

Smith, Steven D. *Fictions, Lies, and the Authority of Law*. Notre Dame: University of Notre Dame Press, 2021. 224 pp. + 49 pp. (back matter).

Steven D. Smith is a penetrating legal and moral thinker whose interests in religious liberty, textual interpretation, and secularism make him an able biblical worldview assistant. Smith—like the somewhat similar thinker whom he thanks in his acknowledgments, Stanley Fish—tends to stick to critical analysis and to defer concrete claims. But, again like Fish, Smith’s analyses are so sharp, and so cognizant (and respectful) of the claims of Christian theism, that his books are like quasi-Christian commentaries exegeting the signs of the times. While the lenses through which one views the world may be of first importance, Christians must actually get around to viewing the world, not merely staring at and polishing those lenses. Smith is an expert world-viewer.

Smith’s *Fiction, Lies, and the Authority of Law* is almost two books in one, both of which are highly interesting for and relevant to Christian thinkers. The book is an exploration of the difficulties attendant to the interpretation of legal documents, and it is a rigorous yet entertaining effort to answer the question posed by the title of the last chapter: “Is Genuine Authority Possible?” It is that question that sets up the book’s program.

Smith opens his prologue with a quotation from Hannah Arendt: “Authority has vanished from the modern world. . . . Practically as well as theoretically, we are no longer in a position to know what authority really is.”¹ A statement like this immediately raises powerful and important worldview questions: In a materialist universe, what does it even mean for an intangible authority to “be”? If matter and energy are all that exists, then “authority” has no ontological substance; it is simply what lions in press conferences claim to have over weaker animals. “Authority” is window-dressing for “power,” nature red in tooth and claw.

As Smith points out, the modern liberal West cannot permit authority to be *real*, something that makes people have to obey “just because” an authority figure expresses a particular desire. Such an authority does not square with the West’s “commitment to freedom . . . understood in terms of individual autonomy” (3). People have to obey out of self-regard, or out of some independent judgment about morals (though how real are *those* in a materialist world?). Heirs of the Enlightenment are supposed to Question Authority, as the bumper sticker says. How indeed can a government exist among autonomous agents?

Democratic Western societies have a neat answer to this apparent conundrum, an answer they insist is “self-evident”: the American founders’ “consent of the governed.” Autonomous beings can *choose* to be governed for their own good.

Fictions

But here Smith switches on his relentless, analytical jackhammer, the noise of which resounds throughout his book. He notices, for example, the rather obvious fact that none of us (aside, perhaps

¹ “What Was Authority?,” in *Authority: NOMOS I*, ed. Carl J. Friedrich (Cambridge, MA: Harvard University Press, 1958), 1:81–82.

from naturalized citizens?) is ever asked to give his or her consent to the powers that be. Even the first generation of citizens to live under the US Constitution did not exactly provide individual consent. Some were Tories! And the rest of us were born into the system. We have not consented to be ruled; we have not signed a “social contract.” Does this mean, then, that the US government has no authority over us? The “flags, anthems, uniforms (including police uniforms with badges and judges’ robes), stately or majestic architecture, rituals and ceremonies (such as presidential inaugurations and solemn swearing-in ceremonies), and ponderous official language” (16) that lend an “aura of authority” (16) to the US government—are they only so many clever talking points on the lion’s teleprompter, meant to convince the wildebeests in the press corps that they are being despoiled for their own good?

Smith has an answer that provides one of the words of his book’s title: the origin myth of the US government is a beneficent *fiction*, not unlike a good movie. We suspend disbelief for our own enjoyment; the story does not work if it does not feel real on some level. Political authority in the American legal and political system, and probably in other liberal democracies as well, has a fictional quality. Authority itself is a fiction, perhaps, or at least it is grounded in fictional foundations (xii).

It is when we must leave that level and ask specific questions the fiction cannot answer that its character as a fiction is most clearly revealed. How did Darth Vader not know he had twins? Was Dumbledore gay? Likewise: Did the framers’ intent include women’s suffrage—or gay marriage? Smith argues: “When we ask what the Constitution means or what some statute means with respect to some contentious question, experience shows that notwithstanding all of our debate and research, we are unlikely to agree. An important reason for this impasse . . . is that we are trying to squeeze factual-type answers out of things that are, at their core, fictions” (27). Smith points out that in fictions, there is no “fact of the matter,” no baseline reality to which one might appeal. And this presents a problem for government.

Government

First, government. It turns out in Smith’s telling the intent of legislatures is ultimately a fiction, too: how can a body of more than one person have a clear intent? The Supreme Court is ultimately a fiction for the same reason. Smith calls this the “aggregation error.”

The textualist tradition of legal interpretation, says Smith, responds to the aggregation error with this argument: “We will not concern ourselves with the motives of the framers of any given law, but only with the final text they produced.” But, Smith says, you cannot say this, because when you sever authorial intent from the law, you also sever the authors from it—and with them any reason you might have for regarding their text to hold authority. (Smith’s book can be mind-bending, but for the same reason that Pilates is body-bending: good health requires it.) Smith calls this the “separation error.”

I am a grateful citizen of these United States, and of course I found myself hoping that Smith would neatly explain in the final chapter why governmental authority is *not* an ultimate fiction and how we may come to the *right* interpretation of any given legal document. But I read the entire book, and no such explanations were forthcoming. Under the sun, at least, authority in liberal democracies is a fiction. That is, true authority may exist in republican/democratic governments (I believe it does, as I

will explain momentarily), but they cannot give an adequate account of this authority on their own “lower-story” terms, to borrow from Francis Schaeffer. Governmental authority can also be expected to falter when projected into ensuing generations. How indeed could we expect fallen, finite framers to form a Constitution that accounts for all future possibilities?

I cannot give a blow-by-blow of Smith’s intricately argued and brilliantly written book. I must already cut to the final scene, the one he did not write.

God

I felt as if Smith, whose religious affiliation I do not know (I have reason to believe he is a theist, perhaps a cultural Mormon), wrote a book in which he kept pointing members of modern liberal democracies to their Unknown God. He kept pointing to a God-shaped hole in their logic about authority. Like a Sunday school teacher, he kept raising questions to which the children were supposed to answer, “God!”

God solves the aggregation problem. When God speaks, he speaks with unified intent: though he is three, he is also one. And though the Spirit of the Lord spoke using human agents (“our father David . . . said by the Holy Spirit,” Acts 4:25, ESV), there were no contradictions in their respective motives. Holy men of God spoke as they were moved by the Holy Ghost: he made sure of that.

God solves the separation problem, too, because his Spirit goes with his word. But we suffer from that problem when we try to make his word into a mere object of analysis and not something living and active, not divine speech. As Smith says, “A mode of interpretation that severs the connection between the text and the legal authority that enacted or promulgated that text will in effect deprive that designated legal authority of actual lawmaking authority. It will take away with the left hand what the right hand purported to give” (35).

God also solves the authority problem. And he does so rather neatly: *The powers that be are ordained by God*. There may be a sense in which governments derive their just powers from the consent of the governed, but that sense is not the ultimate sense. Authority, as theologian John Frame says, is a personal relation. What Smith calls “just because” authority—an intangible something that means I have to do something “just because” an authority figure said it—is precisely what God has over us as his image-bearing creations. And he invests that authority in countless offices in government, the family, education, the church, and other creational spheres. Also: God’s authority is not a fiction, and he can write authoritative texts that can account for all future possibilities.

God also solves the common problem of authority turning into authoritarianism—because he is love. Our Authority became man and laid down his life for those whom he would make his friends. Christians can know what authority really is, and we can know that Authority really *is*.

Conclusion

It is bad book-review practice to write out the ideas the author did not. So let me close by mentioning again what Smith did say, what he did do.

I have long felt that there were ties between the hermeneutical debates over the interpretation of laws—debates into which Antonin Scalia famously waded—and debates over the proper methods for interpreting Scripture. Smith, a legal scholar, helped me immensely by drawing out these connections at key points.

He also helped me by explaining how and why debates over the present meaning and application of the US Constitution are so intractable. We are asking a human document to be divine.

No: I come away from Smith's book certain again that we need a divine document in order to be truly human.

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