

# Liberals, Litigants, and the Disappearance of Consensus About the Religion Clauses

THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM. By Steven D. Smith. Cambridge, Massachusetts: Harvard University Press, 2014. 240 pages. \$39.95.

Reviewed by Mark Tushnet\*

I feel compelled to say at the outset that there's a lot in the first chapters of *The Rise and Decline of American Religious Freedom* that I found quite offputting.<sup>1</sup> Once I got over my annoyance, I found much in the remainder provocative—right and wrong in almost equal measure. The meat of the book comes in Chapters 3 and 4, on the supposed existence and equally supposed dissolution of an American consensus on religious freedom in a religiously pluralist society. To give the argument that follows in telegraphic form: Smith seems right to me in identifying a certain kind of consensus about both the substance of religious freedom and the way the American polity embedded that consensus in institutions of government; a consensus that existed roughly for the century between 1850 and 1950. But, it seems to me that he overlooks cogent arguments, building upon his own insights, that the dissolution of consensus is more apparent than real and that the culprit, if there be one, is litigation rather than, as he too often suggests, a secular elite indifferent to claims of religious freedom.

Smith describes two competing “positions or ‘models’” of religious freedom in the nineteenth century,<sup>2</sup> when it became more difficult (though not impossible) to see the United States as a Protestant nation rather than a Christian one.<sup>3</sup> He calls these the “providentialist” and the “secularist” views and associates them with John Adams and Thomas Jefferson respectively.<sup>4</sup> It would be a mistake, I think, to try to spell out in detail what these views were. They were, and are, not a set of beliefs or arguments that can be reduced to propositional forms. Rather, they are more like attitudes or general orientations to the human history and the

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\* William Nelson Cromwell Professor of Law, Harvard Law School. I thank Paul Horwitz and Nelson Tebbe for their comments on a draft of this Review.

1. To avoid distracting readers from my main areas of agreement and disagreement with Smith, with the indulgence of the *Texas Law Review* editors I've described what put me off in an Appendix to this Review.

2. STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 87 (2014).

3. *See id.* at 84–85 (stating that the term “‘Christian nation’” evolved from meaning Protestant to secularly neutral during the time period).

4. *Id.* at 94.

social world.<sup>5</sup> So, roughly, the providentialist view is that religion—formerly the god of Protestantism, then the god of Christianity, and later God (singular) alone—has an important place in ordering and stabilizing society (and the United States in particular), leading people to live lives at peace with each other.<sup>6</sup> The secularist view, in contrast, is that people can get along just fine, thank you, without too much adverting to religion as such; religion is fine for people who want to pursue it, but society as such can be stable and people can get along peacefully simply by attending to nonreligious goals on which virtually all can agree at a level of abstraction high enough to secure agreement but low enough to generate real, alternative policy choices.<sup>7</sup>

Describing and seemingly endorsing the views of religion scholar John Witte, Smith writes, “these two models have competed with each other throughout the country’s history, with Adams’s model predominating through the mid-twentieth century and Jefferson’s view achieving ascendancy thereafter.”<sup>8</sup> The theme of competition is important here. Smith writes, this time clearly in his own voice, “the visions have competed, but they have also collaborated, . . . . [T]he American political tradition might be understood as the product of the ongoing competition and collaboration between the providentialist and secularist interpretations of the Republic.”<sup>9</sup>

Competition *and* collaboration: That is the constitutional settlement achieved in the nineteenth century. But, as Smith points out, that settlement was inscribed in what he calls the “soft constitution” or what others more commonly call the “small-c constitution.”<sup>10</sup> The small-c constitution consists of a set of more or less taken for granted presuppositions of our collective political life that provide the underpinnings for more formalized expressions of both policy (in statutes) and occasionally judicial decisions (in litigated cases).<sup>11</sup> Quoting Larry Kramer, Smith writes that the soft

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5. Of course, one can generate a “providentialist thesis” or a “secularist thesis” (for contemporaries, John Rawls’s work exemplifies the latter, see *id.* at 83), but such theses are not the kinds of things that help people orient their thinking in daily life. Attitudes are.

6. *Id.* at 89–91.

7. *Id.* at 93. In comments on a draft of this Review, Paul Horwitz pointed out that some of Smith’s troubles with secularism may arise from the *general* scope of contemporary regulatory authority. Though that scope may be unavoidably large today, Horwitz notes that it might be odd to tax the small-government Jefferson for a troubling secularism.

8. SMITH, *supra* note 2, at 87.

9. *Id.* at 94.

10. *See id.* at 96, 108 (distinguishing between “the Constitution” and “the constitution” and describing the commitments each embrace).

11. *See id.* at 96–99 (defining the small-c constitution as a “body of constructive understandings, practices, and commitments” and identifying examples of legislation and cases these understandings affected).

constitution provides “a framework for argument.”<sup>12</sup> Note: A framework for argument, not arguments themselves. That is, as Smith emphasizes, the guiding principle, expressed in practice rather than in express constitutional theory, is one of contestation, not of resolution.<sup>13</sup> The result is that religious liberty was left undefined substantively: The Constitution and the constitution “embrac[ed] what nearly all Americans agreed on (namely, religious freedom) while leaving firmly open what Americans did not agree on (namely, exactly what religious freedom in this country meant or entailed).”<sup>14</sup> And a further result: “A historical survey by legal scholars John Jeffries and James Ryan describes the political atmosphere of mid-twentieth-century America in terms that systematically mix the providentialist and secularist views.”<sup>15</sup> Smith leaves open the question of whether this mixture occurs at the individual level, where each of us sometimes feels the pull of providentialism and sometimes that of secularism, or on the level of social practice, where we would notice providentialism prevailing in some domains at the same moment that secularism prevails in other domains.

All of this seems to me quite insightful and powerful. One might quibble a bit with the irenic picture Smith paints—or, to switch the metaphor, the tune Smith plays seems attractive even as he inserts quite a few discordant notes with his observations about anti-Catholic riots, persecution of Mormons, and the like.<sup>16</sup> Still, emphasizing the small-c constitution and the existence of social practices that center on regular contestation without final resolution seems to me both right and an important contribution to our understanding of the constitutional status of religious liberty in the United States.

But then, according to Smith, in the twentieth century everything fell to pieces. Here, I treat Smith’s argument about the modern era as an extension of his historical analysis, focusing on his account of why things went wrong and offering an alternative account. One way to get into the alternative account is to observe that we can read Smith’s account of the modern era as a jeremiad by a partisan of providentialism.<sup>17</sup> Or, in Smith’s terms, his book is simply an intervention in the ongoing contestation between providentialism and secularism. As such an intervention, the book

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12. *Id.* at 95 (emphasis omitted).

13. *Id.* at 101–02.

14. *Id.* at 104.

15. *Id.* at 107.

16. *E.g., id.* at 103. For a similar critical observation, see Paul Horwitz, *More “Vitiating Paradoxes”: A Response to Steven D. Smith—and Smith*, 42 PEPP. L. REV. (forthcoming 2014) (manuscript at 113–14), available at <http://ssrn.com/abstract=2427776>, archived at <http://perma.cc/JWQ8-7RVR>.

17. There’s not much analytically that can be said about jeremiads except to analyze their rhetoric and the like, some of which I do in the Appendix.

takes the reasonable position—reasonable, that is, from the perspective of a providentialist—that what’s gone wrong is that secularism has prevailed. In particular, secularist elites came to dominate the constitutional discourse over religious freedom.<sup>18</sup> So, for example, he writes: “The modern Supreme Court seemingly failed to understand” the settlement reached in the principle of regular contestation.<sup>19</sup> “[B]y elevating the secularist interpretation to the status of hard Constitutional orthodoxy, the Court placed the Constitution itself squarely on the side of political secularism and relegated the providentialist interpretation to the status of a constitutional heresy.”<sup>20</sup>

Perhaps so. But, there’s a rather serious problem here. Smith’s account of the nineteenth-century settlement was diachronic: One could see a pattern of contestation when one observed relatively long periods of time and space. Specifically, in some places and at some times, one could see at the least the possibility of secularism prevailing even though, on Smith’s account, in most of the nation and most of the time providentialism prevailed.<sup>21</sup> But, not surprisingly, Smith’s perspective on the present is synchronic: He is examining a specific slice of time in which—as far as we can tell from the perspective of someone who sees ever-present contestation—secularism happens to have prevailed for the moment.<sup>22</sup> Who knows, though, what the future holds?<sup>23</sup>

Smith is rather clearly a glass-is-half-empty kind of guy: pessimistic about the prospect that what he sees as current trends will continue, leading to a death spiral for providentialism. Yet, his historical account—of sequential displacement of providentialism and secularism—counsels against such pessimism, at least in the absence of a story about the mechanism of decline. But, as far as I can tell, Smith doesn’t provide such a story. The most I can get is that secularism is something like a contagion: The more prevalent it is in the society, the more likely that the contagion will spread. That leads me to wonder why providentialism isn’t contagious too. And, after all, what we’re talking about here are *ideas* that help people understand the lives they are living in the world they inhabit. If secularism

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18. SMITH, *supra* note 2, at 122.

19. *Id.* at 123.

20. *Id.*

21. Sometimes I got the sense that Smith thinks that providentialism prevailed throughout, with secularism always and everywhere subordinated. That, though, seems to me inconsistent with the core idea of contestation: What kind of contest is it in which everyone knows who the winner and loser will always be?

22. Smith’s response to Horwitz, Steven D. Smith, *Situating Ourselves in History*, 42 PEPP. L. REV. (forthcoming 2014) (on file with author), acknowledges this—“Win a few, lose a few,” he writes, *id.* (manuscript at 4)—even as he insists on the possibility that we face a potentially irreversible decline in the availability of the providentialist view.

23. To quote Monty Python, “Nobody expects the Spanish Inquisition.” *Monty Python’s Flying Circus: The Spanish Inquisition* (BBC television broadcast Sept. 22, 1970).

makes more sense of that world to increasing numbers of people, and providentialism seems increasingly out of touch with their lives—or, I hasten to add, if people find that providentialism makes more sense of their world—it’s not clear to me what the problem is (from the perspective of a detached observer).

Smith does acknowledge uncertainty about the future, in his discussion of the possibility of a compromise achieved through serial displacement of secularism by providentialism and providentialism by secularism. He is wary about the possibility, because, he writes, “It is hard to admire this kind of compromise—namely, one that results from flagrant inconsistency in adhering to announced doctrines.”<sup>24</sup> This is a strikingly court-focused concern. In my capacity as a citizen—or as an observer of historical trends and patterns—doctrinal inconsistency is a perhaps interesting feature (bug?) of the displacement of the soft constitution by the hard one. It’s not obvious to me that admiration, and its inverse disdain, are attitudes of any interest when looking at things overall.

The court focus of Smith’s concerns about the present is somewhat surprising in light of his insistence on the importance of the soft constitution in the nineteenth century. I would have thought that the first matter of interest would be why and how did the soft, unlitigated constitution get replaced by the hard, litigated Constitution?<sup>25</sup> The consequences of that replacement are quite broad, I think, covering much more than the domain of religious freedom. And, the culprit in Smith’s story may be the replacement of the small-c, unlitigated constitution with the large-C, litigated one, not the views of secularism or providentialism held by elite judges.

The litigated Constitution produces court cases with plaintiffs and defendants, some of whom win and others of whom lose.<sup>26</sup> Litigation is of course a forum for contestation but not, in the first instance, for repeated and ongoing contestation.<sup>27</sup> In every litigated case in which providentialist

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24. SMITH, *supra* note 2, at 158.

25. Nelson Tebbe pointed out to me in comments on a draft of this Review that some scholars treat the large-C Constitution as including both an unlitigated component and a litigated one. Sanford Levinson, for example, calls the unlitigated component of the large-C Constitution its “hard wired” provisions. *E.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 29 (2006). In this Review I focus, as Smith does, on the litigated component of the large-C Constitution.

26. There are hints that Smith sees this, but those hints do not play a large role in his argument. *See, e.g.*, SMITH, *supra* note 2, at 126 (“[I]t seems likely that religious citizens, at least *when in litigating posture*, are sometimes less than forthcoming about their deeper reasons.”) (emphasis added).

27. “Not in the first instance” because no single lawsuit resolves any legal question for all time. Losers can raise variants of the losing claims that will have to be addressed on the merits, and doing so may take long enough that cultural and political changes make victories possible that seemed impossible when the first case was decided.

and secularist views are offered to the court, one or the other is going to prevail. And—again, at least in the short run with respect to the case at hand—it’s difficult to see how a victory is consistent with the nineteenth-century principle of repeated contestation.

There’s a second way in which litigation itself distorts the diachronic principle of contestation. Litigation occurs, necessarily, at one point in historical time. And, at that point, the courts are going to be staffed by people who favor either the providentialist or the secularist view. Lawyers who want to win their cases will strategically shape their arguments to appeal to the judges they have to face. And, when—as everyone appears to concede is true today—most judges are secularists, even lawyers whose clients hold deep providentialist views will offer secular arguments.<sup>28</sup> It’s hardly surprising that sometimes those arguments are unpersuasive on the merits and that they are sometimes greeted either implicitly or explicitly with suspicions of bad faith, so to speak.<sup>29</sup> Under the circumstances, when those who actually hold providentialist views don’t present them to the court but instead dress their arguments up as consistent with secularism, the lawyers might win their cases but providentialism isn’t going to come out on top. That’s a problem with the litigating posture taken by the lawyers.

A lawyer for a providentialist client might respond, “Wait a minute. What do you expect me to do? My client wants me to win the case, and given the assumptions the judges are—to be sure—forcing on me, the best way to win is to make secularist arguments.” In some ways, though, that simply confirms my point. The structure of litigation at any specific point in time generates litigating advantages for those who assert secularist or providentialist views—which is to say, the problem Smith identifies arises from litigation itself.

Here’s another way to see the point I’m making. In the nineteenth century, providentialists and secularists conducted their arguments in the court of public opinion, where there’s no one who will award a decisive victory to either side at any particular moment. Even a victory in the Legislature or the Executive Branch is not—and is probably understood not to be—decisive because it can be reversed by an ordinary legislative or executive action after the next election.<sup>30</sup> Today, the arguments take place

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28. For a useful example, see Jenna Reinbold, *Sacred Institutions and Secular Law: The Faltering Voice of Religion in the Courtroom Debate over Same-Sex Marriage*, 56 J. CHURCH & ST. 248, 252–55 (2014).

29. To repeat a quotation from Smith, this time with the emphasis placed differently: “[I]t seems likely that religious citizens, at least when in litigating posture, are *sometimes less than forthcoming* about their deeper reasons.” SMITH, *supra* note 2, at 126 (emphasis added).

30. Consider, for example, the regular displacement of executive orders dealing with abortion as Republican and Democratic presidents take office. Rob Stein & Michael Shear, *Funding Restored to Groups that Perform Abortions, Other Care*, WASH. POST, Jan. 24, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR2009012302814.html>, archived at <http://perma.cc/K5UX-422S>. I thank Nelson Tebbe for raising this question with me.

in court, where there is an authoritative decision maker. In court, strategic calculations generate one-sided arguments to appeal to those decision makers, and the arguments seem to undermine the principle of repeated and ongoing contestation.<sup>31</sup>

The difficulty Smith identifies, then, may arise more from the structure of litigation—and so from making issues of religious freedom part of the hard Constitution—than from the “demands of twentieth-century liberal theorists and activists.”<sup>32</sup> Could anything be done about that?

Robert Burt offers one path: Develop a judicial rhetoric that resolves a case without awarding a decisive victory to either side.<sup>33</sup> I think this is an exceptionally difficult path to pursue, and Burt’s specific examples are not, to my mind, encouraging. The core difficulty, I suspect, is psychological: Judges don’t like to display the kind of uncertainty that a Burt-inspired rhetoric might convey. Further, a rhetoric of sympathy for the losers seems to me likely to come across as smarmy and insincere.<sup>34</sup>

The other path is to direct “cases”—really, problems of religious freedom—away from the courts.<sup>35</sup> Doing that in a pluralist society is probably impossible. Somebody, somewhere, is going to sue over anything. We have some techniques to screen cases out of court, most

31. I think it worth observing that nothing actually forces lawyers for providentialist clients to make purely secularist arguments. The arguments the lawyers for Jehovah’s Witnesses made to the Supreme Court in the 1930s and 1940s were relentlessly biblical; the Court, not the Witnesses’ lawyers, translated those arguments into terms the Justices were more comfortable with. Compare, e.g., Appellant’s Brief at 26–29, *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (No. 391) (arguing that an ordinance prohibiting the unlicensed distribution of materials applies only to commercial transactions because otherwise the ordinance would conflict with the law of God as recorded in the Bible), with *Lovell v. City of Griffin*, 303 U.S. 444, 451–52 (1938) (reasoning that the ordinance was invalid because “it strikes at the very foundation of the freedom of the press”). Of course, it’s hardly accidental that the principal lawyer for the Witnesses, “Judge” Joseph Rutherford, was himself a leading figure in the denomination’s religious organization. William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah’s Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1007 (1987). It’s as if Pope Francis were to argue a case in the U.S. Supreme Court about the constitutional rights of Roman Catholics.

32. SMITH, *supra* note 2, at 110.

33. See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 353–54 (1992) (describing the destructive impact that occurs when the Court declares “that one party has won and the other has lost”).

34. For example, that’s how I react to almost every effort by Justice Kennedy to achieve rhetorical effect and to Chief Justice Roberts’s expressions of sympathy for the Snyder family in *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker.”).

35. I once suggested that we should develop a “culture of mutual forbearance” in which we would all “forbear from taking” actions “that generated intense hostility”; among such actions (in the article’s context) were filing lawsuits. Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 738 (1986). I thought that I acknowledged that the chances of this happening were slim, but on re-reading the article, I discovered that I was more optimistic then and did not actually say what I thought I said.

notably standing doctrine, and Smith does mention Ernest Brown's view that the Supreme Court should have denied standing to raise an Establishment Clause claim in the school-prayer cases.<sup>36</sup> That would get us something but not enough. As Smith observes, Brown suggested that the Court should have resolved the school-prayer cases under the Free Exercise Clause.<sup>37</sup> One would have to transform standing doctrine quite dramatically so that claimants of free exercise rights would lack standing.<sup>38</sup> And, though other justiciability doctrines might screen out a handful of cases, too many would remain.

A final possibility may be worth noting: a policy decision made within the Supreme Court to deny review on *every* religion-clause case presented to it. That wouldn't keep the cases out of the courts entirely, of course: some would proceed in state courts, others in the federal district courts and courts of appeal. But, Supreme Court abstention, based on prudence rather than law (as the certiorari process probably permits), might have some advantages. It might lower the amount of public attention religious-freedom controversies receive and so lower the stakes of those controversies. And, it might somewhat awkwardly reproduce the pattern of geographic diversity that emerged from—and perhaps contributed to—the nineteenth-century principle of contestation and competition.

It's not going to happen, though. The Justices like the attention they get. And, as providentialists and secularists themselves (what else could they be?), they are going to want to weigh in. Jeremiads like Smith's from both sides will undoubtedly continue.<sup>39</sup>

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36. See SMITH, *supra* note 2, at 132 (stating that “Brown wished that the Court had avoided decision on the merits”); *id.* at 210 n.93 (“I have argued elsewhere that a better way of returning to a ‘softer’ constitutionalism would be through tightening up standing requirements, as recent decisions have done (usually arousing the ire of constitutional scholars).”). For Brown's discussion of the Court's handling of standing in school-prayer cases, see generally Ernest J. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1.

37. *Id.* at 132.

38. See Horwitz, *supra* note 16, at 117 (observing that denying justiciability to free exercise claims would require “looking at such claims more skeptically at the threshold level than we currently do”).

39. Jeremiads like Smith's from both sides were not uncommon in the nineteenth century when, Smith tells us, all was well with religious freedom. See Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 986 (2011) (describing the frequent arguments and criticisms made by both providentialists and secularists in the nineteenth century); *supra* text accompanying notes 8–17. The authors of those jeremiads would have disagreed with Smith's portrayal of their era, just as authors of secularist jeremiads will disagree with his portrayal of ours.



## Appendix

I have described *The Rise and Decline of American Religious Freedom* as a jeremiad. It is also something akin to an extended essay in a journal of opinion—*First Things*, for example.<sup>40</sup> Such journals are typically read by two groups of people: those whose “priors,” as a Bayesian would say,<sup>41</sup> are already in favor of the author’s position, and those whose priors are opposed to that position and who want to find out what people on the other side are thinking. That readership gives the extended opinion essay characteristics different from those in standard academic works.

Smith writes in an accessible and sometimes breezy—sometimes too breezy—style.<sup>42</sup> The breeziness sometimes verges on snark.<sup>43</sup> Godwin’s law—that this sort of exposition inevitably invokes Hitler as exemplifying the tendencies exhibited on the other side—makes its appearance.<sup>44</sup> The rhetoric is often oppositional, which sometimes gets out of hand.<sup>45</sup>

The style of the extended opinion essay also induces what would be described as distortions were they to appear in a fully academic work. Smith sets up his argument by contrasting a “standard” and a “revised” narrative of American religious liberty.<sup>46</sup> The standard narrative has these themes: “Americans as Enlightened innovators”; “[t]he monumental, meaning-full First Amendment”; “[t]he long, dark interlude”; “[t]he modern (court-led) realization”; and “[t]he conservative religious retreat from constitutional principles.”<sup>47</sup> The revised narrative has these: “American religious freedom as a (mostly Christian, marginally pagan) retrieval and consolidation”; “[t]he unpretentious, unpremeditated First Amendment”;

40. *About*, FIRST THINGS, <http://www.firstthings.com/about/>, archived at <http://perma.cc/6YQS-DGQ9>.

41. For a description of Bayesian decision theory and “priors,” see RICHARD A. POSNER, *HOW JUDGES THINK* 65–67 (2008).

42. For an example of the latter, see SMITH, *supra* note 2, at 96–97 (“Was it a condition of participation in this conversation that one’s name begin with *J*?”).

43. *See, e.g., id.* at 68 (“[M]ost scholars and judges today have concluded that the Fourteenth Amendment *did* extend the original rights . . . to the states. That is a convenient and congenial conclusion, obviously, *but even so* it may be correct.”) (second emphasis added).

44. Comparing the approaches of different governments to religious freedoms, Professor Smith observes:

Largely in disregard of the historical facts, critics like Jonathan Kirsch may suggest that Constantine’s government was “totalitarian,” but the secular totalitarianisms of modern times make Constantine . . . look like [a] paragon[] of restraint and civility. And we need not go so far as to consider such horrific examples as the Third Reich . . . .

*Id.* at 45 (footnotes omitted).

45. For example, Smith begins a paragraph about “proponents of the ‘godless Constitution’” with the word “[c]onversely,” but after quite a few readings of the preceding paragraphs I simply can’t figure out to what that paragraph is being juxtaposed. *Id.* at 105–06.

46. *Id.* at 1–11.

47. *Id.* at 1–4.

“[t]he golden age of American religious freedom”; “[d]issolution and denial”; and “[r]eligious freedom in jeopardy.”<sup>48</sup> Yet, as Smith acknowledges, academics have known that the so-called standard story has “already been subjected to severe criticism, and . . . has long been less than fully credible.”<sup>49</sup> The same might be said of the revised version, and Smith acknowledges that as well: “[T]here are important similarities in the stories. . . . A fully adequate account, if such were possible, would no doubt draw on both stories—and on others as well.”<sup>50</sup> So, the device used to frame the extended opinion essay is actually pretty much wrong: Each of the themes said to distinguish the stories has been present throughout the history of American religious freedom. But, the genre appears to require setting up oppositions rather than convergences.

In discussing the “unpretentious First Amendment,” Smith offers an originalist account. Fair enough for readers of an extended opinion essay, but one might want a warning label pointing out that Smith’s version of originalism—in general, it is expected applications originalism<sup>51</sup>—has basically been abandoned by academics who have tried to make originalism a coherent account of constitutional meaning.<sup>52</sup> The essay would actually be stronger from an academic point of view, I think, were Smith to draw on more sophisticated (still conservative) originalisms, and in particular on the distinction between interpretation and construction, which would allow him to use his revised narrative as a source of constitutional interpretation, not simply as the background for the current state of things. Here too the genre’s limits appear: Readers of extended opinion essays are not up on debates within originalism, and the essay would be less effective with that audience were it to get much below the surface of everyday, lay originalism.

Finally, I have to mention what seems to me a serious lapse in judgment in which accuracy has pretty clearly been subordinated to rhetorical effectiveness. Smith discusses *Christian Legal Society v. Martinez*,<sup>53</sup> in which the Supreme Court upheld against a First Amendment challenge a public law school’s policy requiring that student organizations accept as members “all comers.”<sup>54</sup> That the policy was an all-comers one was central to the majority’s analysis of the constitutional issue. Smith’s

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48. *Id.* at 7–8, 10–11.

49. *Id.* at 11.

50. *Id.* at 12–13.

51. *See, e.g., id.* at 63–65 (describing actions taken immediately after the Amendment’s adoption and criticizing those whose analyses fail to take those actions seriously enough in formulating the Amendment’s implicit principles).

52. *E.g.,* JACK M. BALKIN, *LIVING ORIGINALISM* 7–8 (2011) (criticizing the principle of original expected application as “unrealistic and impractical”).

53. 130 S. Ct. 2971 (2010).

54. *Id.* at 2978.

exposition is quite misleading. He accurately says that the Court interpreted the Constitution to permit “viewpoint neutrality in application.”<sup>55</sup> Then he gives readers Justice Alito’s analysis of what Smith acknowledges was a different policy. The quotation describes a policy, which the law school had previously had but abandoned during the course of the litigation, that is expressly *not* viewpoint neutral in application: “[T]he policy singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. An environmentalist group was not required to admit students who rejected global warming.”<sup>56</sup> Smith says that this quotation “point[s] out the implications of this approach,” where the referent of “this” is “viewpoint neutrality in application.”<sup>57</sup> It doesn’t. It’s reasonably clear that Justice Alito didn’t believe for a minute that the law school actually enforced an all-comers policy against environmental and nonreligious groups (and my guess is that he was right to be skeptical), but the lawyers for the Christian Legal Society had made a strategic decision to stipulate that the law school did adhere to an all-comers policy.<sup>58</sup> Given the procedural posture of the case, it’s pretty shoddy to use an example of the implications of an approach, the constitutionality of which the Court did not address, as the basis for criticizing the Court’s actual holding.

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55. SMITH, *supra* note 2, at 160.

56. *Id.* (quoting *Christian Legal Soc’y*, 130 S. Ct. at 3010 (Alito, J., dissenting)).

57. *Id.*

58. *See Christian Legal Soc’y*, 130 S. Ct. at 2982–84 (finding that the parties were bound by their joint stipulation that the all-comers policy was imposed on all organizations).