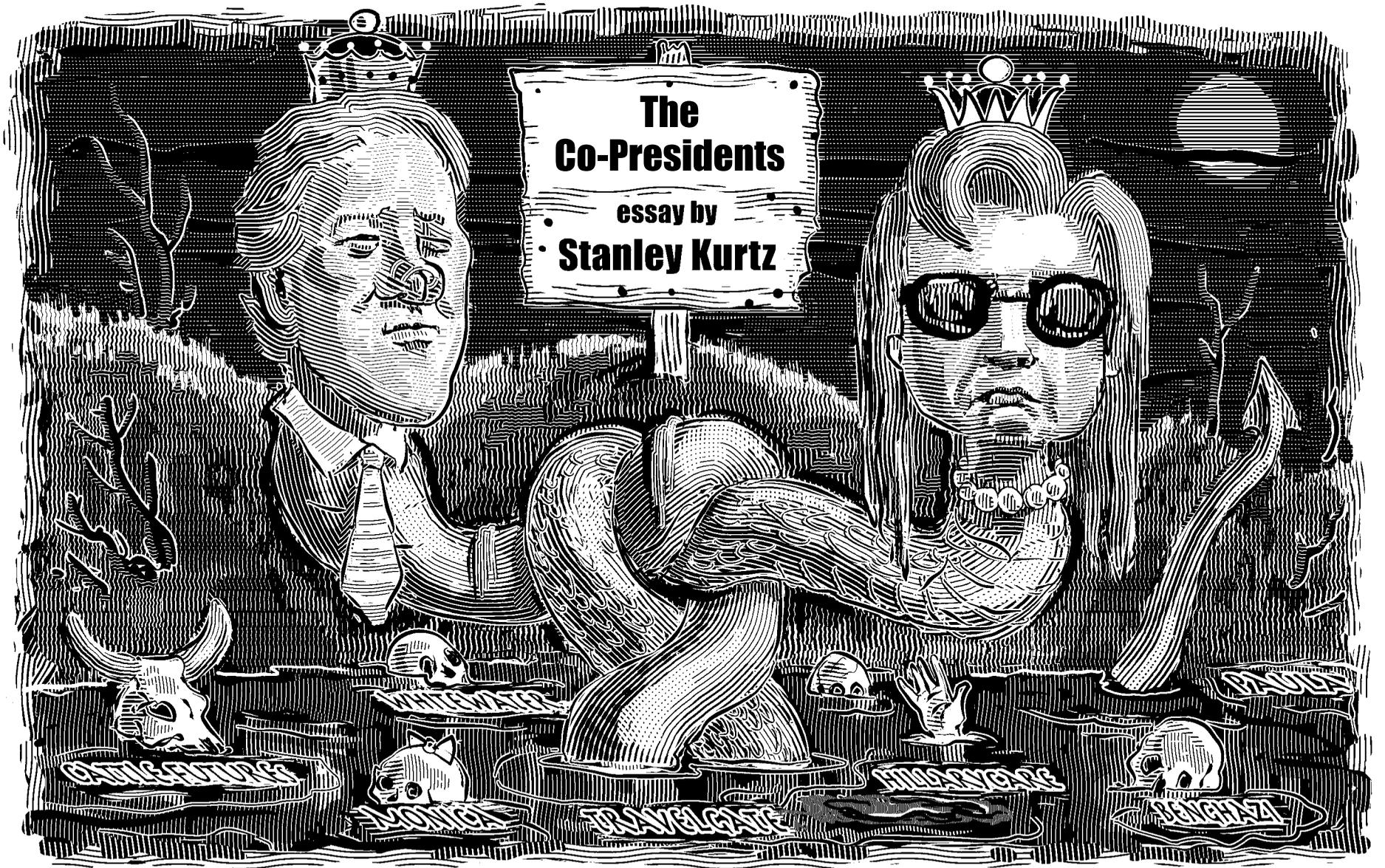


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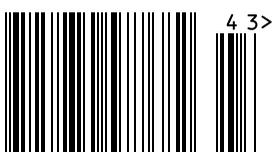
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Book Review by Donald L. Drakeman

AGREEING TO DISAGREE

The Rise and Decline of American Religious Freedom, by Steven D. Smith.
Harvard University Press, 240 pages, \$39.95



THE STANDARD VERSION OF THE AMERICAN religious freedom creation story goes something like this: inspired by Enlightenment ideals, and shocked that European patterns of religious intolerance were taking root in the New World, the freedom-loving colonials cemented into our constitutional foundations a wall of separation between church and state, thus forging what historian Joseph Ellis has called “the first wholly secular state.” It is perfectly in keeping with the framers’ intent, then, that the modern Supreme Court would interpret the First Amendment’s religion clauses to require governments—federal, state, and local—to be scrupulously neutral, neither aiding nor endorsing religion in any form.

Steven D. Smith, a professor at the University of San Diego School of Law and one of our most thoughtful scholars of law and religion, thinks this myth of secularism and neutrality is “profoundly misleading.” It has not only banished religion from the schools and the rest of the public square, it raises constitutional questions about the Pledge of

Allegiance and “maybe even, if we stretch... the names of cities like Los Angeles or Corpus Christi.” Though it is “not wholly false,” it is at best a “collection of partial truths” that completely misses the “distinctive genius of the American approach” to matters of church and state. Smith sets out to recover the real history of the uniquely “American settlement” of religious freedom issues and, to do so, he takes us back not just to the framers, or even to the early colonists, but to the days of the Roman Empire.

HISTORIANS HAVE OFTEN CONTRASTED early Christianity’s tendency toward intolerance with the Romans’ willingness to accommodate a wide range of religious beliefs and practices, but Smith contends that Christianity, in fact, introduced two concepts crucial to the American commitment to religious freedom. The first was the notion of two separate jurisdictions, most famously expressed in Jesus’ injunction to render unto Caesar the things that are Caesar’s, and to God, the things that are God’s. This dis-

inction between the spiritual and temporal realms is the theological foundation for a principled approach to religious tolerance, even if Christians in the ensuing centuries may not always have lived up to their principles.

The second ancient Christian concept that became central to the American church-state settlement was the importance of individual conscience. As Smith puts it, “the emphasis on sincere inner faith as the essential path to eternal salvation” pointed toward religious tolerance because of the “futility of coercion.” Government intrusion into the “domain of conscience is not simply an injustice,” then, but a venture into a “domain [that] is outside government’s jurisdiction.”

The American devotion to church-state separation and to freedom of conscience is, therefore, not born of a modern marriage of secularism and neutrality; in Smith’s view, it stands as “a retrieval and consolidation, under the circumstances of the New American Republic, of distinctively Christian themes that had been defended and sometimes practiced for centuries.” We can embrace Thomas Jef-

erson's famous wall of separation between church and state—even if we believe that God and country should be closely linked—because the policy of separating the church from the control of secular authorities had deep Christian roots, and did not necessarily entail a sharp division between religion and politics.

FROM REFLECTIONS ON THESE “SOMETIMES PRACTICED” traditions, Smith turns to the founding era, and notes that the Constitution's religion provisions hardly did a thing, which explains why we see no evidence of the framers arguing about them. To be sure, 18th-century Americans had strong and conflicting views about the proper relationship between church and state (taxes to support churches, for example, were embraced in New England and abolished in Virginia) but the framers sidestepped all of those differences in the Constitution. The one thing on which all could agree, argues Smith, was that church-state issues were none of the federal government's business; all jurisdiction over them would remain with the states. Hence the First Amendment's language barring Congress from making laws “respecting an establishment of religion.”

This rubber-stamping of a jurisdictional status quo meant that the federal government was prohibited not only from infringing the rights of conscience, but also from “interfering in religion or religious institutions.” Smith is quick to clarify that the framers did not consciously set out to embrace the ancient Christian concepts of religious freedom and the freedom of the church from the state, as such. Instead, the constitutional commitment to these twin principles came to pass in the 19th century because “over time the meaning of the words of the religion clauses subtly changed, and expanded.”

The gradual changes of meaning transformed a primarily jurisdictional amendment into one that affirmatively mandated both the separation of church and state and the free exercise of religion. Irrespective of what the words meant to those who adopted them, they meant something else to most readers by the latter half of the 19th century, thanks to “evolving linguistic meanings, and flip-flopping legal interpretations.” In a series of cases in which the Supreme Court recognized the autonomy of churches, for example, Smith hears

echoes of the early Christian principle of two jurisdictions. Nevertheless, by the time the concepts of the freedom of the church and the liberty of conscience achieved constitutional embodiment, the event was, in Smith's view, not especially momentous. Far more crucial was the country's religious pluralism, which led to the distinctively American way of reconciling religion and politics.

HERE AGAIN, SMITH OFFERS A REVISION to the prevailing story, which holds that colonial commitments to religious toleration blossomed into full religious equality and secular neutrality in the Constitution—despite a few lingering “bad habits,” such as national days of prayer; and that once the Supreme Court began taking the religion clauses more seriously in the 20th century, it merely enforced the original constitutional ideals. Smith looks closely at that lengthy interregnum, and identifies a uniquely promising pluralism. From the founding to the present, he observes, there have been two versions of the American self-understanding: the “providentialists,” who “declare that God works in history, that it is important...to acknowledge [that fact], and that the community should actively instill such beliefs in citizens as a basis of civic virtue”; and the “secularists,” who believe that “government acts improperly if it enters into religion or...endorses religious beliefs.” The genius of what he calls the “American settlement” is that, for most of our history, the law avoided choosing between these two competing interpretations of what “constituted” the nation.

Through the 19th century, providentialists such as Joseph Story and secularists such as James Madison could contend strongly for one view or the other without believing that “the Supreme Court should accept one of their positions as *the* correct interpretation of ‘the Constitution.’” This settlement was not necessarily a conscious, principled commitment to unresolved debate, nor did it always turn out well for religious minorities; but, Smith concludes, “it worked”; the genius of the American settlement was that it took a diverse population “embracing a multitude of different faiths and, without suppressing their differences, [held] them together as a single community.”

All this was lost when the Supreme Court decided in its 20th-century school prayer and

subsequent decisions that Americans would no longer be “allowed to differ” on these crucial questions. Instead, the Justices turned the secularist interpretation into “constitutional orthodoxy,” creating an “optical illusion” of neutrality, which has led to increasingly bitter culture wars. In the past, competing views competed. But in our ostensibly neutral era, “secular liberal orthodoxies” have marginalized the providentialist views that had previously been a key component of a more open and robust marketplace of ideas and ideals.

PERHAPS EVEN WORSE, RELIGION, ONCE hailed as our “first freedom,” could be stripped of its special constitutional protection in an era devoted increasingly to secular neutrality. Faced with a growing hostility to religion in elite circles and the rising population of the religiously unaffiliated “nones,” Smith has written to remind us of the uniquely successful American settlement, and to refocus our attention on the idea that “the American embrace of church-state separation and freedom of conscience is best understood not as a radical innovation but rather as a retrieval and consolidation of these classic [Christian] commitments.” In doing so, Smith has made an important contribution to what might be called the traditionalist revitalization literature. *The Rise and Decline of American Religious Freedom* thus stands with Ross Douthat's *Bad Religion* (2012) and other works that sift through great expanses of history to recover aspects of our heritage worth recovering. For 21st-century providentialists inclined toward “conservative activism,” it may not be sufficient simply to stand “athwart history yelling Stop”; rather, it is becoming increasingly important to look for an image of a better future reflected in the best of our traditions.

One of those traditions is the ability to disagree about important things, and Smith has issued a resounding call for American society to recover a spirit of civic debate and lively disagreement in place of either religious or secular orthodoxy.

Donald L. Drakeman is a visiting fellow at Notre Dame Law School's Program in Church, State, and Society, and the author of Church, State, and Original Intent (Cambridge University Press).

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