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More “Vitiating Paradoxes”: A Response to Steven D. Smith—and *Smith*

Paul Horwitz*

INTRODUCTION

If I were to select a candidate for Legal Theory Trends That Should Have Been, one of my first nominees would be Conservative Critical Legal Studies. The list of key practitioners in the field would, I admit, be tiny. But one of its most honored members would be Steven D. Smith.¹

Of course there is something puckish in this description. The positions Smith argues for, or at least treats as worthy of consideration, are not usually associated with the Critical Legal Studies (CLS) movement, which is generally assumed, both in the popular imagination and by many of its less supple academic fans, to be entirely a creature of the Left.² But at least a few observers have long understood that the CLS approach, while it may be intrinsically radical, is not intrinsically tied to the Left.³

In particular, two central CLS themes—the “identification, in numerous

* Gordon Rosen Professor, University of Alabama School of Law. I am grateful to Rick Garnett for comments. I have learned from Steven D. Smith for years, as a reader, friend, and briefly as a visiting professor at his home base, the University of San Diego School of Law. I cannot express strongly enough my personal and professional admiration for him. Any errors in this piece are, of course, his alone.

1. Warren Distinguished Professor of Law, University of San Diego School of Law. Smith is also the co-director of both the Institute for Law & Religion and the Institute for Law & Philosophy at USD.

2. See generally Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

3. In his “political history” of the CLS movement, however, Mark Tushnet writes that CLS, rather than cohering around a set of key propositions, is (or was) simply “a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy.” Tushnet, *supra* note 2, at 1516. “On this view,” he adds, “the project of critical legal studies does not have any essential intellectual component.” *Id.*

substantive areas of law, of paired oppositions and standard arguments deploying sets of claims from one side of those oppositions against sets drawn from the other side,"⁴ with the inevitable effect of destabilizing or heightening the visible contradictions in those sets,⁵ and the related sense of "alienation from, or as expressed within, the legal system"⁶—are no political side's sole preserve. To the extent that a common, or key, CLS move is to "recast the assertions of mainstream scholars as doubts,"⁷ or to "take mainstream claims one at a time, severing them from their fluid interrelationship with their negation in mainstream work, and extend them seriously until they succeed or collapse"⁸—usually the latter—nothing requires that move to end in a particular political location (or to end at all).

During CLS's prime, few people focused on this fact. Many members of the Left were eager to claim Critical Legal Studies for themselves;⁹ many members of the Right were eager to pin it on the Left; and most members of both sides were unable to see beyond their own particular political moment.¹⁰ But some did recognize it.¹¹ Thus, in 1991 Sanford Levinson pointed out "the possibility that the label Critical Legal Studies, if it evokes a certain way of understanding law, may lend itself just as easily to a right-wing argument as to the leftish ones identified with it."¹²

In the same article, Levinson pointed out that ideas are subject to "ideological drift," which occurs when "positions identified at a particular

4. Tushnet, *supra* note 2, at 1524.

5. Cf. PIERRE SCHLAG, THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 295 (Stanley Katz ed., 2009) (characterizing the work of Roberto Unger and Duncan Kennedy) ("[L]aw, both as pedestrian doctrine and as high theory, was riven with contradictory rules, policies, and imperatives. CLS thinkers viewed these contradictions as structural and incapable of intellectually respectable resolution . . .").

6. Tushnet, *supra* note 2, at 1525.

7. David Kennedy, *A Rotation in Contemporary Legal Scholarship*, 12 GERMAN L.J. 338, 350 (2011).

8. *Id.* at 350–51.

9. See E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL'Y 415 (2000).

10. See generally *id.*

11. *Id.*

12. Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?)*: *The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1252 (1991) (book review). He adds: "As Robin West has recently reminded us, . . . 'legal instrumentalism,' a view that can easily be linked with the CLS critique of legal formalism, 'can be put to either radical, liberal, or conservative political ends.'" *Id.* at 1251–52 (quoting Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 661 (1990)).

moment in history with a given political stance, come at a later point to be identified with quite different stances."¹³ We might currently be experiencing just such a moment of ideological drift. A high consciousness of the contradictory nature of law and its standard moves, and a strong sense of alienation from legal culture, are reactions that might come today from a very different part of the political spectrum than in the 1980s. Today, that feeling may be especially conspicuous for members of illiberal groups, and those who share, belong to, or are sympathetic to the kinds of religious views and groups that face hostility from conventional legal liberal thinkers, or whose claims are given short shrift by the mainstream.¹⁴ There has always been a strain of Critical Legal Theory that carries a strong religious component.¹⁵ It should thus not be entirely surprising or out of the question that the banner of CLS, having mostly been dropped by the Left, might be picked up by some radically religious conservatives.¹⁶ If so, they would be well advised to start by reading Smith's work.

I do not mean to caricature or straitjacket Smith too much with this description. At times, particularly early in his career, the kinship between Smith and CLS was clearer on its face, and appeared to involve something in the water in Colorado.¹⁷ But Smith has written much and well, and in a highly nuanced fashion, and I would be reluctant to lock him into a particular jurisprudential category or description. I would be even more reluctant to attempt to categorize confidently his political or religious views. I do not think he would take offense, however, if I suggested that he is both politically and culturally conservative and deeply religious. He is also a

13. *Id.* at 1251 (citing J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383 (1990)).

14. See Gabriel Arana, "Religious Liberty": *The Next Big Front in the Culture Wars*, THE AMERICAN PROSPECT (Nov. 8, 2013), <http://prospect.org/article/religious-liberty-next-big-front-culture-wars>.

15. See Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515, 528–30 (2009) (emphasizing a strain of CLS that linked the indeterminacy critique of law to a deeper "spiritual and moral foundation," and arguing that "CLS 'stopped,' or perhaps 'paused,' about fifteen years ago because it lost track of this spiritual and moral foundation").

16. See generally *id.*

17. See, e.g., PAUL F. CAMPOS ET AL., *AGAINST THE LAW* (Neal Devins & Mark A. Graber eds., 1996) (a CLS-inflected collection by Smith and two colleagues, all of whom taught at the University of Colorado's law school at the time; it bears emphasis that the other authors did not necessarily share Smith's ideological or religious views). See also Levinson, *supra* note 12, at 1252 (suggesting that Robert Nagel, another Colorado colleague of Smith's, might make up one of the very few members of the "right[] wing of Critical Legal Studies.").

consummate observer, and heightener, of contradictions in church-state law.¹⁸ His Brandeis Lecture¹⁹ (like the book from which it is drawn)²⁰ draws on some of these tensions or contradictions—what he eloquently calls “potentially vitiating paradox[es]”²¹—that threaten to “make religious freedom a vulnerable constitutional commitment,”²² especially in the face of “contemporary liberal egalitarianism.”²³

By coming unmoored from deeper religious views and rationales and coming to rest on the “logic of secular neutrality,” Smith suggests, religious freedom ends up “turn[ing] on and negat[ing] its own supporting rationales. It is like the snake that circles around and swallows itself by the tail.”²⁴ It strangles itself, he says in Crit-like language, with its own “self-subverting logic.”²⁵ Religious freedom is indeed in jeopardy.²⁶ But not from the usual suspects—or what *used* to be the usual suspects and are still viewed as such in many liberal circles.²⁷ Paradoxically, “the threat comes not so much from religious conservatives who reject constitutional commitments as . . . from secular egalitarians who purport to be carrying out the commands of the Constitution’s (self-subverting) commitment to religious freedom.”²⁸ If religious freedom survives, at least as a legal matter, in the face of its own

18. Although not the only one. A similar spirit is present in Frederick Mark Gedicks’s fine book, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995).

19. Steven D. Smith, *The Last Chapter?*, 41 PEPP. L. REV. 903 (2014).

20. See STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* (2014) [hereinafter SMITH, *RISE AND DECLINE*].

21. Smith, *The Last Chapter?*, *supra* note 19, at 907.

22. *Id.* at 906.

23. *Id.* at 919.

24. *Id.* at 907.

25. *Id.*; see also SMITH, *RISE AND DECLINE*, *supra* note 20, at 168 (“In the revised story [of American religious freedom,] religious freedom is being subverted by . . . religious freedom itself (as currently understood), which through its commitments to equality and neutrality and secular government has effectively deprived itself of its historical reasons for being. Thus enfeebled, and faced with being flattened by the juggernaut of ‘equality,’ religious freedom’s long-term chances do not look promising.”).

26. See Arana, *supra* note 14.

27. I am less convinced that the mass of contemporary church-state legal scholars, of whatever political stripe, hold the view that Smith suggests is held by liberals in general—namely, that the primary threat to religious freedom comes from religious conservatives who would tear down the wall of separation between church and state and erect a Christian political-religious establishment in its place. But it is certainly true that many generally educated political liberals believe just that.

28. SMITH, *RISE AND DECLINE*, *supra* note 20, at 11.

contradictions and tensions, it does so only because of the Supreme Court's "flagrant inconsistency in adhering to announced doctrines."²⁹

By setting out the problems with what he calls the "standard story" of American religious freedom,³⁰ Smith clears space in which to offer up a "revised version of American religious freedom."³¹ That version includes, quite prominently, an idea that has recently come into vogue among a set of American church-state scholars (myself included):³² a revival of "the classical commitment to freedom of the church,"³³ which in the American version entails "a commitment to the churches' autonomy from the state."³⁴ Some scholars (myself more or less included) contend that freedom of the church best explains outcomes such as the Supreme Court's unanimous decision upholding the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.³⁵

This is a hurried précis of a full and nuanced argument. I have not covered every caveat or complexity. Moreover, I have taken much from Smith's excellent book that falls outside the scope of his lecture, which focuses more on the "potentially vitiating paradox[es]" that undermine modern American religious freedom than on freedom of the church as a preferable route to understanding and preserving American religious liberty.³⁶ But what interests me at present is the relationship between Smith's approach and what I take to be his preferred outcome. In Smith's critical account, the conventional version of American religious freedom suffers from tensions, contradictions, and paradoxes.³⁷ The well-rehearsed defenses of this conventional version can only shore it up for so long. Perhaps it is better, then, to return to the more traditional "freedom of the

29. Smith, *The Last Chapter?*, *supra* note 19, at 124.

30. SMITH, *RISE AND DECLINE*, *supra* note 20, at 1.

31. *Id.* at 7.

32. See, e.g., PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* ch.6 (2012); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973 (2012); Paul Horwitz, *Churches As First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049 (2013).

33. SMITH, *RISE AND DECLINE*, *supra* note 20, at 169.

34. *Id.* at 70.

35. 132 S. Ct. 694 (2012).

36. *But see* Smith, *The Last Chapter?*, *supra* note 19, at 906–07 (summarizing the concept of "freedom of the church").

37. See e.g., Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41 (2003).

church” version of religious freedom.³⁸ That version would focus less on “justice” and more on “jurisdiction.”³⁹ It would emphasize James Madison’s famous statement that religion is “a domain ‘wholly exempt from [government’s] cognizance.’”⁴⁰ It would treat as central to American religious freedom the status of the church, and of individual religious conscience, as “a *jurisdiction* beyond the regulatory reach of this-worldly officials or authorities.”⁴¹

I find much to admire in Smith’s ironic, gentle, relentless skepticism about the standard story of American religious freedom. I am, to be sure, not entirely convinced by it. I am not persuaded (and Smith does not quite argue) that arguments for religious freedom in a more secular age involve a *necessary* “vitiating paradox” in which, if “religion is wholly outside the state’s cognizance,” it “follow[s] that the state is precluded from acting on religious rationales.”⁴² I do not believe it is true, as a matter of law or of sound and still fairly conventional legal theory, that “the state cannot act on or endorse any religious views,” or that the limitations on the degree to which the state *qua* state *can* endorse religious views necessarily mean that it cannot continue fairly robustly along the path carved out by the “religious rationales . . . that produced the commitment to religious freedom in the first place.”⁴³ I do believe the state itself, in an essentially official capacity, is precluded from making statements that consist of strong religious *outputs*: of strong statements about the truth or falsity of ultimate religious questions. But I do not believe this limitation precludes individual politicians from drawing in many instances on religious *inputs*—religious motivations, arguments, and sources—in deliberating on questions of public policy.⁴⁴

Still, the farthest I am willing to go in defending the input/output

38. SMITH, RISE AND DECLINE, *supra* note 20, at 170.

39. *Id.* at 105.

40. *Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in THE SACRED RIGHTS OF CONSCIENCE 309, 309 (Daniel L. Dreisbach & Mark David Hall eds., 2009)).

41. SMITH, RISE AND DECLINE, *supra* note 20, at 169.

42. Smith, *The Last Chapter?*, *supra* note 19, at 907.

43. *Id.*

44. See generally PAUL HORWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION (2011) [hereinafter HORWITZ, THE AGNOSTIC AGE]. Andrew Koppelman, at least as I understand his work, makes a similar distinction between religious inputs and outputs in describing and defending what he calls the “American” version of religious neutrality. See generally ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013).

distinction is to conclude that it is *mostly* workable. It is certainly not perfect. It is subject to sound (but not, I hope, fatal) criticism at the level of theory and in particular borderline cases.⁴⁵ In large measure, I owe my reluctance to say more than that this distinction (or other aspects of the doctrinal elements of the "standard" version of religious freedom law) is workable to Smith's searching, critical explorations of the tensions in church-state law and theory. Whether one accepts Smith's "revised version" of American religious freedom is a separate question.⁴⁶ But Smith makes a strong case for doubting that the "standard version" is the whole story or that it is completely sustainable in its present form—especially as religious freedom faces substantial pressure from powerful egalitarian impulses.

What I wonder, though, when reading this Lecture and other provocative work by Smith, is where—if anywhere—the "potentially vitiating paradoxes" end. A critical sensibility, once set loose, is not easily cabined. Other tensions and seeming contradictions, perhaps an endless number, can always be found. And although Smith's work shows that the identification of tensions in standard doctrinal or theoretical legal moves⁴⁷ can serve the Right as well as the Left, the fact remains that this critical lens can point in either direction.⁴⁸

This is especially true for the Religion Clauses. The perception of tension between the Free Exercise Clause and the Establishment Clause may not be inevitable. As Smith says of the standard version of American

45. See generally HORWITZ, *THE AGNOSTIC AGE*, *supra* note 44, at 120–21, 305–06 (concluding, after offering an "empathetic agnosticism" approach to the Religion Clauses, that even this approach is not immune from the underlying, built-in tensions that persist in the relationship between religion and the liberal state).

46. I would describe myself as a fellow traveler with respect to freedom of the church rather than as a full adherent to Smith's views. I believe that churches and other religious organizations should enjoy a substantial measure of institutional autonomy under the law, but perhaps not for quite the same reasons as Smith and certainly not with all the same outcomes. Happily, those differences are well outside the scope of this Response.

47. I don't think Smith's critiques of standard views in law and religion would properly be termed as "trashing," and I wouldn't saddle them with that label, but they bear a fair resemblance to it. See Mark Kelman, *Trashing*, 36 *STAN. L. REV.* 293, 293 (1984) (defining "trashing" as follows: "Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (not the germ of truth) in the internally contradictory, incoherent chaos we've exposed."); see also Jeffrey L. Harrison & Amy R. Mashburn, *Jean-Luc Godard and Critical Legal Studies (Because We Need the Eggs)*, 87 *MICH. L. REV.* 1924, 1937 (1989) (describing the deconstructionist CLS method as "deconstructing or demystifying an area of law . . . to make its conceptual structures visible and bare to scrutiny").

48. See generally Smith, *The Last Chapter?*, *supra* note 19.

religious freedom, the "self-subverting logic" of the Religion Clauses "is hardly inexorable."⁴⁹ But it is a common perception,⁵⁰ and for good reason.⁵¹ Attempts to ease that tension, or simply to reach what the writer thinks is a sound interpretation of one or the other clause, by treating that clause expansively or narrowly,⁵² will naturally raise questions about why those arguments do not apply in principle to the other clause as well. But the tendency to aim one's critiques at one clause but not the other, or to find incoherent tendencies in the doctrine of both clauses but recommend very different and not necessarily reconcilable reforms for each of them, is not, I think, the unique to "secular egalitarians."⁵³ It applies across the board.

Take one example—the primary example I wish to discuss. At one time, Smith argues, the "American settlement" on church-state issues constructed "a complex, ongoing compromise on the potentially incendiary subject of religion."⁵⁴ The compromise was jurisdictional rather than universal or perfectly principled: "[M]ore providentialist positions might prevail at one time or in one jurisdiction; more secularist positions could be adopted at other times and in other jurisdictions. School prayer could be (and *was*) forbidden in one state, permitted in another."⁵⁵

Ultimately, according to this story, "the modern Supreme Court substantially undid the American settlement and reduced the possibilities of compromise by expanding the role of judge-enforced hard constitutional law

49. *Id.* at 105; *see, e.g.*, Leo Pfeffer, *Religious Freedom and the American Community*, 28 JUDAISM 137, 142 (1979) (quoted in J. David Holcomb, *Religion in Public Life: The "Pfefferian Inversion" Reconsidered*, 25 J.L. & RELIGION 57, 60 n.20 (2009–2010)). *But see* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 673 (1980) (calling that tension "ineluctable," despite the title of the article).

50. *See, e.g.*, *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) ("Numerous cases considered by the Court have noted the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause.").

51. *See also* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 569–70 (1991) ("The tension [between the Religion Clauses] arises at the boundary between religion and nonreligion; the Free Exercise Clause suggests the privileging of religion over nonreligion, whereas the Establishment Clause suggests the normative equality of the two"). *See generally* Choper, *supra* note 49.

52. *Cf.* *Thomas v. Review Bd.*, 450 U.S. 707, 720–21 (1981) (Rehnquist, J., dissenting) (attributing the "'tension' between the Free Exercise and Establishment Clauses of the First Amendment" that the majority "correctly acknowledges" in part on the Court's "overly expansive interpretation of both Clauses").

53. SMITH, RISE AND DECLINE, *supra* note 20, at 11.

54. Smith, *The Last Chapter?*, *supra* note 19, at 122.

55. *Id.* at 122–23.

in the domain of religion.”⁵⁶ Smith would have us look back to the “soft constitutionalism” represented by the earlier “ongoing compromise” on religious matters,⁵⁷ in which “constitutional questions [involving religion] could be argued, and different states and localities could reach their own conclusions.”⁵⁸ This approach “worked,” Smith says.⁵⁹ It did “what for centuries many had thought impossible—namely, to take a mass of individuals and groups embracing a multitude of different faiths and, without suppressing their differences, to hold them together as a single community.”⁶⁰

This is an interesting picture. As presented, it is attractive enough. It lacks the brittleness of the modern approach, whose sometimes dogmatic and overconfident insistence that “constitutional decisions must be ‘principled’”⁶¹ ends up by demanding more from law and logic than they can reasonably be expected to provide, and reduces “opportunities for pragmatic compromise.”⁶² But I wonder about two aspects of this account.

First, in what way did the “soft constitution” of religion *work* in the nineteenth century—or the “hard constitution” of the past 75 years or so *not* work? Smith notes that the American landscape of the nineteenth century, with its “soft constitution” regime, featured the repression—sometimes “ugly, even violent” repression—of many members of minority faiths.⁶³ He does not turn a blind eye to this history; he just offers a cheerier assessment of it.⁶⁴ Of course everyone is entitled to his or her own interpretation of history, up to a point, and it is generally a good thing to unsettle historical narratives that we have taken to repeating by rote. Still, must we accept that the nation that saw repeated anti-Catholic riots,⁶⁵ governmental hounding of the Mormons,⁶⁶ the order to expel Jews from Union-controlled regions of the

56. *Id.* at 123.

57. See SMITH, RISE AND DECLINE, *supra* note 20, at 94–110.

58. *Id.* at 100.

59. *Id.* at 103.

60. *Id.*

61. Smith, *The Last Chapter?*, *supra* note 19, at 925.

62. *Id.*

63. SMITH, RISE AND DECLINE, *supra* note 20, at 103.

64. *Id.*

65. See, e.g., John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 300 (2001).

66. See generally EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900*

South,⁶⁷ and the Trail of Tears⁶⁸ really "became one (diverse and often turbulent) People?"⁶⁹ Does "turbulent" really do it justice? Did the violently quarrelsome people of our nation really earn that capital "P"?

To apply Smith's assessment of his counter-narrative elsewhere, if we can conclude that *that* settlement "worked," then what should we make of the current state of American religious freedom? I share many of Smith's views about what is right and wrong with particular modern church-state court decisions and scholarly views. Many of the cases that disappoint him disappoint me too, and we rejoice in some of the same decisions. We are both critical of the current administration's treatment of religious liberty. We agree that a slide into too thorough-going a form of secular egalitarianism, without a due regard for the claims of religious liberty and a strong interest in religious accommodation, even where it interferes with widely held secular goals, would be "deeply unfortunate."⁷⁰

Even so, and despite the universalist nature of the claims made by secular egalitarians under a "hard constitution" model, compared to Philadelphia in the 1840s, things look pretty good. The claims made by modern secular egalitarians in the area of religion are excessive, in my view, but they are still a long way from disastrous. Failing to offer a generous enough set of accommodations for religious groups in the provision of health-care benefits including contraceptives or abortifacients, which may then be used or not by individual employees, is a long way from anti-Catholic riots or the attempted expulsion of Jews from United States territory. It is true that the logic of arguments made by some secular egalitarians today could extend further. But not all of them accept all of these arguments, and not all of them are willing to be carried away entirely by mere logic in any event. Nor, except through hindsight, would we have any reason to conclude that the "diverse and often turbulent" approach of the nineteenth century settlement would necessarily have turned out as well as it

(1988).

67. See JONATHAN D. SARNA & DAVID G. DALIN, RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 131–32 (1997). The order—issued by General Ulysses S. Grant—was countermanded by President Lincoln. *Id.*

68. See generally CLARA SUE KIDWELL ET AL., A NATIVE AMERICAN THEOLOGY 129–48 (2001) (discussing religious effects of removal of Native Americans from tribal lands); AMY H. STURGIS, THE TRAIL OF TEARS AND INDIAN REMOVAL (2006).

69. SMITH, RISE AND DECLINE, *supra* note 20, at 104.

70. *Id.* at 141.

did. "A page of history" is still "worth a volume of logic," and the history of our own times is not yet written.⁷¹

To be clear, Smith describes the current state of affairs as a threat to religious freedom, not a disaster. Nor, to be sure, does he ignore the problems of the earlier era of soft constitutionalism. Still, I think it is fair to say that a reader of this lecture, and of Smith's book, will come away with a strong impression that he is quite optimistic about the American state of religious freedom under the earlier settlement and quite pessimistic about its prospects under modern conditions. The earlier settlement worked, while the current one may be nearing its end. "Religious freedom *R.I.P.*," as he says.⁷²

I am not as convinced of this as Smith. "Forced to choose between the standard and revised stories" of American religious freedom, Smith writes in his book, "I would favor the revised story as more illuminating, more perspicacious, ultimately more true."⁷³ Having been exposed to his critical treatment of the "standard story," however, I find myself equally skeptical of the revised version. Having been exposed to both narrative and counter-narrative, I find myself questioning why we should be forced to choose, or at least whether we have any adequate basis for doing so.

My second question has less to do with history than with consistency. Of course, one does not have to be a card-carrying Crit, if any are left, to look for inconsistencies and tensions in legal doctrine and theory. But one point of this Response is that Smith himself, with his skillful critical approach, has helped accustom us to looking for inconsistencies and self-subverting logic in church-state law and theory. Once one starts looking, it is difficult to stop. Smith argues that the "soft" constitutional approach works better in some ways than the "hard" one. He suggests that "a better way of returning to a 'softer' constitutionalism would be through tightening up standing requirements, as recent decisions have done (arousing the ire of constitutional scholars)."⁷⁴ As far as I can tell, however, his recommendations for tightened standing requirements are limited to the

71. See *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

72. Smith, *The Last Chapter?*, *supra* note 19, at 905.

73. SMITH, *RISE AND DECLINE*, *supra* note 20, at 13.

74. Smith, *The Last Chapter?*, *supra* note 19, at 926 n.93 (citing Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN'S L. REV. 407 (2011) [hereinafter Smith, *Soft Constitution*]).

Establishment Clause alone.⁷⁵ Why not bring "soft" constitutionalism back to the Free Exercise Clause as well? One could do so by similarly tightening up standing requirements for that clause. Or one might choose other means, such as demanding a serious personal burden before an individual can bring a viable Free Exercise claim, looking at such claims more skeptically at the threshold level than we currently do.

It is true that many claims that might be viable under the Free Exercise Clause today, or under federal or state legislation applied "in accordance with received understandings of what the free exercise of religion means,"⁷⁶ might fail as a result. If an Establishment Clause claim should not be sustainable for a mere "psychic injury or injury-by-observation,"⁷⁷ as Smith suggests, then we might also hesitate before allowing a mere "psychic injury" to sustain a Free Exercise claim. For various reasons, many claims brought against aspects of the Affordable Care Act might be among the losers.⁷⁸ Beyond a certain point, the Obama administration does not appear willing to compromise on this issue at present, any more than nineteenth century American Protestants were willing to compromise with Catholics. But that might not be reason enough to reject this approach. After all, as Smith writes, "compromise on seemingly uncompromisable matters has been an essential component in the American political tradition."⁷⁹

One possible explanation for the inconsistency⁸⁰ is that the

75. Perhaps I am mistaken. But the article cited above, from which the discussion of soft constitutionalism in his recent book is drawn, mentions the Free Exercise Clause only in passing.

76. Steven D. Smith & Caroline Mala Corbin, Debate, *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261, 262 (2012).

77. Smith, *Soft Constitution*, *supra* note 74, at 440.

78. *See, e.g.*, Transcript of Oral Argument, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Mar. 25, 2014), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf.

79. Smith, *The Last Chapter?*, *supra* note 19, at 924.

80. There is another answer, at least for matters covered by federal legislation such as the Religious Freedom Restoration Act (RFRA)—which would include the contraceptive mandate provision of the Affordable Care Act—or the Religious Land Use and Institutionalized Persons Act (RLUIPA): whatever the Free Exercise Clause itself might require, a compromise *has* been offered through that legislation, and it tilts the scales in favor of religious claimants. My concern is mostly with the Religion Clauses themselves. But if we accept this argument, I would think that Smith would then have a problem with RLUIPA, at least, to the degree that it imposes a particular religious freedom regime on the states. *Cf.* Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 61 (1996) (arguing, with respect to the push for the RFRA legislation, that "conservative religious groups were willing to join an assault on self-government and federalism in pursuit of a promise of preferential treatment."). Smith does appear,

Establishment Clause has more of a "jurisdictional" character than the Free Exercise Clause. But that is a contested historical matter.⁸¹ Moreover, the decidedly mixed history of individual religious exercise in the nineteenth century suggests that the concept of free exercise of religion was no less "soft," and no less varied across time and jurisdiction, than the concept of non-establishment.

Furthermore, the *reasons* that Smith marshals in support of a "soft" Establishment Clause are not just historical in nature. He argues that there is an underlying value to ongoing contestation and compromise itself, "turbulent" though the process may be.⁸² That value, it seems to me, applies to the Free Exercise Clause as well (or as poorly) as the Establishment Clause. So, if we think soft constitutionalism is a valuable approach to church-state issues in general, then perhaps we ought to adopt it for both clauses, tightening up standards across the board for both Religion Clauses and handing matters back to the political process of multiple jurisdictions. Today, in one state, religious groups will lose the ability to fire sinful employees or refrain from subsidizing the use of abortifacients. Tomorrow, in another state, the situation might be different.

Another alternative, although a partial one, is to accept a more straitened Free Exercise Clause but insist that it still, at a minimum, requires the state not to *discriminate* against religion. Take the current and controversial contraceptive mandate cases as an example. One could argue that even if neutral and generally applicable laws give rise to no Free Exercise claim,⁸³

in any event, to believe that all that is required to make out a *prima facie* claim, "under both the Free Exercise Clause and RFRA, is whether a person [or employer] *sincerely believes* that compliance with [a law] would violate religious duties." Smith & Corbin, *supra* note 76, at 263 (emphasis in original). If we can imagine returning to a "soft constitution" for the Establishment Clause by tightening up standing requirements, it is surely not beyond imagining that we could do the same thing for the Free Exercise by raising the necessary showing for a Free Exercise claim above this fairly undemanding threshold.

81. For arguments that the Establishment Clause, at least as it was incorporated through the Fourteenth Amendment if not before, is and was intended to be just as national in scope as any other right so incorporated, see, for example, Steven K. Green, "Bad History": *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1720–28 (2006); Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 774–80 (2005); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1088 (1995) ("To the extent that incorporation of any right can be justified as a matter of historical intent, there is *no less reason* to incorporate the Establishment Clause than any other provision in the First Amendment.").

82. SMITH, RISE AND DECLINE, *supra* note 20, at 104.

83. See *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1991).

thus returning more free exercise controversies to the realm of politics and the "soft constitution," the contraceptive mandate itself "is riddled with such substantial exceptions that it cannot be regarded as a neutral law of general applicability."⁸⁴

But that is not a wholly satisfying answer. For one thing, if one is going to take a broad view of what constitutes discrimination for Free Exercise purposes, then one might believe that similar treatment is needed for claims under the Establishment Clause. Some treatments of current Free Exercise doctrine by both courts and scholars suggest that once a law makes exceptions for other situations, someone who is denied a religious accommodation from the same law is entitled to receive strict judicial scrutiny of that denial.⁸⁵ On this view, whenever "the legislature enacts underinclusive laws and thereby chooses to accommodate certain 'harmful' secular conduct but not 'harmful' religious conduct, it is the duty of courts to intervene and protect the free exercise of religion" by applying strict scrutiny.⁸⁶ Judges who apply this rule broadly and skillfully may "find they have significant flexibility to relieve religious actors from laws or policies that appear to be neutral and generally applicable."⁸⁷

But if we apply such a rule to the Free Exercise Clause, and if—as most scholars and judges seem to agree—the Establishment Clause forbids at least some forms of discrimination, then surely we should end up with a stricter Establishment Clause as well. Surely a government that makes or mandates some forms of religious expression—school prayer, a Ten Commandments display, a Christian cross at a memorial site—but does not allow or provide for expressions of other faiths, or for non- or anti-religious expressions,, gives rise to the same suspicions of discrimination that would be triggered under a similar reading of the Free Exercise Clause.

Moreover, as Smith has recognized here and elsewhere, this whole enterprise of relying on "discrimination" or "inequality" to salvage the Free Exercise Clause is fraught with conceptual thinness and practical difficulty. As he writes, and I agree, "the concept of equality has no universal or

84. Smith & Corbin, *supra* note 76, at 261.

85. See, e.g., Nelson Tebbe, Smith in *Theory and Practice*, 32 CARDOZO L. REV. 2055, 2058–59 (2011).

86. Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 875 (2001).

87. Tebbe, *supra* note 86, at 2059.

intrinsic substantive content or implications.”⁸⁸ It “surely does not entail the absurd notion that all persons, situations, and cases must always be treated in exactly the same way.”⁸⁹ Critical analysis—the same critical analysis that reveals that the secular egalitarians’ appeals to the principle of equality rests on an unclear foundation—suggests that an attempt to salvage claims under the Free Exercise Clause, in the face of ostensibly neutral and generally applicable laws, by appealing to a principle of non-discrimination will be deeply troubled if not incoherent.⁹⁰

My point, in sum, is this: It is Smith’s finely honed critical sensibility that allows us to see problems with various central concepts of current Religion Clause doctrine and theory—“neutrality,” “equality,” “nondiscrimination,” and so on. He clears the ground for a return to a jurisdictional or soft constitutional approach to (at least one of) the Religion Clauses, or reveals current approaches to be so problematic that it is at least worth *thinking* about doing so. In that sense, and acknowledging the crudeness of such labels, it shows that a critical sensibility can lead to proposals for new or revived approaches that appeal to the (religious) Right, not just the (secular) Left. But the same critical sensibility should also lead us to wonder whether those approaches are not ultimately equally inconsistent, incoherent, or unattractive. Without all the folderol about Critical Legal Studies, Alan Brownstein makes the point bluntly and well: “[C]ommentators supporting a rigorously enforced Free Exercise Clause but a diminished Establishment Clause, or vice versa, are likely to discover that their critiques of one clause have severely undermined the other.”⁹¹

One answer to this, of course, is to favor something like a “soft constitutional” approach for *both* clauses, one that returns more disputes

88. Smith, *The Last Chapter?*, *supra* note 19, at 916. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

89. Smith, *The Last Chapter?*, *supra* note 19, at 916; see also Steven D. Smith, *Religious Freedom and Its Enemies, or Why the Smith Decision May Be a Greater Loss Now Than It Was Then*, 32 CARDOZO L. REV. 2033, 2049 (2011) [hereinafter Smith, *Religious Freedom*] (“Live disagreements are not over *whether* people should be treated equally, but over what counts as equal or unequal treatment—over what factors and considerations are morally and legally relevant.”).

90. See generally Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519 (1994).

91. 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, 1705–06 (2011).

over *both* clauses to the political process.⁹² Under current doctrine, that would mean supporting an Establishment Clause with tighter standing requirements that leans more closely to the jurisdictional model, while accepting the Supreme Court's decision in *Employment Division v. Smith*, which eliminated a right to a judicially compelled accommodation for religious claimants in the face of neutral and generally applicable laws.⁹³

In fact, that approach seems to be gaining traction. When it was issued, *Smith* was the target of sustained and emphatic criticism from many church-state scholars holding various political views.⁹⁴ In recent years, however, it seems to me that we have witnessed a growing reconciliation with *Smith*. Obviously the "secular egalitarians" always favored it. But, increasingly, so do what we might label the "religious conservatives."⁹⁵ If they are not strongly in favor of *Smith*, more of them are at least "relatively blasé" about it.⁹⁶ Although religious conservatives still champion religious freedom, they also believe that *Smith*'s criticisms of judicially mandated religious accommodations from neutral, generally applicable laws raised important concerns about "institutional competence, comparative advantage, federalism, and the limits of judicial review."⁹⁷ As a matter of my own understanding of the Religion Clauses, I do not favor that approach. But it at least has the apparent virtue of consistency.

As I understand him, Smith himself does not favor *Smith*. If anything, as the title of a recent article of his suggests, he believes it "may be a greater loss now than it was then."⁹⁸ Both because of the problems with that decision and the supporting concepts—such as equality, neutrality, and general applicability—that a critical examination reveals, and because of the general rise of expansive secular egalitarian laws and sentiments, Smith

92. Another, the one I tend to favor, emphasizes a "strong" Free Exercise Clause *and* a strong Establishment Clause. I suspect it is equally subject to some of the questions raised in the rest of this Article.

93. See *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1991).

94. See, e.g., Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1815–16 (2011).

95. SMITH, RISE AND DECLINE, *supra* note 20, at 11; see also Smith, *The Last Chapter?*, *supra* note 19, at 916–17.

96. Garnett, *supra* note 94, at 1817. I draw heavily on Garnett's article here, but I do not think he is the only person typically associated with conservatism who has come around to some degree on *Smith*, with the important caveats noted below.

97. Garnett, *supra* note 94, at 1821.

98. Smith, *Religious Freedom*, *supra* note 89, at 2033.

believes that *Smith* is unlikely to protect us against ongoing threats to religious exercise.⁹⁹ I agree with him. But, again, I wonder why a regime of judicial accommodations is not subject to the same critical analysis that *Smith* deploys to undermine modern Establishment Clause doctrine, and to the same suggestions that we tighten up standing requirements significantly.

Is favoring both *Smith* and a weaker or “soft” Establishment Clause more consistent and less subject to this kind of heightening of contradictions? Yes—and no. Here, the critical analysis is not so much about revealing direct contradictions or tensions between the two positions. Instead, it is about noticing all the “shoring up” work that this move requires, for those who would like to have *Smith* and a softer Establishment Clause—without giving up such things as the right of religious organizations to “discriminate.”

One such technique we have already seen is the insistence that even under the *Smith* regime, in which we “give to the political processes the bulk of the work of accommodating religion,” courts “can and should [still] enforce a no-discrimination-against-religion rule.”¹⁰⁰ For example, such a rule would require that, due to the existence of *some* exceptions to the contraceptive mandate in the ACA, any failure to provide full religious accommodation must be subject to strict scrutiny. But it seems to me that *Smith*’s critiques of equality and discrimination are applicable here, and that the expansive use of the neutrality and general applicability requirement of *Smith* to smoke out “discrimination” raises the same questions about “institutional competence” and “the limits of judicial review” that have led some to make peace with the *Smith* decision in the first place.¹⁰¹

The other salvaging technique is, in effect, the “freedom of the church” or “church autonomy” approach itself. On this view, even after *Smith*, the courts—not the political process, but the courts themselves—must insist upon and enforce the idea that “the right to religious freedom includes the freedom of religious communities to govern themselves with respect to

99. *See id.* at 2053.

100. Garnett, *supra* note 94, at 1825–26.

101. *Id.* at 1824. In correspondence with me, I should note, Professor Garnett has suggested that there is an important difference between judicial competence to smoke out discrimination in a statute or other governmental action, and judicial competence to balance the general costs, benefits, and scope of a possible accommodation of religious objections to a generally applicable statute. I think he is right about this, although I think a thoroughgoing “Crit” would conclude that the difference is one of degree, not kind.

matters of doctrine, discipline, and polity.”¹⁰² As the writer of these words (with which I agree, I hasten to add), Rick Garnett adds, “This last point is crucial.”¹⁰³

And so it is. For a variety of reasons that Smith canvasses, church autonomy is in some trouble these days, although not completely. The Supreme Court’s unanimous affirmation of the “ministerial exception” in *Hosanna-Tabor*,¹⁰⁴ with its strong statement that the First Amendment “gives special solicitude to the rights of religious organizations,”¹⁰⁵ indicates that *some* support for *some* version of “freedom of the church” is likely to continue for some time.¹⁰⁶ Yet a number of factors mentioned by Smith suggest that it will face increasing resistance or indifference. Those factors include increasing skepticism about whether “special protection for religious freedom” can be justified in principle;¹⁰⁷ what Smith calls generally “the challenge of modern equality;”¹⁰⁸ the sheer number of active faiths in the United States, which heightens the concerns about anarchy offered by Justice Scalia in *Smith*;¹⁰⁹ scandals involving the churches themselves;¹¹⁰ and changes in our “surrounding political culture,” such as the rise of religious believers with little commitment to a particular church and the increase in popular support for gay rights and women’s equality.¹¹¹ One might add to this the likelihood that some of those “religious conservatives who reject constitutional commitments” that Smith mentions—recall that they are the ones he describes as posing less of a threat to religious freedom than secular egalitarians¹¹²—might well prefer a highly narrow version of church autonomy, or an absolute rule subjecting churches to the force of law on an

102. *Id.* at 1827.

103. *Id.*

104. 132 S. Ct. 694 (2012).

105. *Id.* at 706.

106. Cf. Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 128 (arguing that, “[s]omewhat counter-intuitively, freedom of the church [in the United States] today is on a stronger footing precisely because it has become so chastened and reduced.”).

107. Smith, *The Last Chapter?*, *supra* note 19, at 904.

108. *Id.* at 912–18.

109. *See id.* at 932–33; *see also* *Emp’t Div. v. Smith*, 494 U.S. 872, 888 (1991).

110. Smith, *The Last Chapter?*, *supra* note 19, at 932.

111. *See id.* at 114 (citing, *inter alia*, Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 422 (2011)).

112. SMITH, RISE AND DECLINE, *supra* note 20, at 11 (suggesting that religious conservatives pose less of a threat to religious freedom than secular egalitarians). I do not necessarily disagree with this assessment, although I would note that it takes two to hold a culture war.

equal basis with everyone else, since that position would arm them with a basis to reject such things as the use of *shari'a* in interpreting or arbitrating Islamic contracts.¹¹³

So there are reasons to think church autonomy is in an unsettled position. For the reasons Smith has discussed elsewhere, those concerns are heightened under a regime of neutrality and general applicability, with all the questions and uncertainties that Smith's critical analysis of those concepts produces. Although the ministerial exception survived easily in *Hosanna-Tabor*, he is still correct that "[t]he difficulty of squaring even the minimal so-called 'ministerial exception from employment discrimination laws,' let alone more vigorous protections for churches or religious employers, 'with current Religion Clause doctrines reflects the unresponsiveness of those doctrines to emerging challenges.'¹¹⁴

We can thus understand why, for those who support a weakened Establishment Clause *and* a weakened Free Exercise Clause, but still want judges to protect the institutional rights of churches, some freestanding judicially enforceable notion of "freedom of the church" is "crucial."¹¹⁵ Viewed in this light, it may be seen less as a revival or reaffirmation of an idea that has been around for some time but obscured by other developments, or as an intriguing counter-narrative, and more as a salvaging technique. From this perspective, "freedom of the church" becomes a kind of saving construction of the Religion Clauses. It returns *some* church-state issues to the political process—whether to have school prayer or Ten Commandments displays, for instance—while holding back a trump card to play against antidiscrimination laws. This possibility calls to mind another aspect of Critical Legal Studies, although one that is hardly unique to that school of thought: the conclusion that "law is politics, all the way down."¹¹⁶

113. See, e.g., Jaron Ballou, *Sooners v. Shari'a: The Constitutional and Societal Problems Raised by the Oklahoma State Ban on Islamic Shari'a Law*, 30 LAW & INEQ. 309, 315–19, 333–36 (2012). See generally Paul Horwitz, *Rethinking the Law, Not Abandoning It: A Comment on "Overlapping Jurisdictions"*, 4 FAULKNER L. REV. 351 (2013).

114. Smith, *Religious Freedom*, *supra* note 89, at 2053.

115. Garnett, *supra* note 94, at 1827.

116. Tushnet, *supra* note 2, at 1539. Although I say it more than once in the text above, I should emphasize that I accuse no particular individual, including both Smith and Garnett, of conscious bad faith here. I assume that their arguments about both church autonomy and the "soft constitution" version of the Establishment Clause constitute their best understanding of what the Religion Clauses, properly interpreted, demand. To say that law is politics is not necessarily the same thing as saying that law is nothing *but* politics, or that legal practitioners are nakedly political. From a strictly

Presented so baldly, the idea that law is politics is a banal insight, one that is now widely accepted in the legal academy¹¹⁷ My point is not to lambaste those who are intrigued by the notion of church autonomy; I am one of those people. Nor is it to make an accusation of bad faith against those who, unlike me (or Smith), support church autonomy *and* are becoming reconciled to the *Smith* decision. There *are* good reasons to become reconciled to *Smith*, or at least to find it less troubling than its critics initially thought.

Still, I wonder whether a "revised version" of American religious freedom that retains *Smith*, but tries to maintain freedom of the church as a dike against "secular egalitarianism" or antidiscrimination laws, will succeed. More particularly, I wonder what happens once we accept the kinds of arguments that Smith so skillfully deploys about the incoherence or insufficiency of many guiding concepts in church-state legal doctrine. Smith does an excellent job of showing why those concepts have trouble doing all the work that is demanded of them: why those rules promise stability, predictability, and judicial manageability but cannot fully deliver. I suspect that if we applied the same critical tools and insights to the proposed alternatives that I have discussed here, we would find that taking a "soft constitution" approach to the Establishment Clause but not the Free Exercise Clause, or retrieving some notion of freedom of the church, are subject to similar instabilities. That may be an unfortunate or unsettling outcome, but we are obliged to apply the same critical tools across the board nevertheless.

external perspective, however, I do worry about the "salvaging" role that strong support for a judicially enforceable notion of church autonomy may play when combined with arguments for a "soft" approach to the Establishment Clause and growing support for the rule in *Smith*.

117. *See id.*