This Isn't About You: A Comment on Smith's *Pagans and Christians in the City*

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TABLE OF CONTENTS

I. INTRODUCTION

History never really repeats itself. Thinking that it does can get you in trouble. It can make you misinterpret what's in front of you, seeing parallels that aren't there. So, for instance, militant atheists who know about the Inquisition, or about the religious defenses of slavery before the Civil War, sometimes imagine similar impositions when a Christian asks for a

* © 2019 Andrew Koppelman. John Paul Stevens Professor of Law and Professor (by courtesy) of Political Science, Department of Philosophy Affiliated Faculty, Northwestern University. Thanks to Steve Smith for comments on earlier drafts. The treatment of the contraception mandate repeats points previously made in Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 52 (2014), and the discussion of Michael Paulsen's work draws on Andrew Koppelman, *"Freedom of the Church" and the Authority of the State*, 21 J. CONTEMP. LEGAL ISSUES 145 (2013).

mild religious accommodation: if we allow this, pretty soon they'll be burning heretics again!

Steven Smith's *Pagans and Christians in the City* is a marvelous study of the struggle between ancient Roman paganism and early Christianity.[1] Its great strength is its easy mastery of the local details. He is a terrific storyteller. The book is fun to read.

Smith is not an admirer of Rawls, but the problem to which the book responds is the one Rawls posed: "How is it possible that there may exist over time a stable and just society . . . profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"[2] Smith shows that in Rome it was not possible at all. The culture wars were inevitably going to conclude with mass murder.

The Christian case for toleration, Smith observes, could have been offered in Rawlsian terms, as a vision of overlapping consensus. "The pagan and Christian worldviews . . . were obviously very different, but they converged in prescribing allegiance to earthly rulers and obedience to the law adopted by those rulers."[3] Tertullian proposed civil peace on just this basis: we are not hurting anyone, please leave us alone.[4]

But in the end, coexistence between the pagan Romans and the Christians was impossible. When they proposed terms, "both sides failed fully to grasp and credit the other side's commitments."[5] The trouble was "that the Jerusalem-centered faiths represented a radically different form of religiosity—indeed, a fundamentally different orientation to the world—that was unassimilable into the Romans' thoroughly worldly civic piety."[6] Four aspects of Christianity made it unendurable to the Romans. The Christians were unwilling to manifest their loyalty to the emperors by sacrificing to the pagan gods—a display that the Romans thought indispensable to civic order. The Christian teachings "fundamentally contradicted and thus undermined the basis of civic allegiance and obligation in the Roman political system."[7] Their teachings endangered the state: "[I]f the gods were insulted or

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1. *See generally* STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC (2018).
2. JOHN RAWLS, POLITICAL LIBERALISM, at xxv (expanded ed. 2005). The words I have omitted, "of free and equal citizens," was not even a possibility in Rome, where slavery was routine. The question was whether the pagans and Christians could achieve stability.
3. *Id.* at 136.
4. *See id.* at 3–5.
5. *Id.* at 138.
6. *Id.* at 102.
7. *Id.* at 142.

offended, they might visit ruin on the community."[8] The condemnation of pagan views was insulting.

So, the Roman persecutions of Christians were really inevitable.

Smith thinks this episode sheds light on today's culture wars, with sobering implications. In contemporary America, there is "a renewal of the fourth-century struggle between Christianity and paganism—a struggle seeking to reverse the 'revolution' that Christianity achieved in late antiquity."[9] It is a zero-sum game. The Rawlsian aspiration is as forlorn now as it was then. And "the scope of conflict and potential repression is much larger than it was in antiquity."[10]

It is a misdiagnosis. It repeatedly leads Smith astray when he confronts contemporary controversies, as he does in the book's last four chapters. In the contemporary culture wars, the legal impositions of which conservative Christians complain do not bear even a family resemblance to what the Romans imposed. It is not just that Christians do not get crucified. Of the four features Smith emphasizes, only the dignitary harm is anything like an analogue, and even there the differences considerably outweigh the similarities. The most fundamental difference is that the laws that press on conservative Christians were not written with them in mind and do not require them to abjure their religious faith. Like most religious accommodation cases, they involve burdens on religion that were not contemplated by the law's drafters. It thus might be possible to accommodate the religious objectors without defeating the purposes of the laws. To make that case, though, Smith would have to engage with those purposes, and he never does that.

Smith misunderstands the culture wars, he misunderstands antidiscrimination law; he misunderstands the recent resistance to state Religious Freedom Restoration Acts (RFRAs); he misunderstands the contraception mandate; he misunderstands the basis of religious liberty; and he misunderstands the possibilities for achieving the Rawlsian ideal today.

Torn from their original context, the categories of "pagan" and "Christian" are too crude to offer any diagnostic help. Similarly with immanence and transcendence, the fundamental division on which Smith builds his analysis. Each is open to such a huge variety of specifications that neither has any

8. *Id.* at 145.
9. *Id.* at 259.
10. *Id.* at 360.

definite practical or political entailments. Rome is fascinating, but it does not tell us much about contemporary America.

II. MISUNDERSTANDING THE CULTURE WARS

Smith's very specific account of ancient history leads him to a more dubious grand historical narrative, in which humanity faces a perennial struggle between three basic orientations toward reality:

> One, associated with paganism, is an immanently religious orientation that affirms the reality of the sacred but locates that sanctity within nature, or within life in this world. The other, associated with Christianity, asserts a transcendent sanctity that while entering into the world, ultimately lies beyond nature. By contrast to these orientations, the modern secularism associated with scientific naturalism denies the existence of the sacred altogether.[11]

Today's culture wars, Smith thinks, are fundamentally based on a collision between these world views, and, in particular, the intolerance toward Christians of the proponents of paganism and scientism.[12]

There has indeed been an unbecoming zeal in the culture wars. But, it is no more the necessary consequence of the encounter of these worldviews than the Saint Bartholomew's Day Massacre was the necessary consequence of the encounter between Catholicism and Protestantism. Religious diversity sometimes breeds nasty intolerance. It depends on local contingencies. High philosophical theory offers limited illumination.[13]

Smith associates modern progressive views of sexuality with the rejection of theism. He claims that

> the Court's substantive due process jurisprudence has systematically dismantled the Christian norms of sexual morality and marriage that previously were officially recognized in law, and has moved the law decisively in the direction of a view of sexuality that resonates with the immanent religiosity of both ancient and modern paganism.[14]

The Court has thus turned the Constitution "into a partisan instrument in the struggle between transcendent and immanent conceptions of the city."[15]

Reading Smith, you would not know that American theists are themselves divided about these matters. James Davison Hunter, on whom Smith

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11. *Id.* at 223.
12. *See id.* at 357–59.
13. Here I am continuing an argument I have been having with Smith for years. *See, e.g.*, Andrew Koppelman, *Theorists, Get over Yourselves: A Response to Steven D. Smith*, 41 PEPP. L. REV. 937 (2014).
14. SMITH, *supra* note 1, at 299.
15. *Id.* at 300.

relies, did not make that mistake. The culture wars, as Hunter understood them, reflected first and foremost a division within American theistic religion.[16]

Hunter's fundamental contribution was to point out the cleavage between orthodox and progressive worldviews. Orthodoxy is characterized by its adherents' commitment to an external, definable, and transcendent authority.[17] Progressivism, on the other hand, tends to take human well-being as the ultimate standard by which moral judgments and policy decisions are grounded, and to treat any moral truth as a human construction that is always subject to reevaluation in light of experience.[18] The defining feature of progressivism is "the tendency to resymbolize historic faiths according to the prevailing assumptions of contemporary life."[19] The old divisions between Protestant, Catholic, and Jew have been supplanted by new cleavages within these groups, in which the orthodox and progressive both ally with likeminded members of other denominations against their own coreligionists.[20]

The crucial fact that Smith overlooks is that the progressives are theists as well. Mostly they are Christians with unusually high levels of education.[21] That is why almost every Christian denomination is divided over the issue of whether to sanctify same-sex unions. If the progressives were really pagans, they would not fight. They would just leave their churches. They do not. It is, of course, possible to argue that the progressives within each

16. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).
17. *See id.* at 43–45.
18. *See id.*
19. *Id.* at 44–45 (emphasis omitted).
20. *Id.* at 47–48.
21. *See* David A. Hollinger, *Christianity and Its American Fate: Where History Interrogates Secularization Theory*, *in* THE WORLDS OF AMERICAN INTELLECTUAL HISTORY 280, 281, 295 (Joel Isaac et al. eds., 2016). Hollinger compiles voluminous social science studies to support a refined version of the secularization thesis:

> The more one knows about the world, the less inclined one is to ascribe to supernatural authority whatever value one finds in the teachings and social function of Protestant and Catholic churches, and the less inclined one is to invoke supernatural authority as a warrant for whatever specific worldly conduct one advocates.

Id. at 289 (emphasis omitted). The theological implications are not obvious. Hollinger observes that

> the secularization debates would look different if they were informed by the conviction that liberalized Protestantism and Catholicism were the real Christianity, and the so-called orthodoxy of the conservatives was simply a set of anachronisms left over from times and places in which Christianity took on the contours of cultures then enjoying hegemony.

Id. at 295.

of these denominations are in theological error, that every last one of their theologies, rightly understood, support the orthodox. But to show that, one would need to get deep into each tradition—and even then, one would end up revealing, not paganism, but theistic heresy. Smith does not attempt that.[22]

Smith thinks that the conflicting orientations described by Hunter "reflected, and reflect, the competing transcendent and immanent religiosities we have been discussing in this book."[23] Actually, the transcendent-immanent distinction cuts across the orthodox-progressive one. The goods of this world have varying degrees of importance within the varying forms of transcendent religiosity. Smith thinks that "what may seem like abstract differences in the location of the sacred support fundamentally different orientations or attitudes toward the world—different orientations with effects and profound implications for even the most mundane aspects of life."[24] There may be a relation, but it is not one of logical implication.

Smith understands that the transcendent orientation is not necessarily dead to immanent goods. It "can acknowledge the beauty and sublimity of life in the world."[25] What distinguishes it is that it deems these to be "reflective of a more transcendent Reality."[26] So those who embrace transcendence will still often make moral judgments based on what is good for human beings in the world.

There are, of course, some enthusiasts for transcendence who are indifferent to human well-being and human pain. They are the ones who give religion a bad reputation. Once one decides that pain matters, religious progressivism has obvious attractions. Martin Luther thought celibacy was too much to ask even of dedicated clergy like himself who had deliberately chosen it.[27] Conservative theism today demands it of every gay person. The response of liberal Christians, that God cannot be this pitiless, has nothing to do with paganism, and in fact is incompatible with it.

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22. At one point, listing those who are "believers in transcendent religion," he includes "orthodox Christians," thus implying that less orthodox Christians are pagans. SMITH, *supra* note 1, at 248. When he goes back in time, he is more willing to acknowledge that a variety of political positions are consistent with theism. The Civil War "was fought out, explained, and rationalized, on both sides, largely under the encompassing canopy of the biblical civil religion." *Id.* at 263. Abolitionists can be understood as early proponents of progressivism, rejecting the force of familiar Biblical defenses of slavery on the basis of a focus on what slaves' lives were actually like.

23. *Id.* at 266.

24. *Id.* at 114.

25. *Id.* at 189.

26. *Id.* at 190.

27. *See* Trevor O. Reggio, *Martin Luther on Marriage and Family*, 2 HIST. RES. 195, 196, 204 (2012).

Modern secularists, Smith claims, hold "views of sexual morality that in important respects parallel those of pagan Rome."[28] He quotes with approval Ferdinand Mount: "[W]e are reluctant to condemn any specific sexual practice as wrong in itself. Between consenting adults in private, there are almost no limits."[29]

How significant is that little detail about consent?

Smith cites Geoffrey Stone's *Sex and the Constitution* for the parallel between modern sexual liberation and the views of the Romans.[30] Stone does draw such a parallel, but, unlike Smith, he sentimentalizes Roman sexual ethics, declaring nostalgically that for "the pre-Christian world" (a term Stone uses to refer to the elites of Greece, Rome, and the Jews), sex was regarded "as a natural and positive part of human experience."[31] That sounds nice. It is *too* nice. It is true that the Romans felt no guilt about sex, but they felt no guilt about a lot of things. If you were a rich Roman, one of the pleasures of life was the convenience of having slaves to rape.[32]

One of the most important achievements of the sexual revolution is its insistence on authentic consent to sex and a sometimes painful sensitivity to the varieties of sexual coercion. The Romans would have regarded all of that with pitiless indifference.

Modern liberal reform efforts have, for centuries, been animated largely by a revulsion against cruelty.[33] That is what produces the liberal positions on abortion, contraception, and gay rights. Smith claims that modern paganism

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28. SMITH, *supra* note 1, at 282.

29. *Id.* at 288 (quoting FERDINAND MOUNT, FULL CIRCLE: HOW THE CLASSICAL WORLD CAME BACK TO US 104 (2010)).

30. *See id.* at 282.

31. GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 4 (2017). For my review of Stone, see Andrew Koppelman, *Sex and the Civitas*, NEW RAMBLER (July 3, 2017), https://newramblerreview.com/book-reviews/law/sex-and-the-civitas [https://perma.cc/4E67- 86DY].

32. Smith explains what Roman sexual liberation amounted to:

> the vast slave populations, the ubiquitous brothels staffed by desperate and downtrodden women, the lethal savagery of the gladiatorial games, the widespread practice of infanticide, and the dismal tenement housing afflicted by fire and filth and disease. In our own times, by contrast, the pagan city would be one that has renounced slavery, has declared an equality of men and women, and has condemned (though not actually eliminated, alas) not only physical violence but also harassment, bullying, and microaggressions.

SMITH, *supra* note 1, at 345; *see also id.* at 76–78 (detailing the predatory character of Roman sexuality). But he does not notice how this ruins his other parallels.

33. *See* JUDITH N. SHKLAR, ORDINARY VICES 7–44 (1984).

"does not seem to demand much of its adherents, either creedally or behaviorally."[34] Then how does he explain this reforming zeal?

Smith thinks that the shift in constitutional law toward the protection of these sexual freedoms "played a central role both in expressing and in facilitating this shift from a Christian to a more pagan sexual ethics."[35] It is all about theological symbolism:

> the embrace of the morality of the sexual revolution by modern laws is cherished, or resented, not only (and perhaps not even primarily) for the laws' practical consequences, but rather for their impact in symbolizing the rejection of the older Christian conception of the community in favor of a revised conception—a conception, I have suggested, that might aptly be described as "pagan."[36]

The women who died in illegal abortions, or who had unwanted pregnancies because contraception was unavailable, and the gay men who were closeted, terrorized into celibacy, or hunted down by the police would have been surprised to learn that the law's "direct, formally legal impact on sexual behavior was often *de minimis*."[37] The reformers were impatient with conservative Christianity, but this was primarily because of its easy tolerance for suffering, especially other people's. The movement for legal reform did not embrace paganism or aim to insult Christians. When I take a pebble out of my shoe, I mean no disrespect to the pebble. This isn't about you.

III. MISUNDERSTANDING ANTIDISCRIMINATION LAW

Smith is particularly troubled by the unwillingness to grant religious exemptions from antidiscrimination laws, even when there are plenty of nondiscriminatory service providers available. When conservative Christians are sued for discrimination, "people are using the law to crack down on a religion or a way of life that they disapprove of but that doesn't seem to be realistically harming them or interfering with their own lives in any obvious way. Why would they do that?"[38]

The obvious way to investigate this question is using the standard techniques of anthropology: you get to know the natives and try to learn their own stories about why they are doing what they are doing. Smith does not appear to have attempted that.[39]

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34. SMITH, *supra* note 1, at 367.
35. *Id.* at 289.
36. *Id.* at 291.
37. *Id.* On the burdens of the prohibition of contraception that the Supreme Court invalidated in *Griswold v. Connecticut*, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 94–95 (1994).
38. SMITH, *supra* note 1, at 7.
39. At one point, he acknowledges that "both sides are struggling to avoid being dominated, culturally and politically." *Id.* at 265 n.32. But that point is not pursued.

The "most important factor" by which "the space for the free practice of transcendent religion becomes ever more cramped," he tells us, is "the enactment and expansion of ambitious antidiscrimination laws."[40] When conservative Christians object to facilitating or recognizing same-sex marriages, they "are told: accept requirements that put you in violation of your religion or else get out of your business or profession."[41] Why are they being treated this way? Smith has elsewhere explained that the discrimination suits against them are "another instance in the centuries-old pattern in which governments have attempted to compel dissenters or outliers to publicly affirm and acquiesce to the dominant orthodoxy."[42]

The antidiscrimination laws however are not there in order to pick on Christians. They are there because there is a lot of nasty discrimination. Here is a summary of more than a thousand reports to gay rights organization helplines:

> Ranging from humiliating harassment to outright service denials, the reports describe discrimination by pharmacies, hospitals, dental offices, and other medical settings; professional accounting services, automobile dealerships and repair shops, gas stations, convenience stores, restaurants, bars, hotels and other lodging; barber shops and beauty salons; stores such as big box retailers, discount stores, pet stores, clothing stores, and toy stores; swimming pools and gyms; libraries and homeless shelters; and transportation services including busses, taxis, ride-shares, trains, air travel, and cruise ships. Discrimination reports included contexts with limited alternate options, such as by tow truck drivers, post office employees, and repair service technicians working in the homes of LGBT customers.[43]

There are stories of patients harassed in hospitals, parents turned away when bringing injured children for medical care, taxis ejecting passengers on the side of highways at night, couples thrown out of restaurants for minor displays of affection, a steady drumbeat of discrimination and abuse. Discrimination is common enough that there is a genre of "gay-friendly"

40. *Id.* at 340.
41. *Id.* at 343.
42. Steven Smith, *What* Masterpiece Cakeshop *Is Really About*, PUB. DISCOURSE (Oct. 24, 2017), https://www.thepublicdiscourse.com/2017/10/20148/ [https://perma.cc/C8NM-SDYN].
43. Brief of Amici Curiae Lambda Legal Defense & Education Fund, Inc. et al. in Support of Respondents at 9, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

guides to goods and services,[44] much like The Negro Motorist Green Book,[45] which, before the Civil Rights Act of 1964, identified establishments that would serve black customers.

The expectation of possible discrimination is itself exhausting. The experience of "discrimination results in a state of heightened vigilance and changes in behavior, which in itself can trigger stress responses—that is, even the anticipation of discrimination is sufficient to cause people to become stressed."[46] Apprehension about probable future threats can produce an increase in physical pain, and, in fact, perceived discrimination is correlated with chronic pain. The mechanisms are understood. Anxiety is "negative affect based on apprehension about anticipated future threats that have uncertain outcomes."[47] This produces "hypervigilance [that] can result in neuro-biological changes that can result in hyperalgesia (increased sensitivity to pain)."[48] This may be evolutionarily adaptive because "heightened pain sensitivity allows potential threats to be detected more readily."[49]

This is why it will not do to simply say that there are plenty of other bakers and photographers. The harm is not ameliorated because the injury does not invariably occur. The uncertainty is itself a harm.

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44. *See, e.g.*, Brief of Amici Curiae Scholars of Behavioral Science & Economics in Support of Respondents at 11, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

45. VICTOR H. GREEN, THE NEGRO MOTORIST GREEN-BOOK (William H. Green Ed., 1940).

46. AM. PSYCHOLOGICAL ASS'N, STRESS IN AMERICA: THE IMPACT OF DISCRIMINATION 8 (2016) (citing Pamela J. Sawyer et al., *Discrimination and the Stress Response: Psychological and Physiological Consequences of Anticipating Prejudice in Interethnic Interactions*, 102 AM. J. PUB. HEALTH 1020, 1020–26 (2012)).

47. Timothy T. Brown et al., *Discrimination Hurts: The Effect of Discrimination on the Development of Chronic Pain*, SOC. SCI. & MED., May 2018, at 1, 2 (citing Weredeselam M. Olango & David P. Finn, 20 NEUROBIOLOGY OF STRESS-INDUCED HYPERALGESIA, *in* Behavioral Neurobiology of Chronic Pain 251 (Bradley K. Taylor & David P. Finn eds., 2014).

48. *Id.*

49. *Id.* Other evidence of the individualized harm of discrimination is compiled in Brief of Amici Curiae Ilan H. Meyer et al. in Support of Respondents, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

That is why antidiscrimination law is necessary.[50] That is why twenty-one states and the District of Columbia have statutes prohibiting discrimination on the basis of sexual orientation.[51]

Gay people still remember a huge range of other indignities, including being hunted down by police, driven out of their jobs, involuntarily committed to mental institutions, and lobotomized.[52] These activities reached their peak in the 1950s,[53] a period that some recall with nostalgic longing. When one counts America's misdeeds, the 1950s antigay panic should take its rightful place beside the genocide of Native Americans, slavery, Jim Crow, and the internment of Japanese-Americans. These abuses were usually justified by citing morality and religion.[54]

When gay people look at conservative Christian attitudes toward sexuality and see nothing but hatred, it is on the basis of this kind of experience. They misunderstand conservative Christianity. I have been saying so to my colleagues in the gay rights community for years.[55] I have gotten my share

50. For a comprehensive review of the evidence, see generally Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibition Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715 (2012). For evidence that discrimination in public accommodations is as common with sexual orientation as it is with race and sex, see generally Christy Mallory & Brad Sears, *Refusing to Serve LGBT People: An Empirical Assessment of Complaints Filed Under State Public Accommodations Non-Discrimination Laws*, 8 J. RES. IN GENDER STUD. 106 (2018). See also the scholarship cited in the report accompanying the Employment Non-Discrimination Act of 2013, S. REP. NO. 113-105, at 14–19 (2013).

51. *See* Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1379–83 (2017).

52. *See* Andrew Koppelman, *Why Gay Legal History Matters*, 113 HARV. L. REV. 2035, 2038–39 (2000) (reviewing WILLIAM M. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999)).

53. *Id.*

54. *See id.* at 2040–41, 2053.

55. *See* Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U.L. REV. 1125, 1128 (2016); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 620 (2015); Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 126 (2006).

of abuse for it.[56] But I understand what has brought so many proponents of gay rights to this misunderstanding.

The logic is depressingly familiar: some members of group X hurt me, therefore every member of X is malevolent and dangerous. This happens a lot. Many Americans are profoundly ignorant of Islam. After the September 11, 2001 attacks, they were ripe for appeals to bigotry, culminating in the incomparable Donald Trump's declaration that "Islam hates us."[57] This kind of distorting vision, of course, makes coexistence difficult.

Smith has fallen into a parallel error. Some gay rights activists do want to humiliate conservative Christians. Therefore, humiliating conservative Christians is what gay rights is all about.

Gay rights activists, for the most part, are happy to leave conservatives alone.[58] They however worry, on the basis of ample experience, that the conservatives cannot be trusted to leave *them* alone. They resist religious accommodation because they think that the law is holding back a tidal wave of hatred masked by religious rationalization. They fear that so many people will take advantage of any exemption that the law's protection will be nullified. It is not an unreasonable fear. I disagree, but the question is reasonably contestable.

IV. MISUNDERSTANDING THE STRUGGLE OVER RELIGIOUS LIBERTY

There is, in fact, a powerful animus on the left against the very idea of "religious liberty," instantiated in the fight over the Indiana RFRA. But Smith omits from his narrative the crucial fact that the Indiana statute was enacted precisely in an effort to make sure that what happened in *Elane Photography*, *LLC v. Willock* in New Mexico, where a religious wedding photographer was denied exemption from an antidiscrimination law,[59]

56. For a particularly vehement example, see generally Shannon Gilreath & Ashley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 VT. L. REV. 237 (2016).

57. Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us*,*'* CNN (Mar. 10, 2016, 5:56 PM), https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/ [https://perma.cc/KX9H-6XC8].

58. The motives of those who file lawsuits in response to the insult of being turned away are sometimes less admirable. *See* Smith, *supra* note 42. But the questionable motives of a plaintiff are not relevant to adjudication. If you negligently drive your car into my house and I sue you, the court will not care that I have hated you since kindergarten for reasons of racism or sheer malignity. Even if the plaintiffs in some of these cases are trying to compel affirmation of what the Christian merchants do not want to believe, this has nothing to do with their legal claim.

59. *See generally* 309 P.3d 53 (N.M. 2013).

would not happen in Indiana. It aimed to license such exemptions, and everyone knew that.[60]

The federal RFRA was enacted to reinstate a rule, laid down and later abandoned by the Supreme Court, that those with religious objectors to laws must be accommodated unless applying the law to them is necessary to some compelling state interest. After the Supreme Court held that Congress had exceeded its constitutional powers by making that law applicable to the states,[61] many state legislatures responded by passing their own state-level RFRAs, which, like the federal law, make religious accommodations available unless the state can show a compelling justification for denying them.[62] Barack Obama, as a state senator, voted for one of the earliest ones in Illinois in 1998.[63] There are now twenty-one state RFRAs.[64] Most of these came soon after *City of Boerne v. Flores* was decided in 1997,[65] but the movement for them had waned—only three were enacted between 2003 and 2013—until the *Elane Photography* case created new interest among religious conservatives.[66]

It never occurred to gay rights advocates to oppose the first wave of RFRAs.[67] The meaning changed in a new context. And, once more, a lot of the law's opponents were Christians. They honestly feared the Indiana

60. Smith is correct that the law was so vaguely worded that it might not have delivered the exemptions. *See* SMITH, *supra* note 1, at 317. Gay rights advocates often described the law in a misleading way. But religious conservatives did the same thing in order to sell the legislation to their constituents. The claims on both sides depended on unsupported speculation about what the courts would do with the law's language.

61. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

62. *See, e.g.*, *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/4692-9G4K].

63. Katie Sanders, *Did Barack Obama Vote for Religious Freedom Restoration Act with 'Very Same' Wording as Indiana's?*, POLITIFACT (Mar. 29, 2015, 6:57 PM), https://www.politifact.com/truth-o-meter/statements/2015/mar/29/mike-pence/did-barack-obama-vote-religious-freedom-restoratio/ [https://perma.cc/E383-DFXZ].

64. *State Religious Freedom Restoration Acts*, *supra* note 62.

65. *See generally* 521 U.S. 507.

66. *See* David Johnson & Katy Steinmetz, *This Map Shows Every State with Religious-Freedom Laws*, TIME (Apr. 2, 2015), https://time.com/3766173/religious-freedom-laws-map-timeline/ [https://perma.cc/FHE9-TYA9].

67. And even now, Smith observes, they are untroubled by a lot of accommodations, such as permission for Muslim prisoners to wear short beards. SMITH, *supra* note 1, at 318.

RFRA would be used to defeat any antidiscrimination protection for gay people.[68]

When Smith takes up the contraception mandate, he again misses the point. He thinks contraception was mandated by the Obama Administration as part of preventive health services "less because of the practical consequences of the law than because of what it symbolizes."[69] He claims that "most women today could likely obtain contraceptives without legal requirements mandating that employers supply them—by private purchase or from subsidized entities like Planned Parenthood."[70] Therefore, "the conspicuous insistence that contraception be provided *by employers*, rather than through a range of other methods that are sometimes proposed, can be seen as an effort to elicit or extract those employers' support for that policy with its underlying morality."[71]

It can be seen that way, unless you really look. The story of the contraceptive mandate is a *lot* more complicated.

In the United States, most health insurance for the non-elderly is provided through employers.[72] Employer-based coverage has the economic advantages of economies of scale and the creation of natural risk pools.[73] It is also encouraged by the tax code.[74] Most Americans depend upon it. The failure of Bill Clinton's health care reform bill showed that any health care reform that transforms most people's coverage will run into insuperable political

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68. It is thus anthropologically inaccurate to say, as Smith does, that the campaign against the law

> was about affirming righteousness and stamping out wickedness, and the Indiana law provided a convenient symbol or focal point; the law was more important for what it symbolized—or for what, construed with an advocate's ample license, it could be *made to symbolize*—than for its actual legal and practical effects.

Id. at 317. Doubtless this is true of some opponents of the law, but here Smith has fallen prey to the fallacy of composition.

69. *Id.* at 292.

70. *Id.* (citing Helen Alvaré, *Meanwhile, Outside the Panic Room: Contraception, Hobby Lobby, and Women's Rights*, PUB. DISCOURSE (July 10, 2014), https://www.thepublicdiscourse.com/2014/07/13467/).

71. *Id.* at 293.

72. *See* TIMOTHY STOLTZFUS JOST, HEALTH CARE AT RISK: A CRITIQUE OF THE CONSUMER-DRIVEN MOVEMENT 10 (2007).

73. *See id.* at 64.

74. *Id.* at 55–64.

obstacles.[75] So Obama worked within the system as he found it.[76] The requirements imposed on employers are a corollary of that basic decision.

The Affordable Care Act of 2010 (ACA)[77] seeks to approach the goal of universal coverage by, among other innovations, expanding employer health insurance, with a requirement that large employers provide their employees with such insurance or pay a penalty.[78] The requirement would, of course, accomplish little if the government said nothing about what must be covered by the insurance. So a minimum benefits package is specified.

Among other things, the ACA mandates that insurers cover "preventive health services" without additional charge—that is, without co-payments, co-insurance, deductibles, or the like.[79] Congress did this in response to studies showing that "[i]ndividuals are more likely to use preventive services if they do not have to satisfy cost-sharing requirements" and that "[u]se of preventive services results in a healthier population and reduces health care costs by helping individuals avoid preventable conditions and receive treatment earlier."[80]

The implementing regulations recognized that "women have unique health care needs [that] include contraceptive services" and sought to "ensure that recommended preventive services for women would be covered adequately."[81]

One of the principal inequities of the health care system before the ACA was that insurance often excluded coverage of medical needs specific to women, making women bear higher health care costs than men—as much

75. *See* ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 25–28 (2013). The recent enthusiasm of Democrats for abandoning Obamacare in favor of a single-payer scheme suggests many of them have not learned this lesson. *See* Paul Starr, *The Pleasant Illusions of the Medicare-for-All Debate*, AM. PROSPECT (Feb. 7, 2019), https://prospect.org/article/pleasant-illusions-medicare-all-debate [https://perma.cc/J9EK-FD3N].

76. *See id.* at 25–31.

77. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (predominantly codified as amended in scattered sections of 42 U.S.C.).

78. *See generally* KOPPELMAN, *supra* note 75.

79. 42 U.S.C. § 300gg-13 (2012).

80. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013) (citing INST. OF MED. OF THE NAT'L ACADS., CLINICAL PREVENTATIVE SERVICES FOR WOMEN: CLOSING THE GAPS 16 (2011)).

81. *Id.* (citing INST. OF MED. OF THE NAT'L ACADS., *supra* note 80, at 9); *see also* INST. OF MED. OF THE NAT'L ACADS., *supra* note 80, at 18–20 (noting women's health needs differ from those of men, and that these differences have a serious impact on the cost of healthcare coverage).

as a billion dollars a year more in the aggregate.[82] Women of childbearing age spend 68% more in out-of-pocket health care costs than men, largely because of the costs of reproductive and gender-specific conditions, including the costs of contraception.[83] Some contraceptive methods are not medically suitable for women with particular medical conditions or risk factors, and certain more expensive methods are more effective at preventing pregnancy than less costly alternatives.[84]

Women take account of costs when deciding whether to use contraceptives.[85] Without insurance coverage, the affected women will incur significant out-of-pocket costs or forgo contraceptives altogether.[86] For women who need a particular contraception option at a particular time, this loss of coverage is a discrete, focused, and significant harm, especially in emergencies entailing the risk of pregnancy from coerced sex.

In addition, there are numerous health-related and economic repercussions associated with the failure to make available the full range of contraception. For example, pregnancy may be dangerous for women with serious medical

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82. *See generally* DANIELLE GARRETT ET AL., NAT'L WOMEN'S LAW CTR., TURNING TO FAIRNESS: INSURANCE DISCRIMINATION AGAINST WOMEN TODAY AND THE AFFORDABLE CARE ACT (2012), https://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf [https://perma.cc/W6M7-LVNF]; Denise Grady, *Overhaul Will Lower the Costs of Being a Woman*, N.Y. TIMES (Mar. 29, 2010), https://www.nytimes.com/2010/03/30/health/30women.html [https://perma.cc/7U9M-8XPL].

83. INST. OF MED. OF THE NAT'L ACADS., *supra* note 80, at 19–20; *see also* Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 1998, at 5, 5; James Trussell et al., *Erratum to "Cost Effectiveness of Contraceptives in the United States,"* 80 CONTRACEPTION 229, 229 (2009).

84. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,872; INST. OF MED. OF THE NAT'L ACADS., *supra* note 80, at 105. When I investigated in 2014, the cost of an IUD, the most reliable and cost-effective form of contraception, was very high. *See* Gedicks & Koppelman, *supra* note *, at 58 nn.28–29. The providers now no longer reveal the prices on their websites. *See How Much Does Paragard Cost*?, PARAGARD, https://www.paragard.com/faq/how-much-does-paragard-cost/ [https://perma.cc/DK6Z-XX2Y]; *If Mirena Isn't Covered*, MIRENA, https://www.mirena-us.com/if-mirena-isnt-covered/ [https://perma.cc/5A6L-6X9C]; *see also* Jeanne Pinder, *How Much Does an IUD Cost? $55 to $2,600*, CLEAR HEALTH COSTS (Jan. 13, 2014), https://clearhealthcosts.com/blog/2014/01/much-iud-birth-control-cost-draft/ [https://perma.cc/9CGN-S3PH] (explaining that, on average, in 2014 Paragard cost $680 and Mirena cost $307–$1100).

85. *See* Melissa S. Kearney & Phillip B. Levine, *Subsidized Contraception, Fertility, and Sexual Behavior*, 91 REV. ECON. & STAT. 137, 137 (2009) (decreasing the cost of contraceptives leads to a higher usage rate which, in turn, decreases the rate of unintended pregnancies).

86. A 2007 study found that 52% of women—compared with only 39% of men—failed to fill a prescription, missed a recommended test or treatment, or did not schedule a necessary specialist appointment because of cost. Sheila D. Rustgi et al., *Women at Risk: Why Many Women Are Forgoing Needed Health Care*, COMMONWEALTH FUND, May 2009, at 1, 3.

conditions, such as pulmonary hypertension, cyanotic heart disease, and Marfan Syndrome.[87] The lives of women suffering from these conditions literally depends on their access to the contraception most effective for them. Similarly, "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy," which include the prevention of certain cancers, menstrual disorders, and acne.[88] Again, proper treatment of women suffering from these conditions depends upon their access to particular forms of contraception.

The use of contraceptives also reduces the risk of unintended pregnancies, which comprise nearly half of all pregnancies in the United States.[89] Women with unintended pregnancies are less likely to receive timely prenatal care and are more likely to smoke, consume alcohol, become depressed,[90] experience domestic violence during pregnancy, and terminate their pregnancies by abortion.[91] Finally, unintended pregnancies prevent women from participating in labor and employment markets on an equal basis with men.[92]

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87. INST. OF MED. OF THE NAT'L ACADS., *supra* note 80, at 103–04; *see also* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,872 (explaining contraception also helps reduce the risk of adverse pregnancy outcomes).

88. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,872 (citing INST. OF MED. OF THE NAT'L ACADS., *supra* note 80, at 107).

89. INST. OF MED. OF THE NAT'L ACADS., *supra* note 80, at 102 (citing Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90, 90, 92 (2006)).

90. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) ("[W]omen experiencing an unintended pregnancy may not immediately be aware that they are pregnant, and thus delay prenatal care. They also may not be as motivated to discontinue behaviors that pose pregnancy-related risks (e.g., smoking, consumption of alcohol). Studies show a greater risk of preterm birth and low birth weight among unintended pregnancies compared with pregnancies that were planned." (citing INST. OF MED. OF THE NAT'L ACADS., *supra* note 80, at 103)).

91. INST. OF MED. OF THE NAT'L ACADS., *supra* note 80, at 102–03 (citing COMM. ON UNINTENDED PREGNANCY DIV. OF HEALTH PROMOTION & DISEASE PREVENTION, INST. OF MED., THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 75 (Sarah S. Brown & Leon Eisenberg eds., 1995)); *see also* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,872.

92. *See* Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 CONTRACEPTION 465, 465 (2013) ("Economic analyses have found clear associations between the availability and diffusion of oral contraceptives, particularly among young women, and increases in US women's education, labor force participation, and average earnings, coupled with a narrowing in the wage gap between women and men.").

Accordingly, the Department of Health and Human Services issued the "contraception mandate," a rule that defines all FDA-approved contraceptives as preventive service.[93] The mandate improves the health of pregnant women and newborns, reduces the disparity in health costs between men and women, and, most importantly, allows women to determine the course of their own lives.[94]

The rule elicited objections from churches and other nonprofit religious entities that conscientiously objected to facilitating what they regard as evil conduct.[95] The Obama administration devised accommodations for objecting religious organizations but refused accommodations to for-profit businesses whose owners religiously object to some or all of the mandated contraception coverage.[96] Those businesses employed enormous numbers of women who did not share the employers' religious beliefs; Hobby Lobby alone has more than 13,000 full time employees.[97] The *Hobby Lobby* litigation followed.[98] The store won its exemption, but not the relief it was asking for, which was to absolutely cut off its employees from coverage for the expensive forms of contraception that the employer found objectionable.[99]

V. MISUNDERSTANDING RELIGIOUS LIBERTY ITSELF

So, what should the law of religious liberty look like?

Smith is troubled by courts' willingness to balance religion against other goods.[100] That itself seems to smack of paganism, treating religious scruples as just another intense human desire to be weighed against other less exalted desires.

He relies on "Madison's careful demonstration that every person's first obligation (over which the state and civil society have no 'cognizance') is to God—an obligation, Madison stressed, that must be measured by the person's

93. Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U.L. REV. COLLOQUY 151, 151 (2012); *Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost*, HHS (Aug. 1, 2011), http://wayback.archive-it.org/3926/20140108162111/http://www.hhs.gov/news/press/2011pres/08/20110801b.html [https://perma.cc/D8N5-RHGQ].

94. *See* Corbin, *supra* note 93, at 160–61.

95. *See* Hannah Anderson, *Contentious Contraception: The Controversial History of the ACA's Birth Control Mandate*, ST. LOUIS U. (Nov. 1, 2017), https://www.slu.edu/law/law-journal/online/2017-18/contentious-contraception.php [https://perma.cc/D79L-UE3B].

96. *See* Robert Pear, *Birth Control Rule Altered to Allay Religious Objections*, N.Y. TIMES (Feb. 1, 2013), https://www.nytimes.com/2013/02/02/us/politics/white-house-proposes-compromise-on-contraception-coverage.html [https://perma.cc/M252-HTS7].

97. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, No. CIV-12-1000-HE, 2013 WL 5297798 (D.D.C. July 19, 2013).

98. *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

99. Brief for Respondents at 3–5, *Burwell*, 134 S. Ct. 2751 (No. 13-354).

100. *See* SMITH, *supra* note 1, at 306, 323.

own judgment."[101] Madison thought "that our duties to 'the Creator' are prior to our duties to society."[102] Smith cites with approval Michael Paulsen's argument that religious accommodation "is based on an acknowledgment of a transcendent reality, or at least of the possibility of such a reality."[103] Accommodation is an imperative: "[A] government that defies what a transcendent authority is thought to command would be in a different and more unsatisfactory position than a government that merely declines to recognize some other sort of potentially meritorious objection."[104]

The argument Smith makes here builds on the assertions in James Madison's *Memorial and Remonstrance* that "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him," and that "every man who becomes a member of any particular Civil Society [must] do it with a saving of his allegiance to the Universal Sovereign."[105] Michael McConnell has made these assertions a premise for an argument—never stated by Madison—that religion ought to be a basis for exemptions because it involves a duty to God.[106]

> If the scope of religious liberty is defined by religious duty (man must render to God "such homage as he believes to be acceptable to him"), and if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable.[107]

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101. *Id.* at 326 (citing James Madison, *Memorial and Remonstrance Against Religious Assessments [Virginia], 1785*, *in* CHURCH AND STATE IN THE MODERN AGE: A DOCUMENTARY HISTORY 59, 60 (J.F. Maclear ed., 1995)).

102. *Id.* at 312–13 (citing Madison, *supra* note 101, at 59).

103. *Id.* at 314–15 (citing Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160–61 (2013)).

104. *Id.* at 322.

105. 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 183, 184–85 (Gaillard Hunt ed., 1901).

106. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453, 1497 (1990) [hereinafter McConnell, *Origins and Historical Understanding*]; Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 29 (2000) [hereinafter McConnell, *Problem of Singling Out Religion*]; Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1246–47 (2000).

107. McConnell, *Origins and Historical Understanding*, *supra* note 106, at 1453.

McConnell claims that religion has a unique claim to accommodation because "[n]o other freedom is a duty to a higher authority."[108] Even those who do not believe in God should understand the value of avoiding "conflicts with what are perceived (even if incorrectly) as divine commands."[109]

Smith makes a similar argument. In the classical conception he aims to revive, "[t]he church and its officials were something like the ambassadors of the kingdom of God within the secular domain . . . and they thus enjoyed a sort of diplomatic immunity from secular law."[110] Like McConnell, Smith relies on the first paragraph of Madison's *Memorial and Remonstrance* to show that this conception is reflected, albeit imperfectly, in the American law of religious liberty.[111]

Paulsen has shown where this logic leads, though he does not regard it as a *reductio ad absurdum*. The canonical formulation is that accommodation can be denied only if this is necessary to a compelling state interest.[112] Paulsen correctly observes that the compelling interest "formulation subtly implies ultimate state supremacy, rather than the priority of God."[113] Paulsen thinks, as does Smith, that religious freedom presupposes that God's demands precede, and are superior in obligation to, those of the state. "As a matter of the constitutional text, the problem remains that there is no compelling-interest override written into the Free Exercise Clause; it is all judicial interpolation. How can such an exception be justified as proper constitutional interpretation?"[114]

It would seem, then, that the state must yield to religion in every context. "God's commands—God's will, God's purposes—rightfully trump man's. Freedom of religion, understood as a human legal right, is government's recognition of the priority and superiority of God's true commands over anything the State requires or forbids."[115]

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108. McConnell, *Problem of Singling Out Religion*, *supra* note 106, at 30; *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1152 (1990).

109. McConnell, *Problem of Singling Out Religion*, *supra* note 106, at 30.

110. Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES 249, 268 (Austin Sarat ed., 2012).

111. *See id*. at 273–74.

112. *See* Paulsen, *supra* note 103, at 1210.

113. *Id.*

114. *Id.* at 1207.

115. *Id.* at 1160. Paulsen claims that this is the original linguistic meaning of the First Amendment, but he does not cite, and I am not aware of, any contemporaneous writer who reads it as he does. At the time, the amendment was not understood to mandate *any* judicial accommodations. *See* Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 931 (1992). Instead, Paulsen imagines a small menu of possible regimes—which excludes the one we actually have, see ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 166–67

Paulsen understands—what Smith never acknowledges—that this will put the state in an embarrassing position when, say, Abraham thinks that God has commanded him to sacrifice his son Isaac.[116] So Paulsen adds a proviso: deference "must give way in clear, or extreme, cases—because surely there are some claims individuals make about God's commands that are simply intolerably and irredeemably false."[117] This is not because the state's commands are superior to God's. God forbid. "There are some things that we can and should confidently say God thinks are always and everywhere wrong (or at least we should so presume)."[118] In such a case, "there is *no true command of God to be obeyed*."[119]

He knows he has entered the valley of the shadow of death. "Past a certain point, quickly reached, the business of judging the truth or validity of religious beliefs destroys religious liberty."[120] This business also has other discomforts. Paulsen cannot bring himself to say that Abraham was wrong, and he thinks that the refusal of medical care to children by Christian Scientists and Jehovah's Witnesses presents "extraordinarily difficult problems."[121]

The logic of religious liberty, Paulsen thinks, makes inevitable a state role as the arbiter of religious truth.[122] He thus places himself athwart a long tradition that has held that allowing the state to do that inevitably corrupts religion. In the *Memorial and Remonstrance*, Madison argued that the idea "that the Civil Magistrate is a competent Judge of Religious truth . . . . is

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(2013)—and picks from these the one he finds most consistent with religious accommodation, and works out its logical implications.

116. *See* Paulsen, *supra* note 103, at 1206.

117. *Id*. at 1160–61.

118. *Id*. at 1214.

119. *Id*.

120. *Id*. at 1212.

121. *Id*. at 1208 n.144. Kathleen Brady, whose arguments have a similar structure to Paulsen's, proposes that "religious believers should be afforded relief whenever laws substantially burden practices essential to their relationship with the divine unless there is no way to alleviate the burden without endangering the existence, peace, or safety of the state, or basic conditions of public order, or invading the rights of others." KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 304 (2015). She does not explain how God's commands could be overridden by such mundane matters as the state's peace and safety, public order, or rights. For further critique of Brady, see generally my review, Andrew Koppelman, *Kathleen Brady, The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence*, 97 J. RELIGION 548 (2017).

122. *See* Paulsen, *supra* note 103, at 1167–68.

an arrogant pretension falsified by the contradictory opinions of Rulers in all ages."[123]

Smith is troubled by the requirement that laws have a secular purpose. He thinks it shows the triumph of paganism in the Supreme Court.[124] This reading of the history is hard to reconcile with the reasons the Court actually gave, that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[125] It also neglects the role of Jews in the Warren Court's embrace of strong separation. Once more, you need to talk to the natives. The law of disestablishment is based on reverence, not contempt, for religion.

Madison's rhetorical move made sense within a Lockean framework, where religious and secular duties operated in different spheres, so that conflict could easily be avoided.[126] Locke had no use for exemptions from generally applicable laws: if the state is doing its legitimate business, religious objections could have no weight. If religious exemptions are to be justified, it must be on some basis other than Madison's suggestion that religious duties categorically override secular ones. The effort to build a theory of religious liberty on that suggestion is a dead end.

Religion is an appropriate category of protection because it refers to interests, not otherwise signifiable, urgent enough to be a basis of rights. Perhaps this cluster concept *does not* correspond to any real category of morally salient thought or conduct. It is flexible enough to capture intuitions about accommodation while keeping the state neutral about theological questions.[127] The case for exemptions will have to be based on personal interests that are commensurable with other interests that may defeat them. Otherwise, there is no good answer to Abraham.

Balancing religious liberty against other goods is not a manifestation of incipient paganism. It is a manifestation of sanity.

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123. Madison, *supra* note 101, at 61.

124. *See* SMITH, *supra* note 1, at 274.

125. Engel v. Vitale, 370 U.S. 421, 431–32 (1962) (quoting Madison, *supra* note 101, at 61). This concern, theistic all the way down, has pervasively shaped the law of the religion clauses. *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009); Andrew Koppelman, *Justice Stevens, Religious Enthusiast*, 106 NW. U.L. REV. 567 (2012).

126. *See* Madison, *supra* note 101, at 62.

127. I have expanded on this point in Andrew Koppelman, *How Could Religious Liberty be a Human Right?*, 16 INT'L J. CONST. L. 985 (2018); Andrew Koppelman, *Nonexistent & Irreplaceable: Keep the Religion in Religious Freedom*, COMMONWEAL, Apr. 10, 2015; Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71 (2017) (responding to Micah Schwartzman, *What if Religion Is Not Special*, 79 U. CHI. L. REV. 1351 (2012)); Andrew Koppelman, *"Religion" as a Bundle of Legal Proxies: Reply to Micah Schwartzman*, 51 SAN DIEGO L. REV. 1079 (2014). For a similar argument, see Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481 (2017).

VI. POSSIBILITIES FOR COEXISTENCE

So what about Rawls's question: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"[128] Smith thinks that his pessimistic diagnosis of Rome applies as well to the contemporary United States.[129] So long as so many Americans are closed to transcendence, persecution is inevitable. Our only hope is that the pagans experience a religious conversion—and this time without a Christian emperor to force them. The book's conclusion appears to be an appeal for such a conversion.

Smith's grand narrative is an example of what Charles Taylor calls "subtraction stories," which hold that, if theistic religion is abandoned, what emerges "is to be understood in terms of underlying features of human nature which were there all along, but had been impeded by what is now set aside."[130]

Smith's subtraction story is this: if one eliminates theism, what remains is a paganism that unites ancient Rome and modern New York. For the Romans, "sexual gratification was something to be celebrated and assiduously pursued,"[131] and the same is true of the moderns. The Romans persecuted Christians, so the New Yorkers must at least be headed in that direction. What modern secularists are in fact guilty of is that they remind Smith of the Romans. It is like attacking vegetarianism because Hitler was a vegetarian.

Both Smith and the militant atheists are confident of what people will believe if you take theism away. Both are wrong. Atheism per se has no normative entailments whatsoever. It is consistent with profound humanitarian concern or sociopathic evil.[132]

One reason Taylor rejects such stories is that contemporary atheism has no good account of its own commitment to universal benevolence, which it cannot disentangle fully from its roots in Christian *agape*.[133]

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128. *See supra* note 2 and accompanying text.
129. *See* SMITH, *supra* note 1, at 259–60.
130. CHARLES TAYLOR, A SECULAR AGE 22 (2007).
131. SMITH, *supra* note 1, at 283.
132. Smith has denied in conversation that he is embracing a subtraction story. But without one, how can *paganism* be an entity with distinctive characteristics? How could it entail, for example, the intolerance that so concerns him?
133. TAYLOR *supra* note 130, at 245–59.

> That I am left with only human concerns doesn't tell me to take universal human welfare as my goal; nor does it tell me that freedom is important, or fulfillment, or equality. Just being confined to human goods could just as well find expression in my concerning myself exclusively with my own material welfare, or that of my family and immediate milieu. The in fact very exigent demands of universal justice and benevolence which characterize modern humanism can't be explained just by the subtraction of earlier goals and allegiances.[134]

Smith makes the same point. He claims that "an interest-satisfying or preference-fulfilling consequentialism does seem to be the normative posture most congruent with the disenchanted world of philosophical naturalism."[135] Desires and preferences are natural facts, and the question of what will best fulfill them is susceptible to empirical investigation. That, he thinks, is why philosophical naturalists are drawn to this account of ethics. But there is a puzzle: if the good is merely desire satisfaction, "why should anyone ever care about the good of others, except in a self-serving, *quid pro quo* way?"[136]

Smith's aim here is to show the incoherence of secular liberalism. He wants to show that a transcendent perspective is more intellectually and morally satisfying.[137] If the aim is to help reduce the intensity of today's culture wars, however, a different inference can be drawn.

Utilitarianism aims to gratify whatever preferences people actually have, leaving them free to pursue whatever ends they find attractive. For any person to take general utility as an end, however, is an extraordinarily demanding task, requiring that I give as much weight to the happiness of others as I do to my own. If I am to pursue a utilitarian policy, I may have to endure the frustration of my own preferences. Smith is right that utilitarianism cannot explain why I should do that. But then, an immanent, pagan orientation does not entail utilitarianism. As Taylor also emphasizes, utilitarianism assumes, without explaining, an intense and demanding benevolence.[138] So do the more sophisticated forms of secular political philosophy that have displaced it, such as Rawlsian contractarianism. Smith is right that this ideal, which is baked into contemporary secularism, has Christian roots.

But that means the opposition that motivates today's culture wars is far less profound than the division between Roman pagans and Christians. One can easily imagine what the Romans would have thought of the utilitarian

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134. *Id.* at 572.
135. SMITH, *supra* note 1, at 225.
136. *Id.* at 226.
137. He develops this claim at greater length in *id.* at 344–79.
138. *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 31 (8th prtg. 2006).

notion that the happiness of a Roman Senator matters no more than that of a slave.

Modern secular economics and public administration, relying as they do on utilitarian premises, incorporates precisely this demanding benevolence. And so does a lot of secularist political discourse. It can, as Smith observes, protect religion only on the basis of the intense feelings of its adherents, without giving any obeisance to the worthiness of its objects.[139] But if the protection happens, why should anyone care?

Smith cites the Memories Pizza incident as evidence that "modern paganism . . . is severely censorious not just of antisocial *actions* but also of what it perceives as racist or sexist or homophobic *attitudes* or expressions. Remember Memories Pizza."[140] The episode was not pretty. At one point during the controversy over Indiana's RFRA, a TV reporter walked into a pizzeria to ask the owners what they thought of the religious accommodation issue, and they naively indicated that they would not cater a gay wedding.[141] It was a silly question—weddings are rarely catered with pizza—and they should have refused to talk to him. They were then subjected to a flood of vituperation and one threat of arson, which led them to temporarily close the business and consider leaving the state.[142] Before one analogizes this to the Roman persecution of the Christians, though, notice that none of what

139. *See* SMITH, *supra* note 1, at 328–33.

140. *Id.* at 360 (citing David McCabe, *Indiana's Memories Pizza Reopens After Gay Rights Furor*, HILL (Apr. 10, 2015, 9:18 AM), https://thehill.com/blogs/blog-briefing-room/news/238415-indiana-pizza-parlor-embroiled-in-religious-freedom-law-reopens [https://perma.cc/Y324-UQMJ]).

141. *RFRA: Michiana Business Wouldn't Cater a Gay Wedding*, ABC57 (Apr. 1, 2015, 9:37 AM), http://www.abc57.com/news/rfra-first-business-to-publicly-deny-same-sex-service [https://perma.cc/QPQ3-9YNR].

142. Conor Friedersdorf, *Should Mom-and-Pops That Forgo Gay Weddings Be Destroyed?*, ATLANTIC (Apr. 3, 2015), http://www.theatlantic.com/politics/archive/2015/04/should-businesses-that-quietly-oppose-gay-marriage-be-destroyed/389489 [https://perma.cc/NT6P-ZRMD]. The pizzeria eventually reopened, and some months later a gay couple took great satisfaction in buying two pizzas there and serving it at their wedding ceremony. Billy Hallowell, *Gay Couple Ordered Two Large Pies From Memories Pizza. What They Did Next Is Getting a Lot of Attention*, BLAZE (Sept. 29, 2015), http://www.theblaze.com/news/2015/09/29/memories-pizza-said-it-wouldnt-cater-same-sex-weddings-but-this-gay-couple-claims-they-tricked-the-shop-into-doing-just-that/ [https://perma.cc/5KGX-K27H]. The pizzeria owner was untroubled when he learned the truth about the order: "'We weren't catering to their wedding,' he said. 'They were picking pizzas up.'" Billy Hallowell, *Christian Owner of Memories Pizza Responds to Claim that His Shop 'Catered' a Gay Wedding*, BLAZE (Oct. 1, 2015), http://www.theblaze.com/news/2015/10/01/memories-pizza-owner-responds-to-claim-that-his-shop-catered-a-gay-wedding/ [https://perma.cc/T43E-2RLZ].

the pizzeria endured came from the state. The worst threat came from a high school softball coach who tweeted, "Who's going to Walkerton, IN to burn down #memoriespizza with me?"[143] The tweet triggered a police investigation, and she was fired from her job.[144] Christians get the same protection from violence as everyone else. The protection of unpopular opinions is part of today's Rawlsian overlapping consensus. "Remember Memories Pizza,"[145] indeed.

For practical purposes, there is quite a lot of agreement between conservative Christians and modern secularists. Secular liberalism and conservative Christianity alike condemn lying, cruelty, poverty, oppression, and prejudice.

They need to unite against their common enemies.

The way to begin to cope with religious diversity is to talk to the natives. When we do that, we may discover more common ground than we expected. We may even discover important aspects of our own views we had not noticed.[146] It is not helpful to diagnose current disagreements in a way that makes those disagreements seem more profound than they actually are.

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143. *Concord Fires Assistant Softball Coach over Memories Pizza Tweet*, S. BEND TRIB. (Apr. 22, 2015), https://www.southbendtribune.com/news/business/concord-fires-assistant-softball-coach-over-memories-pizza-tweet/article_63d2f14c-e849-11e4-83c7-5bb86f8f4576.html [https://perma.cc/YG67-9CVT]; Katherine Timpf, *High School Coach: Anyone Want to Help Me 'Burn Down' the Pizzeria that Won't Cater Gay Weddings?*, NAT'L REV. (Apr. 1, 2015, 9:13 PM), https://www.nationalreview.com/2015/04/high-school-coach-anyone-want-burn-down-pizzeria-wont-serve-gays-me-katherine-timpf/ [https://perma.cc/X7BV-52MR].

144. *Id.*

145. SMITH, *supra* note 1, at 360.

146. *See generally* Andrew Koppelman, *If Liberals Knew Themselves Better, Conservatives Might Like Them Better*, 20 LEWIS & CLARK L. REV. 1201 (2017).