

## *Featured Review Essay*

### **The Drama of American Religious Freedom**

***Religious Freedom in America: Constitutional Roots and Contemporary Challenges.* Edited by Allen D. Hertzke. Norman, OK: University of Oklahoma Press, 2015. 288 pp. \$24.95 Paper**

***The Rise and Decline of American Religious Freedom.* By Steven D. Smith. Cambridge, MA: Harvard University Press, 2014. 240 pp. \$39.95 Hardcover**

***The Tragedy of Religious Freedom.* By Marc O. DeGirolami. Cambridge, MA: Harvard University Press, 2013. 320 pp. \$45.00 Hardcover**

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Contemporary discourse surrounding religious freedom in America is often cast in dramatic terms. Politicians and advocates routinely warn that religious convictions are besieged in the United States, citing a variety of policy prescriptions as instances of undue government encroachment. Recent examples include the Affordable Care Act's "contraception mandate," and certain anti-discrimination laws compelling Christian businesses to serve same-sex couples. Such concerns are validated in the academic literature, which in recent years has examined religious freedom issues in earnest. Winnifred Fallers Sullivan (2007), for instance, has written of *The Impossibility of Religious Freedom*. David Sehat (2010) has followed up with *The Myth of American Religious Freedom*, and Brian Leiter (2012) has asked *Why Tolerate Religion?* These titles are merely a sampling of the broader academic discussion about the appropriateness, the legality, and/or the protection of religious influence in the public square.

This article considers three more — and more recent — academic books about the status of religious freedom in the United States. They include Marc O. DeGirolami's *The Tragedy of Religious Freedom*, Steven D. Smith's *The Rise and Decline of American Religious Freedom*, and Allen D. Hertzke's edited volume, *Religious Freedom in America: Constitutional Roots and Contemporary Challenges*. Taken together, these texts demonstrate the complexity — indeed, the *drama* — of religious freedom in the United States.

For Marc O. DeGirolami, much contemporary legal theorizing is incapable of grappling with the intractable problems of religious freedom. This is because most theorists are, in his view, *comic* theorists, where tragedians are needed. In his book, *The Tragedy of Religious Freedom*, DeGirolami critiques comic theory before offering a “method of tragedy and history” in its stead. He argues that this approach, though admittedly less direct than its rivals, stands the best chance of respecting the difficulties posed by religious liberty jurisprudence.

Importantly, when DeGirolami uses the terms *comedy* and *tragedy*, he is drawing on their ancient Greek ancestry. “A comedy,” he explains, “moves from sorrow to joy. Its aim is to take an existing chaos and to order it through and through — to give it a satisfying and intimately worked-out architecture.” Thus, in this usage, the term signifies order rather than humor. “A tragedy, by contrast, proceeds not from joy to sorrow, but from struggle to unresolved struggle” (4). If comedy takes a confusing situation and arranges it toward a tidy conclusion, then, tragedy acknowledges that confusion is likely to remain. This is the crux of the distinction DeGirolami draws. One set of theorists attempts to solve religious freedom problems cleanly. The other set — *his* — acknowledges that clean solutions do not exist. “A tragic perspective,” he writes, “denies that fully systematic answers to the conflicts of religious liberty are possible. It also emphasizes an acute sense of the losses and costs that adjudication invariably entails, and it seeks to make those losses and costs explicit in judicial opinions” (55).

The method of tragedy and history is thus founded upon the observation that, in an atmosphere of competing values, some are certain to be both “incompatible” and “incommensurable.” In other words, jurists will be forced to decide between values that are equally legitimate, opposed to each other, and completely unable to peacefully coexist. In such situations, principled resolution can never be satisfactory to both parties. Conflicts between values such as *liberty* and *equality* are certain to arise and may be impossible to resolve. For DeGirolami, these difficult cases are the

truly important ones. “Conflicts about what are the true values of religious liberty *ultimately derive from* the irresolvable conflicts,” he writes, meaning that no single principle can hope to decide religious liberty questions, if only because the imposition of such a rule is bound to produce *new* questions. Still, such conflicts cannot be surrendered to a limitless equivalence of values, so a “range of acceptable values” must be drawn (64). But this does not yet solve the problem. DeGirolami observes that, even when religious freedom disputes are decided well and appropriately, they are often accompanied by “a certain type of experientially significant loss or regret.” To concede this is to consider such decisions within a frame of “sacrifice” rather than in the transactional language of a “trade-off.” Consequently and importantly, “the general attitude or disposition of those committed to the idea of religious liberty is likely to be that of customary attachment” (106). Since custom is both less rigid and more prevalent than principle, the disposition of those committed to religious freedom emerges as a serious obstacle to easy theorizing.

DeGirolami concludes that given the historical challenges, “modest movement” is necessary (111). Respecting the gradual nature of social change, such an approach privileges theory that does not disrupt political or legal practice, but instead integrates itself into real world circumstances. This historical approach values “the collected wisdom of the past in managing the tragic clashes of religious liberty,” drawing from “the sum of its conciliations” (121). Past legal decisions and precedents provide the contemporary theorist with workable material, disclosing both consistencies and inconsistencies, and so making predictability possible in legal decisions.

In Part III, DeGirolami demonstrates his method through a series of contemporary applications. Though space restrictions discourage a lengthy discussion of this section, the method may be quickly evaluated in reference to the first of the controversies listed above. In 2014, the Supreme Court ruled in the case of *Hobby Lobby v. Burwell* that a Christian business cannot be obligated to violate its convictions by covering certain forms of contraception for its female employees. In this case, the religious freedom of a for-profit corporation stood opposed to the healthcare needs of the citizens it employs. Despite often-glib denunciations from the partisans on either side of the case, the values at stake *were* values — indeed, they were *incompatible* and *incommensurable* values. The ruling in that case proved unsatisfactory to those whole believe — as this writer does — that women’s health needs should supersede the supposed personhood of corporations. For them, the loss incurred

by the decision was experienced more as sacrifice than trade-off, and the resultant precedent is certain to be generative of new questions and cases. None of this is easily resolvable via a comic theory. DeGirolami's tragic theses are thus validated by the example. His historic theses may prove less popular among those in favor of radical change, but that does not make them unreasonable principles for adjudication. By the conclusion, DeGirolami has persuasively argued that religious freedom is a difficult and malleable concept, prone to shifts and changes that defy easy theorizing. What his plan lacks in simplicity is quickly offset by its strengths in flexibility and caution. In refusing to take bold, absolutist stands, he reserves the right of judges to make judgments — even in those cases where the facts are complex and the implications unclear.

DeGirolami seems to have a kindred spirit in Steven D. Smith, who also seeks to complicate conventional wisdom. Smith's book is historical, focusing on a "standard story" of American religious freedom that, he argues, is largely mistaken. Instead, Smith offers a "revised version" that overlaps with — but improves upon — the widely accepted, overly simplified account. Indeed, his *The Rise and Decline of American Religious Freedom* begins with this distinction, and proceeds to develop it throughout the text.

According to the standard story, Smith writes, the American founders broke from a dark history of European wars, crafting the First Amendment to ensure the separation of church from state and the protection of the individual conscience. Though the stewards of this vision often failed to implement it in the 19th and early 20th centuries, the modern Supreme Court re-asserted and realized its full potential. Smith argues that, since it is founded on *some* truth, and since it is edifying to both the founding and current generations, the standard story enjoys broad credibility in the American imagination. It also holds a "formidable rhetorical advantage," in that it "makes the history of the legal treatment of religion run closely parallel to the well-known, oft-recited history of the legal treatment of race" (5). This narrative trajectory, from noble intention to failure to revival, lends itself to a variety of American memoirs. But narrative fidelity is not the same thing as truth.

As a corrective to this not-entirely-true telling, Smith offers a revised version that, he argues, is both less edifying and more accurate. In this account, the First Amendment was devised not so much to signal a sharp break from the past as to keep things exactly as they were. Specifically, the Amendment relegated religious matters to the jurisdiction of the states, and thus ensured — as a jurisdictional matter — that there

could be no official, national church. The interim period, between the ratification of the Constitution and the rise of the modern Court, was not a “dark interlude” in Smith’s view, but rather a “golden age,” in which a variety of distinctly religious perspectives contended for public influence. He identifies these years as the time of the “American settlement,” during which religious viewpoints were granted remarkable input into policy matters. In the mid-20th century, the Supreme Court effectively dashed that settlement, secularizing constitutional interpretation and relegating religious opinion to the private sphere. The result was “a divisive dynamic of resentment, alienation, and bewilderment that affects citizens both religious and secular” (11).

Interestingly, both versions express concern that religious freedom is at risk in the early 21st century, but the cited threats come from opposing corners. For proponents of the standard story, religious conservatives stand poised to de-secularize the Constitution, replacing its neutral pluralism with something sectarian or even theocratic. For proponents of the revised version, the secularized Constitution is itself an innovation, enabling secularists to disempower religious citizens or otherwise dismiss religious protections as unjustifiable, *special* treatment. Thus contemporary debates about religious liberty hinge on deep disagreements — not just about policy in the present, but also about the discursive evolution of the American past.

Like DeGirolami, Smith observes that religious freedom cases are complicated, defying easy — *comic* — resolution. His critique of the modern Court is thus also based in the conviction that no single value can serve as arbiter in all cases, and that values such as *neutrality* and *secularity* are necessarily deceptive in practice. In contemporary America, Smith argues, “the salient competing visions of the nation [are] no longer Catholic versus Protestant ... but rather secularist versus providentialist” (124). For this reason, a purely secular Court cannot claim to be an impartial third party in the constitutional dispute. Rather, such a Court allies itself with one faction, compromising itself along the way. This conspicuous side-taking helps explain corollary phenomena, such as the rise of the contemporary culture war. Smith argues that the divisive, often vitriolic discourse surrounding controversial social issues can be largely attributed to the alienation engendered by the secular Constitution — an alienation that extends into both competing parties. The religious feel increasingly marginalized even as the secular feel perpetually threatened. This problem may be overcome, Smith suggests, if constitutional interpretation were to return to a posture of *true* neutrality — that is, to the

American settlement. Understood as a marker of jurisdictional boundaries, the First Amendment surrenders its radical ethos in exchange for something more modest and mediatory. No longer the guardian of the secular public square, it serves instead as referee, supervising a raucous field of constant contestation.

Again like DeGirolami, Smith advocates an approach without clean lines and firm precedents. The complexity and/or utility of his approach may be clarified with reference to the second controversy listed above, the obligation of for-profit businesses to serve same-sex couples. Evaluated against a secular, comic interpretation of religious freedom, values such as *equality* and *LGBT* (Lesbian, Gay, Bisexual, Transgender) *freedom* may simply outweigh *religious freedom* so-conceived. But in Smith's view, such an interpretation makes a false claim to neutrality, siding with secularism over and against religiosity, and so disenfranchising religious citizens with sincere beliefs. The result is culture warfare, as evidenced by the controversy over Indiana's 2015 Religious Freedom Restoration Act. Under a model of Constitution-as-referee, the clean and sweeping judgments of anti-discrimination law would be disavowed in favor of more tentative laws granting civic space to Christian bakers and florists as well as to the same-sex couples hoping to furnish their weddings. For those — like this writer — who oppose discrimination against the LGBT community, such an environment would demand begrudging acceptance. But in mirroring the begrudging acceptance of those opposed to same-sex marriage, it would facilitate a shared civic arena in which a healthy contestation could — and would — continue.

Readers of theoretical texts like DeGirolami's and Smith's will no doubt have a variety of practical examples in mind, as case studies feature regularly on the evening news. Some of the most prominent of these are on display in academic studies as well. In *Religious Freedom in America: Constitutional Roots and Contemporary Challenges*, Allen D. Hertzke has collected 10 impressive essays from 11 accomplished scholars. Drawn from departments of history, law, political science, sociology, and religious studies, the list of contributors boasts an array of named professorships, directorships, awards, recognitions, and enough books to fill a small library. Each chapter examines a facet of American religious freedom, and the text is divided into three thematic sections. Hertzke provides an introduction, situating contemporary challenges to religious freedom within the context of an expanding regulatory state, a retreating religious consensus, and a prevailing commitment to Rawlsian public reason.

Acknowledging the gravity of these challenges, Hertzke proposes a “Madisonian framework” for engaging them. In James Madison he finds grounds to argue that religious freedom is a fundamental and foundational right, “ontologically prior to one’s obligations to the state” (10). Hertzke’s focus on the founding generation transitions smoothly into the first part, titled “The Founding Moment and Constitutional Evolution.” Here Thomas S. Kidd puts Madison into conversation with Thomas Jefferson and Patrick Henry, contextualizing the rise of religious freedom as a revolutionary value. In his chapter, Vincent Phillip Muñoz notes that the Founders were divided over what form church-state relations ought to take, and Steven K. Green then carries that controversy into a series of 19th century debates over prayer in the public schools. Green provides a useful bridge between the first and second sections, correcting the tendency of religious freedom studies to gloss over the period between the late 18th and mid-20th centuries.

In the second part, “Societal Implications of Constitutional Principles,” Robert R. Martin and Roger Finke open with a quantitative analysis of free exercise cases between 1981 and 2011. Noting that “the terms and limits of free exercise rights have been clarified only through the labors of those who put them to the test” (91), Martin and Finke review the standards, consequences, and trends arising from thousands of contemporary court opinions. They conclude that even small limitations on free religious practice can have important consequences — especially for religious minorities. In the following chapter, Charles C. Haynes draws on his experience working with public school districts on First Amendment issues to propose sound religious policy that avoids needless litigation. If Martin and Finke are concerned with those who test the limits of religious freedom, Haynes hopes to preempt courtroom tests through careful deliberation.

Finally, the third part of the book is committed to “Exploring Contemporary Challenges.” Robin Fretwell Wilson opens with a chapter on the Affordable Care Act, arguing that the compulsory nature of the contraception mandate marks a “sharp departure from the live-and-let-live regime surrounding abortion objections since *Roe v. Wade*” (136). Like Haynes, Wilson argues that high-profile clashes between religious objectors and government may often be avoided with some advance planning. Harry F. Tepker, Jr. follows Wilson, focusing on the religious freedom implications of same-sex marriage — the other hot button issue of the day. Tepker returns to a discussion of Madison and Jefferson to launch a defense of same-sex marriage based in the equality protections

of the 14th Amendment. Finally, the book closes with a pair of chapters on minority faiths in the United States. Rajdeep Singh chronicles the struggles and triumphs of Sikh Americans since 1900, and Asma T. Uddin shows how American Muslims have navigated political obstacles to cultivate a distinctly American Islam and contribute to a more vibrant national religious environment.

Though it is clear that Hertzke's authors represent a diversity of viewpoints, the general tenor of the text sympathizes with Smith, suggesting that religious freedom is vulnerable in the contemporary United States. Certainly the assembled essays testify to the variety of venues in which public religious practice has been asserted and/or challenged throughout American history. They testify, further, to the emotional and spiritual energy that American citizens have invested in these struggles. The authors disagree on particular issues and points, but are largely united on the importance of free religious practice and the government's responsibility to facilitate it without undue interference. That there continues to be so much interference of government in religion — and, some would counter, religion in government — is exemplary of the dramatic inflection of contemporary discourse about religious freedom.

Of the several common themes that arise across these texts, the *tentative* nature of religious freedom disputes appears most prominently. Because such disputes are both frequent and emotional, there is a temptation to resolve them quickly and easily. But these scholars will testify that quick and easy resolution is the province of *comedy* — understood in either the ancient or pop contemporary sense. Religious freedom is a drama, with serious actors, strong themes, unexpected developments, and often unsatisfying conclusions. At points, it may even drift into *melo-drama*, as intense emotions are stoked, harnessed, and exploited by advocates with agendas. But if a nation is at all invested in the freedom and well-being of its citizens, then it must take seriously their disputes and crises, even and especially in those cases that prove intractable and exhausting. Defined by current conflicts, built upon previous conflicts, and, no doubt, providing the foundation for conflicts yet to come, religious freedom demands a cautious, pliable treatment capable of adapting to an intense and ever evolving set of circumstances. If religious faith is to retain a special place in the American ethos, legal theorists and policy-makers must re-commit themselves to the difficult work of protecting it with openness and humility.