic nuclear forces would be consistent with a general Brezhnev policy of detente.16

14. The mechanism of this sub-limit illustrates the complexity of the agreements: Article I of the Interim Agreement limits each side to the number of offensive missile launchers operational or under construction at the time of signing. Conversion of launchers to "heavy" ICBM's is banned by Article II. Agreement Interpretation J bans any "significant increase" in silo size, Document L, at 10, labelled (a)C in T.I.A.S. 7504, at 17, which could allow retrofit of heavy ICBM's into light ICBM holes. Common Understanding A defines such increases as those in excess of 10-15 percent, Document L, at 11, labelled (b)A in T.I.A.S. 7504, at 18. There is no formal agreement on what constitutes a "heavy" ICBM, but an elaborate United States "unilateral declaration" describes a heavy ICBM as one larger than an SS-11 or SS-13, the other two modern ICBM's in the Soviet missile arsenal in May 1972, Document L, at 14, T.I.A.S. 7504, at 20.


16. A possible corollary to this theory, not directly mentioned by Newhouse, is that the Soviet civilian leadership now regards spending on the continued expansion of
theory of Soviet behavior implies that still more significant agreements may be achieved in the follow-up SALT talks now underway. But neither Newhouse nor anyone else outside the Kremlin knows with certainty what rationale for arms agreement dominated Moscow's thinking in 1972.

If the reasons for Soviet agreement to the Moscow accords are obscure, so is the basis for the crucial decision on the American side: Nixon's sacrifice of the Safeguard ABM program. Newhouse seems to ascribe Nixon's action to a belief that Congress, having passed the initial stage of Safeguard in 1969 by the slimmest possible margin of a Vice Presidential tie-breaking vote, simply would not pay for the entire system. After all, Newhouse notes, in 1970 the Senate Armed Services Committee eliminated funds for "advanced preparation" of city-defending Safeguard sites from the second Safeguard request. Undoubtedly Safeguard's difficulties in the Senate made the Administration far more willing to reexamine the system's true worth and to use it as a bargaining chip instead of an occasion for congressional confrontation. Anxiety over congressional resistance, however, can hardly have sufficed to persuade Nixon to abandon Safeguard. The 1969 battle was, in the end, won, and the margin for the 1970 installment was, if not comfortable, at least not so narrow as in 1969. Moreover, the crucial Nixon SALT decision was the proposal in July 1970 of "Option E," which would have held ABM's to 100 launchers at a single site for each side. In "Option E" Nixon advanced for the first time a low ABM limit in a relatively realistic proposal. Yet the offer was made during the Administration's ultimately successful battle for Senate approval of the second Safeguard installment. If Nixon had preferred a Safeguard system to a SALT agreement, he could have terminated the talks by insisting on an ABM defense, and by blaming the Soviets for the SALT failure he would very likely have gained the political sympathy necessary to win the Senate ABM fight.

To attribute the sacrificing of Safeguard to anticipation of defeat in the Senate may not only underestimate President Nixon's belief in his legislative influence; it may also deny him deserved credit for making the decision on the merits. It is at least plausible that, when presented with an opportunity to put significant constraints on Soviet strategic forces as offering decreasing political and military returns. Brezhnev seems to want to raise the overall technical level of the Soviet economy. SALT will not be a major moneysaver for either side, but for the technologically-pressed USSR, an agreement which limits diversion of technical resources into strategic programs, especially the computer-devouring search for an effective ABM, may provide a more significant economy than direct cost savings would indicate.
offensive forces by a SALT agreement, he was willing to reexamine his early commitment to Safeguard. And certainly Kissinger, who strongly believed in the political and military usefulness of the Safeguard program, deserves credit for nurturing a bureaucracy whose evaluations may ultimately have satisfied the President that preservation of Safeguard was not worth the sacrifice of the arms control opportunities which SALT offered.

The Nixon Administration's use of the SALT achievement is far less creditable than the achievement itself. Immediately after the triumphant return of the President from the Moscow summit, SALT was used as the occasion for some strikingly ill-advised budget requests, of which the worst—an effort to develop American ICBM's potentially accurate enough to destroy silo-encased missiles—was killed by Congress. Now, in the year of Watergate, seeking to defend itself against charges of abusive exercise of governmental power in the name of "national security," Administration spokesmen have invoked the SALT negotiations as proof that leaks of information about United States foreign and military policy must be halted, at whatever cost to civil liberties. The Administration rightly senses that this is a potentially effective argument because its severest critics would not have wanted the SALT agreements jeopardized.

Cold Dawn, however, provides evidence to refute claims that preventing SALT leaks was a serious motive for the Administration's "national security" measures, or that leaks of United States positions were in fact a major obstacle to successful negotiation. Administration complaints about SALT leaks generally refer to a story by William Beecher which appeared in The New York Times in July 1971. That story, apparently derived from sources outside the White House, contained a summary, accurate in outline but erroneous in key detail, of a new position which the United States was about to advance in the talks. The search for the leak's source involved the White House "plumbers" and CIA lie detector tests of State Department officials. But that 1971 leak could not possibly have been the reason for putting wiretaps on the home telephones of White House and State Department staff members from 1969 to early 1971, nor for the approval in the summer of 1970 of a massive and illegal domestic security operation.

Less obviously, leaks such as the one to Beecher were not uncom-

Book Reviews

mon and seemed to have had little impact on the talks. Beecher's 1971 story was by no means the first time that an American position was previewed in the newspapers before being presented to the Soviets. Indeed, the previous summer Chalmers Roberts reported President Nixon's decision to propose a "limited" agreement (a numerical ceiling without a ban on MIRV's) before Kissinger had even circulated the President's decision within the American bureaucracy. And two weeks later, Hedrick Smith accurately outlined in The New York Times the details of the new United States position while it was being presented to the Soviets in Vienna. Similar apparently White House-authorized leaks occurred at many other stages of the negotiations. The Soviets occasionally complained, but no real interference with the bargaining followed, nor did the Soviets seem to find any way to make use of these brief advance warnings.

Newhouse himself has profited from a striking leak: His report of the spectacular Soviet proposal in July 1970 for joint United States-Soviet action against "provocative" attacks by smaller nuclear powers must have been supplied from within the Administration. If there is ever an argument for preserving the secrecy of negotiations, not only while they are in progress but afterward, it would seem to be when they involve such daring and far-reaching proposals. Even three years later, news of the Soviet offer might well upset the British, French, or, most relevantly, Chinese, but the Administration is not heard complaining that Newhouse's book exemplifies the necessity for halting "national security" information leaks. In short, on examination it turns out that SALT leaks are just like all the others. Those

20. While the White House was almost certainly the source of many SALT leaks, the degree to which Newhouse's inside information about the Soviet proposal had actual White House approval is unclear. There would appear to be no political or bureaucratic payoff for the White House in the revelation. At his confirmation hearings Kissinger acknowledged that he had given the NSC staff "guidelines" for revealing information to Newhouse. The Senate Foreign Relations Committee declined his invitation to make the "guidelines" public, but Kissinger testified that they permitted the staff to "explain to him [Newhouse] positions that were more or less publicly known, that had already been given to the other side," while barring "discussing national security decision memoranda, any current negotiating position, and any internal memoranda that bore on the subject of SALT." He was not asked where the Soviet "provocative attack" offer falls in those instructions. At Kissinger's behest one former NSC staff member declined Newhouse's request to review the galleys "for accuracy." There was no discussion at the hearings of whether any other current or former staff member was asked, or agreed, to review Newhouse's manuscript. Hearings on Nomination of Henry A. Kissinger Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 110-15, 331-32 (1973).
leaks which have White House sanction are, in its view, good; those which do not are bad—all without regard to their actual or potential impact on negotiations or on American foreign policy generally.

Nixon's SALT achievement does not excuse police state tactics. Political misuse of the agreements, however, cannot erase the SALT accomplishments. The agreements, in particular the ban on large-scale ABM systems, are by many orders of magnitude the most significant arms control pacts of the nuclear era, and *Cold Dawn* is an excellent and historically valuable portrayal of the complex negotiations behind them.