

BOOK REVIEW

AMERICAN PROVIDENTIALISM: A REAPPRAISAL

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BOOK REVIEW: *THE GODLESS CONSTITUTION AND THE PROVIDENTIAL REPUBLIC*

Among the existential questions that all human persons confront, few are more daunting than those concerning the nature of eternal life. To borrow from Søren Kierkegaard, the mere invocation of the phrase “eternal life” is likely to cause a fair measure of fear and trembling.¹ And yet, curiosity about eternal life—and who may or may not ultimately enjoy it—has animated members of every political community, especially of those that have taken root in the lands that became America.²

Because one’s understanding of “eternal life” requires some prior notion of eternity, it seems unremarkable to observe that most visualizations of “eternal life” are decidedly other-worldly. Consider, for example, the first ten images that appear when the phrase is searched online—all of which include renderings of the sky and/or sun, and most of which include a depiction of something akin to Led Zeppelin’s “Stairway to Heaven.”³ Alongside traditional sacred art, these popular images hardly evoke a sense that eternal life is especially this-worldly. And this is far from surprising. If “eternal” means something like “forever,” and personal experience teaches that nothing on this planet will last “forever,”⁴ then to begin thinking about “eternal life” with reference to anything other than the transcendent rightly seems peculiar—at least at first glance.

Despite the fact that we may imagine eternal life in transcendent terms and through other-worldly images, even the most orthodox believers have argued that the *inchoatio vitae aeternae*—Latin for the “beginning of eternal life”—is not as far away as it seems. The Jesuit priest and political philosopher John Courtney Murray, for instance, argued in one 1945 essay that the *inchoatio vitae aeternae* is a “true life, personal and social, religious and civic,” that does not commence merely once we take our first steps through the clouds towards

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1. See generally SØREN KIERKEGAARD, FEAR AND TREMBLING (Howard V. Hong & Edna H. Hong eds. & trans., 1983) (1843).

2. See generally THOMAS A. TWEED, RELIGION IN THE LANDS THAT BECAME AMERICA: A NEW HISTORY (2025).

3. LED ZEPPELIN, *Stairway to Heaven*, on Led Zeppelin IV (CD, Atl. Recording Co. 1971).

4. See also Luke 12:13–21 (NRSV).

whatever awaits beyond.⁵ Rejecting the sharp dichotomy between the “earthly city” and the “heavenly city” often associated with St. Augustine,⁶ Murray believed that there is, in fact, a stairway to heaven, but one that begins on earthly soil.⁷ Indeed, Murray argued that God places human persons on a “pilgrimage from this life to the next by providing them with historical opportunities in which to live a life that is ‘social’ and ‘civic,’ a life that is the *inchoatio vitae aeternae*.”⁸ Every human person’s faithful journey on this pilgrimage, Murray concluded, allows the eschatological City of God to “begin[] [being built] in human history, and particularly in political community with others,” even if the City of God “ultimately extends beyond time and earth itself.”⁹

In *The Godless Constitution and the Providential Republic*, Steven Smith¹⁰ grapples with how Americans from Thomas Jefferson to Donald Trump have responded to this conception of eternal life—that, to put it at a relatively high level of generality, what happens on this side of the great divide has much to do with what happens on the next. Perhaps best described as a personal disposition, this belief that the actions of individual human persons in this life are inextricable from transcendent realities has long animated Americans, making Smith’s study equally timely and timeless. As the influential First Amendment litigator William Bentley Ball characteristically remarked a few years after successfully arguing *Wisconsin v. Yoder* at the Supreme Court,¹¹ for example, “I am a complete debtor to God.”¹² Reflecting in his personal diary on “how short” his life, “at best,” might be, Ball asked himself, “What is left to do [in life], and what to avoid?”¹³ The objective, “in the end,” he answered: “be saved.”¹⁴

5. John Courtney Murray, S.J., *Freedom of Religion: I. The Ethical Problem*, 6 THEO. STUD. 229, 238 (1945).

6. See, e.g., VERONICA ROBERTS OGLE, POLITICS AND THE EARTHLY CITY IN AUGUSTINE’S CITY OF GOD 42 (2021) (observing that, for Augustine, there is a “battle . . . between the two cities, earthly and heavenly”).

7. See generally Dennis J. Wieboldt III, *Christian History Meets Constitutional History: John Courtney Murray’s Augustinian Political Theology of the American Founding*, 51 HORIZONS 134 (2024) (describing Murray’s understanding of the relationship between, in the classic Augustinian formulation, the earthly and heavenly cities).

8. *Id.* at 153.

9. *Id.*

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11. 406 U.S. 205 (1972).

12. William Bentley Ball, Diary Entry (Sept. 12, 1980) (on file with William Bentley Ball Priv. Fam. Coll., Mechanicsburg, PA, doc. no. 714) [hereinafter WBBPFC].

13. *Id.*

14. *Id.* See also William Bentley Ball, Diary Entry (Jan. 9, 1988) (WBBPFC, doc. no. 847) (“[There is] [n]o point in pretending that we can have a happy life or that I can do good work without God’s being the center of my life. Hence, time must be made for prayer and such service to others as may be pleasing to God.”) (emphasis added); William Bentley Ball, Diary Entry (Nov. 7, 1988) (WBBPFC, doc. no. 888) (listing, in hierarchical order, “Salvation,” “Family,” and “Service” as the only “permissible” goals towards which one’s time ought to be directed).

Ball's work in the field of church-state relations is especially illustrative of how this personal disposition towards the earthly and heavenly cities has helped to shape the course of American legal history. Even placing *Yoder* aside, Ball—like Murray before him—explicitly drew on his beliefs about the divine arc of human history when he engaged in prominent constitutional debates during the latter half of the twentieth century. But Ball and Murray, of course, are merely two examples. Thus, Smith's survey of how even more well-known figures have channeled this disposition in their everyday work over the last 250 years provides a genuinely novel way to think about longstanding challenges at the heart of the American experiment in self-government about the proper relationship between theology, religion, politics, and law. In Section I, this Essay therefore engages the central descriptive claims that *The Godless Constitution and the Providential Republic* makes about what Americans have believed about the divine arc of human history (or, what Smith more precisely terms "providentialism"), and how this providentialism has shaped the Supreme Court's First Amendment jurisprudence. Then, in Section II, this Essay identifies some of the unresolved tensions in Smith's account of the rise and decline of American providentialism. And, this Essay concludes in Section III by proposing that those who share Smith's malaise about the current state of American legal culture would do well to consider how likeminded figures in the twentieth century attempted to stymie the emergence of the deleterious intellectual currents now lamented in *The Godless Constitution and the Providential Republic*.¹⁵ By learning from their triumphs and travails, perhaps Smith and other contemporary commentators may more effectively persuade the legal profession that the monumental shifts that took place in the twentieth century were not welcome, modernizing advances, but rather deviations from a more robust legal tradition that ought to be restored.

I. SMITH'S PROVIDENTIAL FIRST AMENDMENT

Unsurprisingly, *The Godless Constitution and the Providential Republic* begins by reproducing an excerpt from John Courtney Murray's 1964 book, *The Problem of God*: "Atheism is the public philosophy, established by law. The establishment was accomplished by the law of separation of church and state."¹⁶ Following Murray—who believed that advocates for a strict separation between church and state on both sides of the Atlantic sought to effectively constitutionalize public atheism—Smith's prologue therefore makes an implicit suggestion that unifies the remainder of his study. In simple terms, this suggestion is that what Americans believe about God has shaped (and continues

15. See also STEVEN D. SMITH, *LAW'S QUANDARY* ix (2007) (lamenting how the United States' contemporary "understanding of law has deteriorated due to our wanton neglect (or, rather, our systematic suppression) of its ontological dimensions").

16. STEPHEN D. SMITH, *THE GODLESS CONSTITUTION AND THE PROVIDENTIAL REPUBLIC* vii (2025) (quoting JOHN COURTNEY MURRAY, S.J., *THE PROBLEM OF GOD: YESTERDAY AND TODAY* 99 (1964)). All subsequent references to *The Godless Constitution and the Providential Republic* will be cited parenthetically, unless otherwise provided.

to shape) their behavior vis-à-vis this-worldly law and politics.¹⁷ *The Godless Constitution and the Providential Republic* therefore seeks to examine what Americans have believed about the transcendent and how the Supreme Court's First Amendment jurisprudence has reflected and shaped those beliefs.

According to Smith, Americans at the founding inherited a particular form of Enlightenment thought that "generally embraced a providentialist view of the universe" (ix). This providentialism, Smith further argues, was reliant upon a firm belief in God and God's operation in human history. Perhaps the best evidence for this claim about founding-era beliefs about the transcendent comes from the Declaration of Independence. "In America," Smith writes, "the Declaration of Independence not only declined to reject God; it explicitly acknowledged and indeed depended on 'Nature and Nature's God'" (ix). Repeating the standard refrains of what the political scientist Ken Kersch once labeled "Declarationism,"¹⁸ Smith proposes at the outset of his study that founding-era conceptions of this-worldly individual rights depended on an other-worldly conception of the source of those rights. And Smith further contends that this Declarationism—again, premised on a prior belief in God's providential operation in human history—persisted through the Civil Rights Movement.

In the prologue to *The Godless Constitution and the Providential Republic*, Smith rightly frames John Courtney Murray as a reliable source for understanding the form of mid-twentieth-century providentialism that devoted outsized attention to the Declaration of Independence. Indeed, Murray offered a "landmark statement"¹⁹ of Declarationism with the publication of his 1960 *We Hold These Truths*, citations to which abound in Smith's study. As the Jesuit historian Mark Massa has argued, *We Hold These Truths* offered a "brilliant resolution of the demands of Catholic first principles and American constitutional loyalties" by, in part, framing the Constitution's drafters as disciples of St. Thomas Aquinas.²⁰ From Murray's perspective, therefore, the scope of the individual rights that the founding generation wrote into the

17. Although Smith does not articulate precisely what Americans have believed about the nature of the human person and his relationship to God, *The Godless Constitution and the Providential Republic* seems to assume, as other scholars have argued, that human persons are "beloved creatures, made in God's image and likeness, hard-wired to search for, and cling to, the transcendent truth about what it means to be human." Richard W. Garnett, *Gerard V. Bradley and the American Law of Church and State*, 70 AM. J. JURIS. 71, 81 (2025).

18. Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229 (2011); see also KEN I. KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 55 n.82 (2019) (describing Declarationism).

19. KERSCH, *supra* note 18, at 73.

20. Mark Massa, *Catholic-Protestant Tensions in Post-War America: Paul Blanshard, John Courtney Murray, and the "Religious Imagination"*, 95 HARV. THEO. REV. 319, 336 (2002). But see Mark S. Massa, S.J., *A Catholic for President?: John F. Kennedy and the "Secular" Theology of the Houston Speech, 1960*, 39 J. CHURCH & STATE 297, 313 (2002) (arguing that the "Catholic natural law discourse" on prominent display in *We Hold These Truths* was not politically advantageous to the nation's soon-to-be first Catholic president, John F. Kennedy).

Constitution ought to be determined by reference to Aquinas—or, more particularly, Aquinas’s natural law philosophy.²¹ In fact,

Murray’s political theology of the Founding was inextricable from a Thomistic account of natural law philosophy. In his seminal collection of essays, *We Hold These Truths*, for instance, Murray proceeded from the classic Thomistic view that there is a “certain body of objective truth” known as natural law that is “universal in its import, accessible to the reason of man, definable, [and] defensible.” Because the United States, in Murray’s eyes, was organized “in an era when the tradition of natural law and natural rights was still vigorous,” he concluded that Americans had a particularly unique responsibility to respect the natural law-informed contours of the “American Proposition.”²²

On Smith’s perceptive reading of Murray, the “American Proposition” is premised on an appeal stated in the Declaration, one that is a “truth that lies beyond politics” and “imparts to politics a fundamental human meaning.”²³ For the late American Jesuit, this “first article of the American political faith” was a providential belief in the “sovereignty of God over nations as well as over individual men,” and a corollary belief that “the political community, as a form of free and ordered human life, looks to the sovereignty of God as the first principle of its organization.”²⁴ In contrast with France, Murray believed that the providentialism pervasive in the late eighteenth-century United States encouraged the founders, through the adoption of the First Amendment’s Establishment Clause, to constitutionalize an institutional “separation of church and state” that nevertheless sought to protect and promote religion. And so this separation was not, in Murray’s telling, to be the “strict separationism” that the Supreme Court articulated in *Everson v. Board of Education*²⁵ and its progeny.

21. See Robin W. Lovin, *Religious Freedom and Public Argument: John Courtney Murray on “The American Proposition,”* 50 LOY. U. CHI. L.J. 25, 27 (2018) (observing that “Murray’s reflections [in *We Hold These Truths*] established a relationship between Catholic thought and the American proposition by locating the origins of constitutionalism squarely within the tradition of natural law”). This view was widespread among twentieth-century American Catholics. See, e.g., Dennis J. Wieboldt III, *The “Crusading Fanatics” of American Law: American Jesuits and the Origins of the Neoscholastic Legal Revival, 1870-1960*, 40 J. L. & RELIGION 80 (2025) (describing the prevalence of this view among twentieth-century Catholic legal scholars).

22. Wieboldt, *supra* note 7, at 136 (alteration in original) (quoting JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* x, 30 (1960)). But see MARK S. MASSA, *THE STRUCTURE OF THEOLOGICAL REVOLUTIONS: HOW THE FIGHT OVER BIRTH CONTROL TRANSFORMED AMERICAN CATHOLICISM* 9 (2018) (“[Thomas Jefferson] is often labeled as a ‘natural law deist,’ but such an identity, if related at all [to Aquinas], was a distant third cousin to the Thomistic brand, so that to refer to both Aquinas and Jefferson as ‘natural law theorists’ (precisely the claim voiced by John Courtney Murray in *We Hold These Truths*) actually raises more problems than it solves.”).

23. SMITH, *supra* note 16, at xi (quoting MURRAY, *supra* note 22, at 28).

24. *Id.* (quoting MURRAY, *supra* note 22, at 28).

25. 330 U.S. 1, 18 (1947) (constitutionalizing Thomas Jefferson’s “wall of separation” between church and state that must be “high and impregnable”). See also DONALD L. DRAKEMAN,

Rather, this was to be a differentiation between the institutions of church and state that recognized what Pope Benedict XVI would later describe as the “[f]undamental . . . distinction between that which belongs to Caesar and what belongs to God[.]”²⁶

After expressing his agreement with Murray’s understanding of the original historical meaning of the Establishment Clause, Smith proposes that, by 1960, “the times, they were a-changin’” (xi). And as one might expect for a study of the First Amendment written by a distinguished legal scholar, the Supreme Court is framed as a source and sign of this changing mid-century relationship between law and religion. Indeed, Smith contends that

[e]ven as Murray was defending “the American proposition” . . . the American Supreme Court and the legal profession were in the process of redefining the First Amendment and the separation of church and state . . . reconceiving the constitutional scheme in terms of the very political secularism that Murray perceived to be the establishment of atheism as “the public philosophy” (xi).

Understanding this shift at the Court and its “far-reaching consequences” comprises the descriptive aim of the remainder of Smith’s study (xii). And challenging the desirability of this shift comprises its related prescriptive objective. Consequently, this Section first reconstructs Smith’s theory of the Establishment Clause, and then engages with the evidence that Smith marshals to support that theory. Section II will then evaluate Smith’s account of the relationship between the Court’s post-*Everson* First Amendment jurisprudence and the decline of American providentialism.

A. *The Theory*

To explain the Supreme Court’s mid-twentieth-century “redefinit[ion]” of the First Amendment, Smith introduces in the prologue—and continues in Part I of *The Godless Constitution and the Providential Republic* to articulate—his theory of the original historical meaning of the Establishment Clause. As the author acknowledges, there has been no shortage of scholarly efforts to do the same,²⁷ but the novelty of Smith’s approach is its desire to articulate an

CHURCH, STATE, AND ORIGINAL INTENT 74–148 (2010) (discussing the origins of the Supreme Court’s opinion in *Everson*). Some commentators have argued recently that *Everson* ought to be overruled by the Supreme Court. See, e.g., Timon Cline, Josh Hammer & Yoram Hazony, *Everson Must Fall*, 48 HARV. J. L. & PUB. POL’Y 1 (2025).

26. Richard W. Garnett, “*The Freedom of the Church*”: (Towards) An Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33, 36 (2013) (quoting Pope Benedict XVI, *Deus caritas est* 28(a) (2005)). Of course, Pope Benedict was not the first to articulate this distinction. See, e.g., *Mark* 12:17.

27. Compare, e.g., VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES (2022), with Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). See also, e.g., Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986); GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73

understanding of the Establishment Clause that appreciates the founding generation's providentialism. In this way, Smith's ultimate conclusions about the meaning of the Establishment Clause are not themselves particularly novel, but the historical arguments that he marshals to construct that meaning do represent a genuine contribution to this saturated field.

Smith's theory of the Establishment Clause can be summarized by one word: "agnostic." Described as a "distinctive stance, deliberately adopted, with important implications that modern observers . . . have routinely failed to understand," this "agnostic stance meant that America would not endorse or support religion *as a constitutional matter* . . . but that governments had considerable freedom to endorse and support religion—or *not* to endorse and support religion—on a *nonconstitutional level*."²⁸ "The Constitution," Smith continues, "left both of those options open," thus meriting the nation's founding charter the (perhaps laudable?)²⁹ adjective "agnostic" (xiii). To counter the "[d]emonstrably mistaken" perception that the Constitution was instead designed as a "Godless Constitution,"³⁰ Smith explains why the Constitution's omission of "God" does not itself resolve the question of what the government may or may not do to support religion (xiv).

Smith concedes that the Constitution "left open the possibility of a 'godless politics' and 'godless' governance," but affirms that the Constitution was understood at the founding to be "compatible with a more religion-infused governance and politics—which is in fact what ensued in the early republic and persisted for at least the next century and a half or so" (7). To highlight the space that the Constitution left open for everyday citizens and political leaders to choose to integrate religion and politics more thoroughly, Smith therefore posits that the Constitution "rests on religious presuppositions . . . that are unstated" (10). Despite their being "religious," these presuppositions are compatible with an "agnostic" Constitution because, in Smith's view, the Constitution is "demurely agnostic" (27). As Smith explains, "The Constitution itself does not take a position for or against God, and it thus leaves undecided what the posture toward God will be not only for individuals but for other political contexts and at other levels of government" (27). In a more concise formulation, the Constitution is agnostic as to God because it leaves "options

(2005); Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505 (2019); Donald Drakeman, *Which Original Meaning of the Establishment Clause Is the Right One?*, in THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 365 (Michael D. Breidenbach & Owen Anderson eds., 2020).

28. SMITH, *supra* note 16, at xii–xiii. All emphases in *The Godless Constitution in the Providential Republic* are original unless otherwise noted.

29. To be sure, there have been countless critics of the Constitution who have objected to its failure to mention God. *See, e.g.*, JEROME E. COPULSKY, AMERICAN HERETICS: RELIGIOUS ADVERSARIES OF LIBERAL ORDER 114–63 (2024) (describing the nineteenth- and twentieth-century "religious amendment movements" which sought to amend the Constitution to ensure its explicit recognition of God).

30. ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE (2005).

open to individuals” to choose or reject a more thorough integration of religion and politics (28).

Because the style of *The Godless Constitution and the Providential Republic* is somewhat scholastic, the second half of Part I responds to the objection that the Establishment Clause’s inclusion in the Constitution renders the nation’s founding charter atheist—that is, anti-religion (as opposed, in Smith’s view, to religion-neutral). Smith raises this objection quite bluntly: “So, did the [Establishment Clause] alter the basic character of the Constitution, such that . . . the option of a religion-infused politics and governance . . . was taken off the table?” (33).

As a textual matter, the fact of God’s omission in the Constitution and the Establishment Clause’s inclusion in the Bill of Rights would seem to suggest that a potentially religion-optional (agnostic) constitution is, in fact, an anti-religion (atheist) constitution. However, Smith persuasively responds to this objection by turning to the providentialism of Americans at the founding and in the period immediately thereafter. In doing so, Smith makes deft use of the interpretive hermeneutic now known as “traditionalism,”³¹ demonstrating that a long and unbroken tradition of “drawing on, promoting, expressing, [and] endorsing religion” makes it “apparent that the people who were on the scene—the people who wrote and enacted the [Establishment Clause] or who were immediately subject to it—were either unaware of [its] prohibition [on God] or pretended to be unaware of it.”³² In another formulation, Smith rhetorically asks,

How can the First Amendment as enacted have contained a prohibition on the involvement of religion in governance if the people who were there at the time, and who wrote and debated and voted for the amendment, did not understand it to contain such a prohibition? How could the provision have meant something that no one at the time understood it to mean? (36).

Smith identifies three potential objections to this position. First, Smith acknowledges that it is theoretically possible that the Constitution did, in fact, prohibit “the use or involvement of religion in governance,” but that “early officials were unhappy with the restriction and thus proceeded to ignore and violate it” (36–37). According to Smith, this view has been advanced by Douglas Laycock, Howard Gillman, and Erwin Chemerinsky.³³ In response to this objection, Smith simply claims implausibility: “Why would Americans—

31. The literature on “traditionalism” continues to grow, but representative scholarly treatments of the subject include Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023), and Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9 (2023).

32. SMITH, *supra* note 16, at 35. See also Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1659–61 (2020) (discussing recent decisions of the Supreme Court in which the Justices have used similar traditionalist evidence to uphold the constitutionality of public religious displays under the Establishment Clause).

33. See, e.g., SMITH, *supra* note 16, at 37 (referencing Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986), and HOWARD GILLMAN & ERWIN CHERMERINSKY, *THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE* (2020)).

why would anyone—do such a thing?” (37). Second, Smith concedes that it is theoretically possible that the “founding-era officials who mixed religion with politics and governance” were “innocently unaware” of the Constitution’s prohibition on such activities (39–40). Turning again to a standard refrain in traditionalist scholarship, Smith claims implausibility: “[I]t would be merely nonsensical to suppose that, unbeknownst to the people who were actually using the language, the [Establishment Clause] did somehow contain such a prohibition” (40). Finally, Smith introduces the “evolutionary explanation” associated with Martha Nussbaum’s Dworkinian claim that “our understanding of constitutional meaning evolves with new historical experiences.”³⁴

Of these three objections, Smith suggests that Nussbaum’s is the most intellectually honest because it concedes (what in his view is) the irrefutable historical evidence of the Establishment Clause’s original meaning. But on its own Dworkinian terms, Nussbaum’s objection, he concludes, fails. Indeed, even accepting Dworkin’s premise that we ought to interpret the Constitution such that it will be “the best it can be,” Smith argues that “believ[ing] that religion-free governance is the most consistent with justice and sound policy” would require a belief in something contrary to centuries of historical experience.³⁵ As Smith proposes in later chapters, “a more secularizing interpretation” of the Constitution would produce outcomes that are not “the best [they] can be.”³⁶

Having rejected the three leading explanations for the “Godless Constitution,” Smith then follows Nathan Chapman and Michael McConnell in asserting that the original historical meaning of the Establishment Clause renders this provision quite “minimalist.”³⁷ According to Smith, the Establishment Clause “imposed an important but relatively narrow prohibition: it meant that the national government was forbidden to set up any sort of official church, as England and several of the states had done, and was also precluded from interfering in religious establishments at the state level” (43). On this view, the First Amendment leaves for everyday Americans and their political leaders the choice of whether to integrate religion and politics more thoroughly, so long as the federal government does not, for example, establish a national church.

34. SMITH, *supra* note 16, at 45 (quoting MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 100 (2008)).

35. *Id.* at 48–49 (referencing RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996), and RONALD DWORKIN, LAW’S EMPIRE (1986)).

36. *Id.* at 50. *But see* DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM viii (2011) (arguing that “U.S. religious history [is] not a history of progressive and unfolding freedom[,]” but rather “a history of religious conflict” that “involve[s] . . . periods of religious coercion and the continual attempt to maintain religious power and control”).

37. SMITH, *supra* note 16, at 43 (referencing NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (2023)). *But see* Christopher C. Lund, *Favoritism, Coercion, and the Establishment Clause*, 122 MICH. L. REV. 1303, 1320 (2023) (challenging Chapman and McConnell’s “reduc[tion of] the Establishment Clause to a ban on religious coercion”).

B. *The Support*

To support his theory of the Establishment Clause's original historical meaning, Smith turns in Part II of *The Godless Constitution and the Providential Republic* to the type of evidence now frequently invoked by traditionalist legal scholars who are interested in pre- and post-ratification practices that illuminate what constitutional text at the time of its enactment meant to those who wrote it and/or were subject to it.³⁸ From the author's perspective, the best evidence for an agnostic First Amendment is elucidated by one's focus on the providentialist character of the eighteenth- and nineteenth-century United States. In short, Smith's argument goes, it is implausible to believe that the founders sought for the Constitution to be an atheist (God-less) document that banished religion from the public square because, throughout the eighteenth and nineteenth centuries, everyday Americans and their leaders believed that they lived in a "Providential Republic" governed by God and in the history of which God was actively at work. Once contemporary lawyers and judges "inhabit" this eighteenth- and nineteenth-century "constitutional worldview,"³⁹ Smith compellingly argues, it will become clear that the founders did not adopt a "Godless Constitution" that requires the strict separation between church and state envisioned by the Supreme Court in and after *Everson*.

At the outset of Part II, Smith takes care to note that *The Godless Constitution and the Providential Republic* does not express a view about whether the founders were uniformly Christian or whether the United States was founded as a Christian nation.⁴⁰ Rather, Smith claims that he is interested in the providentialist character of early American history. "Providentialism and religion tend to go together," Smith concedes, "and Christianity often has provided the form and content of providentialist thought" (53). "And yet providentialism is not the same thing as Christianity, and it is not even the same thing as religion," he continues (53). In Part II, therefore, "religion [is] . . . relevant" to Smith's discussion, but the author is "rather and more specifically" concerned with how "providentialism—sometimes in a Christian form, sometimes not—was crucial to America's constitution, self-

38. See *supra* notes 31–32 and accompanying text. See also *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 81 (2022) (Barrett, J., concurring) (collecting scholarship that offers "competing and potentially conflicting frameworks" for "determin[ing] the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution").

39. See JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 252 (2024) ("Only once we've done the painstaking work of inhabiting a different constitutional worldview can we begin deciphering the complex things the Constitution expressed at the time it first appeared."). See also *id.* at 42, 52 (arguing that it is important for contemporary constitutional theorists to "appreciate" the ways in which prior generations of Americans, including "Founding-era constitutionalists," "thought differently than we do today," and urging judges to approach constitutional texts as "inhabitant[s] of the eighteenth century would have").

40. For further discussion of these issues, see, e.g., MARK DAVID HALL, *DID AMERICA HAVE A CHRISTIAN FOUNDING?: SEPARATING MODERN MYTH FROM HISTORICAL TRUTH* (2019).

understanding, and development” (54). This was, of course, “[u]p until the time when . . . it wasn’t” (54).

Divided into three chapters, Part II begins by defending the “thesis . . . that America was founded and for decades was maintained on *providentialist* premises and with a providentialist self-conception” (55). Following the historian Nicholas Guyatt, Smith then continues to define “providentialism,” dividing first between “personal providentialism” and “national providentialism,” and, among the latter, between “historical providentialism” and “judicial providentialism.”⁴¹ To be sure, these distinctions are important in some respects,⁴² but more critical at this juncture is Smith’s general characterization of providentialism’s place in the eighteenth- and nineteenth-century American public consciousness: “Providentialist premises shaped public discourse, inspired hope and resolve in difficult or desperate times, and conferred on Americans a sense that their nation was not merely an association formed for mutual self-interest but rather a divinely ordained entity with a providential role in the history of the world” (57).

The evidence that Smith introduces in this section of his study presages a later theme in *The Godless Constitution and the Providential Republic*—namely, the importance of public symbols. Indeed, to defend his providentialist reading of eighteenth- and nineteenth-century American history, Smith frequently cites presidential proclamations (58), public prayers (60), inaugural addresses (63), and “days of national fasting, prayer, and thanksgiving” (63) that began in pre-republic America and “continued with some regularity thereafter” (63). According to the author, such public acknowledgments of God throughout the eighteenth and nineteenth centuries make it increasingly implausible that the First Amendment, as originally understood, sought to constitutionalize a “high and impregnable wall” that would strictly separate religion and politics.⁴³

Recognizing that Thomas Jefferson and Abraham Lincoln were among the most prominent eighteenth- and nineteenth-century providentialists—who were also “not Christians, at least in any orthodox sense”—Smith continues in the first chapter of Part II to identify the “different visions of providentialism” that, understood together, reflect the “inclusive character of the providentialist perspective in America” (65). For Jefferson, Smith explains, God’s “providential design was a wholly beneficent one” that had a “childlike” quality (72). Of course, this was connected in the founding-era imagination to the new

41. SMITH, *supra* note 16, at 56 (referencing NICHOLAS GUYATT, *PROVIDENCE AND THE INVENTION OF THE UNITED STATES, 1607–1876* (2007)).

42. *See infra* note 76.

43. Recently, the Supreme Court has suggested similarly that the meaning of the Establishment Clause should be understood with reference to history and tradition. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 547 (2022) (Sotomayor, J., dissenting) (observing that the Court has “replace[d] the standard for reviewing . . . questions [about unconstitutional endorsements of religion] with a new ‘history and tradition’ test”). *See also* Christian B. Edmonds, *Supplication and Separation: The Establishment Clause After Kennedy*, 94 GEO. WASH. L. REV. ARGUENDO 21 (2025) (examining the Supreme Court’s post-*Kennedy* “revolution[] of Establishment Clause jurisprudence”).

world's incredible natural abundance and a related sense of what historians for decades have called "manifest destiny."⁴⁴ But this providentialism also led founding-era Americans to derive a "fixed set of universal and equally shared human rights" from "the divine design" (72).

Having described the general prevalence of providentialism in the eighteenth- and nineteenth-century United States, Smith then defends his claim that providentialism was "actually essential to the American project and tradition" (76). This leads the author to identify three "principal (albeit overlapping) functions that providentialism has performed" in American history (77). Two of these three functions are especially "overlapping," having to do with, on the one hand, the construction of a national purpose (77–80), and, on the other, the constitution of a national community (82–84). The third—the role of the "providential perspective" in informing American "discourse"—likewise transects the other two categories, but it is on this discursive theme that Smith had the greatest opportunity to persuade his readers that providentialism was indeed "essential" for much of American history. This somewhat missed opportunity is one to which we will later return, but it bears making a few observations at this juncture about how Smith defends his view that the "providential perspective" decisively shaped American legal discourse until the 1960s.

Smith's emphasis on the "providential perspective" follows from his observation that Americans have "pervasively argued about which course would be in accordance with the design of providence" (80). Such arguments were (in)famously invoked for and against slavery, among other moral issues, Smith rightly notes (80). And, importantly, Smith adds that many such debates were conducted "in the vocabulary of 'rights'" (81). "But at least to Americans like Jefferson," Smith argues, "this vocabulary [of rights] itself presupposed a providential design in which such rights were grounded" (81). "So stated the nation's original founding document—the Declaration of Independence: the people's rights were those by which they were 'endowed by the Creator'" (81). Therefore, Smith concludes that "[a]rguments over rights were thus a kind of providentialism at one short remove" (81).

Alongside this "rights talk,"⁴⁵ Smith observes that Americans have engaged in "epic national debates and mundane court cases . . . [by] deploy[ing] the vocabulary of 'natural law,' which again was understood to be grounded in the providential design" (81). Citing to the legal historian Stuart Banner's recent study of "the decline of natural law"⁴⁶ and similarly incisive work on natural law's eighteenth- and nineteenth-century history by R. H. Helmholz,⁴⁷ Smith then observes that Americans have commonly believed that "Christianity is

44. See, e.g., ERNEST LEE TUVESON, *REDEEMER NATION: THE IDEA OF AMERICA'S MILLENNIAL ROLE* (1968).

45. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

46. See STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* (2021).

47. See R. H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* (2015).

built into the common law” such that early Americans in particular held a “‘nonpositivist’ view of the common law ‘as having an existence independent of the statements of judges,’ and hence as something that was there to be ‘discovered,’ not made.”⁴⁸

Again, these important features of *The Godless Constitution and the Providential Republic* are ones to which we will later return. But it bears noting here that Smith encounters a challenge similarly present in Banner’s scholarship on natural law—namely, how to understand the relationship between religion (and especially Christianity), on the one hand, and concepts related to divine providence (including natural law), on the other.⁴⁹ This challenge follows from the fact that one’s belief in natural law—at least as a theoretical matter—does not require adherence to a Christian understanding of the Trinity, for example, but may nevertheless require some conception of eternity and the design of the universe that may or may not cohere with a Christian conception of the same.

Having by this point in Part II identified three different ways in which providentialism was important in the eighteenth and nineteenth centuries, Smith then considers whether “a providentialist perspective persist[ed] beyond the Civil War period—into the Gilded Age and the twentieth-century” (85). To answer this periodization question, Smith turns to the work of the distinguished religious historian Mark Noll, who argues in his *America’s Book*⁵⁰ that “the specific form of providentialism aiming at . . . a ‘Bible civilization’ did *not* survive the [Civil War]” (85). Following Noll, Smith continues:

Differences of biblical interpretation—and in particular, vehement disagreements about what the Bible taught with regard to slavery—sharply divided Americans and fragmented church denominations; and these disagreements meant that the Bible could no longer serve as the common authoritative source of guidance that it had been in the republic’s early decades.⁵¹

The decline of the United States’ “Bible civilization” notwithstanding, Smith concludes that a “more ecumenical providentialism remained very much alive” after the Civil War, even as “immigration brought more and more Catholics and also Jews to the country [that broke] the Protestant quasi monopoly” (85).⁵² “[G]rowing pluralism served to reveal the adaptable and protean character of American providentialism,” Smith further observes, such that what the historian Kevin Schultz has described as mid-twentieth century

48. SMITH, *supra* note 16, at 81–82 (quoting Stuart Banner, *When Christianity Was Part of the Common Law*, 16 L. & HIST. REV. 27, 61, 50 (1998)).

49. See Dennis J. Wieboldt III, Book Note, 56 ESSAYS HIST. 1 (2023) (reviewing BANNER, *supra* note 46).

50. MARK NOLL, *AMERICA’S BOOK: THE RISE AND DECLINE OF A BIBLE CIVILIZATION, 1794–1911* (2022).

51. SMITH, *supra* note 16, at 85 (citing NOLL, *supra* note 50, at 473–74).

52. For further discussion of the decline of the “Protestant quasi monopoly” to which Smith refers, see, e.g., *BETWEEN THE TIMES: THE TRAVAIL OF THE PROTESTANT ESTABLISHMENT IN AMERICA, 1900–1960* (William R. Hutchison ed., 1989).

“Tri-Faith America”⁵³ could claim a “religious and indeed providentialist orientation” (85). Taking this argument one step further, Smith contends that “it might be argued that providentialism reached its high point in the 1950s—the era of a ‘piety on the Potomac’ that was joined in all branches of government,” citing to the public statements of President Dwight D. Eisenhower (85), the rhetoric of the Jewish sociologist Will Herberg (86), and the “providentialist thinking, or at least providentialist rhetoric,” of President John F. Kennedy (87) and Martin Luther King, Jr. (87). With this evidence in tow, Smith posits that providentialism did, in fact, survive the Civil War, but still asks the “harder question” of “what happened to public providentialism” after the Civil Rights Movement (88). The answer, Smith later reveals, is that public providentialism precipitously declined after the Civil Rights Movement—in part due to several decisions of the U.S. Supreme Court in the 1960s and 1970s that prohibited public displays about or even simple acknowledgments of God under the Establishment Clause.

Before explaining what became of “public providentialism” after the 1960s, Smith takes a brief detour in the fourth chapter of his study to reflect on what the sociologist Robert Bellah famously termed “American civil religion.”⁵⁴ The ultimate necessity of this chapter for Smith’s overarching thesis is not immediately clear, given that the author rejects the view that his “providentialism” is functionally equivalent to Bellah’s “civil religion.” Nevertheless, Smith makes three important observations in this chapter about twentieth-century American providentialism that merit discussion. First, Smith rightly notes that the “malleable and expansive character of American providentialism would seem to have softened the perspective’s exclusionary effects . . . because usually and especially in earlier periods, almost all Americans, despite their differences, could embrace or at least respect a providentialism of one kind or another” (94). Second, Smith rightly notes that religious minorities who have immigrated to the United States—including and especially Catholics—“have not been at odds with providentialism per se,” and have instead “had their own providentialist interpretations of the nation” (95). Finally, Smith rightly notes that “[h]owever encompassing providentialism may be . . . there is one group that presumably would not fit within its big tent—namely, those who do not believe in a deity or providence of any sort” (95). As proslavery theologians characteristically argued in the nineteenth century, “[i]f slavery was ‘natural, universal, moral, and providential,’” then an “‘atheistic’ or ‘rationalist philosophy’ that ‘preached a false conception of humanity and human rights . . . seemed poised to cause ‘radical disorder.’”⁵⁵ Thus, those without any faith in the transcendent “seemed unworthy for toleration or membership in a moral, God-fearing polity.”⁵⁶ This was true in the late

53. See KEVIN M. SCHULTZ, *TRI-FAITH AMERICA: HOW CATHOLICS AND JEWS HELD POSTWAR AMERICA TO ITS PROTESTANT PROMISE* (2011).

54. Robert N. Bellah, *Civil Religion in America*, 6 *DAEDALUS* 1 (1967).

55. Dennis J. Wieboldt III, *Church, State, and the Anglo-American Morality Problem*, 53 *REV. AM. HIST.* 200, 229 (2025) (quoting COPULSKY, *supra* note 29, at 97).

56. *Id.*

nineteenth century, as it was during the twentieth-century crusade against “atheistic communism.”⁵⁷

II. SMITH’S ACCOUNT OF PROVIDENTIALISM’S DECLINE

Before reflecting on the contemporary state of American constitutional culture, Smith advances a historical argument about how the providentialist disposition that he has described was “banished” in the United States so as effectively to constitutionalize “public atheism” (contrary to the original meaning of the Establishment Clause). This Section therefore reconstructs Smith’s account of the decline of American providentialism and then identifies some of the unresolved tensions in that account. As has been suggested, *The Godless Constitution and the Providential Republic* persuasively demonstrates the importance of providentialism to the American public consciousness by highlighting the continuity in public displays of religion between the founding and the Civil Rights Movement. However, this outsized—really, exclusive—attention to public religious displays leaves important questions unanswered about what ultimately enabled the Court to constitutionalize public atheism in the 1960s and 1970s. Indeed, without meaningfully considering how the intellectual infrastructure that substantiated American providentialism in the eighteenth and nineteenth centuries may have been reshaped in the lead-up to *Everson* and its progeny, Smith’s account of providentialism’s decline after *Everson* becomes both intriguing and unsatisfying. And this is true regardless of whether the Court’s post-*Everson* Establishment Clause decisions were the agent of public atheism’s rise to the fore or merely a reflection of broader cultural trends—a question that Smith carefully avoids answering with certainty. So, readers of *The Godless Constitution and the Providential Republic* are likely to be left with more questions than answers about the rise and decline of what certainly was once a “Providential Republic.”

A. American Providentialism in Decline

Citing the Supreme Court’s 1952 decision in *Zorach v. Clauson*—in which the Court described Americans as “a religious people whose institutions presuppose a Supreme Being”—Smith posits at the outset of his chapter on “Providence Banished” that, “in the 1950s, in the age of ‘piety on the Potomac,’” Americans “generally seemed to suppose that the official practice

57. See, e.g., Francis E. Lucey, S.J., *INFORMATIONES ET NOTITAE: INFORMATION ON COMMUNISM AND INTERNATIONAL ATHEISM* (1937) (on file with Geo. U. Libr., Booth Family Ctr. for Spec. Coll., Francis E. Lucey, SJ, Papers, box 5, folder 196) (situating “Divine Truth,” “The Christian State,” and “The Charity of Christ” against “Atheism,” “Communism,” and “Unholy Greed”). For further discussion of the twentieth-century crusade against atheistic communism, see, e.g., KERSCH, *supra* note 18, at 201–46, 299 (“In the struggle against atheistic communism, the ultimate triumph would come only through a commitment to God, perfect moral clarity, and, in a Cold War context, a willingness to fight.”); Kyle Burke, *Radio Free Enterprise*, 40 *DIPLOMATIC HIST.* 111, 130 (2016) (“At the peak of the Cold War, evangelical Protestants began to embrace conservative Catholics as valuable partners in the Cold War struggle against atheistic communism, a shift that helped redefine American religious communities along partisan lines.”).

of providentialism . . . was fully compatible with the American Constitution.”⁵⁸ “And then,” Smith continues, “everything changed—quite suddenly, actually, and at least partly as the result of a new constitutional jurisprudence elaborated and imposed by the Court” (112). According to the author, constitutive of this new jurisprudence was a regime of strict neutrality in which the “government had to confine itself . . . to the domain of the secular” (113). Indeed, in Smith’s telling, the Jeffersonian “wall of separation between *church and state*” came to represent a “wall of separation between *government and religion*” (113). And this novel view of the Religion Clauses—or, more particularly, the Establishment Clause—“logically entailed that all of the entrenched and cherished features and incidents of public providentialism were now, at least in principle, out-of-constitutional-bounds” (113).

Following “most commentators,” Smith identifies the Supreme Court’s 1947 decision in *Everson* as the “seminal modern case” from which the Court’s strict separationist jurisprudence subsequently evolved (117). As the decision in which the Court constitutionalized Jefferson’s metaphorical wall of separation, and because of which the Court, “for the first time in American history, . . . [found] itself in the position of final arbiter of First Amendment controversies with an ever-increasing docket of cases,”⁵⁹ *Everson*, Smith notes, was crucial, even if not ultimately the “real watershed” (118). Indeed, Smith continues to identify the Court’s later “classroom prayer and devotional Bible reading” decisions, *Engel v. Vitale*⁶⁰ and *Abington Township v. Schempp*,⁶¹ as the decisions that were most “profoundly disruptive of [the public’s] traditional practices and understandings” (117–18).

Regardless of which decision was, the “real watershed,” Smith concludes that, by 1963, the “central doctrine that would govern judicial decisions [under the Establishment Clause] for the rest of the twentieth century and well into the twenty-first” was firmly in place (118). This doctrine required that laws and government actions: (1) “have a ‘secular purpose,’” and (2) “have a ‘primary effect that neither advances nor inhibits religion’” (118). And, in 1971, the final element of the three-part test articulated in *Lemon v. Kurtzman*⁶² to assess Establishment Clause claims was added: that laws and government actions avoid “excessive entanglement” with religion (119). Taken together, these three elements of the *Lemon* test represented a new “orthodoxy” that the federal and state governments “should be separated from religion and should stay within the realm of the secular, not just in the reasons they act on and the purposes they pursue, but also in their utterances, or in what governments intentionally or unintentionally communicate” (119).

58. SMITH, *supra* note 16, at 112 (referencing *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)).

59. Dennis J. Wieboldt III, “*Shall We Settle for Anything Less Than Complete Equality?*”: *Catholic Power and the First National Fight for Parental Rights in Education, 1947*, 34 RELIGION & AM. CUL. (forthcoming 2026) (manuscript at 8), available at: <https://dx.doi.org/10.2139/ssrn.6064411> (quoting J. DAVID HOLCOMB, GUARDIAN OF THE WALL: LEO PFEFFER AND THE RELIGION CLAUSES OF THE FIRST AMENDMENT 22 (2021)).

60. 370 U.S. 421 (1962).

61. 374 U.S. 203 (1963).

62. 403 U.S. 602 (1971).

From Smith's perspective, the Supreme Court's post-*Everson* Establishment Clause jurisprudence sought to—or, if it did not seek to do so, did in fact—undermine the “providentialist position that had characterized American governments through much of the nation's history” (120). This was a longstanding providentialism, Smith continues, that “had prescribed that not only individual citizens but communities and their governments should affirmatively acknowledge and seek the assistance of [the] deity” (120).

As these passages from *The Godless Constitution and the Providential Republic* should suggest, Smith's account of American providentialism's decline is closely tied to public displays of religion. Consequently, Smith identifies the Supreme Court's decisions in *Engel* and *Schempp*—which prohibited the government from publicly acknowledging God (under the theory that such acknowledgement would constitute an unconstitutional “endorsement” of religion)—as the clearest evidence that the mid-century Court was undermining the nation's long-held providential presuppositions. Smith's turning to the decline of public religious displays as a means by which to understand the decline of American providentialism follows from the author's prior view that the theistic worldview undergirding American providentialism “has implications or entailments for how a government should speak and act” (124). “[A] government that declines to accept [a theistic] position and its entailments,” Smith concludes, “has in effect rejected it” (124). Thus, by prohibiting government officials from respecting the “entailments” of providentialism—including invitations to publicly acknowledge God—the mid-century Court effectively repudiated what had been “actually essential to the American project and tradition” for centuries prior (76).

Smith describes this mid-twentieth-century repudiation of providentialism as a product of a “bashful, not a boisterous, atheism” (126). Unlike “Communist regimes that have actively sought to repress religion,” the Supreme Court's post-*Everson* approach to the Establishment Clause, Smith argues, presupposed that religion could be an appropriate subject of private interest (126). And yet, Smith also asserts that the Court sought to obscure the logical implications of its atheism—for example, that “people acting in the domain of government and political deliberation . . . act as if they are atheists.”⁶³ Because the consistent enforcement of such a constitutional requirement was far too extreme for a polity that, even in 1952, could be described as being constituted by “religious people,” Smith persuasively argues that the Court and supportive “academic theorists . . . elaborate[d] sophisticated or sophisticated versions of neutrality that worked to obfuscate the plain and nonneutral implications of the ideal” (129). In other words, Smith proposes that, even as the Court's mid-century Establishment Clause jurisprudence sought to ensure government neutrality in matters of religion by prohibiting public acknowledgment of God, the public atheism that the Court constitutionally mandated was anything but “neutral.”⁶⁴

63. SMITH, *supra* note 16, at 126. This claim—that “religious arguments should be excluded from democratic deliberation”—has been opposed often by advocates for religious liberty. See, e.g., Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639.

64. But see ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013).

Importantly, Smith contends that the Supreme Court's post-*Everson* Establishment Clause jurisprudence had significant consequences outside of the public-display context. Indeed, according to Smith, the *Lemon* test and the public atheism that it constitutionalized also has been "powerfully influential *sub silentio*" in "cases where laws and practices grounded in Christian premises or traditions have been challenged under provisions such as the Fourteenth Amendment[]" (138–39). Citing cases involving "procreation and marriage," among other contested social practices, Smith argues that the late-twentieth-century "assumption" increasingly seemed to be that, "insofar as . . . laws [regulating contested social practices] were grounded in Christian or religious beliefs, they were no longer legitimate" (139). "Under [the] Fourteenth Amendment," Smith continues,

a state could defend its laws against such challenges only by showing that the law served some important and legitimate state interest. And in accordance with [the Court's] secular neutrality conception, it came to be assumed that if the reason for a law or the interest served by it was "religious," that reason or interest could not count as a basis for upholding the law (139).

Although *The Godless Constitution and the Providential Republic* was published before the Supreme Court decided *United States v. Skrametti*,⁶⁵ Smith's intuition about the long-term consequences of the Court's "public atheism" seems to have recently proven prescient—at least on some readings of *Skrametti*. For example, Josh Blackman has argued that the majority opinion in *Skrametti* "ignored the *real* reason why Tennessee and so many other states have enacted . . . laws [banning transgender hormone therapy]: the legislatures morally disapprove of transgenderism for minors, and sought to prevent children from medically transitioning to another sex."⁶⁶ "The opinions in *Skrametti* stretched more than a hundred pages," Blackman has further noted.⁶⁷ "But the analysis could have been pretty simple: the legislature concluded that transitioning minors was immoral, and the [Court found] that this judgment is rational."⁶⁸ To explain why the *Skrametti* majority instead chose to uphold Tennessee's ban on transgender hormone therapy under traditional equal protection principles, Blackman has posited that, "[i]n a series of decisions stretching two decades," Justice Anthony Kennedy "found that moral disapproval was not a rational basis [on which] to enact legislation, but instead reflected impermissible 'animus,' or hatred, of certain groups."⁶⁹

To be sure, Justice Kennedy had not yet joined the Court when it handed down the mid-to-late twentieth-century "public atheism" decisions to which

65. 605 U.S. 495 (2025).

66. Josh Blackman, *What Skrametti Should Have Said*, CIVITAS OUTLOOK (Jun. 23, 2025), <https://www.civitasinstitute.org/research/what-skrametti-should-have-said> [<https://perma.cc/FH32-KFCZ>] (emphasis original).

67. *Id.*

68. *Id.*

69. *Id.* (referencing *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *United States v. Windsor*, 570 U.S. 744 (2013)).

Smith most strenuously objects. However, it nevertheless seems reasonable to place Justice Kennedy in precisely the tradition that Smith identifies as animating in *Engel*, *Schempp*, and *Lemon*.⁷⁰ And, at least with respect to *Skrimetti*, other legal scholars have agreed that the Court there sought to avoid addressing the apparent fact that morality motivated the Tennessee legislature.⁷¹ In this way, while the majority in *Skrimetti* reached the outcome that Smith and likeminded scholars would seem to prefer personally, the majority did so in such a way as to avoid confronting the argument now seemingly foreclosed by the Court's mid-to-late twentieth-century Establishment Clause decisions—namely, that, “insofar as . . . laws [regulating contested social practices are] grounded in Christian or religious beliefs, they [are] no longer legitimate” (139).

B. Unresolved Tensions

Before turning to Smith's reflections on the contemporary consequences of the Supreme Court's having “banished” (or at least helped to banish) American providentialism, the unresolved tensions in Smith's historical account merit discussion. First, Smith's failure to disentangle the relationship between providentialism and twentieth-century “rights talk,” “nonpositivism,” and appeals to “natural law” might fairly leave readers wondering what enabled the Court to constitutionally mandate public atheism after the Civil Rights Movement; after all, it seems quite implausible that the Court made a move as striking as the constitutionalization of public atheism without any prior indication of movement in this direction—either at One First Street or in American culture more broadly. Second, and relatedly, Smith's failure to explain how twentieth-century providentialists attempted to stem the tide of the then-emerging jurisprudence to which Smith now objects might leave readers with the unfortunate impression that the Court's coup against American providentialism was executed without challenge.

In Part II of *The Godless Constitution and the Providential Republic*, Smith makes several related arguments to support his thesis that providentialism was a decisive feature of the American public consciousness until the Civil

70. Despite the fact that this became the Court's later-twentieth-century view, morals regulation was a routine feature of state and local efforts to build a “well-regulated society” in the nineteenth century. See, e.g., WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 149–190 (1996).

71. See Hadley Arkes, *Supreme Confusion: The Court Does Transgenderism*, ANCHORING TRUTHS, <https://www.anchoringtruths.org/supreme-confusion-the-court-does-transgenderism> [https://perma.cc/G8PH-HT82] (last visited Nov. 12, 2025); see also Jeremy Christiansen, *Give Me That Old-Time Judge Thomas*, THE NEW DIGEST (July 1, 2025), <https://thenewdigest.substack.com/p/give-me-that-old-time-judge-thomas> [https://perma.cc/5RWX-YE7Z] (“The Court reached the right result [in *Skrimetti*], no doubt. I agree with Hadley Arkes' view that the *Skrimetti* . . . conservative justices apparently see themselves as barred from speaking the truth here, having largely relied on a parade of ‘contingent harms’ to justify much of their reasoning, and should have done more. And I also agree mostly with Josh Blackman's observation that, but for the ‘shadow’ of Anthony Kennedy, *Skrimetti* was an easy case—classical moral legislation that would be subject only to rational basis review.”).

Rights Movement. Among these claims is that “arguments over rights were arguments over providentialism once removed,” that the vocabulary of “natural law” has been another vehicle through which to debate rights, that providentialism as practiced in the United States has been inclusive (save for atheists), and that, because Americans once believed that “Christianity is built into the common law,” they held (until some unidentified point) a nonpositivist understanding of the common law. Again, it seems as though Smith advances these arguments about providentialism’s many discursive formulations to suggest that the providential worldview undone after the Civil Rights Movement was, in fact, animating before then.

Smith is right: Providentialism has been a decisive feature of American political thought, and was especially so among prominent public intellectuals like John Courtney Murray and Martin Luther King Jr. during the twentieth century.⁷² In Murray’s view, for example, the *inchoate vitae aeternae* takes place on earthly soil because it is in the course of human history that God offers every human person an opportunity to participate in the divine plan. Indeed, the life that Murray described as the *inchoate vitae aeternae* “is lived during the course of human history, in political community, and under the direction of Divine Providence.”⁷³ And “[p]recisely by virtue of its being undertaken in the course of human history . . . this life participates in and contributes to the building of the eschatological City of God that ultimately extends beyond human history and earthly political communities.”⁷⁴ Even if articulated in different forms, this providentialist disposition similarly animated the earliest European visitors to the New World, including the Puritans of the Massachusetts Bay Colony, who understood their mission on American shores to be an eschatologically purifying mission.⁷⁵ And while Murray’s providentialism was most focused on the *individual* person’s participation in God’s providential plan, Americans—including President Lincoln—have routinely argued that God has providentially placed the United States on a *national* mission of salvific importance.⁷⁶

72. See, e.g., Kersch, *supra* note 18, at 231 n.8, 234, 267–68 n.242 (discussing King).

73. Wieboldt, *supra* note 7, at 153.

74. *Id.*

75. See, e.g., PERRY MILLER, *ERRAND INTO THE WILDERNESS* (1956).

76. This is the distinction between “personal providentialism” and “national providentialism” that Smith adopts from Nicholas Guyatt. See SMITH, *supra* note 16, at 56 (“Defining providentialism as ‘the belief that God controls everything that happens on earth,’ Guyatt distinguishes between ‘personal providentialism,’ or the belief that God guides the lives of *individuals*, and ‘national providentialism,’ which holds that God governs the destinies of *nations*.”) (emphases original). In my view, twentieth-century American Catholic intellectuals like Murray, though certainly self-professed American patriots, were more frequently personal providentialists than national providentialists. This was likely due to their “self-conscious membership in a global religious community,” a disposition not shared with many of their Protestant contemporaries who contrastingly understood the United States to be a distinctive Christian community on what Perry Miller once described as a salvific “errand” in the new world. Dennis J. Wieboldt III, *Making Natural Law “Useful in the Solution of Practical Problems”*: *Global Catholicism and Human Rights in The Catholic Lawyer, 1955-1964*, 111 CATH. HIST. REV. 334, 338 (2025). But see *infra*

The providentialism evident in Murray's political philosophy is one that has both long existed in the United States and one that had a particularly outsized influence within the twentieth-century American Catholic Church—which, both institutionally and as a community of believers, was more influential than any other religious institution or community in twentieth-century debates over the First Amendment. By way of example, consider William Bentley Ball, an often-overlooked figure in the law-and-religion historiography who not only argued seminal Establishment Clause cases before the Supreme Court (including *Lemon*), but who also followed Murray in believing that every human person's life on earth has an inextricable relationship to the transcendent because there is a providential arc to human history. As Ball, a "prominent Roman Catholic layman,"⁷⁷ once remarked in his personal diary, for example, any "worry over the future" that one might have, even amidst extreme "anxiety," ought to be left "to his [God's] Providence."⁷⁸ And importantly, this conviction that the world in which human persons live is governed by God and in the history of which God is actively at work was shared with Ball's and Murray's Protestant contemporaries—who, with Catholics, comprised the vast majority of the nation's population at mid-century.⁷⁹

Even as Protestants in the twentieth-century United States strenuously objected to important features of Catholic theology,⁸⁰ they shared with their Catholic neighbors a striking commitment to American providentialism. In 1959, for instance, the Jesuit author and civil rights activist John La Farge took the occasion presented by the "325th anniversary of the founding of Maryland, which, as a colony, introduced religious freedom to America," to highlight the inclusive character of divine providence and its relationship to the founding of the United States.⁸¹ Standing alongside "a leading Protestant layman" at an event sponsored by an "interfaith" organization, La Farge remarked that "[a] growing sense among American citizens [is that] dialogue is possible" between, among others, "Protestants and Catholics."⁸² La Farge continued: "[T]he debate [over the place of religion in American politics] turns on the question as to whether or not there exists a providential purpose for the United States, or

notes 81–84 and accompanying text (quoting a prominent American Catholic intellectual channeling both personal and national providentialism).

77. Wolfgang Saxon, *William Ball is Dead at 82; Defended Religious Rights*, N.Y. TIMES (Jan. 18, 1999).

78. William Bentley Ball, Diary Entry (Feb. 20, 1977) (WBBPFC, doc. no. 630).

79. See Brent H. Burdick, *The Status of the Church in North America*, 115(2) REV. & EXPOSITOR 200, 206(2018) (tracking the decline of Protestant and Catholic religious preference from 1948—at 69% and 22%, respectively—through 2017—down to 38% and 21%, respectively).

80. See, e.g., ROBERT A. ORSI, HISTORY AND PRESENCE 12–16 (2016) (describing the 1933 novella *Tony*, in which a young Catholic boy "in an unnamed American industrial city" was hanged by Protestant boys because he refused to deny Christ's presence in the Eucharist).

81. *Jesuit Author Decries Dragging of Religious Issues into Politics*, NAT. CATH. WELFARE CONF. NEWS SERV. (Nov. 23, 1959) (on file with Cath. U. of Am. Spec. Coll. Lib., NCWC/USCC/USCCB L. Dept./Gen. Counsel Rec., box 7, folder 9).

82. *Id.*

whether our country is a mere haphazard evolution[.]”⁸³ “For my own part,” he concluded:

I foresee the great and providential function of our nation as an active agent of unity and peace in a divided world. I see the office of our country as that of conveying to all men some of those insights into the personal dignity of our human nature under God which we, in turn, have inherited from these first founders [of the United States]. Thus we will help to create for all mankind, regardless of race, color or creed, those conditions of freedom under law by which, through God’s grace, the forces for unity and peace can freely operate.⁸⁴

From this general providential disposition came the “rights talk” that Smith rightly identifies across a broad temporal sweep of American history. In the twentieth century, for example, John Courtney Murray and other religious liberty advocates understood the First Amendment’s guarantee of the “free exercise of religion”⁸⁵ to be a declaration of an individual right providentially ordained by God.⁸⁶ Importantly, however, Murray and his likeminded contemporaries most often made this argument about Americans’ religious free-exercise rights by appealing to natural law, framing natural law as the medium through which God is at work in human history vis-à-vis the protection of individual rights. Indeed, Murray and many of those in his intellectual milieu routinely argued that the drafters of the Constitution “built better than they knew” by placing natural law at the foundation of the American republic.⁸⁷ And some more particularly claimed that, “[t]hanks to the Ninth Amendment . . . the Natural Law of philosophy explicit in the Declaration of Independence” was also “implicit in the Constitution.”⁸⁸ As one of Murray’s contemporaries characteristically argued in a 1954 address:

If the word “rights” implies a law establishing them, and if the American people “retain” rights not expressed in the Constitution [under the Ninth Amendment], nor set out in any human statutes,

83. *Id.*

84. *Id.*

85. See U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

86. See generally Wieboldt, *supra* note 7. See also SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 8 (2010) (describing the “conviction” shared among various American religious communities in the nineteenth and twentieth centuries that “the Constitution could only be rightly understood as protecting them”).

87. See Wieboldt, *supra* note 7, at 136–37; see also Dennis J. Wieboldt III, *Our Natural Law Moment(s)*, 24 GEO. J. L. & PUB. POL’Y (forthcoming 2026), available at: <https://dx.doi.org/10.2139/ssrn.5259199> [<https://perma.cc/H27P-T93F>] (discussing, in part, the views of the former dean of the University of Notre Dame College of Law, Clarence E. Manion).

88. Edward F. Barrett, *The Natural Law and the Lawyer’s Search for a Philosophy of Law*, 1 CATH. LAW. 128, 131 (1955).

such “retained rights” can have no other source or origin than the Natural Law to which the Declaration appealed.⁸⁹

Whether effectuated through the text of the Ninth Amendment or some other provision,⁹⁰ this understanding that the Constitution was drafted providentially by natural lawyers to protect unenumerated rights exercised significant influence on twentieth-century constitutional discourse.

The example of religious liberty is particularly illustrative, but this conviction that God has imbued the universe providentially with natural law principles that are “immutable”⁹¹ and “unchanging,”⁹² and that the drafters of the Constitution recognized God’s doing so, is what made “rights talk” so contentious during the twentieth century, as in previous periods of American history. As Stuart Banner has argued with respect to the Civil War, for instance, because both proponents and opponents of slavery could claim a divine mantle, their asserted natural law rights to enslave human persons, on the one hand, and to be free from slavery, on the other, came into ever-sharper conflict.⁹³ Likewise, during the Second World War and Cold War, countless lawyers and legal scholars argued that the United States had an obligation to prevent Nazism and Communism from arriving on American shores because those ideologies appeared to reject God’s providential ordering of the universe and the rights that follow from that ordering through natural law.⁹⁴

This all having been said, Smith’s readers ought now to return to the author’s explanation for the decline of American providentialism, which *The Godless Constitution and the Providential Republic* explains with reference to Mark Noll’s study of how the United States’ “Bible civilization” declined. From Smith’s perspective, it seems, even if one accepts Noll’s thesis that the United States’ Bible civilization declined by the early twentieth century, an “ecumenical providentialism” could have nevertheless survived until the latter half of the century (and, in particular, until the 1960s). But Smith does not support this (re)periodization with much tangible evidence; rather, Smith makes passing references to the fact that providentialism in the United States has been inclusive, that many public statements acknowledging God were made by prominent political leaders through the mid-twentieth century, and that, for example, twentieth-century immigrants to the United States (especially Catholics) bought into what was once an identifiably Protestant providentialism.

89. *Id.*

90. See, e.g., Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1438 n.35 (describing various scholarly views about the meaning of the Ninth Amendment vis-à-vis unenumerated rights).

91. See, e.g., William J. Kenealy, S.J., *The Immutable Foundation of Law*, 11 HASTINGS L.J. 440 (1960).

92. See, e.g., R. D. Lumb, *Natural Law—An Unchanging Standard?*, 6 CATH. LAW. 224 (1960).

93. BANNER, *supra* note 46, at 149–60.

94. See Wieboldt, *Our Natural Law Moment(s)*, *supra* note 87.

In my view, the historical distinction that Smith makes between the decline of the United States' Bible civilization, on the one hand, and its providentialism, on the other, is intuitively persuasive—even if not for the reasons that Smith exactly articulates. Indeed, even accepting Noll's thesis that the Bible was no longer the text around which the American polity was organized by the early twentieth century, it does not necessarily follow that providentialism declined similarly precipitously. Rather, a more intuitive explanation for providentialism's continued vitality until the Civil Rights Movement seems to be that, instead of locating the source of the United States' self-understanding in the Bible—a move that often engendered significant hostility between Protestants and Catholics—postbellum Americans like President Lincoln turned to more general (and inclusive) appeals to divine providence.⁹⁵ Importantly, in making this move, postbellum figures invented what would later become known as “Declarationism” by channeling Americans' providentialism into the Declaration of Independence—or, more particularly, its reference to the “Laws of Nature and of Nature's God.”

All things considered, *The Godless Constitution and the Providential Republic* ought not to be criticized for confronting the historian's inescapable chicken-or-egg problem—whatever precipitated American providentialism's decline after the Civil Rights Movement was the product of contingent historical factors, none of which can be pinpointed with exact certainty, even if it is clear that the Supreme Court had some important role to play in its “banish[ment].” This notwithstanding, readers of *The Godless Constitution and the Providential Republic* may fairly wonder to what Smith attributes the persistence of providentialism through the Civil Rights Movement, and therefore its undoing afterwards. To be sure, the twentieth-century invocations of God from the bully pulpit to which Smith points his readers are helpful evidence that providentialism persisted longer than the United States' “Bible civilization,” but that evidence offers relatively little insight into why Americans remained providentialists—other than perhaps to suggest that Americans remained broadly theistic. And this tension in Smith's narrative is particularly acute in light of the fact that he does not offer any explanation other than sophistry for how the Supreme Court was able to execute its coup against American providentialism—and its concomitant constitutionalization of public atheism—so effectively.

If, as I have suggested, the continued vitality of Declarationism between Lincoln and King might help to explain how American providentialism survived the waning of the nation's “Bible civilization,” then so too might the nonpositivism undergirding the Declaration's appeal to the “Laws of Nature and of Nature's God” have a place in how scholars ought to understand providentialism's decline after the Civil Rights Movement. Indeed, perhaps it

95. For example, determining which version of the Bible should be read in public schools generated deep distrust between Catholics and Protestants in the nineteenth century. See, e.g., Linda Przybyszewski, *Religious Liberty Sacralized: The Persistence of Christian Dissenting Tradition and the Cincinnati Bible War*, 39 L. & HIST. REV. 707 (2021) (discussing the Cincinnati Bible War, which was fought over the use of the King James Version of the Bible in Cincinnati's public schools).

is the case that Americans remained providentialists until the Civil Rights Movement because they remained, in large part, nonpositivists. As Ken Kersch, among others, has demonstrated, nonpositivism (especially in its specific Declarationist formulation) was crucial to King's Civil Rights Movement-era organizing,⁹⁶ as it was to John Courtney Murray and his contemporaries who so fervently opposed Communism during the Cold War.⁹⁷ For my own part, I have sought to highlight the nonpositivism of other Civil Rights Movement-era organizers,⁹⁸ as well as its importance to influential Cold Warriors in historiographically marginal corners of the American legal profession.⁹⁹ And I have done the same with respect to the interwar period, World War II, and the postwar period, seeking to highlight the extent to which nonpositivism remained animating in some Americans even after the "decline of natural law" that Stuart Banner has dated to the late nineteenth and early twentieth centuries.¹⁰⁰

On this reading of the twentieth-century record, it would seem at least arguable that an abandonment of nonpositivism in the elite legal community that has long-surrounded the Supreme Court was a causal explanation for the Court's sudden and unreflective adoption of public atheism in *Engel*, *Schempp*, and *Lemon*—the first of which, as Smith rightly notes, generated more ill will towards the Court among everyday Americans than any other decision in the Court's history.¹⁰¹ Interestingly, Part III of the *Godless Constitution and the Providential Republic* seems to gesture towards this view by addressing the place of "rights talk," "nonpositivism," and appeals to "natural law" in the decline of the "Providential Republic," but does so in such a way as to leave Smith's readers equally intrigued as unsatisfied. Ultimately, in fact, Smith does not articulate a clear position on the cause of American providentialism's "banish[ment]" by the Court between 1962 (*Engel*) and 1971 (*Lemon*). And yet, Part III appears to suggest that a rejection of founding-era nonpositivism in the

96. See *supra* note 72 and accompanying text.

97. See Dennis J. Wieboldt III, *Ideas With(out) Consequences?: The Natural Law Institute and the Making of Conservative Constitutionalism During the Cold War, 1947-1951*, 42 L. & HIST. REV. 847 (2025) (describing, in part, the connection between nonpositivism and mid-century anti-Communism).

98. See, e.g., Dennis J. Wieboldt III, *The Natural Law and Interreligious Social Advocacy: The Civil Rights Movement-Era Case of William J. Kenealy, S.J.*, 134 AM. CATH. STUD. 55 (2023); Dennis J. Wieboldt III, *Civil Rights and Prophetic Indictment: A Discursive History of Jesuit Superior General Pedro Arrupe's On The Interracial Apostolate*, 21 J. CATH. SOC. THOUGHT 107 (2024).

99. See Wieboldt, *supra* note 97.

100. See Dennis J. Wieboldt III, *Natural Law Appeals as Method of American-Catholic Reconciliation: Catholic Legal Thought and the Red Mass in Boston, 1941-1944*, 41 U.S. CATH. HISTORIAN 27 (2023); Dennis J. Wieboldt III, *Natural Law for the Laity: A Case Study in Catholic Education on the Airwaves*, in THEOLOGY AND MEDIA(TION): RENDERING THE ABSENT PRESENT 196-209 (Stephen Okey & Katherine Schmidt eds., 2024); Wieboldt, *supra* note 21.

101. And, notably, the plaintiff who brought *Schempp* was described by *Life* magazine in 1964 as "the most hated woman in America." BRYAN F. LE BEAU, THE ATHEIST: MADALYN MURRAY O'HAIR (2003).

elite legal community either contemporaneously reflected or eventually hastened the demise of American providentialism in the latter half of the twentieth century.

III. RESOLVING THE TENSIONS?

Part III of *The Godless Constitution and the Providential Republic* addresses the consequences of providentialism's decline with reference to "liberalism." As Smith rightly notes, "the justifications for the various commitments that made up the cluster of liberalism [in the founding period] were themselves rooted in the providential plan" (142). "Despite their manifest differences," Smith continues,

humans were equal, as the Declaration of Independence asserted, because they had been made so by "their creator." They were equal in the sense that they had been endowed *by their creator* with certain "unalienable rights." Rights and law were not merely human constructions that could be crafted and recrafted, or curtailed or abolished, as humans might see fit; they were derivations from and reflections of the providential plan, which was beyond the power of mortals to construct or deconstruct (142).

To be sure, Smith ascribes this general set of views to the founding generation, these views were also shared among figures like John Courtney Murray who opposed the twentieth-century incarnations of what Smith describes as "modern liberal thinking" that followed "the 'antifoundational path' [i.e., positivist path] of much modern theorizing about knowledge and ethics" (151). Consequently, it seems that, from Smith's perspective, the nation's abandonment of its providentialism in the 1960s and 1970s precipitated an abandonment of its founding-era nonpositivist liberalism—in other words, of a political liberalism that acknowledges God, God's operation in human history, and God's imbuing the universe with natural law principles. In the author's telling, the nation had largely adopted an "antifoundational liberalism" by the end of the twentieth century, aided and abetted by the Supreme Court's decisions in *Engel*, *Schempp*, and *Lemon* (153).

Part III of *The Godless Constitution and the Providential Republic* gestures towards some of the tensions that this Essay has identified in Smith's historical narrative. Indeed, in Part III, Smith takes care to explain how, "[i]n the American and liberal tradition, . . . the term 'rights' is not limited to positive legal rights" (158). Smith continues: "[I]t is of the essence of liberalism to insist that human beings have rights that are 'unalienable,' as the Declaration of Independence says, or 'natural,' or 'human,' and that these rights exist whether governments and legal systems recognize them or not" (158). This understanding, Smith further argues, was animating at the founding, including in the minds of figures like Thomas Jefferson and Alexander Hamilton who subscribed to the "classic providentialist view" that "the providential plan creates or amounts to a normative order constituted by a set of 'natural laws' that prescribe and prohibit—not in detail, typically, but in broad strokes" (159). "In this view, God or providence is to the natural law (and thus to the corollary rights) what the king or the legislature are to positive law and positive legal

rights” (159). In light of mid-twentieth-century public intellectuals like Murray, Smith further suggests that the “concept of a ‘right’ makes sense only on the assumption of a background normative order,” and that “if the providential foundation is discarded, for public purposes anyway, natural or nonpositive human rights would disappear” (160).

In diagnosing the problems that have arisen in the United States since the nation abandoned the notion of rights as classically understood, Smith recovers a principal argument of twentieth-century providentialists who attempted to stymie the emergence of “antifoundational liberalism.” This argument followed the form the classical understanding that,

if rights are thought to be based on some foundation (such as the natural law or the providential plan), that foundation may help both to ground or *support* rights and also . . . to *limit* them And both the supportive and the limiting functions are necessary to give rights meaning—to explain what it means and why it matters that something is said to be a “right” (165–66).

As I have argued elsewhere, Murray and other figures in his intellectual milieu described the natural right to religious liberty, among other natural rights, in precisely these terms.¹⁰² From their perspective, the “foundation” to which Smith refers was “natural law”—or, in the Declarationist vocabulary strategically employed to make once-marginalized Catholics seem increasingly American, the “Laws of Nature and of Nature’s God.”¹⁰³ Consequently, as natural lawyers—including but not only Murray—began to recognize that the elite legal community was turning in a decidedly positivist direction in the 1920s and 1930s, they built institutions, established journals, took to the radio waves, and published voluminous scholarship to stymie the now-completed positivist transformation that Smith laments.¹⁰⁴

As has been suggested, *The Godless Constitution and the Providential Republic* seems to gesture towards this twentieth-century development and its relevance to the history of American providentialism’s decline. For example, Smith rightly notes that, “for generations,” American lawyers and legal scholars “have been taught and have recited that law can be and has been established quite nicely on a purely human and positivistic footing,” a view that erroneously “free[s] law from its classical metaphysical commitments.”¹⁰⁵ Nevertheless, Smith offers rather little concrete historical evidence of this development, instead assuming that the classical notion of rights was replaced by an antifoundational liberalism at some unidentified point in the twentieth century, thereby sowing the seeds of the Supreme Court’s constitutionalization of public atheism—or, in the reverse, that the Court’s public atheism decisions themselves led the nation to adopt an antifoundational liberalism.

102. See Wieboldt, *supra* note 7; Wieboldt, *Our Natural Law Moment(s)*, *supra* note 87.

103. See Wieboldt, *Natural Law Appeals as Method of American-Catholic Reconciliation*, *supra* note 100 (describing the use of a Declarationist vocabulary to Americanize Catholics in the United States).

104. See Wieboldt, *Our Natural Law Moment(s)*, *supra* note 87 (collecting scholarship).

105. SMITH, *supra* note 16, at 185 (referencing SMITH, *supra* note 15).

This tension in Smith's historical account about why American providentialism declined after the Civil Rights Movement is not resolved by the author's gestures towards the rise of antifoundational liberalism. And yet, what gestures he does make about the twentieth-century relationship between providentialism and (non)positivism seem to suggest that he may concur with one alternative explanation that could be offered for the "banish[ment]" of American providentialism in the 1960s and 1970s—that is, that the ascendancy of antifoundational liberalism in the elite legal profession during the first three-quarters of the twentieth century enabled the Supreme Court to render its public atheism decisions in the last quarter of the century in the sudden and unreflective way that Smith describes. At least upon initial reflection, this theory of causation seems more likely to explain how the Court came to constitutionalize public atheism and hasten the demise of the "Providential Republic" several decades after the decline of the United States' "Bible civilization."

To be sure, more research would be necessary to determine whether the alternative causal narrative identified in this Essay can account for the other features of late twentieth and early twenty-first-century constitutional discourse that Smith rightly identifies, including and especially the proliferation of appeals to "rights." But this notwithstanding, the argument that antifoundational liberalism enjoyed an inverse relationship to providentialism during the twentieth century seems intuitively persuasive. In fact, perhaps the most important feature of the intellectual infrastructure that substantiated American providentialism in the eighteenth and nineteenth centuries was the classical notion of rights as derived from God's imbuing the universe with natural law(s), which was translated in the postbellum period into the Declarationist vocabulary that Ken Kersch has expertly chronicled. As Stuart Banner has demonstrated, however, the "decline of natural law" was complete in most American courtrooms in the early twentieth century, and there is little reason to believe that natural law persisted any longer at the Supreme Court afterwards. Consequently, it seems at least plausible to argue that the fabric of an antifoundational liberalism—and therefore public atheism—began to be woven not after *Everson*, but rather in the 1920s and 1930s as positivism came to dominate the institutions of elite legal education that have long produced most Justices on the Supreme Court. And if this account is right, then it could potentially explain why the public displays of religion in which Smith is so interested persisted through the mid-twentieth century; after all, these traditional signs of public providentialism were prominent in the most democratically responsive (i.e., non-insularly elite) federal institutions—Congress and the White House. For this reason Declarationism indeed persisted beyond the decline of America's Bible civilization, helping to ensure the continued vitality of providentialism even as a small but influential corner of the legal profession was moving in the decidedly positivist and anti-providentialist direction that produced *Engel*, *Schempp*, and *Lemon*.

Again, this narrative is perhaps little more than a thought experiment generated by *The Godless Constitution and the Providential Republic*. And yet, the well-documented history of opposition to what Smith describes as "public atheism" between the 1920s and 1960s provides persuasive evidence that those

who contemporaneously observed the emergence of now-completed transformations in American legal thinking understood the elite legal academy's adoption of an antifoundational liberalism in the 1920s and 1930s as a significant challenge to the nation's traditional self-understanding. Because Smith fails to describe how the changes in American law now lamented were challenged during the last century, however, the author leaves explanatory tensions unresolved in his narrative of the decline of American providentialism.

IV. RECOVERING OUR PROVIDENTIAL (AND NONPOSITIVIST?) HISTORY

Steven Smith's *The Godless Constitution and the Providential Republic* represents a substantial contribution to the way in which scholars ought to understand the place of providentialism in American legal history. And, too, it ought to generate further interest in providentialism's relationship to the other developments in twentieth-century American legal culture that Smith rightly identifies, including and especially the rise of antifoundational liberalism and the Supreme Court's constitutionalization of "public atheism." If, as this Essay has suggested, developing a more nuanced understanding of the place of nonpositivism—in its Declarationist formulation or otherwise—in twentieth-century American legal culture is one place to begin understanding this relationship, then *The Godless Constitution and the Providential Republic's* unresolved tensions may prove to be generative in the years to come. And this is especially true in light of Smith's encouragement that Americans recover the nation's providential (and nonpositivist?) history.

Smith concludes *The Godless Constitution and the Providential Republic* with an exhortation that Americans become historians—at least of a certain sort. "We human beings are finite creatures situated in place and time, in history, and we maintain our identity and continuity—or moral reality, really—by maintaining our connection to a history," Smith observes (203). "Conversely, if we are cut off from our history, or if we degrade our history into a mutable fabrication fashioned not according to truth but rather by present perceived needs, then we lose our identity and become merely transitory phantoms of shifting consciousness and conversation, without continuity or substance" (203). For this reason, Smith especially objects to the Supreme Court's mid-to-late twentieth-century Establishment Clause jurisprudence, a jurisprudence that prohibited the nation's political leaders from acknowledging the nation's past, and, in particular, the providentialism that has been so animating in American history.

As a distinguished legal scholar, Smith will surprise few readers in his directing much blame towards the Supreme Court for these developments. But if *The Godless Constitution and the Providential Republic* is right that our public historical consciousness is of the utmost importance both to national identity and individual flourishing, then future work remains necessary to resolve the explanatory tensions in Smith's account of American providentialism's decline. Indeed, for those who share Smith's malaise about the state of contemporary legal culture, it seems pertinent to understand how those who contemporaneously observed the emergence of now-completed shifts in that culture attempted to stymie those shifts in their tracks, for the

developments to which Smith now objects were not inevitable, and they certainly were not made without any contestation.

As this Essay's engagement with *The Godless Constitution and the Providential Republic* should suggest, there is a rich and complicated history, which has largely been forgotten, about how figures like John Courtney Murray attempted to stem the antifoundational/positivist tide that washed up on One First Street in the twentieth century. Thus, if it is true—as the epilogue to *The Godless Constitution and the Providential Republic* suggests—that “Only a God Can Save us,” then perhaps it is that same God who has given scholars like Smith today an invitation (or an “opportunity,” to borrow from Murray), to recover the history of those who, decades ago, attempted to persuade the legal profession that the abandonment of the nation's providentialism (and nonpositivism) would not be a welcome, modernizing advance, but rather a deviation from a more robust legal tradition. And if there is such a God, then accepting this challenge with an equal measure of confidence and humility ought to displace whatever fear and trembling even the most pessimistic constitutional commentators may have about the nation's future, for if there is any reliable guide to the future, it is the past.