

# Paganism Is Dead, Long Live Secularism

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*Pagans and Christians in the City*<sup>1</sup> is very readable and highly entertaining. To secularists, and to those who see the current culture wars as reflecting an ideological battle between secularism and religion for influence in, and perhaps even control of, the public square, the book mounts an interesting and original challenge. The story Steven Smith tells stems from a different way of looking at the aftermath of the apparent victory of Christianity over paganism in the fight for the hearts and minds of ordinary people, first in Europe and later in North America. Although Smith admits that his interpretation of the genesis and nature of existing cultural, political, and legal disputes over the place of religion in public life “is to some extent an artificial imposition upon a complex and messy reality,” he contends that his account “will nonetheless be useful just to the extent that it provides illumination into our profoundly confused and confusing times.”<sup>2</sup> My aim here is to investigate just how much illumination Smith’s story casts on current disagreements over the proper understanding and application of the nonestablishment and free exercise norms that are both culturally and legally foundational, particularly in the United States.<sup>3</sup> My conclusion will be that there are better sources of light.

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1. STEVEN D. SMITH, *PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC* (2018).

2. *Id.* at 259–60.

3. Freedom of religion under the First Amendment to the U.S. Constitution consists of two norms: nonestablishment, which forbids the government from establishing religion, and

I begin with the basic elements and structure of Smith’s story, which has conceptual, historical, and normative aspects. Early in the book, Smith attempts to explicate a concept that is foundational to his enterprise: “the sacred”—or “the holy.”<sup>4</sup> The sacred is an irreducible and unanalyzable “higher Reality” that “represents a different kind or order of being,” one that “gives life and the world meaning, beauty, order—even being.”<sup>5</sup> *Meaning* here presupposes the existence of a metanarrative, some “‘secret plot to it all’ . . . in which we [human beings] have somehow been placed.”<sup>6</sup> Smith supposes that our lives lack *ultimate* meaning if there is no “Grand Story or metanarrative that [explains] what the cosmic and human drama is all about.”<sup>7</sup> And the relevant sort of beauty or order that the sacred is supposed to provide is not something that induces mere pleasure or aesthetic appreciation, but rather something sublime, to which the correct response is “[w]onder or radical amazement,” a “feeling of the divine [or] of religious awe.”<sup>8</sup>

According to Smith, it is the concept of the sacred that can help us make sense of the nature of religion, whose function it is to “consecrate,” that is, “to bring something into alignment [or harmony] with the sacred.”<sup>9</sup> And hence, for those who take ultimate meaning and the sublime to be extremely important to their lives, consecration, so understood, represents a kind of imperative: inasmuch as their lives are not in harmony with the ultimate source of meaning and sublimity in the universe, they lose something of inestimable value.<sup>10</sup>

Critical to Smith’s own story is a distinction between two conceptions of the sacred: “the immanent” and “the transcendent.”<sup>11</sup> The relevant question here concerns the “location” of the sacred: the sacred is either in the world, in which case it is “immanent,” or it is outside the world—“beyond time and space”—in which case it is “transcendent.”<sup>12</sup> Paganism is the view that the

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free exercise, which forbids the government from prohibiting the exercise of religion. *See* U.S. CONST. amend. I.

4. SMITH, *supra* note 1, at 33.

5. *Id.* at 33–34, 36, 38.

6. *Id.* at 27 (footnote omitted) (quoting TERRY EAGLETON, *THE MEANING OF LIFE* 61 (2008)).

7. *Id.* at 29.

8. *Id.* at 31–32 (quoting ABRAHAM JOSHUA HESCHEL, *GOD IN SEARCH OF MAN: A PHILOSOPHY OF JUDAISM* 45 (1st Harper Torchbook ed. 1966); and then quoting VALERIE M. WARRIOR, *ROMAN RELIGION: A SOURCEBOOK* 2 (2002)).

9. *Id.* at 37.

10. *See id.*

11. *Id.* at 111–12 (emphasis omitted).

12. *Id.* (emphasis omitted).

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sacred is immanent, whereas “Judaism and Christianity, by contrast, reflect a *transcendent* religiosity.”<sup>13</sup>

In the earlier parts of the book, Smith compares and contrasts the paganism of Ancient Rome with the increasingly influential and powerful Christianity with which this paganism found itself at loggerheads.<sup>14</sup> Although Smith’s reading of the historical record suggests that it was possible—at least when the Roman Empire was not under much internal or external stress—for Roman pagans and Christians to establish a *modus vivendi*, Smith recognizes that the fact that Christians bore ultimate allegiance to a transcendent God and experienced His commandments as categorical gave them standing “to criticize—and, in time, reform—practices that were taken for granted in the pagan world: infanticide, slavery, inequality, the neglect of the poor and the diseased.”<sup>15</sup> Moreover, although Christians took themselves to be required to “render unto Caesar the things that are Caesar’s,” and the Apostle Paul counseled that “it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience,” they also took themselves to be mere “pilgrims” on earth, waiting for their chance of immortality in the beatific vision of God, and they gave precedence to the demands of the heavenly city over the demands of its earthly denizens.<sup>16</sup> In times of economic, political, or military stress, Roman pagans could easily point to the fact that Christians were not properly propitiating the gods as an explanation for military defeats or failed crops.<sup>17</sup> Peace between pagans and Christians was therefore fragile, inevitably punctuated by periods of intense repression, eventually culminating in the Great Persecution under the Roman Emperors Diocletian and Galerius in 303–304, when Christians who refused to sacrifice to the Roman gods

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13. *Id.* at 111. I assume that Smith also includes Islam and Hinduism among the religions that treat the sacred as transcendent, but he has very little to say about either of these religions in his book. *See, e.g., id.* at 218, 231 n.44. Perhaps more importantly, Smith has even less to say about Buddhism, which, depending on whether one takes the various versions of this influential body of thought and practice as involving the recognition of the sacred, would counterintuitively either count for him as pagan or as non-religious. I infer from his brief discussion of Buddhism that Smith thinks of Buddhists as pagans. *See, e.g., id.* at 239–40.

14. *See generally id.* at 108–39.

15. *Id.* at 128.

16. *Id.* at 136–37 (first quoting *Matthew* 22:21; and then quoting *Romans* 13:5).

17. *See id.* at 145 (quoting 1 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 537 (David Womersley ed., Penguin Books 2005) (1776)).

were burned alive, their churches and sacred books destroyed, and their assets seized.<sup>18</sup>

Luckily for the Christians, the Great Persecution was followed by Emperor Constantine's somewhat ambiguous conversion to Christianity and an edict that put an end to persecution of Christians in the empire: "[W]ithin a generation Christianity had passed from being a persecuted to a preferred faith."<sup>19</sup> There followed a "long period of Christian political dominance" that some might think represented the complete destruction of paganism.<sup>20</sup> But for Smith the story is more complex. Whereas the "mythical and civic forms of classical paganism"—that is, the forms involving regular communal rites and sacrifices to propitiate a cornucopia of mythical gods—were obliterated, "paganism continued to flourish" inasmuch as its "badges and incidents," for example, astrology and other pagan practices, were preserved and because, in respect of existential orientation, there continued to be a hankering after various forms of immanent religiosity.<sup>21</sup> For Smith, paganism survived in both positive and negative dimensions, with the positive represented by "the effort to recall and recover the positive virtues of the classical past" during the Renaissance, and the negative represented by Enlightenment-era accusations that Christendom was a period of "horrible wars, genocide, slavery's ideology, sexual exploitation, torture, devaluing others as not human, terrorism, and organized hatred."<sup>22</sup>

According to Smith, there are indications of the continued resilience of paganism even in the present day. Smith sees confirmation of his story of paganism's flourishing under the "canopy" of Christian dominance in the work of four modern pagans, Ronald Dworkin, Sam Harris, Barbara Ehrenreich, and Anthony Kronman, along with their more or less direct forebears, Baruch Spinoza and Albert Einstein.<sup>23</sup> Modern paganism, as Smith understands it, sloughs off the mythical, but also inessential, aspects of ancient paganism, while retaining the pagan core of immanent religiosity.<sup>24</sup> According to Smith, existing surveys of religious orientation do not distinguish well between true Christians and effective pagans who call themselves "Christian" but really spend their lives going through the motions without belief in a

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18. *Id.* at 164 (quoting LACTANTIUS, ON THE MANNER IN WHICH THE PERSECUTORS DIED, ADDRESSED TO DONATUS 21 (Alexander Roberts, James Donaldson & Arthur Cleveland Coxe eds., 2015) (320)).

19. *Id.* at 166.

20. *Id.* at 193.

21. *Id.* at 194.

22. *Id.* at 198, 207 (quoting Ross Koppel, *Public Policy in Pursuit of Private Happiness*, 41 CONTEMP. SOC. 49, 52 (2012)).

23. *Id.* at 14, 212, 237, 256–59.

24. *Id.* at 237.

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transcendent God.<sup>25</sup> So, the fact that few people call themselves “pagan” and a great many self-identify as “Christian” is not probative evidence that Smith’s “canopy” hypothesis is false.

Thus far, Smith’s is a historical narrative about the survival of immanent religiosity behind the veil of a seemingly hegemonic Christianity. The story, which is captivating in itself, has a fascinating corollary, one that Smith thinks illuminates current cultural and legal debates around the role of religion in the public square.<sup>26</sup> In the legal arena in particular, Smith claims that the various battles that have been fought, and continue to be litigated, on issues that are usually discussed under the rubrics of nonestablishment and free exercise are more perspicuously represented as issuing from a conflict between dueling pagan and Christian interpretations of the U.S. Constitution.<sup>27</sup>

On Smith’s account, at the founding and for many years thereafter, the United States was a Christian nation with a “neutrally agnostic” Federal Constitution; but, since the 1960s, a counterrevolution has been under way, designed to reclaim the Constitution for modern paganism.<sup>28</sup> But if modern paganism succeeds in its war with Christianity, then, argues Smith, we will all be the worse for it: we will lose our understanding of ourselves as forming a “political community”;<sup>29</sup> we will become intolerant of those we take to be intolerant<sup>30</sup> and attempt “to drive overtly Christian employers and professionals out of the public square and the public marketplace”;<sup>31</sup> we will live with a conception of meaning and “sublimity” that is “a sort of unstable halfway house or way station for people in transition, either from scientific naturalism to transcendent religion or vice versa”;<sup>32</sup> and we will live a conception of the sacred that is “too intellectually, morally, and ceremonially or liturgically thin to provide what religions are supposed to provide.”<sup>33</sup> By contrast, if we reclaim the public square and the Constitution for Christianity, then, in keeping with the aspirations of T. S. Eliot’s *The Idea of a Christian Society*, we will live in an ideologically stable political

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25. *Id.* at 255.

26. *Id.* at 275.

27. *See id.* at 276.

28. *See id.* at 295.

29. *Id.* at 296.

30. *See id.* at 302.

31. *Id.* at 363.

32. *Id.* at 370.

33. *Id.* at 371.

community in which certain transcendent ideals are respected.<sup>34</sup> And because conditions of pluralism require that there be no “official account of what transcendence is and requires,” a modern Christian society, unlike its pagan counterpart, will “attempt to accommodate its citizens in their efforts to live in accordance with their understandings of transcendence.”<sup>35</sup> Modern Christianity, then, is a better way to live in this world, and promises a life of unspeakable blessedness and joy in the hereafter.

The story that Smith tells is, in a way, inspiring. If it succeeds in convincing those who read it, it will breathe new life into the Christian arguments for religious accommodation for the transcendentally religious and for the imposition of Christian sexual mores on non-Christians. Rhetorically, the story partakes of the sublimely clever. For by recasting existing debates about the role of religion in public life as a conflict between a weak-kneed and unstable immanent religiosity and a strong and stable transcendent religiosity, Smith puts those who would like to think of themselves as defending secularism against religiosity on the defensive.

But Smith’s story is misleading, not because he misdescribes the events on which he focuses but because his ultimate conclusion is contradicted by facts he does not mention or only briefly acknowledges. Smith recognizes, of course, that Christian leaders often did not live in accordance with their own Christian ideals, and that the history of Christianity is, at least in part, a story of “hatred for pagans, heretics, idolaters and their temples, rites, and gods”<sup>36</sup> and a story of sexual repression, with its emphasis on celibacy and the condemnation of adultery, fornication, sexual relations between persons of the same sex, and pederasty, together with the discouragement of prostitution.<sup>37</sup> The “accusations” of Christianity as intolerant and repressive, fanned by Enlightenment thinkers, “have their historical bases,” says Smith.<sup>38</sup> But he argues that the negatives should be placed alongside the positives, which include “credit[ing] Christianity with helping to bring about many of the features of modern civilization that are most valued—including respect for the dignity of the individual, human rights, the commitment to equality, and concern for the poor” along with “shared public reason, the progress of human society through history, and the ability of humanity to investigate its world.”<sup>39</sup> On balance, then, Smith finds more than enough evidence to support the claim that Christianity can provide the ideological backbone

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34. *See id.* at 379 (citing T.S. ELIOT, *The Idea of a Christian Society*, in *CHRISTIANITY AND CULTURE* 1, 18–19 (1977)).

35. *Id.* at 378.

36. *Id.* at 205 (quoting JAN ASSMANN, *THE PRICE OF MONOTHEISM* 10 (Robert Savage trans., 2010)).

37. *See id.* at 284.

38. *Id.* at 206.

39. *Id.* at 206–07 (footnotes omitted) (citations omitted).

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of progress-seeking and welfare-enhancing democratic republics in which human rights and the rule of law are respected.

I do not accept this mixed, but holistically relatively rosy, picture of the history of Christendom. And I also dispute Smith's account of how Western culture came to value human rights and equality, shared public reason, and moral and technological progress. My reasons appear in an Appendix.<sup>40</sup>

Still, Smith insists that there is evidence of paganism percolating under the canopy of Christianity from the fourth century to the present day: "rather than disappearing, immanent religiosity . . . has (like Proteus) merely altered its forms and manifestations," and "all of this is happening behind a facade of secularism."<sup>41</sup> Smith is well aware of "the increase in self-declared unbelievers."<sup>42</sup> Rod Dreher, a senior editor at *The American Conservative*, writes: "The most pressing problem Christianity faces is not in politics. It's in parishes. It's with the pastors. Most of all, it's among an increasingly faithless people."<sup>43</sup> At the same time, Smith is right that polling organizations do not distinguish clearly between those for whom the sacred is transcendent and those for whom it is immanent.<sup>44</sup> So, for example, although the percentage of religiously unaffiliated adults in the United States jumped from 16% to 23% between 2007 and 2014, and although the percentage among the religiously unaffiliated who say they believe in God dropped from 70% to

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40. See *infra* Appendix. Because this conference focused on the last four chapters of Smith's book and because the earlier chapters of the book are largely devoted to recapturing the history of the conflict between paganism and Christianity in Europe during the Roman Empire and in the centuries preceding the founding of the United States, I am cabining my historical remarks to an Appendix. For those familiar with the history of Christianity in the Middle Ages, the Renaissance, and the Enlightenment, the Appendix will serve only to remind them of what they already know. I think the reminder is important because it casts doubt on one of the overarching themes of Smith's book, which is that the culture wars that we are witnessing today, and that are being played out in private relationships, in the political arena, and in the courtroom, derive largely from a revival of an ancient paganism, shorn of its mythical aspects, that has been simmering under the Christian canopy for hundreds of years. See *id.* at 195, 212, 259. Those more interested in whether Smith's recasting of the First Amendment disputes over nonestablishment and religious accommodation is accurate should feel free to skip the Appendix.

41. *Id.* at 218.

42. *Id.* at 232.

43. Rod Dreher, *Trump Can't Save American Christianity*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/opinion/trump-scaramucci-evangelical-christian.html> [<https://perma.cc/HZF9-VA2U>].

44. See SMITH, *supra* note 1, at 232, 241–45.

61% in the same period,<sup>45</sup> it is quite possible that the “God” in whom a majority of the religiously unaffiliated profess belief is a kind of Spinozistic *Deus sive Natura*,<sup>46</sup> and it is possible that the minority of the religiously unaffiliated who claim not to believe in God still believe in the existence of an immanent sacred. Sure, it’s possible. And surely many among the religiously unaffiliated who do not believe in a transcendent God think of themselves as “spiritual” in a sense that would fit Smith’s characterization of paganism.

But here, it seems to me, we need more in the way of evidence than Smith provides. What Smith uses as his evidence that paganism is thriving under the Christian canopy is four prominent public intellectuals who, despite their professed atheism or atheist upbringing, have come to rest in an existential orientation that appears to be pagan—though without the mythic accoutrements of the classical kind: Ronald Dworkin, Sam Harris, Barbara Ehrenreich, and Anthony Kronman.<sup>47</sup> But only the last member of this group is a real pagan.

In order to understand this, we need to go back to Smith’s characterization of the sacred. The sacred is supposed to be an irreducible higher order of being that gives life and the world meaning and sublimity—even being, where meaning is understood as a metanarrative that makes sense of the cosmic and human drama, and sublimity is whatever appropriately triggers a response of “wonder or radical amazement.”<sup>48</sup> The pagan, then, is someone who believes that the sacred, *in this sense and in this sense only*, is in the world, rather than outside the world. Let us now compare Smith’s description of the sacred with Dworkin’s. There are, to be sure, surface similarities: Dworkin says that the religious attitude is defined as a combination “of two central judgments about value”:

The first holds that human life has objective meaning or importance. Each person has an innate and inescapable responsibility to try to make his life a successful one: that means living well [and] accepting . . . moral responsibilities to others . . . because it is in itself important whether we think so or not. The second holds that . . . the universe as a whole and in all its parts . . . is not just a matter of fact but is itself sublime: something of intrinsic value and wonder.<sup>49</sup>

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45. GREGORY A. SMITH ET AL., PEW RESEARCH CTR., U.S. PUBLIC BECOMING LESS RELIGIOUS 3–4 (2015), [https://www.pewforum.org/wp-content/uploads/sites/7/2015/11/2015.11.03\\_RLS\\_II\\_full\\_report.pdf](https://www.pewforum.org/wp-content/uploads/sites/7/2015/11/2015.11.03_RLS_II_full_report.pdf) [<https://perma.cc/FK4W-KHHF>].

46. *Deus sive natura* is “[t]he slogan of Spinoza’s pantheism: the view that god and nature are interchangeable, or that there is no distinction between the creator and the creation.” SIMON BLACKBURN, *Deus Sive Natura*, in OXFORD DICTIONARY OF PHILOSOPHY 131, 131 (3d ed. 2016).

47. SMITH, *supra* note 1, at 14, 256–59.

48. *Id.* at 31–38 (quoting HESCHEL, *supra* note 8).

49. RONALD DWORIN, RELIGION WITHOUT GOD 10 (2013).



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Smith says that these two judgments “correspond almost exactly to the two-themed account of religion” Smith offers, in terms of the source of meaning and sublimity.<sup>50</sup>

But there are differences, *important* differences. First, the kind of meaning that Dworkin thinks human life has, though objective, is not necessarily dependent on the existence of a metanarrative. In Dworkin’s sense, life has meaning inasmuch as we have objective ethical responsibilities to ourselves and moral responsibilities to others. It is not clear that a meaningful life would need narrative structure, but even if it did, there is no reason to think that the narrative would need to be *overarching*, a story—or part of a story—that makes sense of the cosmic and human drama as a whole. Second, the sublimity that Dworkin attributes to the universe is not necessarily a “higher order of being,” and not necessarily something that gives being to, or metaphysically supports the being of, “lower” beings. Dworkin does say that “[t]he religious attitude rejects naturalism,”<sup>51</sup> and so, in that sense, he takes the sublimity of the universe to be irreducible. But what Dworkin means by “naturalism” is “that nothing is real except what can be studied by the natural sciences.”<sup>52</sup> So, according to Dworkin, someone who thinks that wondrous aesthetic properties—such as the beauty of a symphony or the greatness of a novel, or moral properties, such as the altruism of a Mother Teresa—cannot be studied by the natural sciences would count as holding the second of the two central judgments that define the religious attitude. But such a person need not think that these properties betoken a higher order of being, the sort of thing that is or could be responsible for the being of other beings.

Sam Harris reports on a mystical experience in which “love, compassion, and joy in the joy of others extended without limit.”<sup>53</sup> Smith says that this experience was “drug-induced,”<sup>54</sup> but it was pretty clearly drug-*caused*. Harris took Ecstasy—or 3,4-methylenedioxy-N-methylamphetamine—with a friend, and as the drug worked its way to his brain, he experienced a kind of “moral and emotional clarity,” as envy, anxiety, competitiveness, rumination, and sense of separation from others melted away.<sup>55</sup> It was at this point

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50. SMITH, *supra* note 1, at 236.

51. DWORKIN, *supra* note 49, at 12.

52. *Id.*

53. SAM HARRIS, WAKING UP: A GUIDE TO SPIRITUALITY WITHOUT RELIGION 3–5 (2014).

54. SMITH, *supra* note 1, at 239.

55. HARRIS, *supra* note 53, at 3–4.

that he claims to have experienced an “insight” involving “boundless love,” partly on the basis of which he concludes that “[t]here is no discrete self or ego living like a Minotaur in the labyrinth of the brain.”<sup>56</sup> But such a belief does not entail commitment to anything like the meaning-aspect or higher-reality aspect of Smith’s conception of the sacred. Smith is aware of this problem because he writes that Harris’s “claim that transcendence is within consciousness” makes it “debatable” whether he “should be admitted as an acolyte of Dworkin’s atheistic religion.”<sup>57</sup> But then, Smith wonders: “Why couldn’t” a Dworkinian think that the sacred “reside[s] in human consciousness?”<sup>58</sup>

There are several problems with the classification of Harris as a pagan. First, assimilation of Harris to Dworkin is not sufficient to establish this result, given that, as I have just argued, Dworkin does not believe in the sacred *as Smith conceives it*. Second, and more importantly, neither boundless love nor the no-self view is anywhere near sufficient for commitment to the existence of a cosmic metanarrative or to a higher order of being that is responsible for meaning, sublimity, and being. In his drug-induced state, Harris felt connected to everyone and experienced the boundary between self and world disappear. That does not make him a pagan. Third, none of what Harris says suggests acceptance of the view that the sacred, even if it exists, resides in human consciousness. Fourth, even if we grant that Harris achieved a kind of pagan “insight” in an Ecstasy-induced brain state, there is little reason to think that this “insight” is shared by anyone under the Christian canopy except for those who have experimented with, or regularly use, mood-altering drugs.<sup>59</sup>

Barbara Ehrenreich’s case is similar in some ways to Harris’s. She writes that her own wordless mystical experience at the age of seventeen while walking in the early dawn, a “furious encounter with a living substance that was coming at [her] through all things at once,” may have given her a “tantalizing glimpse[] of other forms of consciousness, which may be

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56. *Id.* at 4–5, 9 (emphasis omitted).

57. SMITH, *supra* note 1, at 239–40.

58. *Id.* at 240.

59. By the way, the National Institute of Health’s National Institute on Drug Abuse reports that over the course of the week following moderate use of Ecstasy, which increases the activity of the neurotransmitters dopamine, norepinephrine, and serotonin, a person may experience “irritability,” “impulsiveness and aggression,” “depression,” “sleep problems,” “anxiety,” “memory and attention problems,” “decreased appetite,” and “decreased interest in and pleasure from sex.” NAT’L INST. ON DRUG ABUSE, DRUG FACTS: MDMA (ECSTASY/MOLLY) (2018), <https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/drugfacts-mdma.pdf> [<https://perma.cc/KM9M-DH7N>]. So, if you are thinking of mimicking Harris’s way of obtaining the insight that changed his outlook on life, think again.

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beings of some kind, ordinarily invisible to us and our instruments.”<sup>60</sup> Alternatively, Ehrenreich proposes, “it could be that the universe is itself pulsing with a kind of life, and capable of bursting into something that looks to us momentarily like the flame.”<sup>61</sup> The claim that there are loci of consciousness apart from human beings and nonhuman animals, perhaps in trees or flowers or stones, is characteristic of some religions, for example, Indian religions of North America,<sup>62</sup> but it is not sufficient for immanent religiosity, as Smith understands it. Similarly, for the claim that the universe itself is alive, which is perfectly compatible with the view that there is no such thing as the sacred.<sup>63</sup> I conclude that Smith’s best evidence for thinking that paganism has been simmering for hundreds of years under the lid of the Christian pot is weak.<sup>64</sup>

In the arena of present-day U.S. law under the Establishment Clause, Smith claims that the competition between paganism and Christianity, which is “comparable to that of fourth-century Rome,” is playing out in at least three “theaters of . . . struggle” to “define America”: “symbols or expressions of public religiosity, public recognition and ratification of the norms of sexuality, and the Constitution itself.”<sup>65</sup> I will discuss each of these theaters in order, before moving on to discuss Smith’s interpretation

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60. Barbara Ehrenreich, *A Rationalist’s Mystical Moment*, N.Y. TIMES (Apr. 5, 2014), <https://www.nytimes.com/2014/04/06/opinion/sunday/a-rationalists-mystical-moment.html> [<https://perma.cc/Z23F-BXJT>].

61. *Id.*

62. See Christine S. Vanpool & Elizabeth Newsome, *The Spirit in the Material: A Case Study of Animism in the American Southwest*, 77 AM. ANTIQUITY 243, 244, 247 (2012); Clinton N. Westman, *Pentecostalism and Indigenous Culture in Northern North America*, 55 ANTHROPOLOGICA 141, 144 (2013).

63. Interestingly, Ehrenreich recognizes that her *epiphany* occurred when she was “sleep-deprived and probably hypoglycemic” as a result of a “severely underfunded and poorly planned skiing trip.” Ehrenreich, *supra* note 60. Hypoglycemia, if sufficiently severe, can cause blurred vision, seizures, and hallucinations. *Hypoglycemia*, MAYO CLINIC (Sept. 7, 2018), <https://www.mayoclinic.org/diseases-conditions/hypoglycemia/symptoms-causes/syc-20373685> [<https://perma.cc/7ZKP-KYXX>]. We should ask Ehrenreich why she is as confident as she is that her experience was not simply the understandable effect of physical activity coupled with low blood sugar. If my intake of sugar drops and I begin to see small pink elephants flying around me, is it reasonable for me to assume—assuming I know that I am hypoglycemic—that there really *are* small pink elephants around me?

64. Still, there are Baruch Spinoza, Albert Einstein, and Anthony Kronman—the greatest philosopher of all time, the greatest scientist of all time, and the former Dean of Yale Law School. I may just have to become a pagan, so that I can be mentioned in the same breath as those three.

65. SMITH, *supra* note 1, at 266.

of the development of religious accommodation law under the Free Exercise Clause.

Let us start with controversies over public religious symbols. The Establishment Clause of the First Amendment states: “Congress shall make no law respecting an establishment of religion.”<sup>66</sup> Since the 1950s, which many Americans saw as a time to defend godly capitalism and freedom against the godless communism and tyranny of the Soviet Union, localities and States in which Christians predominate have repeatedly sought to display and proclaim their Christianity on public stages in public ways: Christmas displays in front of town halls, slogans on currency—“In God We Trust”—“Ten Commandments monuments, legislative prayer, crosses . . . as war memorials,” and so on.<sup>67</sup> Smith sees all these displays as assertions of an imagined political community, displays of “*who we are*, or what kind of community we live in.”<sup>68</sup> This explains why, despite the fact that these symbols appear to cause little or no harm, the battle over symbols in public buildings, on public currency, or on public land is as fraught as it is.<sup>69</sup>

The Establishment Clause is not self-interpreting. What does “establishment of religion” mean?<sup>70</sup> The U.S. Supreme Court has held that the proper test of establishment, known as the *Lemon Test*, at least in the arena of public symbols, has three prongs: to pass the *Lemon Test*, a statute or practice must (1) have a “secular . . . purpose,” (2) “neither advance[] nor inhibit[] religion” in “its principal or primary effect,” and (3) “not foster ‘an excessive government entanglement with religion.’”<sup>71</sup> In *County of Allegheny v. ACLU*, the Court explained that government endorsement or promotion of religion, or of a particular religion, would violate the second prong of the *Lemon Test*, for the principal or primary effect of endorsement or promotion

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66. U.S. CONST. amend. I.

67. SMITH, *supra* note 1, at 269.

68. *Id.* at 272.

69. *Id.*

70. U.S. CONST. amend. I. I here skate over two important questions: first, what the word “respecting” means when applied to “establishment,” and second, whether the Establishment Clause applies to States and to other branches of the Federal government, particularly the executive branch, which appear to be excluded, at least by implication, from the reach of the First Amendment. *Id.* Legal theorists, particularly textualists and other originalists, pass over the second problem much too quickly, assuming—on what basis?—that the word “Congress” in “Congress shall make no law” is a synecdoche standing for all agencies of government. *Id.*; *see, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 53–54 (2005).

71. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (first citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968); and then quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 674 (1970)).

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is advancement.<sup>72</sup> Hence, the Court reasoned, nonestablishment requires nonadvancement as a principal effect, which itself requires nonendorsement.<sup>73</sup> The central justification for the nonendorsement requirement, as Justice O'Connor wrote in her *Lynch v. Donnelly* concurrence, is that any endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>74</sup> Although Smith has criticized this particular justification of nonendorsement in the past on the grounds that dissenters are *not* treated as lesser members of the political community when the government endorses religion or a particular religion,<sup>75</sup> he now recognizes, I think rightly, that Justice O'Connor's rationale picks up on the fact that "religious expressions may have a more fundamental alienating effect than other sorts of controversial public statements typically have."<sup>76</sup>

Having distinguished between immanent and transcendent religiosity, Smith then asks whether "the 'no endorsement' doctrine . . . mean[s] that government is forbidden to endorse" *all* religion or whether it means that government is forbidden to endorse "*transcendent* religion."<sup>77</sup> The former version of nonendorsement, says Smith, is in keeping with a fully secular conception of the political community, but the latter version would reflect the view, consistent with a pagan outlook, that there is nothing wrong or unconstitutional about government sacralization of worldly items or matters.<sup>78</sup> Smith argues that, even though "[t]he jurisprudence [of nonendorsement] is notoriously confused"—and with this, I agree—the latter, pro-pagan version of the no endorsement doctrine "may help make some sense—though probably not complete sense, alas—of that jurisprudence."<sup>79</sup> Why?

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72. 492 U.S. 573, 592–94 (1989) (first citing *Lemon*, 403 U.S. at 612–13; then citing *Engel v. Vitale*, 370 U.S. 421, 436 (1962); then quoting *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985); then quoting *Edwards v. Aguillard*, 482 U.S. 572, 593 (1987); then quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389–92 (1985); then quoting *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring); and then quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

73. *Id.* at 593–94.

74. 465 U.S. at 688 (O'Connor, J., concurring).

75. See, e.g., Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 306 (1987).

76. SMITH, *supra* note 1, at 273.

77. *Id.* at 276.

78. *Id.* at 276–77.

79. *Id.* at 278–79.

First, Smith compares the *Allegheny* decision with *Texas v. Johnson*, in which the Court struck down a state law banning flag desecration.<sup>80</sup> In the former case, the Court said that it would be legally impermissible for a local government to sponsor a Christmas crèche in a courthouse.<sup>81</sup> In the latter case, the Court simply presupposed the legal permissibility of “the nation’s sponsorship and promotion” of a “sacred” object: the American flag.<sup>82</sup> The best way to explain this, says Smith, is to suppose that what the Court finds problematic is not the endorsement of any and all religion, including immanentist views that locate the sacred somewhere in the world, but rather the endorsement of *transcendent* religion.<sup>83</sup>

Second, Smith wonders whether the pagan version of nonendorsement actually makes better sense of other cases, such as decisions upholding the legality of the national motto, “In God We Trust,” on U.S. currency,<sup>84</sup> the placing of a Ten Commandments monument on the grounds of a State Capitol,<sup>85</sup> the commencement of legislative or town board meetings with prayer,<sup>86</sup> and the inclusion of “under God” in the Pledge of Allegiance.<sup>87</sup> He tells us that “the closest thing to an official explanation” of these decisions is that these symbols “have lost their religious significance (at least in the eyes of a ‘reasonable observer’) and instead serve now to ‘solemnize public occasions, express confidence in the future, and encourage the appreciation of what is worthy in our society.’”<sup>88</sup> But, argues Smith, the reference to God in the Pledge of Allegiance still retains its religious meaning, and symbols serve to “solemnize public occasions” only because of their religious content.<sup>89</sup> So, Smith proposes, instead, that what best explains the Court’s decisions is acceptance of the legality of public symbols that involve veneration and promotion of what is *immanently*, rather than *transcendently*, sacred.<sup>90</sup> Smith acknowledges that the word “God” might be thought to refer, in all its uses, to something transcendent, but his response is that the term “is capable of being taken in either a transcendent or an immanent sense.”<sup>91</sup>

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80. 491 U.S. 397, 399 (1989).

81. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 612–13 (1989).

82. SMITH, *supra* note 1, at 278 (quoting Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511 (1991)).

83. *See id.*

84. *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970).

85. *See Van Orden v. Perry*, 545 U.S. 677, 681, 691–92 (2005).

86. *See Town of Greece v. Galloway*, 572 U.S. 565, 569–72 (2014).

87. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004).

88. SMITH, *supra* note 1, at 279 (quoting *Elk Grove*, 542 U.S. at 35–36 (O’Connor, J., concurring)).

89. *Id.* (quoting *Elk Grove*, 542 U.S. at 36 (O’Connor, J., concurring)).

90. *Id.* at 279–80.

91. *Id.* at 280.

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I think that Smith's case for thinking that the best way to reconstruct the Court's jurisprudence of nonendorsement is to suppose that the relevant constitutional ban applies only to government endorsement of transcendent religiosity is weak. Consider the *Allegheny* and *Johnson* decisions. Suppose that *Allegheny* is settled by a large and politically powerful group of Spinozists—or Anthony Kronman's extended family. The folk build a temple to *Deus sive Natura*, attend regular services, promote pagan rites in the home—a daisy on the front door instead of a mezuzah on the door jamb—and carry a copy of the *Ethics*<sup>92</sup> with them at all times. They organize revival meetings at which the attendees spend hours looking at flower petals and bird-watching—but not fly-fishing, because fish are sublime. After a few years, local government comes to be dominated by members of this pagan sect, and, on Spinoza's birthday, November 24, the town council erects something similar to a crèche in the main courthouse: a hologram of the visible portion of the known universe, topped by a banner proclaiming "Gloria In Excelsis Deo." The ACLU files suit again, and in *Allegheny 2*, the Supreme Court considers whether the town's erection of the pagan crèche violates the nonendorsement test. Does anyone believe that the Court would distinguish *Allegheny* and *Allegheny 2*? I don't. The moral of this thought-experiment is that, as best I can tell, the nonendorsement test, as currently understood and interpreted by the Court, invalidates government-sponsored displays of *pagan* religiosity that are sufficiently similar to already invalidated government-sponsored displays of *transcendent* religiosity.

As for the American flag, Smith picks up on Justice Brennan's description of it as "virtually sacred to our [N]ation as a whole"<sup>93</sup> and his contention that "we do not consecrate the flag by punishing its desecration."<sup>94</sup> Smith claims that "consecration" means "associat[ion] with the sacred," and "desecration" means "desacralization"—a word that Smith does not explicitly define, but that he presumably takes to mean "dissociation from the sacred."<sup>95</sup> On this basis, Smith understands Justice Brennan to be acknowledging that the American flag is sacred, and that consecration of the flag is permitted, though not by banning public dissociation from it as a sacred symbol.<sup>96</sup>

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92. See generally BENEDICTUS DE SPINOZA, *ETHICS* (R.H.M. Elwes trans., Floating Press 2009) (1677).

93. SMITH, *supra* note 1, at 277 (quoting *Texas v. Johnson*, 491 U.S. 397, 418 (1989)).

94. *Johnson*, 491 U.S. at 418.

95. SMITH, *supra* note 1, at 277–78.

96. See *id.* at 278.

But Smith’s interpretation of Justice Brennan’s opinion for the Court in *Johnson* is mistaken. First, the Court’s opinion, concurrences, and dissents simply took on board Texas’s definition of “desecration” in its Penal Code: “For purposes of this section, ‘desecrate’ means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.”<sup>97</sup> So, when Justice Brennan talks of “desecration,”<sup>98</sup> he does not mean “desacralization” or *dissociation from the sacred*.<sup>99</sup> Second, and more importantly, Justice Brennan’s conception of the sacred is not—or, at least, not necessarily—the same as Smith’s. As Smith understands it, the sacred is an irreducible higher order of being that gives life and the world meaning and sublimity—even being.<sup>100</sup> But it is not in *this* sense that Justice Brennan takes the flag to be sacred—or even associated with the sacred: he does not conceive of the flag as a higher order of being that explains the meaning and sublimity of the universe, nor does he take it to be a symbol of something that provides this explanation.<sup>101</sup> Instead, Justice Brennan tells us that Texas defended its flag desecration ban by “assert[ing] an interest in preserving the flag as a symbol of nationhood and national unity.”<sup>102</sup> This is Texas talking, not Justice Brennan. But even if it were Justice Brennan speaking in his own voice, he would not be telling us that nationhood and national unity represent a higher order of being that provides the cosmic metanarrative that makes sense of the universe as a sublime whole.

So, what is going on here? The Oxford English Dictionary (OED) rightly points out that there are various uses of the term *sacred*.<sup>103</sup> In its more literal meaning, “sacred,” as applied to “things, places, persons and their offices,” means “[s]et apart for or dedicated to some religious purpose, and hence entitled to veneration or religious respect.”<sup>104</sup> But, like many words, “sacred” has also taken on what the OED calls a *transferred sense* or *figurative meaning*, namely: “Regarded with or entitled to respect or reverence similar to that which attaches to holy things.”<sup>105</sup> And it is fairly obviously in the “transferred sense” of “sacred” that the American flag is widely taken to be sacred. No one thinks that the flag is entitled to *religious* veneration, but many think that it is entitled to the kind of reverence that is *similar to* religious

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97. TEX. PEN. CODE ANN. § 42.09 (1989).

98. See *Johnson*, 491 U.S. at 401.

99. SMITH, *supra* note 1, at 278.

100. See *id.* at 33–38.

101. See *Johnson*, 491 U.S. at 401.

102. *Id.* at 410.

103. *Sacred*, in 14 THE OXFORD ENGLISH DICTIONARY 338, 338–39 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

104. *Id.* at 338 (defining meaning 3a).

105. *Id.* at 339 (defining meaning 4a).



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eneration. Texas was not a pagan State in 1989, and Justice Brennan was not a pagan, nor was he assuming that the citizens of the United States are pagans.

But doesn't Smith's pro-pagan version of the nonendorsement doctrine make better sense of *Aronow*, *Van Orden*, *Town of Greece*, and *Newdow*? No. What these cases reveal is multi-faceted disagreement about the proper understanding and application of the Establishment Clause. *Town of Greece*, for example, which concerns a town's invitations to local clergy—based on a cursory look at the local telephone book—to open town board meetings with a prayer, was decided largely on the original intent principles used to decide its closest precedent, *Marsh v. Chambers*.<sup>106</sup> The driving idea in both of these cases is that the kind of practice of which most of the Framers and members of the First Congress approved establishes that they did not intend the First Amendment to prohibit it;<sup>107</sup> and given that original intent should be the touchstone of constitutional interpretation—at least, when the evidence of original intent is as clear as it is in this sort of case—it follows that this kind of practice is constitutionally permitted.<sup>108</sup> So, we can think of these two cases as anomalous, inasmuch as they did not rely on the nonendorsement norm.

But what of the other cases on Smith's list? Smith objects to the theory that the references to "God" on the national currency and in the Pledge of Allegiance—or, for that matter, on the Ten Commandments monument—pass the nonendorsement test because they have lost their religious significance.<sup>109</sup> I am inclined to agree with him. But I am also inclined to explain these cases, not by appeal to a pagan version of the nonendorsement test, but by appeal to the Court's assessment of various contextual factors and its understanding of the function of the religious references. Context is most obviously at issue in *Van Orden*, and in a number of cases, including *Stone v. Graham*,<sup>110</sup> *Lynch*, and *Allegheny*, concerning state-sponsored religious displays. In these cases, there is usually fact-driven disagreement about whether a reasonable person would interpret the placement of the religious

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106. See 572 U.S. 565, 570–71, 590 (2014) (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

107. See *id.* at 575–79, 584; *Marsh*, 463 U.S. at 786–92.

108. There were separate issues in the case, namely whether the *Town of Greece* practice was *fair* to non-Christians and atheists, and whether it involved coercion of those present to participate in prayer or other religious activity. See 572 U.S. at 577–78.

109. SMITH, *supra* note 1, at 279–80.

110. 449 U.S. 39 (1980).

references—usually to God—as an indication of government endorsement of the relevant religious message—“In God We Trust,”<sup>111</sup> or “one Nation under God,”<sup>112</sup> or “I AM the LORD thy God. Thou shalt have no other gods before me.”<sup>113</sup> In *Aronow*, writing for a three-judge panel, Judge Thompson stated that the use of “In God We Trust” on the currency “is of a patriotic or ceremonial character” and that “[i]t is quite obvious” that the slogan “has nothing whatsoever to do with the establishment of religion.”<sup>114</sup> In *Van Orden*, the question was whether passers-by spying a very large Ten Commandments monument on the grounds of the State Capitol, with words such as “LORD” capitalized and the First Commandment rendered in larger font than the others, would take the message of the monument to be a form of religious endorsement.<sup>115</sup> Different Justices differed on this issue, some focusing on the fact that the same grounds contained many other non-religious monuments, others focusing on the fact that the other monuments were scattered over twenty-two acres, with each clearly to be taken in one view, on its own terms, apart from the others.<sup>116</sup> And in *Elk Grove*, the issue was whether the function of the Pledge of Allegiance, which is clearly to encourage patriotism, overwhelms whatever residual religiosity a reasonable person would understand to be conveyed by the use of “under God” in the Pledge.<sup>117</sup> These cases are not properly understood as a battle between immanent and transcendent religiosity: they concern differences of opinion about whether a reasonable person would understand various government activities as constituting the endorsement or promotion of religion or of a particular religion or religious denomination.

Regarding the legal developments wrought by the sexual revolution of the 1960s and 1970s, I agree with many aspects of Smith’s description.<sup>118</sup> Contraception, for example, *did* go from being largely legally forbidden, to being constitutionally permitted for married couples,<sup>119</sup> to being constitutionally permitted to single adults and presumptively responsible adolescents.<sup>120</sup> A limited right to abortion was constitutionally protected—at least for adults—in *Roe v. Wade*<sup>121</sup> and reaffirmed, though with greater leeway given to states to restrict *access* to abortions in ways that do not

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111. *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970).

112. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 7 (2004).

113. *Van Orden v. Perry*, 545 U.S. 677, 707 (2005) (Stevens, J., dissenting).

114. *Aronow*, 432 F.2d at 243.

115. *Van Orden*, 545 U.S. at 739 (Souter, J., dissenting).

116. *Id.* at 681, 691–92, 742–43.

117. *Elk Grove*, 542 U.S. at 6–8.

118. See SMITH, *supra* note 1, at 289–92.

119. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

120. See *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972).

121. 410 U.S. 113, 164–66 (1973).

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constitute an *undue burden* on the exercise of the right, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>122</sup> and reaffirmed again, along with the undue burden test, in *Whole Woman's Health v. Hellerstedt*.<sup>123</sup> Having recognized that *Bowers v. Hardwick*, in which the Court refused to strike down State laws banning sodomy,<sup>124</sup> was a doctrinal anomaly and poorly reasoned, the Court decided in *Lawrence v. Texas* that it would be unconstitutional for a State to ban sodomy between consenting adults, no matter their sexual orientation.<sup>125</sup> And, more recently still, the Court held in *Obergefell v. Hodges* that if a State extends the right to marry to opposite-sex couples, then it is constitutionally impermissible for it to withhold the right from same-sex couples.<sup>126</sup>

What explains these developments? According to Smith, the legal sexual revolution is best understood as a revival of Roman paganism without its classical cultural restrictions, “the ethic of manliness” and “the need for population replenishment,” but with new ethical commitments, “to gender equality” and “personal autonomy.”<sup>127</sup> Quoting Ferdinand Mount, Smith claims that “the modern attitude [toward sexual relations] reflects a ‘Neo-Pagan yearning for a return to the easy, down-to-earth sexual life of the ancient world.’”<sup>128</sup>

I beg to differ. As I see it, Smith has mistaken what he takes to be the modern accompaniments of modern paganism for the essence of paganism itself. Paganism, as Smith defines it, is a *religious* outlook that takes the sacred to be immanent, in the world instead of outside it.<sup>129</sup> And the sacred, again, is a higher order of being that provides a metanarrative for our lives and grounds the sublimity of the universe.<sup>130</sup> I do not see any “yearning” for the immanent sacred, *in this sense*, in the sexual revolution, whether manifested in the bedroom or in the courtroom. For one thing, many of those who advocate for—or at least accept the existence of—reproductive rights, the right of a woman to terminate her pregnancy, the right to engage in culturally proscribed sexual activities, and the right to

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122. 505 U.S. 833, 877–79 (1992).

123. 136 S. Ct. 2292, 2309–10 (2016).

124. 478 U.S. 186, 196 (1986).

125. 539 U.S. 558, 578–79 (2003).

126. 135 S. Ct. 2584, 2604–05 (2015).

127. SMITH, *supra* note 1, at 289.

128. *Id.* at 288–89 (quoting FERDINAND MOUNT, FULL CIRCLE: HOW THE CLASSICAL WORLD CAME BACK TO US 96 (2010)).

129. *Id.* at 111.

130. *See id.* at 34–38.

marry, were and are believers in a transcendent God. A recent Pew Research Center Report found that “[e]ven when it comes to Catholics who attend Mass weekly, just 13% say contraception is morally wrong, while 45% say it is morally acceptable and 42% say it is not a moral issue.”<sup>131</sup> And the same report notes that 42% of Protestants and 47% of Catholics believe that having an abortion is either morally acceptable or not a moral issue, while 45% of Protestants and 64% of Catholics think that “homosexual behavior” is either morally acceptable or not a moral issue.<sup>132</sup> Perhaps Smith thinks that all or most of these self-described Christians are really pagans underneath, but that sort of claim strikes me as unsupported.

Furthermore, both the legal arguments and the arguments in the political arena supporting rights to contraception, abortion, sodomy, and same-sex marriage are primarily founded on principles of autonomy, and secondarily buttressed by considerations of gender equality. These principles are not mere accoutrements to some sort of robust paganism that lies at the heart of *Griswold*, *Eisenstadt*, *Roe*, *Casey*, *Whole Woman’s Health*, *Lawrence*, and *Obergefell*: these decisions are *founded* on the moral and constitutional principles of freedom and equality. This is clearest in the case of *Obergefell*, but all the other decisions on this list are explicitly grounded in the constitutional right to privacy, which has come to be seen as entailed by the liberty guarantee of the Due Process Clause, or in the equality guarantee of the Equal Protection Clause. Even if most of us are pagans under a Christian canopy, it is not our paganism that explains the Court decisions that supported the demands of the sexual revolution: it is our commitment to the value of deciding for oneself how one shall conduct one’s life in its most personal and intimate facets, as well as the value that all persons are worthy of equal respect and concern. And these values, which are sacred in the transferred or figurative sense, are not sacred in the religious sense.

Smith is unhappy that, as he sees it, the U.S. Constitution has been “commandeer[ed]” to serve pagan interests over the more traditional vision of the document as “neutrally agnostic.”<sup>133</sup> A neutrally agnostic Constitution, according to Smith, provides a “legal framework of governance” that *itself* neither advances nor impedes religion, a framework within which “city or state governments or the federal government might develop measures that [are] consonant with Christianity, with paganism, or with a more positivistic

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131. PEW RESEARCH CTR. WHERE THE PUBLIC STANDS ON RELIGIOUS LIBERTY VS. NONDISCRIMINATION 25 (2016), <http://assets.pewresearch.org/wp-content/uploads/sites/11/2016/09/Religious-Liberty-full-for-web.pdf> [<https://perma.cc/22UH-BFPU>].

132. *Id.* at 25–26.

133. SMITH, *supra* note 1, at 295–99.

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secularism.”<sup>134</sup> Smith thinks that neutrality of this sort “serve[s] a valuable function,” inasmuch as all citizens would be assured that the Constitution does not “put its imprimatur on either Christian or secular (or pagan) conceptions of the community.”<sup>135</sup> But there is something misleading in this touting of a Constitution “that once stood majestically above the fray of contesting religious and secular conceptions of the community.”<sup>136</sup> For it is, of course, predictable that such a Constitution, in a polity that is, and has always been, overwhelmingly religious—roughly 76% of the U.S. population identifies itself as affiliated with some religion or other—would stack the deck in favor of religiosity; and, indeed, it is even more predictable that such a Constitution would stack the deck in favor of *Christians*, given that they represent 93% of the religiously affiliated.<sup>137</sup> And these are the numbers we see *after* a significant *decline* in religiosity in the United States over the last fifty years!<sup>138</sup>

But how exactly has the Constitution been commandeered to serve the interests of pagans? Smith’s story is a familiar one within conservative legal academe and among conservative judges. We begin with the Fourteenth Amendment, which has three very important clauses, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause.<sup>139</sup> Smith claims that the Due Process Clause, which states, “nor shall any State deprive any person of life, liberty, or property, without due process of law,”<sup>140</sup> has been twisted to serve pagan ends through the interpretive doctrine of “substantive due process,” which involves “importing *substantive* principles or values into a constitutional provision that on its face appear[s] to be merely a guarantee that government w[ill] follow proper legal *procedures*.”<sup>141</sup> Smith’s unhappiness with “substantive due process” stems not just from the fact that it appears to contradict originalist interpretive principles but also from the familiar complaint that the doctrine was used in the *Lochner* era as “an instrument for supporting laissez-faire

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134. *Id.* at 295–96.

135. *Id.* at 296–97.

136. *Id.* at 299–300.

137. See GREGORY SMITH ET AL., PEW RESEARCH CTR., AMERICA’S CHANGING RELIGIOUS LANDSCAPE 4 (2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> [<https://perma.cc/U98A-C3YM>].

138. See *id.* at 3–4.

139. See U.S. CONST. amend. XIV, § 1.

140. *Id.*

141. SMITH, *supra* note 1, at 297. Smith is thinking here of *pagan* values.

public policies against the emerging regulatory state.”<sup>142</sup> Understandably, then, it bothers Smith that, after the doctrine “came to be generally discredited” in 1937, it was later “rehabilitated and used to invalidate regulations reflecting traditional or Christian sexual norms.”<sup>143</sup>

But this story, which Smith claims “is a standard part of most first-year constitutional law courses, and is taken for granted by most lawyers and judges,”<sup>144</sup> is itself a twisted take on the jurisprudential record. I happen to agree with Smith that the original meaning of the Due Process Clause does not justify the doctrine of substantive due process. And, unlike many in the legal academy who think that the way to justify using the doctrine is to give up on original meaning as a touchstone of legal interpretation, I think there is a great deal to be said in favor of original meaning originalism, *properly understood*.<sup>145</sup> But Smith’s standard story omits the Court’s shockingly unjustified evisceration of the Privileges or Immunities Clause in the *Slaughterhouse Cases*.<sup>146</sup> I am not the first to point this out,<sup>147</sup> but somehow the message seems not to have percolated into the standard first-year law school curriculum. So, allow me to explain.

The Privileges or Immunities Clause of the Fourteenth Amendment lays down that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>148</sup> But what is the meaning of “of”? The Court reasoned, on the basis of the Fourteenth Amendment’s distinction between citizenship of a State and citizenship of the United States, that the word “of,” in the context of the Privileges or Immunities Clause, does not mean what a reasonable reader—then or now—would take it to mean.<sup>149</sup> Instead of reading “privileges or immunities of citizens of the United States” to mean privileges or immunities *that belong to* citizens of the United States, the Court read the phrase as meaning privileges or immunities *that follow from being* citizens of the United States.<sup>150</sup> The Court then looked around to find rights that might plausibly be held to attach to one’s status as a citizen of the United States, rather than to one’s status

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142. *Id.* (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

143. *Id.* at 297–98.

144. *Id.* at 298 (footnote omitted).

145. Because most purveyors of original meaning originalism do not have a clue what linguistic meaning is, how it is structured, how it is related to syntax and context, or how it should be distinguished from pragmatic phenomena, it is no surprise that I do not accept many of the—conservative or reactionary—doctrinal consequences that are usually held to follow from original meaning originalism.

146. 83 U.S. (16 Wall.) 36 (1873).

147. See, e.g., Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 *YALE L.J.* 643, 646 (2000).

148. U.S. CONST. amend. XIV, § 1.

149. *Slaughterhouse Cases*, 83 U.S. at 74.

150. *Id.* at 76–77.

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as a citizen of any particular State.<sup>151</sup> And it found such privileges as the right to use the navigable waters of the United States, the right to come to the seat of the Federal government to “petition for . . . grievances,” and the right to Federal government assistance when abroad or “on the high seas.”<sup>152</sup> But because there are few such rights in the firmament of positive and negative rights held against government, the result of the *Slaughterhouse Cases* is that the Privileges or Immunities Clause essentially became a dead letter. But had the clause been interpreted in accordance with its original meaning, it would have been held to invalidate a host of State laws, because the list of privileges and immunities that *belong to U.S. citizens* is quite long. Among the laws that the Privileges or Immunities Clause should have been used to invalidate are the laws restricting or banning the use of contraceptives, access to abortion, sodomy, interracial marriages and same-sex marriages, laws that were later invalidated via the doctrine of substantive due process.<sup>153</sup> The latter doctrine, though unjustified on originalist grounds, is fully justified, in my view, as a way of compensating for the Court’s grave error in the *Slaughterhouse Cases*.

But does this mean that *Lochner*<sup>154</sup> was rightly decided and should never have been overturned?<sup>155</sup> No. The *Lochner* Court was *right* to hold that liberty of contract is a fundamental right.<sup>156</sup> But the constitution does not merely protect liberties: it protects the meaningful *exercise* of liberty. If the government prevents everyone else from listening to what I say, then, even if I have freedom of speech, I do not have the ability to exercise that freedom meaningfully. If a State establishes arbitrary rules that make it impossible for reproductive health clinics to operate there, then a pregnant woman faces an undue burden when it comes to the meaningful exercise of her freedom to obtain reproductive health care.<sup>157</sup> And, importantly, if the government sustains and promotes an economic system of private ownership of the means of production with insufficient protections for workers during

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151. See *id.* at 79–80.

152. *Id.*

153. See, e.g., notes 121–126 and accompanying text.

154. 198 U.S. 45 (1905).

155. Although the Supreme Court did not expressly overturn *Lochner*, the Court’s decision in *West Coast Hotel Co. v. Parrish* effectively signaled the end of the *Lochner* era when the Court overruled *Adkins v. Children’s Hospital* and refused to invalidate the state of Washington’s minimum wage regulations for violating economic substantive due process rights. See 300 U.S. 379, 398–400 (1937).

156. See *Lochner*, 198 U.S. at 45.

157. See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

slumps and depressions, then a worker's ability to exercise liberty of contract is not meaningful. For during a labor glut, firms have the power to set wages, and the freedom to work for pennies rather than starve is practically worthless. So, *Lochner* was wrongly decided, not because it enacted "Mr. Herbert Spencer's Social Statics," as Justice Holmes pithily put it,<sup>158</sup> and not because the freedom to make contracts is not implicit in the concept of ordered liberty, but because the *Lochner* Court wrongly assumed that what the Fourteenth Amendment protects is liberty *per se*,<sup>159</sup> rather than the value or meaningfulness of its exercise.

So, it is a mistake to suppose, as Smith does, that the U.S. Constitution has been commandeered to serve purposes that it does not actually serve.<sup>160</sup> The Constitution protects autonomy in all its facets, along with the meaningful exercise of the liberties that constitute it. This explains *both* why *Lochner* was wrongly decided and why the "right to privacy" cases in the areas of sexual behavior, reproductive health, and marriage were rightly decided. Moreover, autonomy is not a pagan value, as Smith understands the word "pagan," but rather a value backed by secular moral arguments based on reason and observation.<sup>161</sup> The Constitution is, in a way, neutral as between religiosity and secularism, and as between different religious outlooks, immanent or transcendent. But the *kind* of neutrality it displays is one that protects persons from state oppression, including unjustified government infringement of their rights and liberties, privileges and immunities. The Constitution was not meant to make the world safe for bigotry or oppression, whether religiously motivated or not. The Constitution was designed to, among other things, "establish Justice . . . and secure the Blessings of Liberty."<sup>162</sup>

This brings us to Smith's discussion of the law of free exercise. Here is the legal and cultural history, as Smith understands it. At its founding, the United States understood itself to be a Christian nation, though not *officially* Christian, in part because of its "neutrally agnostic" Constitution.<sup>163</sup> At the same time, the members of the founding generation presupposed a version of the Augustinian "two cities" model of faith: allegiance to temporal rulers overseen by allegiance to a higher transcendent power.<sup>164</sup> The model was itself Christian, and required, both logically and structurally, a particular form of religious accommodation, first for faith communities—churches,

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158. 198 U.S. at 75 (Holmes, J., dissenting).

159. *See id.* at 53.

160. *See* SMITH, *supra* note 1, at 295–300.

161. *See infra* Appendix.

162. U.S. CONST. pmb1.

163. SMITH, *supra* note 1, at 295.

164. *Id.* at 313.



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primarily—in the form of “*libertas ecclesiae*,” and later for individual citizens, in the form of freedom of religious “conscience.”<sup>165</sup> Religious accommodation “mandated that people whose religion would be burdened by compliance with state or federal law should be exempted unless the government had a ‘compelling interest’ in their compliance that could not be achieved in some less restrictive way.”<sup>166</sup> Smith argues that the doctrine of religious accommodation was the constitutional standard from *Sherbert v. Verner*<sup>167</sup> until *Employment Division v. Smith*,<sup>168</sup> but was both the explicit norm in many State Constitutions and implicitly assumed by many State judges as governing “freedom of conscience” cases “[f]or much of the nation’s earlier history.”<sup>169</sup> But, over time, the concept of “freedom of religion” was severed from the concept of “freedom of conscience,” and eventually “conscience c[ame] to be privileged over religion.”<sup>170</sup> This “transvaluation of values”<sup>171</sup> was effected by the draft exemption cases of the Vietnam War period, *United States v. Seeger*<sup>172</sup> and *Welsh v. United States*,<sup>173</sup> in which the United States Supreme Court held that draft exemption for theistic conscientious objectors would need to be extended to nontheistic but morally serious conscientious objectors.<sup>174</sup> But the conscience that is now protected under the Free Exercise Clause, which states “Congress shall make no law . . . prohibiting the free exercise [of religion],”<sup>175</sup> now encompasses “individuals’ judgments about and commitments to what they perceive as inviolable or ‘sacred’—if not to the ‘sacred’ in a transcendent sense, then to the immanently ‘sacred.’”<sup>176</sup> As a result, the law of free exercise has developed from the doctrine of religious accommodation to a doctrine of accommodation of beliefs about the sacred, whether conceived of in transcendent or immanent terms.<sup>177</sup> Thus, from a community that once deferred to transcendent religious authority, we are in the process of turning into a pagan community.<sup>178</sup>

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165. *Id.* at 311–12.

166. *Id.* at 306.

167. 374 U.S. 398 (1963).

168. 494 U.S. 872 (1990).

169. SMITH, *supra* note 1, at 306, 312.

170. *Id.* at 329–30 (emphasis omitted).

171. *Id.* at 328.

172. 380 U.S. 163 (1965).

173. 398 U.S. 333 (1970).

174. SMITH, *supra* note 1, at 330.

175. U.S. CONST. amend. I.

176. SMITH, *supra* note 1, at 332.

177. *See id.*

178. *See id.* at 333.

At the same time, the nonestablishment norm, which we have already discussed, has driven the exercise of freedom of conscience, whether backed by immanent or transcendent religiosity, from the public sphere into private life.<sup>179</sup> And the recent “enactment and expansion of ambitious antidiscrimination laws” at all levels of government has had “the effect of annexing the marketplace, once mostly thought of as part of the *private* sphere, into the *public* domain, at least for many important purposes.”<sup>180</sup> The result of this “[p]ublic annexation” is that business will be closed to photographers, bakers, restaurateurs, and florists who refuse their services at same-sex weddings, to doctors and pharmacists who refuse to prescribe or dispense—certain types of—birth control devices, and to marriage counselors who refuse to counsel same-sex couples.<sup>181</sup> This, argues Smith, is a development to be lamented, in part because modern paganism represents a “critical, antitraditional, acidic posture [that] subverts rather than sustains the social material with which actual communities are built and maintained,” and in part because it has already led to the “exclu[sion], marginaliz[ation], or sanctioning [of] people or institutions whose views are deemed intolerant.”<sup>182</sup>

My own view is that this is a somewhat distorted picture of the law of free exercise and its development. In the first place, even if the accommodation of nontheistic draft resisters was actually driven by interpretation of the Free Exercise Clause, the central constitutional importance of the value of autonomy, as we have already seen,<sup>183</sup> whether enshrined in the Privileges or Immunities Clause or in the Due Process Clause, would be sufficient to prevent the government from coercing conscientious objectors to kill others—especially innocent noncombatants—unless it has a compelling reason to do so.<sup>184</sup> So, what *appears* to be a legal morphing of freedom of *religion* into freedom of *conscience* is better understood as a situation in which protection of freedom of religion overlaps with protection of autonomy.

Second, and relatedly, the draft exemption freedom of conscience cases do not stand for the principle that the government must accommodate beliefs and judgments about the *sacred*, as Smith understands the term. It is true that the Court held that strong moral views about the wrongness of killing would count for purposes of conscientious objection,<sup>185</sup> but there is no reason to suppose that those moral views would need to be tied to some conception of the sacred, in the sense of a higher order of being that

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179. *See id.* at 339.

180. *Id.* at 340.

181. *Id.* at 341–43.

182. *Id.* at 355, 358.

183. *See supra* text accompanying note 161.

184. Not to speak of the practical reasons not to put those who have strong moral objections against killing in war in charge of military objectives.

185. *See generally* *United States v. Seeger*, 380 U.S. 163 (1965).

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provides a metanarrative for the cosmos and grounds the sublimity of the universe. From the constitutional perspective, religious accommodation of conscientious objectors is really grounded in respect for their autonomy, their fundamental right to make life-defining decisions free of government coercion in the absence of a compelling government interest in their choosing differently.

Third, although I agree with Smith that *Employment Division v. Smith*<sup>186</sup> is a problematic decision,<sup>187</sup> I have little doubt that Federal and State Religious Freedom Restoration Acts (RFRAs),<sup>188</sup> along with Title VII of the Civil Rights Act of 1964,<sup>189</sup> will continue to give special protection to the exercise and implementation of religious beliefs, both in public and in private, as long as the religiously motivated actions do not infringe the rights of others. For example, under current law and for the foreseeable future, employers with at least fifteen employees—whether in the private or public sector—must make reasonable accommodations for the wearing of religious garb and other religious practices, even though they are not required to make similar accommodations for practices that are not motivated by religious requirements.<sup>190</sup> So the proposition that freedom of religion has been, or is being, *replaced* by freedom of conscience in our legal and political culture strikes me as false.

Finally, I find it odd that Smith thinks of business with the public, which is a form of economic activity permitted and encouraged by the government precisely because of its public benefits, as belonging to the private sphere.<sup>191</sup> Even leaving aside the important fact that bigotry of any kind is far more corrosive of societal bonds than secularism or paganism could ever be, there are powerful reasons not to permit religious discrimination free rein in the arena of public accommodations.

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186. 494 U.S. 872 (1990).

187. SMITH, *supra* note 1, at 323.

188. The Religious Freedom Restoration Act (RFRA) of 1993 protects the free exercise of religion by ensuring the government does not substantially burden religious exercise without compelling justification. See 42 U.S.C. § 2000bb-1 (2012). The Court subsequently held that the RFRA only applies to the federal government and not states and local municipalities. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Consequently, numerous states have passed their own version of the RFRA. See *State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/2PBB-4DHH>].

189. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of religion, among other factors. 42 U.S.C. § 2000e-2(a).

190. See *id.* §§ 2000e(b), 2000e(j), 2000e-2(a).

191. See SMITH, *supra* note 1, at 340.

First, there are reasonable worries about the practical consequences of protecting the freedom to discriminate on religious grounds. Maybe Bob and Fred are the only same-sex couple in a small town, and the only florist—or the only wedding cake baker, or the only wedding photographer—within miles refuses to assist them at their wedding. What are Bob and Fred supposed to do? Are they supposed to go without flowers or cake at their wedding? Are they supposed to ask a member of the wedding party to take pictures of the other members of the wedding party? Or are they supposed to find the nearest businesses that are willing to offer their services and hire them? What if the owners of those businesses refuse to travel hundreds of miles to assist at the wedding? Or what if those owners charge double or triple what local businesses would have charged, both because of the cost of transportation and because of the fear that they will lose business once the bigots around them find out that they assisted at a gay wedding? It is very important to recognize that the very real consequences of religious accommodation of discrimination in business are actually far more negative than Smith allows. And those consequences are more than merely practical or financial. Those who experience the effects of discrimination, whether religiously or non-religiously motivated, suffer very real psychological harm. If we as a society tolerate intolerant *behavior* in public accommodations, then the message that we send to the victims of such behavior is that they are second-class citizens.

Smith may reply that the accommodation norm should *not* be held to apply in cases such as the one I have just described. He might say that we should accommodate religious discrimination only when the victims of discrimination can find other ways of meeting their needs or desires—flowers, cakes, photographs. But how is such a principle supposed to be implemented and policed? Imagine the practical ramifications. Suppose the local baker refuses to bake a cake for Bob and Fred’s wedding, and the closest available baker who is willing to bake a cake for them charges them triple for a clearly inferior product. Are we as a society supposed to tell Fred and Bob: “Stop complaining. You got a cake, didn’t you?” That seems absurd. Or are we supposed to compensate them in some way for the additional cost of the inferior cake? But that seems impracticable as a matter of public policy. The gradations of inconvenience and harm that would ensue from accommodating religious discrimination are infinite, and also extremely difficult to measure. Smith does not offer a solution to this problem, focused as he is on only those cases in which “the services offered by [the relevant] professionals are readily available from other providers.”<sup>192</sup>

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192. *Id.* at 301.

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Second, there is the question of principle. Smith recognizes, as surely he must, that there must be principled limits to religious accommodation. As the Court recognized in *Reynolds v. United States*:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?<sup>193</sup>

Religious accommodation, then, is not absolute. As is the case with all rights protected under the U.S. Constitution, government infringement of those rights is permissible if it is necessary to the achievement of some compelling government interest.<sup>194</sup> This is no more than is required by the strict scrutiny test that Smith thinks *should* govern in such cases.<sup>195</sup> The relevant question, then, is whether proscribing a person's refusal to offer services in the public marketplace to particular persons or groups on religious grounds is a necessary means to a compelling public end.

This is a question that Smith avoids, but it is one that must be faced. Now there are some who believe that nothing short of pressing public necessity, whether in the form of the preservation of national security in time of war or in the form of compensation for government injustice, could possibly count as a compelling government purpose.<sup>196</sup> But this is an extreme view. Sometimes freedoms clash with other important values, including respect for the rights of others. Thus, to take well known First Amendment examples, there is no right to falsely shout "fire" in a crowded theater<sup>197</sup> and no right to whip up a crowd into a murderous frenzy by using incendiary language.<sup>198</sup> The question, then, is whether there is any value of great importance that would be seriously compromised by permitting people to discriminate against others in the marketplace for religious reasons. The answer is surely yes.

As a society, we are all covered by the equal protection guarantee of the Fourteenth Amendment. The United States Supreme Court held, in *Bolling*

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193. 98 U.S. 145, 166 (1878).

194. See, e.g., *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 439 (2006).

195. See SMITH, *supra* note 1, at 306.

196. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 316–18 (2013) (Thomas, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 351–53 (2003) (Thomas, J., concurring in part and dissenting in part).

197. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

198. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

*v. Sharpe*, that this guarantee applies as much to the Federal government as it does to the States.<sup>199</sup> In a series of cases, the Court has concluded that the guarantee also applies to public accommodations—businesses, restaurants, theaters, and so on.<sup>200</sup> The Court did not do much to explain *why* the guarantee applies more broadly than to government actions or policies, but we can reconstruct a plausible rationale on the basis of the principle of equality of opportunity that lies at the heart of the most important Court decision of the twentieth century: *Brown v. Board of Education*.<sup>201</sup> Not only is it impossible for children to have an equal opportunity to succeed in life if the State segregates them by race in public schools, but it is also impossible for adults to possess the same sort of equal opportunity if the most important arena of public exchange—namely, commerce—is not open to them on the same terms as it is open to others.<sup>202</sup> I think it is not too much to say that *Brown* enshrined the principle of equal opportunity in the law of the United States, and, unless we go back and overturn it—something that no reasonable scholar or judge, to my knowledge, has suggested we do—we must honor the value it protects as best we can. And this means that we cannot allow religiously grounded refusal to treat customers in the marketplace equally.

It is worth remembering that it was not that long ago that racial segregation was not just mandated by government, but also implemented by private businesses catering to the public. Restaurants, movie theaters, hotels, shops, and other public accommodations refused to serve people on account of their skin color. What is less well understood is that many of those who refused to cater to African-Americans did so on religious grounds. Bible passages and bizarre inferences from existing facts about God's intentions were routinely invoked to justify segregation. The trial judge who first told the Lovings that they would face a year in jail for miscegenation unless they agreed to leave the State for twenty-five years is quoted in *Loving v. Virginia* as having said:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>203</sup>

I have no doubt that many of the shopkeepers, restaurateurs, and hoteliers who refused to cater to African-Americans did so, at least in part, because they believed that it would be sacrilegious to do the opposite. I do not think

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199. 347 U.S. 497, 498–99 (1954).

200. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716–17 (1961).

201. 347 U.S. 483 (1954).

202. See *id.* at 492–93.

203. 388 U.S. 1, 3 (1967).

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that Smith believes that we should go back to the days when—often very devout—Christians refused to serve African-Americans at lunch counters. And what he must explain, then, is why devout Christians should be permitted to discriminate against gays who are celebrating one of the most joyous of life's occasions. As far as I am able to determine, there is no relevant difference between the cases.

But wouldn't a devout theist who is prevented from refusing to hand out marriage licenses to gay couples or who refuses to bake a cake for a same-sex marriage celebration or who refuses to prescribe contraceptives reasonably feel that society is treating her as a second-class citizen? Wouldn't it be reasonable for her to feel alienated and aggrieved, that she herself is not being treated as an equal member of society? No. I do not doubt that this is what many devout theists feel, but I deny that these feelings are reasonable or legitimate. If you agree to set up a business or join a company that serves people, you thereby agree to serve *anyone and everyone*, regardless of whether that person is a skinhead or a Black Lives Matter activist, regardless of whether that person is celebrating a gay wedding or a straight wedding. To deny to some what you make available to others is to treat people unequally without sufficient justification, and that is anathema to us as a legal and political community. No one is forcing you to attend black weddings, or malay weddings, or yellow weddings, or red weddings. Or, for that matter, gay weddings. You are working for a business and your job does not consist in offering your services to some but not to others.<sup>204</sup> It would be understandable for you to refuse to assist at the celebration of a *moral* wrong. But there is nothing morally wrong about same-sex marriage, and there is nothing morally wrong about using contraceptives. If you think there is, then either you are seriously deluded or you are excessively deferential to religious authorities. Wrongness is a function of the unjustified infringement of rights or the absence of charity when called for. So, stand proudly with the rest of us, as we constitute the one polity whose reason for being is to make possible the pursuit of happiness on equal terms. And also, by the bye, be true to your own religion and love your neighbor as yourself.

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204. Of course, this still allows you to refuse service to those who are not wearing a shirt or shoes. But that is a separate matter, related to public health and related matters.

## APPENDIX

The word *Crusade* appears three times in Smith's book, and only twice as a way of describing the three hundred years of off-and-on religious war in Europe and the Levant waged by Christian leaders and their followers against Muslims, Jews, heretics, Cathars, Mongols, Lithuanians, Germans, and others from around 1095 until 1291.<sup>205</sup> The word *Inquisition* appears four times in the book, but without any description of what this form of persecution involved, who was responsible for it, or how many times it was implemented.<sup>206</sup> Smith spends one paragraph on the "horrific" French wars of religion between 1562 and 1598, the "devastating" Thirty Years' War of 1618–1648, and the English Civil War of 1642–1651.<sup>207</sup> And there is no mention of the Revocation of the Edict of Nantes of 1685, which ushered in decades of severe repression of French Protestants.<sup>208</sup>

The Enlightenment thinkers who were looking back at an almost unbroken string of religious wars, massacres, expulsions, persecution, and repression from the late eleventh century until the beginning of the eighteenth century were not simply revealing "a distaste for Christianity amounting almost to an obsession," to use a description of Voltaire's later pamphlets that Smith quotes with approval.<sup>209</sup> If we are going to provide a "fair assessment"<sup>210</sup> of Christianity as it achieved hegemony in Europe during the Middle Ages, through the Renaissance, and well into the Enlightenment, we need to focus as carefully on the startlingly vicious, gut-wrenching, sadistically violent, torture, and killing of non-Christians organized and perpetrated by the most devout and educated Christians as Smith focuses on the persecution of Christians and Pagans in Imperial Rome.<sup>211</sup>

Did Christian leaders, Popes, and kings and nobles among them, fall away from the virtues of charity and non-maleficence? Yes, and with a vengeance. After the Council of Clermont in 1095, at which he gave an impassioned speech exhorting the faithful to undertake an armed pilgrimage, Pope Urban II recruited nobles, knights, and peasants to march on Jerusalem and retake

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205. SMITH, *supra* note 1, at 206, 214–15, 241.

206. *Id.* at 206, 209, 214, 378.

207. *Id.* at 219.

208. See NORMAN RAVITCH, *THE CATHOLIC CHURCH AND THE FRENCH NATION 1589–1989*, at 23–24 (1990) (comparing French Protestants, known as Huguenots, to the "classic behavior of Jews in hostile environments" because the French Protestants' fate after the Edict of Nantes was "persecution, exile, forced conversion, and the execution of their clergy").

209. SMITH, *supra* note 1, at 208 (quoting PETER GAY, *THE ENLIGHTENMENT: THE RISE OF MODERN PAGANISM* 391 (1995)).

210. *Id.* at 206.

211. See generally *id.* at 193–216.



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the “Holy Land.”<sup>212</sup> Even before the Crusade began in August 1096, the call to kill nonbelievers led to massacres of Jews all over the Rhineland.<sup>213</sup> In Mainz, a “major centre of Jewish learning and culture as well as business,” the archbishop, who had promised to protect the Jews, reneged on his promise.<sup>214</sup> Jews killed their own children so that they might be spared an even more horrific death at the hands of the mob, and the adults were slaughtered.<sup>215</sup> Before killing Rachel, a young mother of four who had just killed her children, the Christians demanded, “Show us the money you have in your sleeves.”<sup>216</sup> When the Crusaders reached Jerusalem in 1099, they massacred hundreds of Muslims and Jews, including those who had sheltered in synagogues and mosques.<sup>217</sup>

No sooner was the blood washed from the stones against which the children of non-Christians had been impaled than a new wave of slaughter began: the Crusade of the Faint-Hearted (1101–1102), the Second Crusade (1147–1148), the Third Crusade (1189–1192)—which included the massacre of roughly three thousand Muslim captives when Saladin missed a ransom deadline—the Fourth Crusade (1203–1204), the Albigensian Crusade against Cathar heretics (1209–1229), the Fifth Crusade (1218–1221), and on and on.<sup>218</sup> In 1231, Pope Gregory IX established the Papal Inquisition, and in 1242, a papally commissioned jury in Paris condemned the Talmud and ordered that books by Jewish authors such as Rashi and Maimonides be publicly burned.<sup>219</sup> “[T]he first mass burning of Jews [at] the stake in”

212. SYLVIA SCHEIN, *GATEWAY TO THE HEAVENLY CITY: CRUSADER JERUSALEM AND THE CATHOLIC WEST (1099–1187)* 35–48 (Routledge 2016) (2005).

213. See JONATHAN RILEY-SMITH, *THE FIRST CRUSADE AND THE IDEA OF CRUSADING* 34 (1986) (“[There was a] merciless persecute[ion] of the Rhineland Jews in the early summer of 1096.”).

214. CHRISTOPHER TYERMAN, *GOD’S WAR: A NEW HISTORY OF THE CRUSADES* 101–02 (2006).

215. *Id.* at 102.

216. *Id.*

217. *Id.* 154–58.

218. See generally *id.* at 243–649. For an in-depth description of the massacre that resulted from Saladin missing a ransom deadline, see *id.* at 452–56. The Crusade of 1101–1102 is often described as the Crusade of the Faint-Hearted due to the movement’s lack of experienced leaders, game plan, and foresight. See generally James Lea Cate, *The Crusade of 1101*, in 1 *A HISTORY OF THE CRUSADES* 343 (Marshall W. Baldwin ed., 1958).

219. Robert Chazan, *The Trial and the Condemnation of the Talmud* 6–7, 16 (Tikvah Ctr. Law & Jewish Civilization, Tikvah Working Paper No. 01/11, 2011), <http://www.law.nyu.edu/sites/default/files/TikvahWorkingPapersArchive/WP1Chazan.pdf> [<https://perma.cc/GJU7-9P4R>].

France took place in 1288.<sup>220</sup> Crusades continued throughout the fourteenth century, and non-Christians—especially Jews—were slaughtered all over Europe.<sup>221</sup> In 1306, Philip the Fair ordered the expulsion of roughly 100,000 Jews from France, the confiscation of their property, and the execution of those who remained.<sup>222</sup> The Spanish Inquisition initiated by the Catholic monarchs of Aragon and Castile in 1478 led to the torture and execution of thousands, most of them Jews, all of whom were expelled or forced to convert to Catholicism in 1492—a similar decree of 1502 banned Islam in the Kingdom of Grenada.<sup>223</sup>

Religious wrath was directed not only at non-Christians, but, after the Reformation, at fellow Christians. In France, the bloodbath produced by eight or so wars pitting Catholics against Protestants between 1562 and 1598—when the Edict of Nantes ushered in a period of relative tolerance—led to the deaths of roughly 3 million people.<sup>224</sup> Smith mentions the Saint Bartholomew’s Day Massacre of 1572,<sup>225</sup> but it is worth noting that this involved rampaging mobs of Catholics killing around 2,000 Protestants in Paris and thousands more in the French provinces.<sup>226</sup> So many Protestant corpses were thrown into the Rhône river at Lyon that the citizens of Arles—downriver—did not drink the water for three months.<sup>227</sup> The Thirty Years’ War, which also pitted Catholics against Protestants, though a more complex affair, resulted in 8 million deaths.<sup>228</sup> To take just one example, the population

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220. FARUQUE HASAN, *THE REALITIES AND THE MYTHS OF THE CLASH OF CIVILIZATIONS* 16 (2013).

221. In 1348–1349, towns all along the Rhine “scapegoated” the Jewish community for the Black Plague; as a result, more than two thousand Jews were “rounded up” and burned alive or exterminated. Michael Omer-Man, *This Week in History: The Jews of Basel Are Burnt*, JERUSALEM POST (Jan. 14, 2011, 12:52 AM), <https://www.jpost.com/Features/In-Thespotlight/This-Week-in-History-The-Jews-of-Basel-are-burnt> [<https://perma.cc/4JPH-WW74>].

222. David B. Green, *This Day in Jewish History: 1306: King Philip ‘The Fair’ Expels All France’s Jews*, HAARERTZ (July 22, 2016, 7:30 AM), <https://www.haaretz.com/jewish/premium-1306-king-philip-expels-all-france-s-jews-1.5413718> [<https://perma.cc/7DVW-CSVX>].

223. Edward A. Ryan, *Spanish Inquisition*, ENCYCLOPEDIA BRITANNICA (Dec. 5, 2018), <https://www.britannica.com/topic/Spanish-Inquisition> [<https://perma.cc/23GM-PCUY>].

224. Jeanette Lamb, *Today in History: The Massacre of Wassy Sparks a Religious War that Claims 3 Million Lives (1562)*, HIST. COLLECTION, <https://historycollection.co/today-history-massacre-wassy-sparks-religious-war-france-claim-3-million-lives-1545/> [<https://perma.cc/YA7B-YAVE>].

225. SMITH, *supra* note 1, at 219.

226. *Massacre of St. Bartholomew’s Day*, ENCYCLOPEDIA BRITANNICA (Aug. 17, 2018), <https://www.britannica.com/event/Massacre-of-Saint-Bartholomews-Day> [<https://perma.cc/5KFF-T27D>] (noting one author claims that 70,000 were killed).

227. Georges Goyau, *Saint Bartholomew’s Day*, CATHOLIC ENCYCLOPEDIA (Apr. 6, 2019), <http://www.newadvent.org/cathen/13333b.htm> [<https://perma.cc/TMX2-VKW8>].

228. *Thirty Years’ War*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/reformation/thirty-years-war> [<https://perma.cc/RM6Z-MVQ9?type=image>].

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of Magdeburg in 1618 was 25,000; by 1644, it was 2,500.<sup>229</sup> In “1685, the Edict of Nantes was revoked,” and severe repression of Protestants followed.<sup>230</sup> Hundreds of thousands of Huguenots left France at the end of the seventeenth century to avoid persecution.<sup>231</sup>

So, if we are engaged in a “fair assessment” of the wages of Christendom, we must conclude that the negative side is resoundingly, horrifically, sadistically negative. We are not talking about a small mob of uneducated peasants here and a small mob of uneducated peasants there. We are talking about a systematic, top-down, officially sanctioned series of campaigns to slaughter heretics, members of other faiths, and unbelievers, combined with the confiscation of their property, the torching of their books, the desecration and destruction of their places of worship, and the expulsion of the rest from entire swaths of European territory. Why? Was it because they were hardworking, saved money, and lent it at relatively low rates of interest to Christians, as in the case of the slaughtered Jews of Mainz?<sup>232</sup> Was it because they worshiped the same transcendent God in a different way? Was it because they were in the minority, everywhere? What we *do* know is that it was not because non-Christians were really sucking the blood of boiled Christian children or committing other sorts of atrocities. Jews and Muslims, at least those who lived in the lands of Christendom, were largely interested in going about their business and living in peace with their neighbors. Christian dominance was not faith, hope, and charity in action: it was, instead, six centuries of indescribable evil and carnage, perpetrated first by Christians on non-Christians and then by Christians on Christians and non-Christians alike.

“But,” Smith will say, “what about the positives of Christianity, positives that in any fair assessment should be placed on the other side of the balance?” Smith claims that Christianity was responsible for the philosophical respectability and cultural significance of personal dignity and human rights, of the moral imperative to aid the poor, the weak, and the diseased, and of the importance

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229. C.N. Trueman, *Population and the Thirty Years War*, HIST. LEARNING SITE (Nov. 28, 2015), <https://www.historylearningsite.co.uk/the-thirty-years-war/the-social-and-economic-impact-of-the-thirty-years-war/population-and-the-thirty-years-war/> [<https://perma.cc/CZ6Z-LFXP>].

230. See, e.g., *The Period of Revocation of the Edict of Nantes (1661–1700)*, MUSÉE PROTESTANT 1, <https://www.museeprotestant.org/en/notice/the-period-of-the-revocation-of-the-edict-of-nantes-1661-1700/> [<https://perma.cc/9FPZ-TP39>].

231. *Results of Intolerance: Revocation of the Edict of Nantes*, in 3 THE CATHOLIC LAYMAN 46, 47 (Dublin, William Curry & Co. 1854).

232. See TYERMAN, *supra* note 214, at 100–02.

of scientific and technological progress.<sup>233</sup> If Smith is right, then there is at least the possibility of making some sort of consequentialist case for Christianity: The bad for which it is responsible is outweighed by the good it has achieved.<sup>234</sup> But is Smith right?

It is true, of course, that official Christian doctrine speaks of turning the other cheek,<sup>235</sup> loving one's neighbor as oneself,<sup>236</sup> and doing unto others as one would have them do unto one.<sup>237</sup> It tells us that the meek, the merciful, and the peacemakers are blessed,<sup>238</sup> that it is more difficult for the rich to get into heaven than it is for a camel to pass through the eye of a needle,<sup>239</sup> and that hell is reserved not only for those who commit murder or mayhem, but also for those who express anger at, or insult, others.<sup>240</sup> Christianity insists that all humans are made in the image of God.<sup>241</sup> But despite all of this, Christians at all levels of every society in Christendom, including the most devout, did not merely fail to live up to these rules and constraints: they *flouted* them, repeatedly, enthusiastically, with an almost unfathomable passion. It was mercilessness on steroids. This casts significant doubt on Smith's historical claim that it was *Christianity*, more than any other system of interconnected doctrines, that introduced and nurtured the ideals of universal beneficence and universal respect for human rights in Europe and the Americas. Smith points out that the Christian community was distinctive for "its egalitarian quality" and was notable for "caring for its poor and sick."<sup>242</sup> But notice the use of the word *its*: it is possible to believe in equality and beneficence, even while restricting those principles *to Christians*. And there is more than sufficient evidence to suggest that this is *exactly* what happened within the Christian community in the Middle Ages and beyond. *Christians* are made in the image of God, Christians should turn the cheek when slapped by other *Christians*, Christians should not slaughter other *Christians*, and so on. And after the Reformation, there was more than sufficient evidence to suggest that the restrictions on the relevant principles were

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233. SMITH, *supra* note 1, at 206.

234. Though this sort of case for Christianity does not sit well with the nonconsequentialist imperatives at the heart of Christian morality, such as the Doctrine of Doing and Allowing and the Doctrine of Double Effect. See Fiona Woollard, *The Doctrine of Doing and Allowing I: Analysis of the Doing/Allowing Distinction*, 7 PHIL. COMPASS 448, 448 (2012); see also 2 THOMAS AQUINAS, THE SUMMA THEOLOGICA pt. 2-2, question 64, art. 7 (Fathers of the English Dominican Province trans., Encyclopaedia Britannica, Inc. 1987) (1485).

235. *Matthew* 5:38–39.

236. *Mark* 12:30.

237. *Matthew* 7:12.

238. *Id.* at 5:5, 5:7, 5:9.

239. *Id.* at 19:24.

240. *Id.* at 5:22.

241. *Genesis* 1:26–27.

242. SMITH, *supra* note 1, at 178–79.

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narrowed further: Catholics should not slaughter other *Catholics*, Protestants should not slaughter other *Protestants*, but the Protestants' God will not mind if Catholics are slaughtered, the Catholics' God will not mind if Protestants are slaughtered, and Christians can unite in delight when Jews are burned at the stake.<sup>243</sup>

The restrictions, whether at the level of principle or at the level of implementation, applied just as much to women. Although women were active in the church in its earliest years, by the end of the Patristic age men had taken over all the important positions of authority.<sup>244</sup> The Latin father Tertullian, whom Smith represents as plaintively demanding from the rulers of the Roman Empire justification for “the extreme severities inflicted on our people,”<sup>245</sup> writes in *On the Veiling of Virgins*: “It is not permitted to a woman to speak in the church; but neither (is it permitted her) to teach, nor to baptize, nor to offer, nor to claim to herself a lot in any manly function, not to say (in any sacerdotal) office.”<sup>246</sup> So, women were to be seen but not heard. Moreover, whereas husbands were commanded to love their wives even as themselves, wives were commanded to submit to their husbands because “the husband is the head of the wife.”<sup>247</sup> Worse, Tertullian, who publicly renounced sexual relations with his wife and admonished her to become celibate, declared that women in general “are the devil’s gateway.”<sup>248</sup> And Origen, another early church father, like Tertullian, “considered woman a primary source of carnal corruption in Christian society.”<sup>249</sup> According to Thomas Aquinas, woman, as regards her individual nature, is misbegotten, for “the production of woman comes from defect in the active force or from some material indisposition, or even from some external influence; such

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243. Yes, Tom Lehrer was onto something in his song, *National Brotherhood Week*. TOM LEHRER, *National Brotherhood Week, on THAT WAS THE YEAR THAT WAS SIDE 1* (Wamer Bros. Records 1965).

244. See William Weinrich, *Women in the History of the Church: Learned and Holy, but Not Pastors*, in RECOVERING BIBLICAL MANHOOD AND WOMANHOOD: A RESPONSE TO EVANGELICAL FEMINISM 263, 265, 273–74 (John Piper & Wayne Grudem eds., 2012).

245. SMITH, *supra* note 1, at 3.

246. Tertullian, *On the Veiling of Virgins*, in 4 THE ANTE-NICENE FATHERS: THE WRITINGS OF THE FATHERS DOWN TO A.D. 325, at 30, 33 (Alexander Roberts & James Donaldson eds., 1925). In this, Tertullian is doing no more than echoing the words of Paul in 1 *Corinthians* 14:34–35 and 1 *Timothy* 2:11–12.

247. *Ephesians* 5:22–23.

248. Tertullian, *On the Apparel of Women*, in 4 THE ANTE-NICENE FATHERS: THE WRITINGS OF THE FATHERS DOWN TO A.D. 325, *supra* note 246, at 14, 14.

249. JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 64 (paperback ed. 1990).

as that of a south wind, which is moist,” and “woman is naturally subject to man, because in man the discretion of reason predominates.”<sup>250</sup> So much for Christian commitment to equality.

Smith’s story is notable for its claim that there is a strong strain in Christian doctrine that promotes religious accommodation.<sup>251</sup> The “two cities” approach of Augustine of Hippo, based on Christ’s statement about rendering unto Caesar that which is Caesar’s and rendering unto God that which is God’s,<sup>252</sup> suggests that those whose lives are built on belief in the existence of the transcendent sacred should, on the one hand, be left free to honor the sacred in the way they choose and, on the other hand, recognize that there are both practical and principled reasons to respect the political authority of temporal rulers.<sup>253</sup> But the “two cities” approach, which Smith suggests governed the relation between church and polity well into the time of the founding of the United States,<sup>254</sup> was not the only, or even the dominant, conception of church-state relations among the Christian elite in the Middle Ages. Part of the ideological justification for the Crusades was laid down in a list of twenty-seven assertions inserted into the papal register by Pope Gregory VII in 1075.<sup>255</sup> The *Dictatus Papae* asserts “[t]hat of the pope alone all princes shall kiss the feet,” “[t]hat it may be permitted to him to depose emperors,” and “[t]hat he may absolve subjects from their fealty to wicked men.”<sup>256</sup> This is not a story of two cities, each with its proper jurisdiction, one over temporal matters and one over eternal matters. It is, instead, a story of papal superiority over temporal rulers, involving both the power to depose them and the power to break the bond of allegiance tying their subjects to them. Gregory was not merely demanding that the Church be treated as sovereign over its proper dominion, but that it be treated as sovereign over everything. It should be no surprise to anyone, then, that Christianity should have exerted a profoundly destabilizing influence in the earthly city: rather than having the effect of binding people of different faiths and persuasions in one community, Christianity attacked those who refused to give the Pope unqualified obeisance.<sup>257</sup>

250. 1 AQUINAS, *supra* note 234, at pt. 2-1, question 92, art. 1.

251. SMITH, *supra* note 1, at 130–31, 138.

252. AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* bk. xviii (R.W. Dyson ed. & trans., 9th prtg. 2013).

253. SMITH, *supra* note 1, at 127–28.

254. *Id.* at 128.

255. See Pope Gregory VII, *The Dictate of the Pope*, in *SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES* 366, 366–67 (Ernest F. Henderson ed. & trans., London, George Bell & Sons 1892).

256. *Id.*

257. So it is not for nothing that John Locke writes, in *A Letter Concerning Toleration*:  
It being impossible either by indulgence or severity to make papists, whilst papists,  
friends to your government, being enemies to it both in their principles and interest,

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But Smith is surely right when he says that principles of beneficence and nonmaleficence, including respect for human rights and a sense of obligation to the less fortunate, entered European culture.<sup>258</sup> The question is when and how. Understood as universal—or nearly universal—and as condemning all forms of domination, including patriarchy and slaveholding, these principles did not really appear in the work of influential intellectuals until the Enlightenment. This is when the strongest arguments for the abolition of patriarchy, slavery, and persecution, including religious persecution, achieved widespread cultural influence. Many of these arguments were secular, based on empirical claims about the rough equality of human intellectual abilities on average, claims that contradicted the Aristotelian orthodoxy accepted by most Christians until the scientific revolution of the seventeenth century.<sup>259</sup> It was not *imago Dei* that led to calls for wider freedom and quality: it was science and reason. Of course, even philosophers and scientists are creatures of their time, so the arguments of Enlightenment philosophers were not fully shorn of cultural bias. But their work, unlike the work of their Christian predecessors, provided at least the beginnings of an argument for *universal* freedom and equality, an argument that has been carried through by their secular successors.

According to Smith, the claim that secularism is the agency responsible for embedding ideals of justice, freedom, and equality in European, and eventually North American, culture is false.<sup>260</sup> The relevant regulative ideal here is Christianity.<sup>261</sup> Smith quotes David Bentley Hart with approval:

Even the most ardent secularists among us generally cling to notions of human rights, economic and social justice, providence for the indigent, legal equality, or basic human dignity that pre-Christian Western culture would have found not so much foolish as unintelligible. It is simply the case that we distant children of the pagans would not be able to believe in any of these things—they would never

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and therefore considering them as irreconcilable enemies of whose fidelity you can never be secured, whilst they owe a blind obedience to an infallible pope, who has the keys of their consciences tied to his girdle, and can upon occasion dispense with all their oaths, promises and the obligations they have to their prince, especially being a heretic, and arm them to the disturbance of the government, I think they ought not to enjoy the benefit of toleration.

JOHN LOCKE, *An Essay Concerning Toleration*, in A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 105, 123 (Mark Goldie ed., Indianapolis, Liberty Fund 2010) (1689) (footnote omitted).

258. See SMITH, *supra* note 1, at 206–07.

259. See THOMAS HOBBS, LEVIATHAN 56–59 (2001) (1651).

260. See SMITH, *supra* note 1, at 147.

261. See *id.* at 213–14.

have occurred to us—had our ancestors not once believed that God is love, that charity is the foundation of all virtues, that all of us are equal before the eyes of God, that to fail to feed the hungry or care for the suffering is to sin against Christ, and that Christ laid down his life for the least of his brethren.<sup>262</sup>

But in the light of the history of actual Christian teachings and the sadistic acts of those who preached and proselytized in the name of Jesus, I read the Bentley quote as wrong-headed, almost bizarre. Smith is aware of the accusations against Christian doctrine and activity during the Middle Ages, but he claims that “[t]he most familiar criticisms, after all, essentially accuse Christianity of failing to live up to its own ideals and commitments” and that “[i]n indicting Christianity for its violence, critics thus embrace a Christian standard and deploy it against Christianity.”<sup>263</sup> I disagree. The “most familiar” criticisms of Christianity were that it preached the killing of unbelievers, the subordination of women, and the evils of harmless sexual activity—for details, see above. It is *possible* that this was an internal indictment of Christianity for failing to live up to its own commitments—though given what we know about the views of the most influential Christian theologians and Biblical exegetes from the Patristic age to Aquinas and beyond, I have my doubts—but the most damning criticisms did not—and do not—in any way assume that the standards of criticism *stem from* Christianity itself. The most powerful criticisms of Christianity stand solidly on the bedrock of secular reason.

“Reason, schmeason,” replies Smith, though not in those words. In a breathtaking three pages, Smith makes short shrift of secular consequentialism, and, in the next three pages, dismisses Immanuel Kant’s secular version of nonconsequentialism in a flurry of rhetorical questions and one-liners. Smith concludes that “both the consequentialist and Kantian strategies seem less than compelling.”<sup>264</sup> At the same time, in a welcome display of fair-mindedness, Smith acknowledges that “[i]t is impossible, of course, decisively to dispose of several centuries of moral philosophizing, or of a system as intricate and sophisticated as Kant’s, in a few paragraphs” and that “[i]t may also seem presumptuous, and irreverent, to treat so summarily and casually positions that earnest philosophers have pondered and pontificated on for many decades now.”<sup>265</sup> Because I am a philosopher, allow me to do a little pondering and pontificating in response. Although I am not a consequentialist,

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262. *Id.* (quoting DAVID BENTLEY HART, *ATHEIST DELUSIONS: THE CHRISTIAN REVOLUTION AND ITS FASHIONABLE ENEMIES* 32–33 (2009)).

263. *Id.* at 214–15.

264. *Id.* at 228.

265. *Id.*



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and have actually worked on Kant's argument for the categorical imperative,<sup>266</sup> I will mostly confine my remarks to Smith's discussion of consequentialism.<sup>267</sup>

Smith ties consequentialism to utilitarianism,<sup>268</sup> even though utilitarianism, in all of *its* varieties, is just one version of consequentialism. Broadly speaking, consequentialism takes the standard of rightness to be the promotion of the greatest good.<sup>269</sup> Utilitarianism identifies goodness with utility, usually understood either in terms of pleasure—and the absence of pain—or in terms of the satisfaction of subjective—actual or ideal—preferences.<sup>270</sup> In addition to utilitarianism, there are less subjective versions of consequentialism, according to which the good that is to be promoted is more objective: either a set of perfected capacities or a list—not necessarily hierarchically ordered—of objective goods, such as knowledge, autonomy, achievement, and friendship.<sup>271</sup> But never mind all the distinctions. Smith lumps all these different versions of consequentialism together, tying them all to instrumentalism,<sup>272</sup> which, properly understood, is the even more general view according to which the standard of rightness concerns the promotion of *something or other*. But Smith reads “instrumentalism” more narrowly, as having to do with the satisfaction of interests or the fulfilling of preferences, which really brings us back to preference-satisfaction utilitarianism.<sup>273</sup>

Smith then takes one page to criticize this particular version of consequentialism. We are told that “the enlightened pursuit of self-interest or the satisfaction of desires is just not what we understand morality or ethics to be about.”<sup>274</sup> Although I am not a consequentialist, I do not find this

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266. See generally Samuel C. Rickless, *From the Good Will to the Formula of Universal Law*, 68 PHIL. & PHENOMENOLOGICAL RES. 554 (2004).

267. Regarding nonconsequentialism, let me point out briefly that (i) Kant and his followers are not the only nonconsequentialists—there is, for example, the theory of Philippa Foot, which has been defended and extended by many others, including me; and there are many *Kantians*, philosophers inspired by Kant who do not accept everything Kant says, whether about the nature of the categorical imperative, the argument for it, its various formulations, and so on—and (ii) the secondary literature on Kant contains numerous responses to Smith's criticisms of the categorical imperative.

268. See SMITH, *supra* note 1, at 225.

269. Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA PHIL. (Oct. 22, 2015), <https://plato.stanford.edu/entries/consequentialism/> [<https://perma.cc/MA8K-9EQK>].

270. *Id.*

271. *Id.*

272. See SMITH, *supra* note 1, at 225.

273. *Id.* at 226.

274. *Id.* (citing Nancy Ann Davis, *Contemporary Deontology*, in A COMPANION TO ETHICS 205 (Peter Singer ed., 2000)).

criticism of consequentialism convincing. First, most consequentialists do not believe that the proper standard of rightness concerns *self*-interest. Such a view would be *egoistic*, but egoism is a perverse form of moral dyspepsia and most consequentialists advocate the promotion of the good *impartially considered*. So, why, exactly, is morality *not* “about” the satisfaction of desires, *so understood*? Suppose that I have five doses of a drug that would save the lives of five people, but instead of giving one dose to each of the five, I give all of the doses to one person—who, let us suppose, cannot give them back or give them to anyone else. Is that morally permissible? No. Why? After all, I am being charitable, and I have just saved someone’s life. But wait, someone might say, I have not been charitable *in the right way*. But what *is* the right way? Well, it has to do with the fact that all five people are in dire need, that I am in a position to help all of them and not just one of them, that it would not cost me any more to help five than it would to help one, that none of the five has any more of a claim on the drug than any of the others, and so on. So, I can costlessly satisfy the very important reasonable preferences of five, costlessly satisfy the very important reasonable preferences of fewer, or stay home and read Ephesians. *What else do you want to know*? If Smith’s morality is not, at least in part, about the satisfaction of reasonable desires impartially considered, then I do not want any part of it. Besides, as Philippa Foot once wrote, charity, that most quintessential of Christian virtues, is the virtue that ties us “to the good of others.”<sup>275</sup> So, if you do not think that the satisfaction of other people’s reasonable desires counts for anything, then you are not charitable, you are immoral, and you cannot count yourself as much of a Christian.

Smith counters with a challenge: “[I]f the goal of morality is nothing more lofty than the satisfaction of desires, then why should anyone ever care about the good of others, except in a self-serving, *quid pro quo* way? What is the warrant for generosity, altruism, self-sacrifice? For heroism? For love?”<sup>276</sup> He says that David Hume’s answer, which appeals to the claim that humans “happen to be constituted so that we actually *do* care about our fellows,” is belied by the facts.<sup>277</sup> The reason for this is that many people do not find in themselves the “sympathy” that Hume takes to be part of the human condition.<sup>278</sup> With this response to Hume, I am inclined to agree. But, as Smith himself notes, “[c]onsequentialists have rebuttals to [his]

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275. PHILIPPA FOOT, *Virtues and Vices*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 1, 6 (2002).

276. SMITH, *supra* note 1, at 226.

277. *Id.* at 226 (citing DAVID HUME, *An Enquiry Concerning the Principles of Morals*, in *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* 167, 212–84 (L.A. Selby-Bigge ed., 3d ed. 1975)).

278. SMITH, *supra* note 1, at 226; *see also* HUME, *supra* note 277, at 283–84.

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objections.<sup>279</sup> Does this mean that consequentialism is left standing then? No, because, as Smith goes on to say, “[t]hose who find the rebuttals unpersuasive will look elsewhere for an account of morality.”<sup>280</sup> This is befuddling. After all, those who find Christian morality unpersuasive will look elsewhere for an account of morality, and those who find my grandmother’s account of morality unpersuasive will look elsewhere too. The relevant issue here is what the rebuttals are, and whether they are persuasive.

This, as it turns out, is a vexed question. If morality ties us to the good of others, as even Christians believe, the question Smith raises about why anyone should ever care about the good of others is really just another way of putting the question of why anyone should ever care about morality. Perhaps without realizing it, Smith has bumped up against the “why be moral?” question. Now there are many who accept the question and treat it seriously. Inevitably, they look for an answer, à la Hobbes,<sup>281</sup> that explains how it is really in one’s own interest to be moral. But my own view is that the question is misbegotten. Like other questions of the “how often do you beat your dog?” type, the “why be moral?” question *presupposes* that there is something more basic than morality in terms of which it is possible to justify moral behavior. But that presupposition is false. If you do not understand that the needs of others matter independently of your own needs, then you do not understand what morality *is*. And if the presupposition is false, then I reject the question. The right answer to the question “why be moral?,” just like the right answer to the question “how often do you beat your dog?,” is: “What’s your *problem*?” So, what *is* the warrant for generosity and altruism, then? Again, I reject the question. Alright, but what is the warrant for self-sacrifice and heroism? The answer is: the needs of others. And please do not ask me why the needs of others matter, because I will reject the question—again. Alright, but what is the warrant for love? Well, I have to admit that Paul nailed the answer to this one: “Love is patient, love is kind. It does not envy, it does not boast, it is not proud.”<sup>282</sup> What more do you want?

In any event, the “why be moral?” question applies to everyone who thinks that there are moral requirements or obligations, not just to consequentialists. So, even if you think that the question does not have a false presupposition,

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279. SMITH, *supra* note 1, at 226 (citing Philip Pettit, *Consequentialism, in A COMPANION TO ETHICS*, *supra* note 274, at 230).

280. *Id.*

281. See HOBBS, *supra* note 259.

282. 1 *Corinthians* 13:4.

it is not that consequentialists are going to have a more difficult time answering it than their detractors. In sum, Smith's objections to consequentialism are weak, and, to use his own words, "less than compelling."<sup>283</sup> And just in case you think that there isn't more to be said, let me add one more thing. As I noted above, there are different kinds of consequentialism. Understandably, they all face different objections, on the strength of which it is reasonable to conclude that some are less counterintuitive than others. Smith skates over the complexities because he thinks that *all* versions of consequentialism face the same intractable problems. But I think we need to be open to the very real possibility that some versions of consequentialism actually do a pretty good job of accounting for and explaining our considered moral judgments. For example, Smith does not discuss rule-consequentialism, according to which the standard of rightness is fixed by action in accord with the optimal rule, that is, by the rule the universal implementation of which would produce more good than—or at least as much good as—the implementation of any alternative.<sup>284</sup> On a variety of measures, rule-consequentialism is much closer to commonsense morality than act-consequentialism. The main reason for this is that rule-consequentialism at least arguably counsels against doing or intending harm in particular cases merely in order to achieve the greater good.<sup>285</sup> And this is because the implementation of a rule against harming or against intending harm would likely bring about better consequences than any available alternative rule. Consequentialism itself, then, is far from dead.

Moving back to see more of the forest now, the moral of our discussion of consequentialism—and, I would add, nonconsequentialism—is that Smith has given us no reason to suppose that there can be no reasonable indictment of Christianity that is not already internal to Christianity. Most moral systems debated by philosophers these days are robustly secular, in the sense of having no foundation in any kind of religious doctrine. This is where the action is. And nothing Smith says provides any justification for giving up on these debates and turning to Christianity instead.<sup>286</sup>

I have been arguing that the widespread cultural acceptance of the ideals of freedom, equality, and justice in Europe and the Americas has its firmest roots in secular arguments and theories propounded by the philosophers

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283. SMITH, *supra* note 1, at 228.

284. See BRAD HOOKER, *IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY* 2 (2000).

285. See *id.* at 145.

286. Besides, if secular ethics is bunk, then why not turn to Buddhism, or Islam, or Judaism, or Hinduism, or, for that matter, Scientology? Please do not tell me that Christianity takes precedence over the other religions because it has been around the Western world longer than the other religions have. Truth is not a function of who conquered which lands, who proselytized successfully, and who slaughtered which peoples in the past.

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*Paganism Is Dead, Long Live Secularism*

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of the Enlightenment—and, occasionally, from the philosophers of antiquity to whom they sometimes turned for inspiration. These ideals were used to criticize Christianity, both at the level of doctrine and at the level of implementation. If I am right, then Smith is mistaken in thinking that the most familiar criticisms of Christianity stem from Christianity applied to itself. But Smith also thinks that the tendency to accuse or blame Christianity for the “negative[s]” we have already canvassed is “simply the reverse side of the more positive recollections of paganism” during the Renaissance and the Enlightenment.<sup>287</sup> Smith hypothesizes that “if classical paganism was joyous, exuberant, beautiful, and inclusive, then it is natural enough to feel a profound resentment toward the force that suppressed that splendid world—namely, Christianity—and to attribute the opposite qualities to that historical force.”<sup>288</sup> Indeed, says Smith, “it might plausibly be argued that paganism is the natural condition of humanity.”<sup>289</sup> No surprise, then, that Enlightenment intellectuals, all of them natural pagans, at least according to Smith, would resent Christianity for having destroyed their way of life.

But this, I am sorry to say, is fiction. The philosophers of the Enlightenment were not open or closeted pagans, and immanent religiosity is no more “natural” than transcendent religiosity. It is not just that we should take the word of the philosophers. It is that the indictment of Christianity, when it arrived, for example, in the work of Voltaire<sup>290</sup> and Hume,<sup>291</sup> was not born of resentment, but of the failure of Christianity to respect principles of morality based on reason, reflection, and experience. We know this because these philosophers were no less unsparing in their criticisms of *paganism* than they were in their criticisms of *Christianity*.<sup>292</sup> Enlightenment philosophers were critical of absolute rule, hierarchy, patriarchy, slavery, inequality, superstition, and irrationality in all its forms and wherever manifested.<sup>293</sup> Classical pagan societies, no less than Christendom, were grist for the Enlightenment mill. These criticisms did not stem from resentment born of some sort of wistful longing for the golden age of *pax Romana*: they

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287. SMITH, *supra* note 1, at 207–08.

288. *Id.* at 208.

289. *Id.* at 211.

290. See generally Peter Jimack, *Voltaire*, in *PHILOSOPHERS OF THE ENLIGHTENMENT* 63 (Peter Gilmour ed., 1990).

291. See generally Angus J. Mackay, *David Hume*, in *PHILOSOPHERS OF THE ENLIGHTENMENT*, *supra* note 290, at 133.

292. See Jimack, *supra* note 290; Mackay, *supra* note 291.

293. See Jimack, *supra* note 290; Mackay, *supra* note 291.

stemmed from the loosening and gradual unraveling of the straitjacket of irrational oppression and persecution.