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CHRISTIANS AND PAGANS*

ABNER S. GREENE†

In his provocative and engaging *Pagans and Christians in the City*,¹ Steven Smith argues that ancient Roman persecution of Christians raises a puzzle—why did the persecution exist? What was the harm the Christians were causing?² Smith says this question persists, in different form, in today’s America—why are Christians persecuted here? What harm are they causing?³ Smith’s answer is something like this—we can see a political (sometimes more) battle between two conceptions of God: the pagan conception of God as immanent in the world and the Christian conception of God as transcendent.⁴ Then, as now, when the pagans are in power they fear the Christians (for reasons that are sometimes clear, sometimes less so) and use their political power in various ways to subjugate Christians.

In this response paper, I will offer four thoughts. First, I’m not sure the contemporary picture is best described as pagans vs. Christians. Second, I question the subtle move throughout the book from a generative/creative understanding of God to seeing God as normative, as supervening in human affairs regarding right and wrong conduct. Third, I push back on the notion that theistic belief (or, perhaps, the very existence of God) is necessary to ground meaning and value. Fourth, I discuss some modern-day U.S. constitutional issues that Smith discusses as examples of pagans persecuting Christians: (a) state-sponsored religious symbols, (b) religious arguments in the lawmaking process, and (c) the application of public accommodation anti-discrimination laws to religiously devout persons.

* I refer to the Dar Williams classic song by this title. See DAR WILLIAMS, *CHRISTIANS AND PAGANS*, (Razor & Tie 1996).

† Leonard F. Manning Professor, Fordham Law School. Thanks to Steve Smith and the St. John’s Law School conference organizers for a terrific opportunity to meet and discuss Steve’s book.

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

² *Id.* at 3, 5.

³ *Id.* at 7.

⁴ *Id.* at 33, 111–12, 114–15, 212–13, 278, 280–82, 291, 299, 303, 316, 332–33, 335, 351.

First. Smith contrasts a purely secular, scientific approach with (as Smith puts it) a pagan approach—a claim to share the sublime/wonder/awe response with Christians, but a view of God (or gods) as immanent in humanity and the natural world, rather than transcendent.⁵ Much of Smith’s argument depends on his claim that ACLU-type contemporary liberal litigators are really advancing a pagan agenda. It’s never clear where this conclusion comes from. The arguments advanced in litigation against state-sponsored religious symbols, against laws based on predominant, express, religious justifications, and for the application of public accommodation anti-discrimination laws to businesses serving the general public, neither make reference to nor turn implicitly on a pagan immanent conception of God.⁶ That many liberals who share these litigation positions also share (with Christians) a sense of the sublime/wonder/awe—and maybe therefore share more of a belief in God than they would care to admit—does not mean that these litigation positions are based in pagan-theistic-immanence.⁷

Second. Smith’s set-up is based in different conceptions of the generative/creative God, and is to some extent about ontology and nothing more. God exists . . . in a transcendent way, or in an immanent way. This is a fascinating and important issue, and my own open-ended agnosticism on the God question is in part a life-long struggle with this debate. But it’s one thing to claim/attempt to show that God is transcendent (and perhaps

⁵ See generally *id.* at ch. 9.

⁶ Regarding state-sponsored religious symbols, Smith interprets permitting state speech such as flying the U.S. flag versus not permitting state speech such as a crèche atop a county courthouse staircase as a triumph of immanent over transcendent religiosity. *Id.* at 278, 280. Smith runs a similar argument regarding types of religious argument he claims are permitted and not permitted in the lawmaking process. *Id.* at 281–82, 334–39. And he suggests something similar is happening in the conflict between public accommodation anti-discrimination laws and small business owners who oppose same-sex marriage. *Id.* at 342–43.

⁷ Smith says that apprehension of the sublime/wonder/awe is evidence of God’s existence. *Id.* at 32, 34, 36. (It isn’t clear from these pages whether Smith is merely describing a certain religious perspective or, in addition, supporting this position.) This seems wrong to me. I was lucky enough as a student at Michigan Law School to take a course with the excellent legal theorist Philip Soper, who let me write a paper called “Sitting Still: An Ontology.” The key claim in that paper is that in all humans there is a tension between what I called the “classical” and the “modern,” i.e., between a yearning for what is beyond comprehension, for the infinite/eternity, and what is palpable, here and now. That the classical yearning is part of what it means to be human should not lead us to conclude that that for which we yearn exists. Maybe it does, maybe it doesn’t.

even the more specific Christian theology on this, which as Smith notes complicates transcendence⁸), and another thing to say or suggest that the transcendent God has normative powers over humanity, supervenes in human affairs, is the basis of conceptions of right and wrong conduct, etc.⁹ The move is important for Smith because the struggles between the Christians and the pagans with which Smith is ultimately concerned aren't just struggles over who's right regarding the generative/creative issue, but also are (of most importance to Smith) struggles over conceptions of right and wrong, i.e., they are normative. I'd like to think it's possible to believe that "God had condescended to become incarnate in the man Jesus, that Jesus was born of a virgin, [and] that after his crucifixion he was resurrected"¹⁰ without necessarily believing in the authority of biblical injunctions purporting to stem from Jesus.¹¹

Third. Smith states the oft-heard claim that morality cannot exist without God.¹² Moral objectivism is a well-established position, though, taken by many who do not ground what they claim to be objective moral truths in God's existence or her dictates. I bridle at the position that morality cannot exist without God. It implies either that those of us who aren't theists are amoral or that we're mistakenly living in a kind of fog and hopefully someday we'll see the light. I would hope that theists could be agnostic on this question, open to morality grounded not in God, even as they believe it is.

Fourth. Are Christians being persecuted in today's America? (a) When a court orders a crèche off the staircase of a county courthouse, are Christians being persecuted?¹³ Forget for the moment about the complexities of Establishment Clause doctrine and whether there's a good judicially administrable test here. (I think Justice O'Connor's endorsement test gets it about right, although not quite for O'Connor's reasons.¹⁴) Why isn't it enough

⁸ *Id.* at 112.

⁹ *Id.* at 41, 42, 122, 147, 253, 371.

¹⁰ *Id.* at 181.

¹¹ I apologize for stepping into a vast ages-old debate. But this seemed a good time to raise some of these thoughts.

¹² PAGANS AND CHRISTIANS, *supra* note 1, at 190, 228, 369 (the first cite is arguably just reporting a position taken by others; not so the other two cites).

¹³ See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 579 (1989); PAGANS AND CHRISTIANS, *supra* note 1, at 278, 280.

¹⁴ Abner S. Greene, "Not in My Name" *Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1485, 1513–25 (2018) (arguing that the state does not properly speak in the name of its citizens when it erects sectarian religious symbols). For

to put the crèche up on the front lawn of your home or church? I appreciate that in *McCreary County v. ACLU*, Justice Scalia wrote (in dissent) of “the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*”¹⁵ (by which he clearly means via state action). That interest, however, is illegitimate, unless it makes sense to say that the government may make religious proclamations on behalf of the truth claims of a favored religion or religious sect. Is that what devout religious persons want? Aren’t their religious beliefs stronger when these proclamations are not made by Caesar?¹⁶

(b) Smith suggests that there is a norm afoot preventing religious folk from advancing their religious arguments in politics.¹⁷ But we hear religious arguments in politics all the time, and we should be fine with that. This practice doesn’t violate the Establishment Clause. What violates the Establishment Clause is for law to be based on an express, predominant, religious justification.¹⁸ I argued that years ago¹⁹ and still think it’s right. Whether one buys my argument—that in these instances (and these alone) nonreligious folk are improperly excluded from the political process—or any cognate argument about why capture of the lawmaking process by a religious sect for its openly sectarian ends is improper in our constitutional order, this still leaves lots of room for religion in

O’Connor’s test, see *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773, 779–80 (1995) (O’Connor, J., concurring in part and concurring in the judgment); *Cty. of Allegheny*, 492 U.S. at 631 (O’Connor, J., concurring in part and concurring in the judgment); *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

¹⁵ 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) (emphasis in original).

¹⁶ I write as the U.S. Supreme Court is considering its latest state-sponsored religious symbol case—a large Latin (Christian) cross (as war memorial) at a public road intersection in Maryland. *Am. Legion v. Am. Humanist Ass’n* (U.S. No. 17-1717) (consolidated with *Maryland-Nat’l Capital and Planning Comm’n v. Am. Humanist Ass’n* (U.S. No. 18-18)). This should be an easy case for invalidation—the cross is clearly religious and sectarian and its role as a war memorial is because of the connection to Christian views about death and resurrection and eternal life.

¹⁷ PAGANS AND CHRISTIANS, *supra* note 1, at 334–39, 353–54.

¹⁸ See *McCreary Cty.*, 545 U.S. at 861, 863; *Edwards v. Aguillard*, 482 U.S. 578, 585–94 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 107–08 (1968).

¹⁹ Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1614–33 (1993). See also ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 150–55 (2012).

politics, and indeed leaves room for almost any end a religious person wants so long as she can translate the core express arguments into secular terms.

(c) Finally, consider Charlie Craig and David Mullins wanting a custom-made cake for their same-sex marriage celebration and Jack Phillips' religiously based need to not make such a cake.²⁰ I find this sort of case quite difficult (and am working on expanding a lecture called *The Dilemma of Liberal Pluralism*²¹ to deal with these and related matters). But is application of public accommodation anti-discrimination law really persecution of Christians? This is not state action targeted at a religious sect. It is a law of general applicability that has a disparate impact on some persons/businesses. I share the view that *Employment Division v. Smith*²² should be overruled and that courts should apply elevated scrutiny of some kind to cases such as this; I don't doubt for a minute the harm to people such as Phillips.²³ But whether we should see this as a cost of doing business, and vote for Craig and Mullins, or as an inappropriate burden on a religious small-business owner, and vote for Phillips, the fact that these cases are so close, and reasonable minds can differ, and a reasonable mind (mine!) can be torn (supporting both same-sex marriage and religious accommodation), suggests that we might do better by turning down the heat and not seeing this kind of case as a kind of pagan persecution of Christians.

²⁰ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723–24, 1729, 1732 (2018) (deciding the case on as-applied Free Exercise Clause grounds; holding that the state discriminated against Phillips' religious beliefs); PAGANS AND CHRISTIANS, *supra* note 1, at 340–43. In the text I focus on a core underlying aspect of cases such as this—a claim of harm from, and thus need for religious exemption from, a nondiscriminatory law of general applicability—rather than on the facts that led the Court to decide the case in favor of Phillips.

²¹ Abner S. Greene, *The Dilemma of Liberal Pluralism*, lecture delivered to the McGill University Research Group on Constitutional Studies (Mar. 22, 2018), <https://www.youtube.com/watch?v=R0sdoU4n3eU>.

²² 494 U.S. 872 (1990) (applying rational basis test only to law of general applicability that incidentally burdens religious exercise).

²³ For further thoughts on *Masterpiece Cakeshop*, see Abner S. Greene, *Barnette and Masterpiece Cakeshop: Some Unanswered Questions*, 13 FIU L. REV. 667 (2019).