

## SEPARATION ANXIETY: THE END OF AMERICAN RELIGIOUS FREEDOM?

**THE RISE AND DECLINE OF AMERICAN  
RELIGIOUS FREEDOM.** By Steven D. Smith.<sup>1</sup>  
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### INTRODUCTION

Does the history of the Religion Clauses still matter? The answer appears to be increasingly irrelevant in the modern constitutional world. After all, questions such as “what if religion is not special?” and “why tolerate religion?” have recently gained remarkable traction in mainstream legal and philosophical scholarship.<sup>3</sup> These questions and the attitudes underlying them suggest a contemporary openness towards discarding a special solicitude for religion that was largely borne out of history. In many debates today, both inside and outside the courts, religious liberty claims are now seen as pretexts for discrimination,<sup>4</sup> not as

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3. BRIAN LEITER, WHY TOLERATE RELIGION? (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). See also CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990).

4. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (holding that refusal to photograph a same-sex couple is in violation of state antidiscrimination laws); *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959 (Cal. 2008) (medical facility’s refusal to provide fertility treatment to a lesbian couple on religious grounds is a violation of the Unruh Civil Rights Act). For academic treatment, see MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE LAW* (2005); Caroline Mala Corbin, *Above the Law?: The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965 (2007).

the hard-won product of a long struggle for liberation from the temporal reach of divine revelation.<sup>5</sup> How did we get here?

One reason for the unmooring of contemporary questions *and* answers involving the Religion Clauses from its historical roots is the seeming inability of its own history to supply any coherent or meaningful answer to currently vexing questions surrounding religious freedom. Indeed, even the history itself is contested. The Supreme Court did not help in clarifying matters either when it issued contradictory rulings one after another.<sup>6</sup> While many scholars have been content to live with this arrangement, with one scholar calling the Establishment Clause largely irrelevant,<sup>7</sup> others continued the Herculean task of making sense of the doctrinal quagmire.<sup>8</sup> Whereas twelve years ago, two prominent legal scholars could describe the question of whether publicly funded vouchers may be used at private, religious schools without violating the Establishment Clause as the most important church-state issue at the time,<sup>9</sup> today, religious questions are at the heart of an even more divisive, if not explosive, question in American society: the fight over gay rights and marriage equality. In this context, the history of the Clauses does not appear to offer any surefire ammunition for either side.

The present analysis takes at its point of departure the claims advanced by Professor Steven D. Smith, a law professor at the University of San Diego, and a prominent scholar of the Religion Clauses, in his new book *The Rise and Decline of American Religious Freedom*. Smith presents a revised narrative to the standard version of the story of American religious freedom. The principle of separation of church and state, he argues, was not an unprecedented American innovation, but an ideal that has ancient origins. Instead of being a distinctive product of the

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5. See generally MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST* (2007).

6. Religion Clause jurisprudence is famous for being an “incoherent mess.” See, e.g., Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002).

7. Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583 (2011). This is not to say that these scholars were happy with it, but rather they worked on religion issues piecemeal without attempting to make sense of the whole.

8. See, e.g., MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* (2013); KENT GREENAWALT, *RELIGION AND THE CONSTITUTION* (2 VOLS., 2006, 2008); Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701 (2011).

9. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

Enlightenment, Smith characterizes American religious freedom as a happy blending of explicitly Christian commitments with cosmopolitan pagan attitudes (p. 7), and that this convergence of ancient themes in an American package was unwittingly set aside by the Supreme Court when it inaugurated its modern Religion Clause jurisprudence in *Everson v. Board of Education*<sup>10</sup> (p. 46). Stepping firmly into the thicket of religion-state relations, the Court infused a substantive core into the Religion Clauses which originally had none—the Framers enacted them simply to reaffirm the jurisdictional status quo (p. 8), that is, that matters involving religion would remain the business of the states, and not the federal government. The result of this move was to undo a golden age of American religious freedom, one which is best described as a period of fluid contestation, whereby competing interpretations of the role of religion in American public life had a rightful place at the constitutional table. According to Smith, separation during this period meant separation of church from state, not necessarily religion from government (p. 9). Thanks to the Supreme Court, however, this substantive core, now containing the principle of secular equality, has become hard constitutional law (p. 10), any deviations from which are considered to be official heresy. Consequently, American society is now more divided than ever. Far from being a mere lamentation on the state of Religion Clause jurisprudence, this historical excursion serves as the backdrop to Smith’s ultimate concern that American religious freedom is in jeopardy, not from religious conservatives but from secular egalitarians (p. 11).

These are radical claims. And yet both the premise and the implications of Smith’s revised narrative have much to offer to current debates involving competing claims to religious liberty and antidiscrimination. Perhaps the account could be seen as a clarion call on the hurtling train of the new secular orthodoxy threatening to unravel the lively experiment of the past two hundred years. Of course, secular egalitarians would argue that the opposite is true. But even in that vein, this account could also be considered a confirmation of their beliefs, that their victories are merely recent and most of all fragile against the tyrannical forces of revealed religion.

In this review, I first briefly consider the uses of history in Religion Clause jurisprudence and question the need for deep origins in excavating the origins of the American principles of

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10. 330 U.S. 1 (1947).

separation of church and state and freedom of conscience. A mistaken resort to deep origins detracts from the political and material conditions which shaped the ideas involving religious freedom at the time of its drafting into the Constitution and diminishes the role of human agency. Subsequently, I evaluate Smith's argument that the Supreme Court ended the golden age of American religious freedom when it put a thumb onto the scale and transformed religious freedom questions and answers into hard constitutional law. I argue that these decisions, though frustrating and incoherent as they might seem, in fact, are as responsible for the remarkable religious pluralism that exists in American society today as much as for the contemporary secular extremism that Smith deplors. In the last part of this essay, I pose a brief account of history and judicial review as two technologies of constraint.

These challenges are not intended to undermine the book's goal but rather to support it. If the objective is to keep the American pluralist experiment involving the place of religion in public life from prematurely ending, the solution is not to go back deep into an ancient, remote past or worse, discard history altogether, but it is to let "We the People" grapple with these difficult questions in political and legal circles, armed with a sense of their own past, and an eye cast towards a future that is yet to be written. By their very nature, these questions are open-ended. Within a constitutional tradition such as ours, the task for the courts is to keep that experiment alive.

### I. THE PROBLEM OF DEEP ORIGINS

The distinctiveness of religion as a matter of U.S. constitutional law is seemingly reflected in the two prongs of the Religion Clauses: that of disestablishment and free exercise. At its core, these twin guarantees protect the right of Americans to freely practice their religion. But there universal agreement begins and ends. Since 1947, this unique formulation to protect the liberty of conscience has generated a massive amount of academic literature to explain why the Framers thought it was essential not only to guarantee free exercise but also to mandate disestablishment, and how those ideas could be made applicable within the context of our own time.

Not unlike those of other constitutional provisions,<sup>11</sup> the historical origins of the Religion Clauses not only provide a fascinating view into the eighteenth century world of the Founding generation but they also give the Supreme Court an authoritative ground for its decisions. Indeed, the first prong of the standard model of constitutional interpretation is history, which is to say, the reliance on the original intentions of the ratifiers or the framers of the Constitution.<sup>12</sup> As one commentator remarked, “[t]he past may be only prologue, but for the Supreme Court that prologue sometimes appears to direct the whole drama.”<sup>13</sup> Even if one does not wholly subscribe to the originalist school of constitutional interpretation, the subject of which is beyond the scope of this Review, judicial divination of the original intent behind the Religion Clauses generates much normative work in existing cases.<sup>14</sup> Consider Justice Hugo Black’s majority opinion in *Everson*,<sup>15</sup> a landmark case in Religion Clause jurisprudence which incorporated the Establishment Clause to apply as against the states, in addition to the federal government. Justice Black gave short shrift to the complex story of how the principle of religious liberty found roots in and thrived on American soil. Instead, he advanced what Noah Feldman called a “‘shock’ hypothesis” of religious liberty,<sup>16</sup> in which centuries of persecution before and contemporaneous with the Founding period largely provided the backdrop for the adoption of the Establishment Clause, in order to come up with the rationale that separation of church of state was intended by the Framers to protect religious minorities.

It is hardly controversial in legal academic circles to state that *Everson* was a modern invention of the Establishment Clause by the Court. Among the most well-known of these challenges is Philip Hamburger’s massive tome, *Separation of Church and*

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11. The most recent example is the Second Amendment. *See, e.g.*, Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L. J. 625 (2008).

12. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

13. John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 502 (1964).

14. “No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.” *Everson*, 330 U.S. at 333 (Rutledge, J., dissenting).

15. *Id.* at 3–18. The Free Exercise Clause was incorporated much earlier in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

16. Feldman, *supra* note 6, at 682.

*State*. In that book, Hamburger excoriated the Court's historical reappropriation as erroneously reading a separationist understanding into the First Amendment which had none, and attributed it to nativist, anti-Catholic sentiment, held by no less than Justice Black himself.<sup>17</sup> Similarly, Smith's *Rise and Decline* also takes *Everson* to task. But he does so for an entirely different reason. Smith argues that *Everson* failed to acknowledge the ancient roots of the American principles of separation of church and state and freedom of conscience (p. 46).

In Smith's retelling, *Everson* occupies a marginal, if not distracting, role (p. 114), and instead credits the school prayer decisions of the 1960s, particularly *Engel v. Vitale* and *Abington School District v. Schempp* as profoundly more significant in shaping modern Establishment Clause jurisprudence.<sup>18</sup> *Everson*, he argues, was a misleading starting point. But it is nonetheless important because it mistakenly appropriated the backdrop of the Enlightenment revolt against the dark side of Christendom, though only partially true, as part of the American constitutional narrative. At this point, Smith begins his revised narrative of probing the origins of American religious freedom in deep antiquity, starting with the conduciveness for inclusive tolerance and freedom of Roman paganism (p. 17). From the fourth century when Constantine adopted Christianity as the official religion of the Roman Empire, to the papal crisis of the medieval period, onward to Henry VIII's break with Rome and the consequent creation of the Church of England, up to the American Founding period, he surveys more than two thousand years of Western political development in order to recover the deep origins of the much cherished American principles of separation of church and state as well as freedom of conscience.

*Rise and Decline* is not a work of historical scholarship and at different moments in the book Smith acknowledges that. It belongs to a genre called history-in-law,<sup>19</sup> which is a genre of legal

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17. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002). Specifically, Hamburger accused Justice Black, formerly a member of the Ku Klux Klan, of harboring these anti-Catholic tendencies which formed the background of *Everson's* separationist thrust.

18. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading in public schools is unconstitutional); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that government-directed prayer in public schools is unconstitutional even if the prayer is neutral and students may remain silent or be excused from the room).

19. Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI. KENT L. REV. 909 (1996) (defending history-in-law as a legal, not historical practice).

scholarship that creates a useable past in order to support or generate a legal argument. In its more derogatory form, history-in-law is also known by the term law-office history, a perennial topic of debate between lawyers and historians.<sup>20</sup> Both sides of this debate have been exhaustively mined for quite some time, and this is not the moment to rehash those arguments. As a matter of legal, rather than historical practice, then, history-in-law is therefore not subject to the same criteria for evaluation as ordinary history. Ordinary history emphasizes the pastness of the past; history-in-law mines it to support a contemporary position. That said, however, basic rules of historical practice would presumably still apply. Smith's reach into deep antiquity does not provide a solid ground for his argument that *libertas ecclesiae* or freedom of the church is a major animating principle behind separation of church and state as well as the modern-day conception of liberty of conscience. Indeed, opponents of this position, labeled as religious institutionalism,<sup>21</sup> attack this move as anachronistic and selective.<sup>22</sup> The seemingly nostalgic resuscitation of the bygone era of cosmopolitan paganism under Roman rule, and the dramatic medieval showdown between Henry IV of Germany and Pope Gregory VII which featured Henry's famous Walk to Canossa (pp. 32-33) focuses on questionable episodes from which to plumb for historical imprimatur, and readily invites criticisms of the sort that legal scholars Micah Schwartzman and Richard Schragger make in their article.

The resort to deep origins is not unique to American legal scholarship on the Religion Clauses. Until very recently, the general historiography of human rights has always emphasized its deep roots, whether as early as the Mesopotamian Codes of Hammurabi or from the natural rights claims of the seventeenth century.<sup>23</sup> The revisionist pushback to these accounts revolves mainly around their teleological inclination, that is, the seductive tendency to find a kind of conceptual coherence across historical periods without proper accounting for its immediate political,

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20. See, e.g., Cornell, *supra* note 11. The earliest criticism is in Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965).

21. The most sustained opposition is in Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013) (historical anachronism is only one among several criticisms of this position).

22. *Id.* at 928.

23. See, e.g., MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* (2d ed. 2008).

intellectual, and cultural milieu.<sup>24</sup> The eminent historian Eric Foner called this “the plumb line” problem, in which a political theory or idea is given a fixed definition and is then traced how it has been worked out over time.<sup>25</sup> One problematic result of this approach is that it naturalizes present arrangements, and ignores human agency in the process of working out abstract ideas in concrete and rather messy historical realities. By invoking deep history, however, *Rise and Decline* does the opposite—it generates and naturalizes a normative ideal, not necessarily the present arrangement. But as Schwartzman and Schragger rightfully, if briefly, note, Pope Gregory VII’s cry of *libertas ecclesiae* was part of a broader, long-running political struggle that was not a solely an instance of the church attempting to wrest its independence from an overbearing secular authority.<sup>26</sup> As one scholar put it, even the great confrontation between Henry II and the martyred Archbishop Thomas Becket, the same episode which does a lot of work in Smith’s account (p. 33), was more an “accidental creation of personality and circumstance rather than of any great inevitable clash of principle.”<sup>27</sup> In addition, the idea of dualism, that is, that Christ himself instituted dual jurisdictions between earthly and spiritual authorities, was far from a self-evident notion even at that time. Medieval popes acknowledged it with the caveat that the spiritual realm was of more importance than the earthly one. Kings and emperors, unsurprisingly, did not subscribe to this hierocratic view. Accordingly, canonists, theologians and civil law scholars from both camps engaged in dueling interpretations.

Notwithstanding this analytical flaw, one finds much in Western history on which to base Smith’s assertions that separation of church and state and liberty of conscience were not just American inventions. And one need not go that far back into it. That the very idea of religious freedom has had religious, rather than secular, origins, finds ample evidence in not-so-deep history, and in academic scholarship. The leading figures of the Protestant Reformation, such as John Calvin, Philipp Melancthon, and Martin Luther himself, all wrote on the liberty of conscience from a definitively theological and certainly Christian standpoint.

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24. The most influential is SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

25. ERIC FONER, *THE STORY OF AMERICAN FREEDOM* xiv (1999).

26. Schragger & Schwartzman, *supra* note 21, at 935.

27. J.A. Watt, *Spiritual and Temporal Powers*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350- C.1450*, 391 (J.H. Burns ed., 1988).

Political theorist Eric Nelson, for instance, has recently argued that theological debates in Europe around the notion of a Hebrew Republic influenced the development of ideas surrounding religious tolerance amongst British Protestants during the early modern period.<sup>28</sup> Jeremy Waldron has also argued that John Locke, that quintessential Enlightenment thinker and progenitor of so many American constitutional ideas, was very much influenced by Christian theism in his political writings, including his ideas on religious toleration.<sup>29</sup>

It is difficult, therefore, to justify the resort to deep origins if the Western European religious and political milieu from which American constitutional thought, especially on the relationship between religion and government, arose offered similar resources and arguments. Consider John Locke, an immediate and major influence in the thinking of the two giants of American religious freedom: Thomas Jefferson and James Madison. Locke's *A Letter Concerning Toleration* and *Two Treatises of Government* already expounded on the idea of separate spheres of religious and civil authority. Unlike the medieval decretists, however, he did not think one was more important than the other. Instead, his distinguishing principle was whether one was necessary for salvation or not,<sup>30</sup> an explicitly religious rationale. *Rise and Decline* does recognize that the Enlightenment, mainly through Locke but also in a different way, David Hume, served as a conduit for Christian ideas, rather than a complete break from it, in order to counter the mainstream narrative that the Enlightenment was a triumphant revolt of reason against religion. Thomas Hobbes, Jean Jacques Rousseau, and Baruch Spinoza are the towering philosophical figures associated with this particular strain of Enlightenment thinking. But Locke in particular developed his theory on separate spheres of authority or jurisdictions based on Christian rationales, while Jefferson stressed the importance of the voluntariness of faith, though he

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28. ERIC NELSON, *THE HEBREW REPUBLIC: JEWISH SOURCES AND THE TRANSFORMATION OF EUROPEAN POLITICAL THOUGHT* (2010). Of course, the competing, if more mainstream, narrative, that religious freedom has had rationalistic Enlightenment origins, is also present. Historian Mark Lilla deftly surveys the great philosophers and thinkers of the same period in his book. LILLA, *supra* note 5.

29. JEREMY WALDRON, *GOD, LOCKE AND EQUALITY: CHRISTIAN FOUNDATIONS OF LOCKE'S POLITICAL THOUGHT* (2002).

30. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Dover 2002) (1689). For an excellent discussion of how his ideas were brought to the United States, see Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U.L. REV. 346, 354-98 (2002).

referenced a nonsectarian deity.<sup>31</sup> They were also the ones most directly associated in developing American constitutional thought. But what the book appears to do is to use Locke, Madison, and Jefferson as mere seventeenth century mediums for the more ancient ideas of dual jurisdictions and liberty of conscience (pp. 39–40). That channeling flies in the face of almost five hundred years of discrete political and intellectual struggles within various contexts—institutional, cultural, political—in Europe from the end of the Middle Ages up until the American revolutionary period.

No contemporary idea appears *ex nihilo*, that much is true. But it is also true that no idea or principle stays the same as it travels throughout human history, influenced and developed as it were by varying political claims, unintended consequences, and shifting moralities. Even for history-in-law, the past, especially the deep past, is still very much a foreign country.

## II. THE PROBLEM OF TWO CONSTITUTIONALISMS

*Rise and Decline* also addresses the distinction between two kinds of constitutions: the hard Constitution, that is, the formal legal document that Article III judges interpret and enforce, and the soft constitution, the “more amorphous but not necessarily less important body of constitutive understandings, practices, and commitments” (p. 96), and laments how the shift towards the former to the detriment of the latter ended the golden age of American religious pluralism.

This claim has three major components: first, there was indeed a golden age of American religious freedom, one where competing interpretations of questions involving religion had a rightful place as a constitutional matter; second, there was a definitive shift from the soft constitution to the hard constitution; last and most important, the move to the hard constitution undermined the erstwhile distinctive American strategy of dealing with religious diversity (p. 113). Let us address each of these claims briefly.

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31. The younger John Locke shared similar views with Thomas Hobbes on an Erastian arrangement, wherein religion is subservient to the state for the sake of civil peace and order. He modified his views later on in *Two Treatises*.

## A. GOLDEN AGE OF AMERICAN RELIGIOUS FREEDOM

Smith argues that Americans have largely subscribed to two contrasting interpretations of the Republic, and that these two interpretations, secularist and providentialist, coexisted, “sometimes cordially and sometimes combatively” (p. 87) from the Founding to the present day. That secularist and evangelical impulses *together* characterized much of American history is not in question. Americans for the most part agreed that religious freedom was important and central to the national identity though interpretations of what that ideal actually meant remained constantly up for grabs.

The period that *Rise and Decline* extols as a golden age also happens to coincide with two of the Great Awakenings in U.S. religious history, a period of Protestant revivalism which elevated moral vocabulary and fused evangelicalism with the moral reasoning of the prevailing republican tradition. From the more secular elites to the evangelical masses, everybody believed that religion was important in cultivating civic virtue, the debate mostly surrounded the question of how. These periods, roughly from the end of the eighteenth century to the beginning of the twentieth, saw the emergence and flourishing of a number of Protestant sects and movements. These movements emphasized the application of Christian teachings to social problems, from self-improvement to social reform.<sup>32</sup> But this was also the time when intense religious persecution ran rampant in U.S. history. Widespread anti-Catholic sentiment, a longtime American prejudice inherited from Europe, exploded as a reaction to the influx of Irish immigration in the mid-nineteenth century, the school wars of the nineteenth century just one episode in this long-running saga.<sup>33</sup> During the Gilded Age, Jews, buoyed by their great and rapid financial success, also became the target of populist attacks, though none compared to intensity of the anti-Catholic campaign.<sup>34</sup> These persecutions were mostly rooted on nativist reactions to the social consequences of massive immigration, but even a homegrown religion such as Mormonism fell to pervasive bigotry which saw its followers flee from a small

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32. See generally MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN (2005) (for the Second Great Awakening); ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES (1984).

33. See generally JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (1955); On Catholics in particular, see JOHN MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY (2003).

34. MCGREEVY, *supra* note 33.

town in Illinois to the Territory of Utah. In 1890, as a reaction to Congress escheating all of its assets in favor of the federal government, the Mormon Church finally capitulated and disavowed its controversial practice of plural marriage.<sup>35</sup> These examples hardly scratch the not-so-desirable surface of the American religious landscape of the period. Indeed, the conspicuous absence of the travails of Native Americans involving the practice of their traditional religion in mainstream legal scholarship on religious freedom is glaring evidence.

*Rise and Decline* does not mention any of these episodes, even as it acknowledged that “[r]eligious minorities sometimes suffered estrangement, persecution, even violence” (p. 109). The book appears to almost romanticize the period, and then conceding in effect that one who is already inclined not to find anything positive in this period would not find it satisfactory. But this is not simply an inability to find the silver lining but simply to acknowledge that if there was indeed a golden age, it was simply a golden age for some, and not for most. The majority of Americans of the period found themselves in a milieu undergirded by a Protestant Christian worldview, even given the theological differences among them, and that provided them a common language to express their commitments. That the level and nature of the persecution within the United States was of a milder nature than those in Europe during the same period should hardly be praiseworthy. Using a more modern example, Smith also mentions the relatively peaceful period of the 1950s under the Eisenhower presidency, the calm which would be undone by the school prayer decisions. There is ample historical evidence that suggests, however, that this momentary religious unity—captured by Will Herberg’s classic *Protestant-Catholic-Jew*<sup>36</sup>—was largely a manufactured effort by the government as part of a cultural offensive in the early Cold War years.<sup>37</sup> This is not to say that American religiosity came out of the blue, far from it, but that, at this time, there was an orchestrated, top-down, attempt to present a united domestic front in combating the spread of Communist ideology. As the initial sense of urgency waned, the leaders of this movement, from President Eisenhower to the

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35. SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 219–20 (2002).

36. WILL HERBERG, *PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* (1983).

37. JONATHAN P. HERZOG, *THE SPIRITUAL-INDUSTRIAL COMPLEX: AMERICA’S RELIGIOUS BATTLE AGAINST COMMUNISM IN THE EARLY COLD WAR* (2011).

Supreme Court in *Engel*, halted the march of the “sacralization” of American life. And even if one’s focus is on the political order, as Smith argues, not the suffering of individual dissenters, the American settlement which seemed to manage to hold the nation together regardless of religious differences is as true today with the courts in the picture as it was back then when they were not, or at least not as much. Perhaps courts are even more important now than before because of the incomparable magnitude of religious diversity which currently exists.<sup>38</sup>

#### B. FROM SOFT CONSTITUTIONALISM TO HARD AND BACK

A crucial point that *Rise and Decline* makes is that what made such a golden age possible was soft constitutionalism. The notion of a small-c constitution, “that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system that community had agreed to be governed,”<sup>39</sup> predates the founding of the United States. Prior to the incorporation of the Religion Clauses, Smith celebrates the genius of the American settlement of questions involving religion which consisted of various courts reaching contrary conclusions. Because these were primarily decided as matters of state law, no group could claim that *their* interpretation was the definitive constitutional interpretation, in the big-C, contemporary sense of the term. Even Supreme Court decisions at that time, such as *Holy Trinity Church v. United States*, which infamously declared that “this is a Christian nation,”<sup>40</sup> Smith argues, were intended to reflect fluid social facts, not constitutional ones. As popular views evolve, whether on the secularist or providentialist side, the political process could reflect and give effect to those changes by virtue of legislation. Under this view, states would truly be the local laboratories envisioned by the federal setup. Most importantly, it avoids the polarizing effect that today’s Supreme Court decisions seem to create and foster as one side or the other is left with the feeling of alienation from the national constitutional project.

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38. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* (2010).

39. HENRY ST. JOHN, VISCOUNT BOLINGBROKE, *Dissertation on Parties*, in BOLINGBROKE: *POLITICAL WRITINGS* 88 (David Armitage, ed. 1997).

40. 143 U.S. 457, 471 (1892). This is, however, a case involving statutory interpretation, not the Religion Clauses.

There are two problems with this claim. First, the premise that the Establishment Clause was enacted to be a jurisdictional bar only against the federal government and nothing more is still a matter of ongoing debate. It is true that the clearest we could infer from the historical record is that there was to be no national church similar to the Church of England. But there the consensus ends, and what to make of the substantive content of the Establishment Clause is still a hotly contested topic among scholars.<sup>41</sup> Moreover, a full-blown federalist view of the Establishment Clause detracts from a conception of the Bill of Rights as a guarantee of individual rights, instead of, or in addition to, a limitation on federal government action. Lastly, as a practical matter, this position finds no support from the current members of the Supreme Court, except for Justice Clarence Thomas.

More significantly, *Rise and Decline* faults the Supreme Court's elevation of principles such as secularism or neutrality as hard constitutional law,<sup>42</sup> thus losing what was initially its beneficially agnostic posture. Because this is how the Supreme Court has interpreted what the big-C Constitution definitively means, competing providentialist claims are now understood to be and relegated to the status of "constitutional heresy" (p. 123). The lamentable result of this development, first begun by the Court in its school prayer decisions *Engel* and *Schempp*—Smith's long-running bêtes noires<sup>43</sup>—was to prop up an illusion of secular neutrality, still prevailing up to this day, which in reality, is a conceptual impossibility given that the baseline for measuring such is not available.<sup>44</sup> In a nutshell, what might be a neutral baseline for some is not neutral for others.

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41. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) (for a federalist reading of the entire Bill of Rights); but cf. Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L. J. 669 (2013) (arguing that Establishment Clause not only immunized states but also individuals against the consequences of establishing a national church). For a discussion on why history cannot definitively support the federalist position, see Feldman, *supra* note 30, at 405–12.

42. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (adopting the three-prong *Lemon* test one of which posits that the legislation involved must have a secular purpose); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (declaring Bible reading in public schools to be unconstitutional for violating government neutrality on religion); *Engel v. Vitale*, 370 U.S. 421 (1962) (declaring that government must be neutral with regard to religion).

43. Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945 (2010).

44. For a fuller account of this point, see STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010).

At several instances, *Rise and Decline* sounds like a call to “take the Constitution away from the courts,”<sup>45</sup> that is, to bring the insights of popular constitutionalism, the contemporary intellectual movement in American constitutional scholarship which seeks to broaden the community of authoritative constitutional interpreters, to include other branches of government, the states and the people at large, to Religion Clauses jurisprudence. Defending the prevailing somewhat messy and incoherent jurisprudence in this area is an unenviable Herculean task, and one which is not fit for a review essay. But even conceding the rather unprincipled way the Court has went about in resolving cases involving religion, and the indeterminate nature of the principle of neutrality currently in use,<sup>46</sup> the Supreme Court, and by extension, hard constitutional law, is far from being the enemy.

The big-C Constitution is more than just a written document; it also comprises of a set of practices and understandings which serves as its interpretive context.<sup>47</sup> Thus, a constitution serves as legal framework for an ongoing debate and dialogue in which all members of a society could participate.<sup>48</sup> Courts can therefore facilitate, rather than just hinder, popular deliberation about constitutional issues. Here, perhaps, the gulf between soft constitutionalism and hard constitutionalism is not as wide as Smith sees it to be. The world we presently inhabit features both hard *and* soft constitutionalism; this is what historian and legal scholar Sarah Barringer Gordon calls “the new constitutional world.”<sup>49</sup> While the Supreme Court makes definitive rulings, popular mobilizations around these decisions and the meanings they give to them overlap. They create unlikely alliances in favor of, and against such decisions. For instance, in the aftermath of the *Goodridge* decision in Massachusetts legalizing same-sex

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45. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); *see also* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

46. *But see* ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013) (arguing that neutrality is a coherent and attractive principle which promotes the goals of a secular state through the use of deliberate and careful vagueness).

47. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012).

48. Adam Shinar, *The End of Constitutional Law?*, 29 *CONST. COMMENT.* 181, 207 (2014) (reviewing Louis M. Seidman's *On Constitutional Disobedience*, and arguing for the discursive benefits of having a constitution).

49. SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* (2010). Similar to Smith, she characterizes the pre-*Everson* era as the “old constitutional world.” *Id.* at 213.

marriages, an unlikely alliance, erstwhile unheard of, between the Archdiocese of Boston of the Roman Catholic Church and the conservative Protestant group Focus on the Family, joined forces in a campaign for a state constitutional amendment to overturn the decision. On the opposing side, liberal religious groups banded together with secular feminists.<sup>50</sup> In the same way that *Brown v. Board of Education* became a rallying point for the civil rights movement, the same case could be made for those who are as concerned with the promotion of gender and marriage equality as much as the protection of religious liberty of believing Americans.

It is true that losers have no reason to abide by settlements that they deeply oppose. And here, Smith sees these definitive constitutional pronouncements as only creating a section of the American populace, mostly religious Americans, presumably seeing themselves as perennial losers, and thus intensifying the culture wars that he deplors. Indeed no other pair of decisions by the Supreme Court produced more hate mail against the Court than *Engel* and *Schempp*.<sup>51</sup> But these decisions are an invitation to mobilize and forge alliances, and not, contrary to Smith's claim, to stop any conversation. The remarkable political alliances and reconfigurations which occurred in the wake of *Everson* and *Engel* and *Schempp*, perhaps most vividly captured in the political transformation of the originally anti-Catholic group, Protestants and other Americans United for the Separation of Church and State (POAU), into the more liberal, nonsectarian Americans United for the Separation of Church and State (AU), are a testament to this fluid social landscape that both shapes and is shaped by these Supreme Court decisions. Groups, even religious ones, are never monolithic entities.

Having raised *Brown* as an analogy, it is impossible not to mention the alternative view of what *Brown* was actually responsible for. Under legal historian and constitutional scholar Michael Klarman's backlash thesis,<sup>52</sup> *Brown* crystallized southern resistance to desegregation and, at least, temporarily, destroyed any form of southern moderation on racial issues, while pushing

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50. *Id.* at 204–07.

51. *Id.* at 86 (“However predictable the holdings may seem decades later, they fell like a meteor into American society.”).

52. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994). A fuller account is in MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

to the forefront extremist positions. *Rise and Decline* appears to entertain a similar concern that Supreme Court decisions in the past and in the future, especially with the onslaught of litigation in all levels from district courts all the way up to the Supreme Court, often involving a zero-sum face-off between the values of non-discrimination and religious liberty, would bring out the extremist positions on both sides, and only one out of these two equally important and cherished American values would end up alive. That is not such a far-fetched scenario. Consider the slew of state religious freedom bills which have since been proposed as a reaction to recent federal court and state supreme court decisions striking down same-sex marriage bans. Religious conservatives feel they are under a secularist attack while supporters of gender and marriage equality express their disdain for religious beliefs they thought are being unfairly imposed upon them. For instance, although it has since been vetoed by Governor Jan Brewer, the controversy generated by Arizona State Senate Bill 1062 is an illustrative example. On its face, the proposal simply amends the existing state Religious Freedom Restoration Act (RFRA) to clarify that “exercise of religion” means the “practice or observance of religion, including the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief.”<sup>53</sup> It also expands the definition of “a person” to include not only religious institutions but also groups, including corporations. But because of the highly-charged atmosphere surrounding the issue, opponents unsurprisingly have gone at each other with increasing levels of vitriol, reading into the text, half-real, half-imagined, monsters ranging from religious bigotry to secular extremism to destroy.<sup>54</sup>

### III. “THE FAULT IN OUR STARS”: PRESERVING THE AMERICAN EXPERIMENT

In the latest church-state case to date, *Hosanna-Tabor Evangelical v. EEOC*,<sup>55</sup> a unanimous Supreme Court once again invoked the authority of history in upholding the constitutionality of the ministerial exception from Title VII nondiscrimination

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53. S.B. 1062, 51st Leg., 2d Sess. (Ariz. 2014).

54. Sarah Posner, *Is Supreme Court Jurisprudence Making State Religious Freedom Bills More Dangerous?*, RELIGION DISPATCHES (Mar. 11, 2014), [http://www.religiondispatches.org/dispatches/sarahposner/7680/is\\_supreme\\_court\\_jurisprudence\\_making\\_state\\_religious\\_freedom\\_bills\\_more\\_dangerous/](http://www.religiondispatches.org/dispatches/sarahposner/7680/is_supreme_court_jurisprudence_making_state_religious_freedom_bills_more_dangerous/).

55. 132 S. Ct. 694 (2012) (upholding constitutionality of the ministerial exception).

regulations. The question presented in that case was whether a Lutheran church could be sued for violation of employment discrimination laws when it fired an employee (who was put on leave for narcolepsy treatment but insisted on reporting for duty) for insubordination and disruptive behavior. The Court viewed the Religion Clauses to mean not only that the federal government cannot establish a national church but that it is also prevented from having any “role in filling ecclesiastical offices.”<sup>56</sup> The church, it turns out, is exempt from such suits. Writing for the majority, Chief Justice Roberts pointed to two of James Madison’s statements: first as Secretary of State, that “the selection of church ‘functionaries’ was an entirely ecclesiastical matter left to the Church’s own judgment;”<sup>57</sup> and again, when Madison became President, he vetoed a bill incorporating the Episcopal Church in the town of Alexandria, declaring that the “the bill . . . comprehending even the election and removal of the Minister of the same . . .” violates the First Amendment, as evidence of this understanding.<sup>58</sup>

Critics attacked the decision for giving undue deference to churches at the expense of individual rights,<sup>59</sup> thus flipping the Bill of Rights on its head. The Court’s account of First Amendment history has been described as a “curious mash-up of religious and political history that stops in 1791.”<sup>60</sup> One commentator claimed that *Hosanna-Tabor* demonstrates the danger of historical analogy and originalism in resolving contemporary problems,<sup>61</sup> even while acknowledging that alternative histories also exist that support the other side. But is it true? Did the Court really just use “English history to overcome civil rights legislation approved by Congress?”<sup>62</sup> To be sure, not every invocation of James Madison, though widely recognized as the father of the Religion Clauses (and not Thomas Jefferson) should be treated as holy gospel for

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56. *Id.* at 703.

57. *Id.*

58. *Id.* at 704.

59. See, e.g., Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L. J. 981 (2013); “The Ministerial Exception,” N.Y. TIMES, Jan. 12, 2012, at A22.

60. Winnifred Fallers Sullivan, *The Church*, THE IMMANENT FRAME, (Jan. 31, 2012, 4:25 PM), <http://blogs.ssrc.org/tif/2012/01/31/the-church/>.

61. Griffin, *supra* note 59, at 990 (“Many of the ministerial exception cases have involved women clergy in Christian denominations for whom women’s ordination was not even imaginable at the time of the nation’s founding.”).

62. The decision also cites the freedom of the English church in King John’s 1215 Magna Carta. *Id.*

the purpose of constitutional interpretation.<sup>63</sup> And one can find opposing strands of thought existing during the same historical moment. But as the Court stated, the text of the First Amendment, that is both the Establishment Clause and the Free Exercise Clause, does give special solicitude to the rights of religious organizations.<sup>64</sup> Requiring a church to accept or retain an unwanted minister is not just a mere employment matter, but an infringement on the freedom of the religious group's right to determine its own faith and mission.

It is against such a postmodern backdrop that today we face questions such as “is religion special?,” a question that would certainly acquire increasing constitutional and sociological salience in American society in the years to come. Such a question betrays a willingness to discard the distinctive place of religion in the American constitutional scheme, one that is based largely in history. But the Founding generation did think religion was special, or at least special enough to merit a separate guarantee in the Bill of Rights. In fact, for the most part of American history, religion was, and still is, special, at least for an admittedly shrinking section of the populace.<sup>65</sup> In other words, religion's uniqueness as a subject of constitutional protection is not just for epistemic reasons. If religion was simply like any other secular affect, it could be protected under the umbrellas of freedom of speech, freedom of association or even equal protection, but something important is truly lost—for one, an authentic expression of people's beliefs—if public debates are narrowly framed in those terms,<sup>66</sup> in which case, one is brought back full circle to the never-ending search for a neutral baseline.

This is also the question that *Rise and Decline* tries to get its reader to confront, but it does so by posing a self-subverting paradox: if religious freedom has historically theological origins—specifically the notions of dual jurisdictions and liberty of conscience—and we have, by our adherence to modern-day

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63. See, e.g., Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999) (arguing that contemporary perceptions of the influence of Madison's ideas at the time of the Founding, specifically Federalist No. 10, is probably exaggerated).

64. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 at 706 (2012). But see Schragger & Schwartzman, *supra* note 21, at 976 (misreading the decision to say that it has nothing to do with the rights of churches qua churches).

65. Pew Research Religion & Public Life Project, *Nones on the Rise* (Oct. 9, 2012), <http://www.pewforum.org/2012/10/09/nones-on-the-rise/> (showing the increasing number of Americans who do not identify with any religion).

66. For a great and thoughtful exposition of this point, see JEFFREY STOUT, *DEMOCRACY AND TRADITION* (2005).

principles of secularism and neutrality, disabled the state on acting on religious or theological rationales (p. 143), then religious freedom is a house that stands on shaky ground. But that, it seems, is the wrong proposition to make. Secular rationales also exist in support of religious freedom, though contested; in the American context, why should we need more than what the Constitution *explicitly* protects and why should its original intent still matter? What Smith essentially wants to get his readers to look at is how courts have all but forgotten the historical and particularly *religious* legacy of this important freedom, and to make matters worse, have upheld and continue to uphold a secular neutrality rationale that has largely no basis in history and does not even make sense as a philosophical matter. Faced with the “challenge of modern equality” (p. 147), the unfortunate endgame of this charging train seems predictable.

As a response to Smith’s concerns in particular and a way to keep the American pluralist experiment alive in general, this essay suggests a consideration of history and judicial review as mutually reinforcing technologies of constraint. The history of the Religion Clauses still matters, *not* because it offers any solution or prescribes the right answer, but because it offers everyone, from the individual citizen to Supreme Court Justices, a kind of constraint. Note that this statement is not the same as “history says this, and therefore the result ought to be this . . .” as critics of this inclination are wont to point out.<sup>67</sup> The aim is not to do normative history. While it might be the case that nothing prevents actors from creating their own versions of history meant to reinforce or support a preexisting contemporary agenda, that view erroneously presupposes that the present can be completely severed from the past. That is simple human conceit. However we view that past, it is an inescapable inheritance that provides fixed points of reference for our present-day conversations, the constitutional ones most especially. American constitutional identity might be evolving, but it is still rooted in history. Thus, the results can never veer far off. At the very least, the history behind the Religion Clauses is evidence of an intent, acquiesced to and repeatedly affirmed across time,<sup>68</sup> that the protection of religious liberty is special and merits a distinctive guarantee in the

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67. See, e.g., Erwin Chemerinsky, *History, Tradition, the Supreme Court and the First Amendment*, 44 HASTINGS L.J. 901, 909 (1993) (criticizing the use of history to justify conservative results).

68. STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134–76 (1995).

American constitutional tradition. It is history immediate enough and with sufficient resources for both sides of the debate.

At the same time, judicial review, especially that of the Supreme Court, is still the best institutional vehicle to realize these quite abstract ideals of disestablishment and free exercise in practice. While it does amplify the stakes of a debate, as Smith rightfully points out, litigation also addresses gaps that popular mobilizations cannot. Courts provide a venue for unpopular minority opinions, whether a minority vis-à-vis the rest of the country or a minority vis-à-vis the rest of the state or some other local subdivision.<sup>69</sup> For instance, it would have been rather hard, if not impossible, for adherents of the religious group Jehovah's Witnesses in the early 20th century to get popular support for their refusal to salute the American flag. Notwithstanding claims that courts, even the Supreme Court, are quite limited in terms of inducing broad-sweeping social changes,<sup>70</sup> judicial review first and foremost affords a forum for the redress of *individual* grievances.<sup>71</sup> Under this view, structural or systemic reverberations which are often at the heart of public interest or cause lawyering take a secondary role. But in the process, judicial interpretation of the Religion Clauses also delineates the range of possible meanings and available constitutional vocabulary with which the public and other branches of government could engage then and in the future. Not all constraints are limitations but instead function as an invitation to construct a richer *nomos*.<sup>72</sup> As the history of litigation involving religion in the past half a century since *Everson* would show,<sup>73</sup> the Supreme Court is hardly the final word on the matter. The value of judicial review in a world where separate communities with their respective normative universes, are nonetheless required to coexist in one society under one Constitution, is that it can ensure cooler heads prevail,<sup>74</sup> and thus, keep the conversation going for the foreseeable future.

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69. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

70. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

71. The subject is too complex to be addressed sufficiently in a review essay. For this claim in all its nuance, see Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT'L. J. CONST. L. 950 (2012) (a justification of judicial review is that it affords a right to a hearing).

72. Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

73. Gordon, *supra* note 49.

74. See PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION AND THE CONSTITUTION* (2013).

## CONCLUSION

*Rise and Decline* looks at the future of American religious freedom with much trepidation. As a result, it reaches beyond the Founding period and far back into deep Western history in search of solid ground, and takes a dim view of the secularist slippery slope that the Supreme Court has taken contemporary Religion Clause jurisprudence. This essay has argued that both the nostalgia for the deep past and its disdain for the Supreme Court are misplaced. But that does not mean this thought-provoking book does not raise fundamental questions, or that its diagnosis of the problem is wrong. Smith claims that there is something fundamental that would be lost if we abandon the logic of jurisdiction that animated the historic commitment to freedom of church and conscience. He is right. As Mark DeWolfe Howe wrote, “[G]overnment must recognize that it is not the sole possessor of sovereignty.”<sup>75</sup> It is this concern which is at the heart of the book. The allure of equality, without the depth and robustness a substantive heritage such as religion could imbue it, might be nothing more than cupping sand. We could celebrate it in the short term, but if we do, in the long run, we will end up all the more impoverished for it.

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75. Mark DeWolfe Howe, *The Supreme Court, 1952 Term – Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953) (on the political theory of pluralism).