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## Book Reviews

**FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM.** By Steven D. Smith.<sup>1</sup> Oxford, New York: Oxford University Press. 1995. Pp. 174. Hardcover, \$38.00.

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One hallmark of successful scholarship is its ability to take a seemingly outrageous proposition and make it seem obvious. By this standard, Steven D. Smith's *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* is a success. Professor Smith advances two such propositions: first, that the Constitution's framers envisioned the religion clauses not as substantive provisions, but as a single jurisdictional provision designed to leave the substance of religious freedom to the states; and second, that an adequate substantive theory of religious freedom is impossible. Smith's claims run against the grain of virtually all modern church-state theory. Nonetheless, he makes a compelling case for both propositions.

Part I of this Review discusses *Foreordained Failure*'s historical argument—that the First Amendment embodies no substantive principle of religious liberty. I argue that even if Smith is right to conclude that the *primary* purpose of the religion clauses was jurisdictional, this conclusion does not obviate the need to determine the clauses' substantive scope. Jurisdiction is a synonym for authority, and someone must still determine what Congress lacks jurisdiction to do.

Part II addresses Smith's second, more theoretical argument—that a general theory of religious freedom is impossible. Upon examination, it is clear that what Smith is really arguing is that a genuinely "neutral" theory of religious freedom is impossible. But even if perfect neutrality is elusive, it does not follow

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that the project of theorizing about religious liberty is hopeless. Rather, Smith's argument suggests we might reconsider *when* neutrality is possible and *whether* it is a proper objective of our religion clause jurisprudence.

Part III briefly explores a few of the broader implications and ironies of Smith's two theses.

### I. SMITH'S HISTORICAL ARGUMENT: THE "ESSENTIAL FEDERALISM" OF THE RELIGION CLAUSES

Smith's historical argument begins with a claim few judges and scholars would dispute: that the religion clauses were "an exercise in federalism." (p. 18) Many have commented on the religion clauses' federalist character, (p. 18 nn.4 & 5 (collecting authorities)) and as many others have observed the difficulties attending their incorporation into the Fourteenth Amendment.<sup>3</sup> The problem, says Smith, is the "virtually ubiquitous" assumption "that the religion clauses contain *both* a federalist element and a substantive principle or right and that their substantive content can be extracted and elaborated independently of the clauses' federalism." (p. 18) (emphasis added) For Smith, this "dualistic view of the religion clauses" is mistaken. "The religion clauses," he argues, "were not a hybrid creation—part federalism, part substantive right. They were, rather, simply an assignment of jurisdiction over matters of religion to the states—no more, no less." (p. 18)

In advancing this argument, Smith suggests it is helpful to remember that the founders grappled with two sorts of questions. The first sort of question—"What is the proper relation between religion and government?"—might be thought of as "first-order" or "substantive." Smith terms this inquiry the "religion question." The second sort of question—"Which level of government, state or national, should be responsible for addressing the first-order question?"—might be thought of as a "second-order" question. Smith calls it the "jurisdiction question." (p. 19)

The rest, Smith says, is simply history. It is common knowledge that the founders' views on the religion question were di-

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3. In the Postscript to Chapter Four, Smith briefly discusses how the adoption of the Fourteenth Amendment bears on his conclusions. (50-54) For an argument that the Fourteenth Amendment was intended in part to extend the substantive protections of the First Amendment, see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1145-56 (1994).

vergent: some, motivated by a perception that religion was vital to orderly society, deemed government support for religion desirable;<sup>4</sup> (pp. 19-20) others, motivated by the same perception, opposed such support for fear that it would undermine true religious devotion.<sup>5</sup> (p. 20) Still others may have opposed support for religion, albeit less openly, on the ground that religion was unhelpful or detrimental to society. In short, the founders fundamentally disagreed over the proper relation between religion and government, yet the religion clauses passed with relatively little debate. Smith attributes this to the fact that the founders' divergence on the religion question prompted their convergence on the jurisdiction question. Adopting a purely jurisdictional First Amendment promised the best of all worlds: each state could answer the religion question however it saw fit.<sup>6</sup>

This is certainly a plausible interpretation of the historical debate preceding the First Amendment's adoption.<sup>7</sup> One may attribute the substantive views of a certain founder or founders to the religion clauses, but no one may reasonably argue that there was complete consensus on matters of church and state. Smith simply infers from this lack of consensus that the founders resolved their dilemma by agreeing to disagree. Although the lack of historical evidence makes it impossible to verify his hypothesis, it is easy to imagine the perceived appeal of deferring all matters of religion and government to the states, where each framer had a much greater chance of seeing his own perspective prevail. Indeed, the very absence of recorded debate on the is-

4. Smith suggests that the drafters of the Massachusetts Constitution and Yale President Timothy Dwight were among those who supported this position.

5. Smith places dissenting religious groups such as Baptists, and statesmen such as James Madison, among those who embraced this "voluntarist" position.

6. Thus, Smith discounts originalism neither because it is impossible to ascertain the original meaning of the religion clauses nor because it would be useless to do so. Rather, he assumes *both* that their purpose is ascertainable *and* that knowing it would be useful. The problem, Smith says, is that "we *can* discern what was probably their essential meaning, and when we do so we discover that the religion clauses were purely jurisdictional in nature; they did not adopt any substantive right or principle of religious freedom." (p. 17)

7. It is not, however, the only plausible view. It is true that the fact that the First Amendment would apply only to the federal government simplified the debate, because those legislators who wanted to retain governmental power to do what the amendment forbade knew that the amendment would not limit their state governments. But it does not follow that the amendment has no substantive content, or even that the debate was not principally about substantive content. Significantly, the limited recorded debate on the Establishment Clause was about the meaning of establishment, not about the meaning of federalism. People on both sides took the same position with respect to federal establishment that they took at home with respect to state establishments. See generally Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 906-10 (1986).

sue makes Smith's argument all the more plausible.<sup>8</sup> Would the founders readily have agreed to embodying a particular relation of church and state in the Constitution without putting up a fight for their own views? Hardly.

Smith's argument nonetheless invites certain responses. First, it is hard to deny that the decision to leave substantive matters to the states was *itself* a substantive decision. Rephrasing the religion clauses, interpreted as a jurisdictional provision, elucidates this point.

- Congress may neither establish religion nor prohibit its free exercise.
- States may both establish religion and prohibit its free exercise.

Read together, these clauses suggest an interaction of religion and government in which the states have exclusive authority over religion. Read independently, however, these clauses suggest a relation of church and state in which religion is at once both amenable to and immune from government legislation. Considered separately, the two provisions embody diametrically opposite *substantive* positions on the proper relation between church and state. Whereas the first clause contemplates a society in which the government's power over religion is circumscribed, the second clause contemplates a society in which the government is free to foster or fetter religion as deemed desirable. In other words, we might say the founders adopted not one *jurisdictional* provision, but two *substantive* provisions. Read as one provision, it may be more natural to focus on the religion clauses' jurisdictional character; read as two provisions, their substantive attributes become quite clear. Thus, even accepting Smith's reading of history, it is not entirely accurate to say the framers adopted a "purely" jurisdictional provision.

Moreover, Smith fails to address the implications of his conclusion that the religion clauses are "purely" jurisdictional in nature.<sup>9</sup> Assuming he is correct, it follows that courts should be

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8. According to Smith, "if the enactors believed that they were not answering the difficult questions at all but were merely deferring those questions to someone else—the states—then the complacent and lackluster character of the discussion is entirely understandable." (p. 27) Judges and scholars have erred, he maintains, by resorting to "a two-step interpretive process. The first step has been to identify evidence of what one or more of the framers or their contemporaries said or thought, not necessarily about *the religion clauses per se*, but about *the subject of religious freedom*. The second step has been to superimpose this opinion or view about *religious freedom* onto the *religion clauses*." (p. 46)

9. Although he acknowledges in Chapter 3 that "even a purely jurisdictional measure will necessarily impose substantive restrictions on one level of government to ensure

able to interpret them correctly simply by applying basic principles of federal preemption law—in reverse. Under Smith's interpretation, that is, the religion clauses preclude the federal government from acting in any manner that interferes with plenary state power over religion. This conclusion, however, raises several questions Smith fails to answer: If the federal government possesses no power over religion except that left to it by the states, what constitutes an interference with state power? Are there times when state measures impliedly "preempt" federal legislation "respecting" religion?<sup>10</sup> If the states fail to "occupy the field" and adopt a "hands off" approach as to matters of religion, is Congress free to legislate as it pleases?<sup>11</sup>

Suppose, for example, an early Congress enacted a draft pursuant to its power to raise an army. Further suppose it drafted clergymen and conscientious objectors such as Quakers. In one respect Congress would simply be exercising its power over federal military matters, but in another respect Congress would be exercising jurisdiction over religion by forcing such draftees to violate their religious obligations. Exempting clergymen and conscientious objectors would simply create a different problem. At one level Congress would not be exercising jurisdiction over religion, but at another level Congress would be adopting an explicitly religious classification. Suppose an early Congress subjected federal law to the requirements of the Religious Freedom Restoration Act (RFRA).<sup>12</sup> Would any of these enactments be constitutional?

In sum, Smith's conclusion that the religion clauses were primarily jurisdictional in nature does not obviate the need to determine their substantive scope. Rather, it simply creates new interpretive questions; for even if one accepts that the religion clauses have "no substantive meaning independent of their federalism," one must still determine their substantive meaning *in light of* their federalism, and it remains the case that *Congress*

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that the substantive area is left to a different level of government," (p. 43) Smith fails to explore in any depth where those jurisdictional boundaries lie.

10. Cf. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-04 (1983) (state law can be preempted by congressional occupation of a given field, which preempts any state law within the field, or, if Congress has not occupied the field, state law is still preempted to the extent it actually conflicts with federal law).

11. Cf. *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 256 (1984) (preemption should be judged "on whether there is an irreconcilable conflict between the federal and state standard or whether the imposition of a state standard . . . would frustrate the objectives of federal law").

12. 42 U.S.C. § 2000bb (1993). The Supreme Court recently invalidated RFRA as applied to the states. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

may “make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>13</sup> In order to ensure that Congress makes no law “respecting” religious establishments or “prohibiting” religious free exercise, courts must first define what it means to establish religion and to prohibit its free exercise. Then, and only then, can it enforce the jurisdictional limits on Congress’ power. Thus, if we follow Smith’s argument to its logical conclusion, it leads us back to square one and to his first-order question: What is the proper relation between religion and government?

## II. SMITH’S THEORETICAL ARGUMENT: THE IMPOSSIBILITY OF PERFECT NEUTRALITY

The second half of *Foreordained Failure* is devoted to Smith’s theoretical argument. An adequate general theory of religious freedom is not possible, he argues, because all such theories founder on the following “basic theoretical conundrum”:

The function of a theory of religious freedom is to mediate among a variety of competing religious and secular positions and interests, or to explain how government ought to deal with these competing positions and interests. To perform that function, however, the theory will tacitly but inevitably privilege, or prefer in advance, one of those positions while rejecting or discounting others. But a theory that privileges one of the competing positions and rejects others a priori is not truly a theory of religious freedom at all—or, at least, it is not the sort of theory that modern proponents of religious freedom have sought to develop. (p. 63) (emphasis added)

At first glance, it appears that the final phrase in this passage is sort of an afterthought. As one reads on, however, it becomes clear that it is central to Smith’s thesis. That is, Smith is not simply contending that the *idea* of a theory of religious freedom is impossible. Such theories abound and are ready subjects of criticism. Rather, Smith is arguing that a genuinely *neutral* theory of

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13. A review of the 28 free exercise cases decided by the Supreme Court since *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which incorporated the Free Exercise Clause, reveals that 13 (roughly 46%) involved challenges to federal law and 15 involved challenges to state laws. A review of the 51 establishment cases decided since *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which incorporated the Establishment Clause, reveals that seven (roughly 14%) involved challenges to federal law and 44 involved challenges to state law.

Ironically, if the religion clauses were in fact intended as a purely jurisdictional measure, incorporating them into the Fourteenth Amendment not only distorted their original meaning, but “effectively repudiated—and hence repealed” them. (p. 49)

religious freedom is not possible—a conclusion that, he contends, necessarily renders the entire notion of a comprehensive and *adequate* theory of religious freedom incoherent. As the author states in a later passage:

[T]heories of religious freedom seek to reconcile or to mediate among competing religious and secular positions within a society, but those competing positions disagree about the very background beliefs on which a theory of religious freedom must rest. One religion will maintain beliefs about theology, government, and human nature that may support a particular version of religious freedom. A different religion or a secular viewpoint will support different background beliefs that logically generate different views or theories of religious freedom. In adopting a theory of religious freedom that is consistent with some background beliefs but not with others, therefore, government . . . must adopt, or privilege, one of the competing secular or religious positions. Yet this adopting or preferring of one religious or secular position over its competitors is precisely what *modern* theories of religious freedom seek to avoid. Hence, theories of religious freedom can function only by implicitly betraying their own objective. (p. 68) (emphasis added)

In Smith's terminology, all theories of religious freedom impermissibly grant certain religious or secular perspectives a "preferred position." (p. 71) Accordingly, in one-by-one fashion he dismisses the various modern theories of religious liberty<sup>14</sup> on the ground that they "tacitly but inevitably . . . prefer in advance" (p. 63) one or more "beliefs concerning matters of religion and theology, the proper role of government, and 'human nature,'" (p. 63) (footnote omitted) and thus "implicitly betray[ ] their own objective" (p. 68) of treating those perspectives neutrally.

Smith's observations about neutrality are unlike most other discussions of the subject. Theorists too many to number have criticized this or that theory of religious freedom on the ground that it unduly burdens or favors a certain religion or religion in general. Apparently Smith has no quarrel with most of these theorists, for much of what he says is perfectly consistent with their criticisms. Yet Smith goes well beyond the claim that certain individual theories are, as applied, unfaithful to their de-

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14. In Chapter Seven, entitled *The Pursuit of Neutrality*, Smith critiques seven such theories on the ground that they fail the test of true neutrality: Neutral Application (pp. 78-79); Neutrality as Nondiscrimination (pp. 79-81); Secularism as Neutrality (pp. 81-84); A Trichotomy of Values (pp. 84-88); The "Common Denominator" Approach (pp. 88-90); Symbolic Neutrality (pp. 90-93); and Neutrality as a Matter of Degree (pp. 93-96).



clared objective of neutrality. He instead focuses on an entirely different respect in which theories of religious freedom are non-neutral—at the level of their “selection of background beliefs or premises.” (p. 99) Because the very assumptions upon which any theory of religious liberty will rest—no matter what those assumptions are—inevitably grant priority status to *some* conception of religion, Smith postulates that such theories necessarily cannot achieve neutrality. In short, he advances the more far-reaching claim that neutrality is simply impossible, and reasons that generating and applying theories of religious freedom is therefore a hopeless enterprise that should be abandoned.<sup>15</sup>

To respond adequately to Smith’s theoretical argument would require more than a book review, so I intend only to suggest some of the limits of his theory in the form of two questions. The first question—*Is Neutrality Possible?*—inquires whether Smith’s theoretical argument is descriptively accurate. The second question—*Is Neutrality Desirable?*—explores the normative implications of his argument, namely, if neutrality *isn’t* possible, or at least isn’t possible in all circumstances, is that necessarily a bad thing?

*Question One: Is Neutrality Possible?*

As a descriptive matter, Smith’s theoretical argument has much to commend it. Assumptions about human nature, about the proper role of religion in society, and about the legitimate scope of government clearly inform every theory of religious liberty. As Smith observes, such theories are not created “*ex nihilo*.”<sup>16</sup> (p. 63) Rather, their effectiveness depends upon the validity of the background assumptions upon which they rest.<sup>17</sup> To cite an easy example, a theory that assumes religious persuasion is a matter of one’s free will is of questionable validity from the perspective of those who understand themselves as predestined to hold their religious worldview and act in accordance therewith.<sup>18</sup>

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15. Smith advances this claim primarily in Chapters Five and Nine (the Afterward).

16. Smith states that “an account of religious freedom that was simply asserted and not justified by reference to supporting premises would be mere fiat, and hence could hardly be counted as a theory at all.” (p. 67)

17. Cf. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 188 (1992) (“[I]n the context of government speech—unlike regulation and spending—neutrality is an unattainable ideal. Whenever the government communicates to the people, it will favor some ideas and oppose others.” (footnote omitted)).

18. Cf. *id.* at 125 (“It would come as some surprise to a devout Jew to find that he has ‘selected the day of the week in which to refrain from labor,’ since the Jewish people have been under the impression for some 3,000 years that this choice was made by God.”)

Smith is also correct to suggest that theories of religious freedom that aspire toward neutrality are likely to betray that objective in practice. A theory of formal neutrality, for example, will likely grant a "preferred position" to mainstream religions, just as a theory that contemplates exemptions from generally applicable laws will likely grant a preferred position to those outside the mainstream. Indeed, virtually any government act toward religion may be characterized as non-neutral in *some* respect. Whether an observer perceives a particular state action as neutral will simply depend upon the vantage point, or baseline,<sup>19</sup> she adopts. Consider, for example, the variety of public reactions to the Court's decisions on teaching evolution in the schools. Those whose religious beliefs are contrary to the theory of evolution understandably perceive its being taught in the public schools as hostile to their beliefs. Yet those whose beliefs are contrary to the teachings of creationism would be equally justified in perceiving its addition to the curriculum, if that were permitted, as hostile to their beliefs. Cases involving public use of religious symbols, such as a creche or menorah, illustrate the same point. The state's use of such symbols may reasonably be perceived as an endorsement of religion. Yet court decisions requiring their removal from public places may reasonably be perceived as government disapproval of religion.<sup>20</sup> (p. 114) In short, whether a government act is neutral toward religion is relative, and it is unrealistic to suppose that government can be neutral toward religion in every respect.

But to say that neutrality is sometimes illusory is not to say that it is always illusory. And although Smith persuasively argues that neutrality is often elusive, he ignores important aspects of current doctrine that can and do avoid privileging certain religious positions from the outset. Neutrality—even at the level of background beliefs and assumptions—is possible in limited circumstances, and these circumstances indicate that Smith is wrong

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(footnote omitted) (quoting *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring)).

19. Cf. Cass Sunstein, *The Partial Constitution* 68-92 (Harv. U. Press, 1993); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 3 (1986); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1002 (1990); McConnell, 59 U. Chi. L. Rev. at 155, 173-79 (cited in note 17).

20. "The Court simply takes no account . . . of the alienation . . . that many persons feel toward a government that they perceive as indifferent or hostile to religion, and that is likely to be aggravated by the results of the 'no endorsement' version of religious freedom." (footnote omitted). (p. 114)

to say neutrality is *always* an unattainable goal. I offer just one by way of illustration.

Consider a well-established principle of the Supreme Court's free exercise doctrine, namely that courts may pass on the sincerity, but not on the validity, of a claimant's religious doctrine.<sup>21</sup> Several background assumptions inform this principle. One such assumption is that courts are ill-equipped to act as authorities in spiritual matters; another is that, even if judges were competent theologians, religious belief is sufficiently important that people are entitled to form their own religious opinions, even if they seem wrongheaded to the government or to the majority of society. In consequence, the proper meaning and scope of religious belief is left to the claimant.<sup>22</sup>

Whatever its merits, this aspect of church-state "theory" does *not* grant a "preferred position" to a particular conception of religion. Rather, it avoids precisely that difficulty by deferring the role of defining the proper scope of religious belief to the claimant. As a result, the state is limited to determining when the interests of the community are more important than the claimant's interest in the free exercise of her faith. Although this sort of balancing burdens some religious claimants more than others, and thus is not neutral in application, it *is* neutral in the sense of the word that Smith finds unattainable.

This aspect of current doctrine does not form a complete theory of religious liberty, but it demonstrates that Smith goes too far in arguing that the "background assumptions" upon which all theories of religious liberty rest can never be neutral. But even assuming neutrality is never attainable, does it necessarily follow that the entire notion of a theory of religious freedom is *incoherent*? The answer must be "No"—*unless*, of course, neutrality is the underlying purpose of the religion clauses, and

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21. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation. The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.").

22. For an insightful discussion of the theoretical underpinnings of this aspect of the Court's doctrine, see Michael W. McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1, 15:

[R]eligious claims—if true—are prior to and of greater dignity than the claims of the state. If there is a God, His authority necessarily transcends the authority of nations; that, in part, is what we mean by 'God.' For the state to maintain that its authority is in all matters supreme would be to deny the possibility that a transcendent authority could exist. Religious claims thus differ from secular moral claims both because the state is constitutionally disabled from disputing the truth of the religious claim and because it cannot categorically deny the authority on which such a claim rests.

not simply an approximation for achieving a more fundamental purpose such as the separation of church and state, the establishment of a secular public order, or the accommodation of religion. Smith apparently assumes that neutrality is the driving force behind the religion clauses, for when he concludes that neutrality is unattainable, he declares that theorizing about religious liberty must be abandoned.<sup>23</sup>

*Question Two: Is Neutrality Desirable?*

Smith rightly observes that many modern theories of religious liberty—and the Supreme Court's own religion clause doctrine—aspire toward “neutrality.”<sup>24</sup> (p. 77) Indeed, the term itself seems to have become the *mantra* of the religion clauses. Thus, it is somewhat disconcerting to think that neutrality might not even be possible, and Smith's contentions at first appear quite damning.

Upon further reflection, however, it is somewhat surprising that “neutrality” has become the byword of the religion clauses. The First Amendment itself singles out religion from other philosophies and ideologies,<sup>25</sup> and few take seriously the proposition that government may not in any way take religion *qua* religion into account, either for special advantage or disadvantage.<sup>26</sup> At times religion is entitled to special protection; at times it is placed at an apparent disadvantage. The issue, therefore, is not *whether* government may take religion into account, but *when, how, and for what purposes*. If being “neutral” toward religion means that the government must always treat it like everything else, then

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23. Smith assumes that in making the case against perfect neutrality, he has also made the case for abandoning neutrality entirely. In so doing, he commits the fallacy of the excluded middle. The more sensible third alternative, of course, is to redefine neutrality so that it reinforces and implements liberty. See Laycock, 39 DePaul L. Rev. at 1001-02 (cited in note 19) (defining “substantive neutrality” as minimizing incentives to change religious behavior); Michael W. McConnell and Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1 (1989) (advocating a similar approach in economic terms).

24. Quoting Philip E. Johnson, *Concepts and Compromise in First Amendment Doctrine*, 72 Cal. L. Rev. 817, 818 (1984) (“That in some sense the federal government and the states ought to be ‘neutral’ in religious matters is undisputed.”).

25. See *Welsh v. United States*, 398 U.S. 333, 372 (White, J., dissenting) (“It cannot be ignored that the First Amendment itself contains a religious classification.”).

26. See generally Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 S. Ct. Rev. 83; Michael W. McConnell, *A Response to Professor Marshall*, 58 U. Chi. L. Rev. 329, 331-32 (1991).

[T]he Constitution treats religious belief *differently*—sometimes better, sometimes worse, depending on whether the context is one of interference or advancement. The unifying principle is that the religious life of the people should be insulated, to the maximum possible degree, from the effect of governmental action, whether favorable or unfavorable. To extend this principle to all other beliefs and activities would be impossible.

making neutrality the focus of religion clause doctrine is plainly both undesirable and doctrinally mistaken.

Unfortunately, Smith perpetuates the mistaken assumption that neutrality is the be-all, end-all of the relation of church and state, rather than a commonly useful *means* of promoting the end of religious liberty. As Michael McConnell has observed, “[i]t is sometimes forgotten that religious liberty is the central value and animating purpose of the Religion Clauses of the First Amendment.”<sup>27</sup> Neutrality, like the principle of separation, is no more than an approximation for religious liberty: sometime it advances religious liberty, less often it does not, but it is not a substitute for maximizing religious liberty. Accordingly, it may sometimes be desirable to deviate from the goal of neutrality to achieve the more fundamental purpose of advancing religious freedom.<sup>28</sup> And if violations of neutrality are “precisely what modern theories of religious freedom seek to avoid,” (p. 68) perhaps the theorists ought to rethink their objective.

### III

If the First Amendment embodies no substantive principle of religious freedom, and if the very enterprise of generating such a principle is incoherent, American judges and scholars have indeed embarked on a “hopeless quest,” (p. 120) and Smith’s book is aptly entitled *Foreordained Failure*. Yet one might ask, “Where does that leave us?”

Smith avoids offering anything more than “general and very tentative” (p. vi) conjectures about such questions, noting that the objective of the book is not “to answer normative questions,” but simply “to clarify our situation by trying to explore the nature and sources of our current confusion.” (p. 121) Accordingly, he suggests only that such normative questions will be “troublesome” until we reconsider the basis of “two background assumptions” that inform our current system: first, “that judicial review must be based on something called ‘principle’”; and second, “that the courts necessarily have an essential and central role to play in the realization and protection of religious freedom.” (p. 122)

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27. McConnell, 1985 S. Ct. Rev. at 1 (cited in note 22).

28. Alternatively, we might simply redefine neutrality so that it maximizes religious freedom. See note 23, *supra*. Because the term is malleable, however, and because the courts have not adhered to a consistent definition of neutrality, it may be more desirable simply to abandon the term altogether.

One of the ironies in Smith's modest stated objective is that the normative implications of his arguments are anything but modest. Not only does rethinking these two assumptions follow naturally from Smith's arguments, but, taken seriously, it is hard to imagine what alternative *but* abandoning judicial review of church and state would solve the dilemmas he poses.<sup>29</sup>

Smith notes that we might keep judicial review but base it on something other than principle, such as history or tradition, but one wonders why *courts* would be any better equipped to conduct such a review than other citizens knowledgeable about "history" and "tradition." Moreover, it is hard to take Smith seriously when he suggests keeping judicial review, but basing it on something other than principle. In fact, it is hard to imagine how *any* method of resolving debates concerning the proper relation between government and religion could avoid "degenerating" into an application of "principles" to the subject problems. Nor is the idea of using tradition and history to enlighten our perspective far removed from the notion of "precedent."

Suppose, for example, we assigned juries of average citizens, unconstrained by the Constitution, the role of deciding whether and how given church-state problems should be solved. Could we seriously expect them to come to any resolutions without applying their own notions—i.e., principles—of what is just? If they looked to historical evidence of how past generations solved similar problems, is that so very different from a court's application of precedent? And if we could not expect them to act in accordance with their own notions of just principles and fair sense of the lessons of history, can it seriously be contended that such a system would advance religious liberty? We can speculate that the result would often be a form of majoritarianism incompatible with our history and tradition or, worse, religious persecution.<sup>30</sup> Indeed, it might be said that the reason present church-state the-

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29. A second irony in *Foreordained Failure* is the fact that, if Smith's arguments correctly suggest we should abandon judicial review of church and state, that result is, according to Smith's reading of history, just the result the framers would have desired.

30. Cf. Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 15: Legislators are under no obligation to be principled. Subject only to their oath to uphold the Constitution, they are free to reflect majority prejudices, to respond to the squeakiest wheel among minorities, to trade votes and make compromises, and to ignore problems that have no votes in them. This political freedom is good for many things, but it is not good for achieving even-handed treatment of many small, disparate, and sometimes odd or obnoxious religious minorities. Judges are far from perfect, but they are sworn to do equal justice to all, to decide every case presented to them, and to treat like cases alike. They are obliged by precedent and accepted judicial norms to give principled reasons for their decisions.

ory has failed is precisely because courts have been too pragmatic, too unprincipled, too *ad hoc*, and too majoritarian.

Professor Smith does not address many of the questions left burning at the end of *Foreordained Failure*. He fails to say how he would resolve the interpretive problems created by his historical argument, and he elects to give only a brief discussion of the practical implications of his theoretical argument. Yet these are not tragic flaws in his effort. Smith's historical argument is powerfully presented, and he makes a valuable effort "to clarify our situation by trying to explore the nature and sources of our current confusion." (p. 121) Although Smith is wrong to suggest that the elusive nature of "neutrality" renders the process of theorizing about religious liberty hopeless, he nicely ferrets out and critiques the background assumptions that inform modern theories of religious freedom. His book is insightful, original, and foreordained to succeed.

**JUSTICE IN IMMIGRATION.** Edited by Warren F. Schwartz.<sup>1</sup> New York: Cambridge University Press. 1995. Pp. 246. Cloth, \$49.95.

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Immigration law reduces to a few basic but difficult questions. Should we restrict entry by outsiders? If so, what principles guide those restrictions? And after a newcomer arrives, when is she no longer a "newcomer," but one of "us"? These three questions are deceptively simple when so phrased, but they are the core issues of law and policy. We should keep them in sharp focus, the mind-numbing complexity of the Immigration and Nationality Act notwithstanding.

We can answer these questions from different perspectives. One perspective involves policymaking through legislative and administrative processes. This is, of course, the staple diet of the Senate and House immigration subcommittees, as well as the Immigration and Naturalization Service, the Executive Office of Immigration Review, and other administrative bodies. Our three basic questions inform decisionmaking at this level, but inevita-

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