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A TALE OF TWO CITIES: RELIGIOUS FREEDOM IN A SECULAR AGE

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INTRODUCTION

“There is a religious war going on this country. It is a cultural war, as critical to the kind of nation we shall be...for this war is for the soul of America.”¹ More description than declaration, Patrick Buchanan’s notorious primetime speech during the 1992 Republican National Convention in Houston nonetheless reflected a societal fracture ushered in by a transformation of American politics in the postwar era. Abortion, gender, and sexual equality rights were deemed to be inimical to the conception of America as God’s country. Not much has changed today except that the numbers of those who would have agreed with Buchanan have dramatically dwindled. In 2016, liberal law professor Mark Tushnet wrote, “[T]he war’s over, and we won.”²

But is it really over? In his new book, *Pagans and Christians in the City*, Steven D. Smith offers an account of the American culture wars that expands the analytical frame to include antiquity.³ Smith takes up and updates the claim first advanced by the English poet T.S. Eliot in a series of lectures in 1939 that there is a contest between Christianity and modern paganism over the future of Western societies. His retelling challenges the conventional understanding of today’s moral and cultural conflicts as a battle between religion and secularism. Instead, Smith argues that we should look at it as a contest between competing religiosities. On the one hand, you have transcendent religion represented by Christianity, Judaism and

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¹ Patrick Joseph Buchanan, Address to the Republican National Convention (Aug. 17, 1992), <http://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text/>.

² Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html>.

³ STEVEN D. SMITH, *PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARES FROM THE TIBER TO THE POTOMAC* (2018) [hereinafter *PAGANS AND CHRISTIANS*].

other traditional faiths, which locates the sacred ultimately outside the world. On the other, there is immanent religion which locates the sacred within this world. Both ancient and modern paganism thus consecrates the world as it exists. These two orientations produced radically different worldviews about sex, marriage, civic allegiance, and deities, among other things.

Understanding the terms under which Christianity and paganism could coexist in antiquity thus gives us a semblance of an answer to the question posed early on in the book. In ancient Rome, Pliny asks why Christians were being subjected to legal sanctions, while in our present time, Douglas Laycock asks why people—referring to same-sex couples suing wedding photographers, florists, and bakers who object on religious grounds to their union—would insist on these services they neither need nor want? The paganism of ancient Rome welcomed a plurality of cults and religions but only up to a certain point. When Christians insisted that their God was the one true God and all other deities were false ones, for instance, it immediately became apparent that toleration had its limits. Similarly today, Smith argues that devout citizens that hold on to strong versions of Christianity and other truth-oriented faiths are a “foreign and divisive element” in the city of modern paganism, where they are expected to cabin their religious beliefs in the private sphere.⁴ A partial answer then, it seems, is that whoever is the momentary victor between the two in a centuries-long struggle—in our current moment, it certainly appears that modern paganism is winning—there is not a lot of room for the other.

I. THE PROBLEM OF ORIGINS

The motivations behind Smith’s principal inquiry are quite understandable. It is said that we turn to history because the present troubles us. And this book is no exception. Diagnosing our current predicament by way of ancient Rome casts the American culture war as part of a long-running historical drama between Christianity (mainly) and the forces of paganism, whether ancient or modern. That long view is particularly useful in that it illuminates shared experiences as well as highlights the differences between the past and the present. I particularly enjoyed the book’s chapters with vivid descriptions of ordinary life in ancient Rome. *Pagans and Christians* could be read most

⁴ See *id.* at ch. 12.

fruitfully alongside Smith's *Rise and Decline of American Religious Freedom* where he also recovers the deep origins of the principle of separation of church and state, from ancient Rome to medieval Christianity all the way up to the American founding.⁵ In a review of *Rise and Decline*, I had cast that book as a work in the history-in-law genre, a type of legal scholarship that creates a useable past in order to support or generate a contemporary legal argument, which, in that case, was to view the constitutional principle of separation of church and state as an expression of the Christian commitment to dual jurisdictions.⁶ There is no such explicit argument in *Pagans and Christians* but the historical imprimatur is meant to suggest that the struggles today are very much a reprise of what happened then.

Both books lament the contemporary state of religion in the modern United States. *Rise and Decline* blames the Supreme Court partly for this sorry state of affairs because it elevated ambiguous principles such as secularism and neutrality as a matter of constitutional law thus casting aside what used to be its beneficially agnostic posture. In *Pagans and Christians*, the Constitution and the Supreme Court only gets a portion of the attention, as one site among many of a broader culture war. For instance, Smith points to various constitutional doctrines, such as substantive due process, used to wield the Constitution against "the obstinacy or complacency of the electorate," thus turning it into a partisan instrument in the struggle between transcendent and immanent religiosities.⁷

As a corollary, both books are also nostalgic for a past golden age. As I have also pointed out in my review of *Rise and Decline*, there is ample historical evidence that if there was ever one, it was simply a golden age for some, and not for others.⁸ Moreover, Smith, for instance, looks at the era of the "piety on the Potomac" as an example of widespread public religiosity.⁹ And yet as other historians have shown, the notion of America being "one nation under God" has very little to do with the Founding Fathers and everything to do with strategic allegiances between politicians,

⁵ See generally STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* (2014).

⁶ See generally Anna Su, *Separation Anxiety: The End of American Religious Freedom?*, 30 CONST. COMMENT. 127 (2015).

⁷ See *PAGANS AND CHRISTIANS*, *supra* note 3, at ch. 10.

⁸ Su, *supra* note 6, at 138.

⁹ See *PAGANS AND CHRISTIANS*, *supra* note 3, at ch. 10.

businessmen, and Hollywood.¹⁰ Other prominent examples such as the adoption of “In God We Trust” as a national motto, far from a nation’s acknowledgment of a higher authority, was likewise a manufactured effort by the government as part of a cultural offensive in the early Cold War years.¹¹ This is not to say that American religiosity came out of the blue, far from it, but that, there was an orchestrated, top-down attempt to present a united domestic front in order to combat the spread of Communist ideology.

No contemporary idea (or in the case of culture wars, social phenomenon) appears *ex nihilo*, that much is true. But it is also true that no idea or principle stays the same as it travels throughout human history, influenced and developed as it were by varying political claims, unintended consequences, and shifting moralities. Pointing to a deep past in order to illuminate a present problem certainly has diagnostic benefits but we would also do well to highlight its limitations. There is a kind of seductiveness around the idea that there could be some conceptual coherence across historical periods without proper accounting for its immediate political, intellectual, and cultural milieu. One problematic result is that it ignores human agency in the process of working out abstract ideas in concrete and rather messy historical realities. The emergence of liberalism as an ideology in the seventeenth century might be more relevant than the practices of ancient Romans, seeing that the rise of individualism might have more to do with the decline of communities and meaning associated with traditional religion. Or perhaps it has less to do with Romans and Christians but more about the particularities of present-day American politics and culture. This is all the more important because of the central role that sex and its morality, located at that intersection between private choice and public regulation, has come to occupy in recent religious freedom debates. Certainly, it is conceptually profitable to cast the current culture wars as pitting pagans versus Christians, a point I will elaborate on later, but it is also equally significant for us to closely examine the larger social and political forces that have led to our current predicament. The fear is that obscuring its more immediate milieu, in favor of a

¹⁰ See generally KEVIN KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA (2015).

¹¹ See, e.g., T. JEREMY GUNN, SPIRITUAL WEAPONS: THE COLD WAR AND THE FORGING OF AN AMERICAN NATIONAL RELIGION (2008).

more ancient one, likewise obscures the root causes that we need to address. Then how did we get to the “Hobby Lobby moment,” as legal scholar Paul Horwitz asked?¹² In a recent book, historian Andrew Hartman characterized the culture wars as essentially a recent battle over what America means, prompted by the social upheavals of the 1960s.¹³ Participants in this “war” involved a lot more than just religious conservatives and secular, progressive liberals, and the fracture coalesced around a host of issues, religion among them, on which previously constituted authorities and traditions held sway.

Notwithstanding claims that the culture war is already won, it is true that the struggle remains. The debates involving sexuality and the law and concerns about non-discrimination will certainly only get heated. Some, like Rod Dreher, have advocated a withdrawal of Christians from public life, calling it the “Benedict Option.”¹⁴ Perhaps, Christianity will emerge victorious again in the future. But if that is the case, then it will rest on particular acts and movements and that there is no foreordained ending.

II. A PROBLEM OF INCOMMENSURABILITY

If we look at *Pagans and Christians* simply as a descriptive account of two incommensurable worldviews periodically appearing across time, one seemingly disturbing implication is that it reinforces the notion that the divide is rather insurmountable. I do not mean to suggest that there is some magic formula that we can adopt to make the world a perfect place and that everyone would just get along if they do so. But the way the book lays out its argument appears to imply that there seems to be no room or pockets for mutual understanding. For instance, *Pagans and Christians* does not seem to have space for those religiously devout but with progressive political positions or those who have sought to reform their religions from within. Beliefs do not remain static and neither do people. There are various iterations of liberals and progressives as there are of conservatives. Consider C. Everett Koop, an evangelical Christian appointed by President Ronald Reagan to be Surgeon

¹² Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014).

¹³ ANDREW HARTMAN, *A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS 2-7* (2015).

¹⁴ See generally ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* (2017).

General. Koop had strong anti-abortion beliefs but he also infuriated religious conservatives at the same time for his sex education campaign, which promoted the use of contraceptives, at the height of the AIDS crisis.

Many religions throughout history have sought to make their own faiths compatible with the times and places in which they find themselves. In *The Divine Milieu*, the Jesuit paleontologist Pierre Teilhard de Chardin saw the whole world as a setting where the workings of God are most apparent and sought to demonstrate how science is a means to seek the divine, despite protests from his own religious superiors.¹⁵ Another Jesuit, John Courtney Murray, argued that the Catholic Church should recognize religious freedom because the dignity inherent in human beings means that all persons should have the right to be immune from any kind of coercion in his or her search for God and the truth.¹⁶ The pluralist experiment enshrined in the First Amendment, in fact, was a crucial factor in his thinking. A more contemporary example is another Jesuit, James Martin, who is arguing for the recognition of greater LGBT rights within the Catholic church.¹⁷ In addition to all these diverse positions within single religions, scholars also argue that some minority religions, such as Judaism, cannot be analogized to Christianity, and therefore present a significant challenge to Smith's framing of the issue.¹⁸ There is also, at present, a small but burgeoning scholarship looking at the negotiation of religious and cultural differences from the ground up with the aim of showing that diversity of positions within and among religious communities.¹⁹ Finally, it should be noted however, that even adherents of

¹⁵ PIERRE TEILHARD DE CHARDIN, *THE DIVINE MILIEU: AN ESSAY ON THE INTERIOR LIFE* 112 (1968).

¹⁶ See generally Anna Su, *Catholic Constitutionalism from the Americanist Controversy to Dignitatis Humanae*, 91 NOTRE DAME L. REV. 1445 (2016); Udi Greenberg, *Catholics, Protestants, and the Tortured Path to Religious Liberty*, 79 J. HIST. IDEAS 461 (2018).

¹⁷ JAMES MARTIN, SJ, *BUILDING A BRIDGE: HOW THE CATHOLIC CHURCH AND THE LGBT COMMUNITY CAN ENTER INTO A RELATIONSHIP OF RESPECT, COMPASSION, AND SENSITIVITY* (2017).

¹⁸ See generally Micah Schwartzman & Richard Schragger, *Jews, Not Pagans* (Virginia Public Law and Legal Theory Research Paper No. 2017-67) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087271.

¹⁹ See, e.g., Netta Barak-Corren, *The War Within* (Feb. 20, 2019) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183733; LORI BEAMAN, *DEEP EQUALITY IN AN ERA OF RELIGIOUS DIVERSITY* (2017); JOHN INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* (2016).

traditional religions, do not all necessarily advocate for more public displays of religion or an increase in the role of law in regulating morality.

If T.S. Eliot's bleak prognosis of where Western society is headed given the clash between Christianity and paganism has any semblance of truth to it, there is even more urgency to veer away from the notion that these are the only positions available for one's subscription.

III. CONTEMPORARY CONSTITUTIONAL LAW AND THE CULTURE WARS

As mentioned earlier, the book's framing yields many conceptual insights, and even with all its attendant shortcomings, pitting Christians and pagans does a lot of important work in establishing the stakes and setting the premises of these questions. There *is* something intuitive about the current culture war representing a renewal of the fourth-century struggle between Christianity and paganism, which explains why Smith uses it as a lens, albeit simplified, to diagnose the present reality in the United States. For instance, *Pagans and Christians* sets up a conflict between Christianity which is typified as a conception of religion as transcendent and paganism, where the location of the sacred is immanent in this world. It however coexists uneasily in some kind of a perpetual tug-of-war, particularly in the way that some religious expressions in public are allowed while some are not, such as invocations of "In God We Trust," or "God save this Honorable Court." As I have argued elsewhere,²⁰ these instances of increased visibility of religion in public have come at the cost of its secularization, that is, that their meanings have been stripped of any transcendence as they are justified on the grounds of history, tradition, or culture. Smith construes such development as evidence that the pagan or immanent layer of American civil religion remains, where it was always waiting to reassert itself. That it is going toward such direction is thanks to the Supreme Court, which has taken the lead in pushing the country towards a pagan orientation.

²⁰ See generally Anna Su, *Establishment*, in RELIGION, LAW, USA (Joshua Dubler & Isaac Weiner eds., 2019).

That the constitutionalization of the fight between transcendent and immanent religions has raised the stakes of this modern battle, is not up for debate. Consider the intensity of recent judicial confirmation hearings, and equally intense critiques of whether courts, the Supreme Court especially, should be the final arbiter of the country's principles and values.²¹ In this vein, Smith castigates the shift from the Constitution as once neutrally agnostic to a pagan legal instrument that sets the ground rules for governance, and subsequently fuels the culture war on the ground, albeit in a legal garb. According to him, this explains why there is such a backlash against religious accommodation claims by wedding photographers, florists, and bakers who espouse religion-based objections to providing services for same-sex weddings. A world now reconceived in immanent terms, and safeguarded by a Constitution as such, has no place for claims based on transcendent religiosity. I agree with this critique of the courts, partly because of my own political priors but largely because of a recognition of the limits of judicial enforcement in effecting social change. If the legal history of the American civil rights movement should teach us anything, it is that the outcomes are not necessarily "liberal" or "conservative" wins, but rather a convergence and indeed, a result of compromises between the two. It is still too early to tell what kind of city—the earthly, heavenly or perhaps even a mix of both—will emerge in this battle.²²

CONCLUSION

All this said, it is true, however, that religious accommodation, once an "aboriginal feature" of American law, as Horwitz wrote, is now a controversial question especially when it comes to matters involving sexuality given the background commitment to equality and dignity.²³ And if, as Smith argues, law has largely facilitated the shift from Christian toward more pagan sexual ethics, it is simply a reflection that perhaps the democratic underpinnings of Christianity in America have profoundly changed. Less people are religious, full stop. It means people are a lot less inclined to protect religion in law.

²¹ Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy>.

²² See generally Christopher W. Schmidt, *Beyond Backlash: Conservatism and the Civil Rights Movement*, 56 AM. J. LEGAL HIST. 179 (2016).

²³ Horwitz, *supra* note 12, at 167.

That does not necessarily mean there is a campaign against Christianity. It is simply harder for one to empathize with the epistemological premises of a religious accommodation claim that one does not share. To be sure, it is disturbing to get the kind of social and moral excoriation for not having the “right” beliefs, as Smith notes toward the end of the book, though I do not share the view that the treatment of Christians in the United States today is comparable to the treatment of Christians in antiquity. Nonetheless, in my view, the value of *Pagans and Christians* is that it holds up a picture where we can see the conceptual lines drawn clearly in the sand. The book acknowledges that we are all beings in search of meaning, whether one that objectively exists or one that we create for ourselves anyway, and paints in broad strokes of what the city of God and the earthly city could look like. Traditional religion has views on abortion, marriage, and sex that are clearly at odds (with the caveat that they might still change in the far future) with the prevailing paganistic morality. That should provoke necessary questions on what that means for self-governance in a liberal and pluralistic society, and most importantly, the tenuous and ultimately, limited, power of law to maintain such.