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## ARTICLE

# A FEW GRAINS OF INCENSE: LAW, RELIGION, AND POLITICS FROM THE PERSPECTIVE OF THE “CHRISTIAN” AND “PAGAN” DISPENSATIONS

PAUL HORWITZ<sup>†</sup>

### INTRODUCTION

The pleasures of reading Steven D. Smith’s writing are varied and immense. That certainly holds true for his substantial new book, *Pagans and Christians in the City*.<sup>1</sup> As with so much of his work, Smith’s argument is presented simply and calmly, and with such mild wit and irony as to be seductive. Yet there is no question that in this book as elsewhere, Smith is unafraid of, and even courts, disagreement and controversy.<sup>2</sup> With a book as seemingly panoptic as this,<sup>3</sup> the real challenge is deciding which part of the book to push and poke at.

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<sup>†</sup> Gordon Rosen Professor, University of Alabama School of Law. Thank you to St. John’s University School of Law and the *Journal of Catholic Legal Studies* for the opportunity to participate in a symposium in February 2019 on Steven Smith’s book, to the journal editors for their help and patience, and to Steven D. Smith and the other participants for comments. I am grateful to John Witte, Silas Allard, and Emory Law School’s Center for the Study of Law and Religion for the opportunity to present a draft of this paper in the winter of 2019 during my stint as a visiting fellow there and to Silas Allard, Major Coleman, Gordon Govens, Justin Latterell, Audra Savage, and Anton Sorkin for feedback.

<sup>1</sup> STEVEN D. SMITH, *PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC* (2018).

<sup>2</sup> Smith thus has something in common with the eminently readable Mark Tushnet, whose different perspective on the “culture wars” is mentioned twice in Smith’s book but arguably has a larger influence than that. *See id.* at 344–45, 365–66. Moreover, Tushnet is a founding member of the Critical Legal Studies school, while Smith is arguably a “Crit” after his own fashion. *See* Paul Horwitz, *More “Vitiating Paradoxes”: A Response to Steven D. Smith*, 41 PEPP. L. REV. 943, 943–47 (2014) (proposing Smith’s inclusion in the limited ranks of “Conservative Critical Legal Studies”). Both writers exemplify the puckishness of the best Crit legal writing without the turgidity and obscurity that characterize the worst of it.

<sup>3</sup> I say *seemingly* panoptic because, for a book that seems to cover so much of Western religious and political history, and to apply that history to the contemporary

In this Essay, I expand on a key aspect of *Pagans and Christians in the City*, which features most prominently in the chapter on the “[l]logic” of pagan and Christian persecution<sup>4</sup> and is applied in subsequent chapters on modern America. The question Smith focuses on—with an eye fixed as firmly on the present as on the past—is the possibility of compromise under “Christian” or “pagan” regimes during the Roman Empire. Smith argues that from within each perspective, “peaceful and mutually respectful coexistence *should* have been possible, if only the other side would be less unreasonable.”<sup>5</sup> From *its* point of view, each regime demanded little. But from the perspective of the party asked to give something up, the terms of compromise could not be accepted “without sacrificing or betraying its own beliefs and commitments.”<sup>6</sup> From this perspective, such stubborn resistance to even a minor degree of compromise would naturally be seen as demonstrating the unreasonableness and, perhaps, reactionary and dangerous nature of the other side.

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United States, there are surprising absences. Although Smith is clear that the terms “Christian” and “pagan” include other faiths, it was not until well into the book that I noticed just how little many faiths, Western and non-Western and certainly well within the universe of modern American religious pluralism, feature in his book. Despite making cameo appearances, faiths like Islam, Hinduism, Buddhism, Confucianism, and Mormonism play a remarkably small role, and none appear in the index. “Jews and Judaism” won a spot in the index and many mentions in the text but are, I think, mostly incidental. For discussion, see generally Michael A. Helfand, *Jews and the Culture Wars: Consensus and Dissensus in Jewish Religious Liberty Advocacy*, 56 SAN DIEGO L. REV. 305 (2019); Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 SAN DIEGO L. REV. 497 (2019).

And although the book takes in both the Tiber and the Potomac, the ground between them goes unexamined. We hear nothing of Poland and Hungary, for example, both of which have witnessed fierce religious and political contestation in the past couple of years. (Some of this, to be fair, occurred after Smith had finished writing the book.) This omission may make a difference. Smith focuses on the United States but notes that “a parallel struggle is arguably occurring through much of the Western world (and perhaps beyond).” SMITH, *supra* note 1, at 260. The focus on the United States makes it harder to link his narrative to recent global developments concerning religion and politics and the broader culture wars, such as the rise of political populism, not just as a matter of “Trumpism” but globally; the rise of illiberalism and of newly energized critiques of liberalism; and the rise of religious integralism. An examination of these topics might support or weaken Smith’s general argument for a link between past and present; it might also make his prescriptions less attractive.

<sup>4</sup> SMITH, *supra* note 1, at 130.

<sup>5</sup> *Id.* at 131.

<sup>6</sup> *Id.*

This is a valuable and under-appreciated insight. Of course it is hardly unknown. The general meliorist tendencies of American legal academics and other American cultural commentators, however—our default desire, at least until recently, to “just get[ ] along,”<sup>7</sup> to “resolv[e] or ameliorat[e] social conflict”<sup>8</sup>—may lead us to focus more on the purported solutions to our problems than on the nature of conflict itself. And Smith’s point is precisely that the various proposals aimed at convincing us to “just get along” are part of the problem.<sup>9</sup> Nor do the generally normative tendencies of American legal scholars help. Their work often tends to treat descriptive work as mere prologue, a foundation for the latest proposed solution. Much more can and should be said about the problems themselves, without feeling any need to offer a solution.

I pursue that aim here. My goal is neither to praise nor to bury Smith’s argument, but to expand on it. Smith’s basic point—that both sides in the current culture wars, like those in the “culture wars” between Christians and pagans, propose what they consider only small sacrifices, which from the other party’s perspective are actually unacceptable and dangerous—merits further discussion.<sup>10</sup> Smith’s point suggests that in the areas of both religious free exercise and nonestablishment, the contest between offers of compromise seen by each side as “reasonable” has been an important part of our current disagreements. Although this Essay is structured around Smith’s book, it ultimately uses the book as a jumping-off point. My broader goal is to explore the role that the logic of persecution plays in the current disputes within American law and religion scholarship and jurisprudence, and much of American society beyond that.

My aim here is mostly descriptive. It is more focused on what one might call the sociology and political economy of religion and cultural-political conflict than on prescribing a solution to it. My concern is with the *how* and the *why* of the conflicts Smith describes, not with their solution. Indeed, I have strong doubts

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<sup>7</sup> *Id.* at 157.

<sup>8</sup> Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877 (2014).

<sup>9</sup> SMITH, *supra* note 1, at 157.

<sup>10</sup> See Andrew Koppelman, *This Isn’t About You: A Comment on Smith’s Pagans and Christians in the City*, 56 SAN DIEGO L. REV. 393, 400 & n.39 (2019) (noting Smith’s acknowledgment that in ancient and modern culture wars “both sides are struggling to avoid being dominated, culturally and politically,” but arguing that Smith does not pursue this point sufficiently in his book).

that the somewhat normative view of the modern “Christian city” that Smith offers in his conclusion is likely to turn out as he describes it, or to be any more successful than the “pagan city” that he suggests has not proved to be “a viable basis for community under current circumstances.”<sup>11</sup>

This Essay proceeds as follows: Part I describes Smith’s account of the dilemmas of compromise and the logic of persecution. It is a summary section, although in it I emphasize some factors that may help expand on Smith’s thesis. Parts II and III explore the relevance of that thesis to the current culture wars and their intersection with religion and American law and politics, focusing on free exercise and nonestablishment, respectively. Part IV further supplements Smith’s account, suggesting additional details, factors, and dynamics that may make compromise difficult or impossible.

A few notes about the boundaries of this Essay are necessary. First, I work *within* Smith’s basic account, not outside or against it. There is certainly room to question both Smith’s account of “pagans” and “Christians” in ancient Rome and its application to contemporary culture.<sup>12</sup> But I mostly take Smith’s basic account as a given for purposes of this Essay. Except insofar as they affect my effort to expand upon and color in some of Smith’s picture, I put to one side doubts about his basic account of “pagans” and “Christians,” ancient or modern, and work within it instead. That

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<sup>11</sup> SMITH, *supra* note 1, at 377–78; *cf.* ALAN JACOBS, THE YEAR OF OUR LORD 1943: CHRISTIAN HUMANISM IN AN AGE OF CRISIS 79 (2018) (“Our period is not so unlike the age of Augustine: the planned society, caesarism of thugs or bureaucrats, paideia, scientia, religious persecution, are all with us. Nor is there even lacking the possibility of a new Constantinism; letters have already begun to appear in the press, recommending religious instruction in schools as a cure for juvenile delinquency; Mr. Cochrane’s terrifying description of the ‘Christian’ empire under Theodosius should discourage such hopes of using Christianity as a spiritual benzedrine for the earthly city.” (quoting 2 W. H. AUDEN, *Augustus to Augustine*, in THE COMPLETE WORKS OF W.H. AUDEN: PROSE, 1939–1948 226, 231 (Edward Mendelson ed. 2002)); *id.* at 96–98 (discussing Simone Weil’s argument that the dominant Christianity of the Gothic Middle Ages, following a period in which European Christianity “lived in the midst of, and peacefully tolerated, profanity and error,” ushered in a period of “totalitarian spirituality” that damaged Christian civilization and gave rise to movements, such as “nonreligious, or antireligious, humanism,” that constituted “a genuine attempt, however misguided and doomed to failure, to seek spiritual freedom from the oppression imposed by the ‘imposition of belief’ of the Gothic era” (quoting SIMONE WEIL, *The Romanesque Renaissance*, in SELECTED ESSAYS 1934–1943, at 44 (Richard Rees trans., 1962))).

<sup>12</sup> See generally Steven D. Smith, *Introduction to the Symposium*, 56 SAN DIEGO L. REV. 247 (2019).

said, as will become evident, I do not fully agree with all of his characterizations of the modern “pagan” or “Christian” approaches to free exercise or nonestablishment, and I make those doubts clear. I am particularly critical—in the sense of raising critical questions rather than of mere disapproval—of his treatment of disputes concerning religious symbols.

Second, and somewhat *faute de mieux*, I do not question Smith’s basic historical account. It is surely capable of being questioned and criticized. Any historical account is, especially one that takes in such a vast scope. But, although I have *some* familiarity with the literature, that task requires someone with much more training in classical and early Christian history. Embarrassingly for a generally educated person and a scholar, I do not even read Latin, let alone classical Greek.

Third, I emphasize again that my goals are primarily descriptive and exploratory, not prescriptive. For present purposes, I am not interested in taking a strong side on the conflicts and compromises discussed here. And, as Smith notes, to the extent that we recognize that the contending sides in our culture wars “are struggling to avoid being dominated, culturally and politically,” we might find sympathy even for those with whom we are inclined to disagree.<sup>13</sup>

Finally, my primary focus is on only a few chapters of Smith’s book, particularly Chapters Six and Nine, with some treatment of Chapters Seven and Ten. Even within these strictures, I think there is still considerable room to both advance and question the account that Smith offers.

#### I. “SMALL SACRIFICES” AND THE LOGIC OF PERSECUTION

Smith’s book opens with what he sees as a puzzling question, one that stretches from ancient to modern times and, as it were, from the Tiber to the Potomac. The question, in effect, is: Why bother persecuting others?

What counts as “persecution” varies, of course. The stakes involved are very different between then and now. But there is some continuity in the basic question. Why should Pliny the Younger bother to execute Christians in the province of Bithynia, putting to the sword those who openly avowed their faith or refused to make offerings to statues of the emperor Trajan and of

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<sup>13</sup> *Id.* at 265 n.32.

the Roman gods? Why, if they showed otherwise “innocuous or even laudable behavior,” apart from an “unshakeable obstinacy,” should they be punished?<sup>14</sup> Why should the “rulers of the Roman Empire” have persisted in doing so a century later, despite the “Romans’ reputation for broad-minded religious toleration”?<sup>15</sup> And why, in our own time, would plaintiffs in cases involving antidiscrimination laws in public accommodations, in which the services sought are “readily available from other[s]” who have no religious objections to providing those services, “insist on suing people whose services they neither need nor want?”<sup>16</sup> Why would people bother “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”?<sup>17</sup>

One can expect some fairly standard and perhaps indignant answers to this question. They would invoke terms such as equality, equal dignity, harm to others, and so on. These answers are especially likely to arise in cases in which actions or services are connected to the provision of government benefits or public goods—a category that expands the more we rely on actors in the marketplace, acting under the regulatory umbrella of the state, to provide goods such as contraceptive care rather than having the state provide them directly. They will also arise in cases involving the capacious category of “public accommodations,” especially when we treat the refusal itself as the harm, regardless of whether substitute providers are available.

I do not mean to belittle these important and sincere responses. But one could easily imagine similar responses from a pagan supporter of the persecution of Christians or, later, a Christian supporter of the suppression of pagan practices. The terms, values, and concepts invoked might differ. Still, here too one might hear claims about the harms to society of these practices, their fundamental offensiveness to the public welfare, the “obstinacy” of the objectors, and so on. One could quarrel with

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<sup>14</sup> *Id.* at 1–3.

<sup>15</sup> *Id.* at 3–4.

<sup>16</sup> *Id.* at 6. Smith draws on the writing of Douglas Laycock here and makes clear that Laycock is equally happy to pose the question to the other “side,” asking why religious Christians would insist on “regulations of sexual activity” by others, including opposing the legality of same-sex marriage. *Id.* at 6–7; *see, e.g.*, Laycock, *supra* note 8, at 848–51.

<sup>17</sup> SMITH, *supra* note 1, at 7.

the facts. But from the standpoint of the regnant regime, its values, and its concern for self-preservation, the answers would hardly be outrageous.

The question thus persists in both cases: Why bother? Or at least, why bother *if* the society is otherwise ostensibly tolerant of religious and other differences, the individuals involved are otherwise obedient to the law and capable of contributing to the society, and the harms alleged in individual cases are not immediate, apparent, grave, and urgent?

One answer to this question was provided by Justice Holmes: This sort of persecutory conduct is “perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”<sup>18</sup> If your premises and your desired results are not painted in purely conclusory or mercenary terms but are imbued with a seeming spirit of public-mindedness and, at least in modern times, a potentially expansive vision of the tangible or intangible harms involved in the offending conduct, then suppressing that conduct seems natural, even necessary.

Smith’s own answer is richer than that, adding important details missing from Holmes’s aperçu. In particular, he offers a more dynamic and cyclical account of the logic of persecution.<sup>19</sup> His answer to the questions he poses depends not simply on the apparent rightness of the dominant regime but on its ostensibly pluralistic, accommodating nature and its willingness to compromise.<sup>20</sup> From the perspective of each dominant regime—first the “pagan” regime and then, although Smith has much less to say about this, the “Christian” regime—persecution was logical not because the other side was so *terrible* but because it was so *unreasonable*. One cannot be “unshakeabl[y] obstina[te]” about *nothing*.<sup>21</sup> There must be a “something” to be obstinate *about*, an outstretched hand that one refuses to take.

This is how things look from the perspective of the regimes he discusses. From the perspective of each regime, the other side was obstinate in its refusal to accept the considerable compromises that the regime offered, compromises that demanded at most a small sacrifice from the other side. In each case, the failure from

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<sup>18</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>19</sup> SMITH, *supra* note 1, at 151–53.

<sup>20</sup> *Id.* at 151–52.

<sup>21</sup> *Id.* at 152.

the dominant perspective to understand *why* the sacrifice was not seen as small led to the view that the other side was simply being obstinate, and in turn to the conclusion that it was “inflexible, dogmatic,” and “undeserving of accommodation.”<sup>22</sup> It is this lesson Smith draws from history. It is a lesson we can usefully apply to better understand the dynamics of current events and the factors that influence those dynamics.

Begin with what Smith calls the “Christian position,” the compromise the early Christians offered to what was then the ruling regime: what I will call in this Essay the “pagan dispensation,” the prevailing system of order at the time.<sup>23</sup> According to this view, Christians “insisted that they could still be loyal subjects of the earthly city” despite their “ultimate commitment” to the “heavenly city” of God.<sup>24</sup> They could support the empire’s aims, pray for its leaders and soldiers, share in its commerce and much of its public and social life, and pay their share of taxes to the state.<sup>25</sup> They believed, and proposed to their rulers, “that peaceful coexistence should be possible on fair and mutually acceptable terms.”<sup>26</sup>

This offer was not always rejected. The persecution of Christians was hardly a constant in ancient Roman life, despite “spasms of frightful violence.”<sup>27</sup> Often enough, the offer *was* accepted; but it was accepted “more [as] a matter of pragmatic accommodation than of agreement on principles.”<sup>28</sup> It worked well enough when little was at stake or when the areas of disagreement were not highly visible. The empire was accustomed to “putting up with all manner of exotic cults.”<sup>29</sup>

At other times, however, the fundamental differences between the empire and the Christians, and the imperial perception that Christians posed a threat to the well-being of the regime, became more salient, in ways that may be relevant to contemporary conflicts. It mattered that while some Christians were willing to engage, however perfunctorily, in ritual civic shows of loyalty to

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<sup>22</sup> *Id.* at 153.

<sup>23</sup> *Id.* at 136.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 136–37.

<sup>26</sup> *Id.* at 136.

<sup>27</sup> *Id.* at 138 n.44 (quoting RAMSAY MACMULLEN, PAGANISM IN THE ROMAN EMPIRE 134 (1981)).

<sup>28</sup> *Id.* at 138.

<sup>29</sup> *Id.* at 139.

the empire and its pantheon, others viewed participation in such events as “a forbidden performance of idolatrous worship.”<sup>30</sup> And “[s]ometimes the dilemma arose in connection with commercial activity.”<sup>31</sup> Participation in the “authorized” marketplace required a willingness to engage in ritual shows of loyalty such as giving “specific divine honours to the Caesars.”<sup>32</sup> The intertwinement of public and private, of the market and the state, made it “impossible [for Christians] to escape the observance of [polytheistic rituals], without, at times, renouncing the commerce of mankind, and all the offices and amusements of society.”<sup>33</sup> Finally, the Christian refusal to participate in certain public rituals, combined with their condemnation of pagan practices and beliefs, would have been seen as “an offense against the ‘dignity’ of the censured pagans.”<sup>34</sup>

Taken together, the compromise proposed by the Christians, under which they would obey the law and pay their taxes but refuse to engage in basic public shows of loyalty that involved acknowledging and not criticizing the pagan gods, could not be accepted by the leadership of the pagan dispensation.<sup>35</sup> The Christians would thus come to be seen as stubborn, unreasonable, and “ensorious and dogmatic,” and so confirm the regime in its refusal to accept the compromise and make persecution more likely.<sup>36</sup>

What of the pagan dispensation’s own proposals for “peaceful coexistence”?<sup>37</sup> The pagan offer of compromise was essentially the same one that had been made to and accepted by a variety of other faiths within the Roman Empire,<sup>38</sup> although those negotiations were surely not always voluntary. The offer was one of “reciprocity.” Each side would respect each other’s deity or deities, not so much through mutual toleration as through absorption.<sup>39</sup> The pagans would welcome God, Jesus, or both onto the roster of deities, just

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<sup>30</sup> *Id.* at 140.

<sup>31</sup> *Id.* at 141.

<sup>32</sup> *Id.* (quoting BRUCE W. WINTER, *DIVINE HONOURS FOR THE CAESARS: THE FIRST CHRISTIANS’ RESPONSES* 286 (2015)).

<sup>33</sup> *Id.* (quoting 1 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 460–61 (Modern Library ed. 1995) (1776)).

<sup>34</sup> *Id.* at 149.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 150.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

as they had welcomed other gods. In turn, the Christians would be expected to *show* respect for that roster. Not much, from the pagan point of view, was required. Whatever Christians believed and whoever they worshipped in their own communities, on public or civic occasions they would perform “small sacrificial gestures to the gods.”<sup>40</sup> In Edward Gibbon’s words, “[i]f [the Christians] consented to cast a few grains of incense upon the altar” of the gods when before a public tribunal, they would be “dismissed from the tribunal in safety and with applause.”<sup>41</sup> This was not much to ask, and might be seen as a form of “modest unity” of its time.<sup>42</sup>

Just as the Christians, in Smith’s account, offered a compromise that struck them as reasonable but was unacceptable to the pagans, so the pagan offer, which to them “would have seemed inoffensive and easy to comply with,” was a non-starter for many Christians.<sup>43</sup> Even if it involved only an empty ceremonial gesture, their monotheistic beliefs rendered the “ostensible reciprocity” of the pagan compromise a disingenuous “sham” to be rejected.<sup>44</sup>

That refusal would encourage the pagans to view the Christians as “inflexible, dogmatic, and unworthy of accommodation” and perforce worthy of—perhaps in *need* of, for the sake of a well-ordered society—persecution.<sup>45</sup> A group that vocally rejects what are seen as basic norms of social reciprocity and basic sources of civic unity may well be seen as a threat to the existing order that loses any expectation of tolerant treatment. This, then, is the vision of offer and counteroffer under the shadow of the pagan dispensation, one in which each “held out terms of mutual accommodation that seemed fair and reasonable *to them*, but that for discernible reasons were not—and could not be—accepted by the other side,” leading to suspicion and ultimately persecution.<sup>46</sup>

Smith is less clear about conditions under the Christian dispensation. He harbors no doubt that by the end of the fourth century, “Christianity was now officially in control; paganism was

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<sup>40</sup> *Id.* at 151.

<sup>41</sup> *Id.* (quoting GIBBON, *supra* note 33, at 537–38).

<sup>42</sup> JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 15 (2018). To be clear, this is not the modest unity Inazu is thinking of with respect to our own time.

<sup>43</sup> SMITH, *supra* note 1, at 151.

<sup>44</sup> *Id.* at 151–52.

<sup>45</sup> *Id.* at 153.

<sup>46</sup> *Id.* at 131.

*officially* (if not in practice) banished.”<sup>47</sup> He acknowledges that a leading account of *how* it happened describes the use of “political” and “coercive” measures.<sup>48</sup> And he admits at the least that, just as the pagan regime sometimes persecuted Christians and sometimes didn’t, the Christian regime sometimes persecuted or legally outlawed paganism and sometimes didn’t.<sup>49</sup> But, emphasizing the “disagreements among able historians,” his discussion remains rather inconclusive, even elusive.<sup>50</sup>

Still, Smith gives us a good look at the details of persecution under both the Christian and the pagan regimes of later eras, in a period of greater unsettlement than had prevailed during Christianity’s first century, when the Roman Empire was most firmly entrenched. We may be able to work backwards from that evidence to come up with some sense of what compromise, if any, the Christian dispensation offered.

Working out of historical sequence, Smith describes persecution during periods of Christian rule as varied, laxly enforced, and often more a matter of control over civic and symbolic spaces than of outright repression, though he acknowledges that “the clear overall trend was toward the official elevation of Christianity and the repression of paganism.”<sup>51</sup> Constantine’s “imperial rigor” was more likely to be aimed at Christians themselves, as they underwent internecine disputes, than against the pagans themselves.<sup>52</sup> Toward the latter, his policy was one of toleration.<sup>53</sup> Nevertheless, under his rule Christianity “passed from being a persecuted to a preferred

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<sup>47</sup> *Id.* at 159 (emphasis added).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 162. It is perhaps suggestive that Smith draws heavily at the outset of his book on T.S. Eliot’s lectures, *The Idea of a Christian Society*. See *id.* at 8–15. Alan Jacobs, in his book *The Year of Our Lord 1943*, calls these lectures “a masterpiece of vagueness and evasion,” noting many “disavowals”—statements about what Eliot is *not* saying or discussing, without remedying the “obliquities” in what he *does* discuss—that form “[o]ne of the [lectures’] most persistent and curious tics.” JACOBS, *supra* note 11, at 105–06. One might make similar charges of vagueness and obliquity against the recent literature espousing some form of Catholic integralism—a literature that Smith does not associate himself with here explicitly, but that shares an interest in the theme of the modern “Christian City,” the possibility of which Smith returns to at the end of his book. SMITH, *supra* note 1, at 377–79.

<sup>51</sup> SMITH, *supra* note 1, at 172.

<sup>52</sup> *Id.* at 167.

<sup>53</sup> *Id.* at 166 (discussing PAUL VEYNE, *WHEN OUR WORLD BECAME CHRISTIAN*: 312–394 (2010)).

faith.”<sup>54</sup> He ordered some pagan temples closed and banned some pagan practices. Christian churches were often built on the site of the former pagan places of worship.<sup>55</sup>

Constantine’s son and successor, Constantius, forbade pagan sacrifices, closed more pagan temples, and set heavy punishments for the violation of these edicts—although these laws went largely unenforced and Constantius himself made “a friendly tour of [Rome’s] pagan temples.”<sup>56</sup> Nevertheless, “antipagan laws and precedents were slowly and quietly accumulating.”<sup>57</sup> Following an interlude of pagan rule, later Christian emperors, especially Theodosius, “adopted a harsher series of laws closing temples and forbidding pagan sacrifices.”<sup>58</sup> Even when the officials were not strict in enforcing their laws, “mobs of militant monks and other faithful” sometimes took more violent action against pagans and their temples.<sup>59</sup>

The pagan reaction, during a brief period of pagan rule by the emperor Julian following Constantius’s death in 361, was similar in many respects. Julian “purport[ed] to embrace religious toleration” but “gave preference to pagans for high office.”<sup>60</sup> He required the demolition of Christian churches that had been built over pagan temples.<sup>61</sup> Perhaps most relevantly for modern purposes, Julian issued an edict “banning Christians from teaching in the schools on the grounds that, since they did not believe in the gods, they were morally unfit to teach the classics.”<sup>62</sup> Quoting Adrian Murdoch, Smith calls this “a masterstroke,” since such a measure would effectively ensure that the elite would be pagan and Christians would remain marginalized in the halls of power and culture.<sup>63</sup>

A key site of contestation through both Christian and pagan periods of rule was the struggle over public symbols. Smith argues that even if Christian laws forbidding pagan practices weren’t always enforced, “such measures had a symbolic impact[,] . . . gradually [inducing] subjects to conceive of the empire in more

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 167.

<sup>56</sup> *Id.* at 168.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 172.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 169.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 170 (quoting ADRIAN MURDOCH, *THE LAST PAGAN: JULIAN THE APOSTATE AND THE DEATH OF THE ANCIENT WORLD* 139 (2003)).

Christian terms.”<sup>64</sup> But actual symbols, and public support for them, were at issue more directly. As is true today, some civic symbols were publicly supported and effectively represented the voice of the state. “Culture wars” took place over what the state would say and what it would subsidize:

[W]hen the Christian emperors of the later fourth century cut off funding for the support of the temples and the vestal virgins, it was not merely the withdrawal of material resources that Christians applauded and pagans resented; it was the denial of support that was perceived to be *public* in nature.<sup>65</sup>

In ways that echo contemporary debates, the bishop of Milan, Ambrose, argued for denial of support in a manner that stretched the definition of “public” and treated even indirect state support as “state action.”<sup>66</sup> Against an argument that money for pagan temples had originally come from private bequests, Ambrose counseled the emperor that the funds “had long been deemed part of the public treasury.”<sup>67</sup> Whatever the “technical[ ]” facts, if the emperor restored those funds, “‘you will *seem* to give rather from your own funds,’ and thus to be giving imperial approval to pagan worship.”<sup>68</sup> The Altar of Victory, a statue of the goddess by that name, similarly served as the object of a tug-of-war between pagans and Christians, alternately removed from and restored to its place next to the Senate House.<sup>69</sup>

What does all this suggest about any compromises or proposals for “peaceful coexistence” offered to pagans by Christians when the latter were in power? We have already canvassed the compromise offered by Christians during the pagan dispensation: Christians would obey the law and pay their taxes, but refuse to worship any pagan deities, perform pagan civic rituals, or keep silent about their beliefs. But it is one thing to offer a compromise from a position of weakness and another to offer it from a position of strength. The two deserve to be examined separately.

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<sup>64</sup> *Id.* at 173–74.

<sup>65</sup> *Id.* at 174.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (emphasis added) (quoting AMBROSE, *EPISTLE 17* ¶ 3, <https://people.ucalgary.ca/~vandersp/Courses/texts/sym-amb/ambrep17.html> (last visited June 27, 2020) [<https://perma.cc/LME9-FUMG>]).

<sup>69</sup> *Id.* at 175–76.

Here, Smith again offers less detail than he does concerning the pagan dispensation and its refusal to accept Christian offers. A stronger focus on the Christian emperor Theodosius—who imposed legal bans on pagan sacrifices and even on visiting pagan temples, ordered the closure of pagan temples and created the opportunity to build churches over them, dammed the stream of public support for pagan activities and institutions, and ultimately declared paganism a “*religio illicita*”—certainly suggests that the Christian dispensation left little room for peaceful coexistence.<sup>70</sup> As I have noted, however, I work from within Smith’s framework here, despite its lack of detail on these and other Christian practices during periods of Christian political supremacy. What we can say on the basis of Smith’s limited narrative is that if there was a Christian offer of compromise, it was that paganism would be suffered to continue, while being officially forbidden or disfavored and stripped of any meaningful association with the state and its symbols.

This puts things more strongly than Smith does. For much of the early period of Christian dispensation, he writes,

most temples remained open despite the laws, statues and images of the gods stared down from every corner of the cities, public sacrifices continued to be offered in many parts of the empire . . . , and the traditional religious routines of households throughout the empire could continue unaffected.<sup>71</sup>

Even later Christian emperors, including Theodosius, “continued to tolerate or even support paganism in various ways, and to appoint substantial numbers of known pagans to high positions within the empire.”<sup>72</sup> On this view, the emperors engaged not in wholehearted suppression, but in “halfhearted coercive and somewhat more consistent symbolic support of the new religion.”<sup>73</sup>

Nevertheless, paganism lost more than its official backing. To ban pagan practices and rituals, while leaving the bans underenforced or unenforced, was to render paganism a kind of black-market or grey-market religion. It would be officially forbidden but permitted in practice; it would continue under *sufferance* rather than as a matter of right. Given the continued

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<sup>70</sup> PHILIP HUGHES, *THE CONVERSION OF THE ROMAN EMPIRE* 16 (1957); RAMSAY MACMULLEN, *CHRISTIANIZING THE ROMAN EMPIRE* 55–56, 100–01 (1984).

<sup>71</sup> SMITH, *supra* note 1, at 168 (quoting EDWARD WATTS, *THE FINAL PAGAN GENERATION* 102 (2015)).

<sup>72</sup> *Id.* at 173 (footnote omitted).

<sup>73</sup> *Id.* at 177.

existence of many visible pagan symbols, it would be too much to say that paganism was relegated to private spaces alone. But the increasing removal of state support for pagan institutions—including the continuation of what had initially been private bequests—certainly suggests that its public status was being squeezed into a smaller and narrower scope. And in a state in which private and public—if those terms had any meaning—were intertwined, the removal of public support was, and was *seen as*, significant.<sup>74</sup>

Paganism, in Gibbon's words, "would be deprived of [its] force and energy, if [it was] no longer celebrated *at the expense, as well as in the name, of the republic*."<sup>75</sup> Many pagans would accept these terms, just as some Christians consented to cast a few grains of incense on the altar of the Roman gods during the pagan dispensation. Understandably, however, others would resist, or at least worry that the "compromise" would lead to the passing of their way of life.<sup>76</sup>

In the arguments over the Altar of Victory, we see at least one pagan "counteroffer," a familiar one given contemporary American debates over civil religion and governmental religious displays. In his argument that emperor Valentinian II should retain the altar, the pagan senator and prefect Symmachus "emphasized that the maintenance of the shrine was a way of preserving a continuity of identity with Rome's pagan past."<sup>77</sup> Retaining the altar would be less a matter of faith than of custom and tradition.<sup>78</sup> In modern terms, the pagans proposed that pagan state symbols be retained not for their religious value, but as an "acknowledgment" that much of Roman history and tradition stemmed from paganism. It is equally familiar and unsurprising that figures such as Ambrose

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<sup>74</sup> See *id.* at 174 (noting that the denial of public funding for vestal virgins and other pagan institutions was seen as important by both Christians and pagans in part because "it was the denial of support that was perceived to be *public* in nature").

<sup>75</sup> *Id.* (quoting 2 GIBBON, *supra* note 33, at 75).

<sup>76</sup> See *id.* at 176.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (quoting SYMMACHUS, *RELATION 3* ¶ 8, <https://people.ucalgary.ca/~vandersp/Courses/texts/sym-amb/symrel3f.html> (last visited June 27, 2020) [<https://perma.cc/4AER-85TB>]).

would reject this counteroffer, refusing to treat the statue as lacking in religious significance and insisting that its continued presence would “insult the Faith.”<sup>79</sup>

Based on the account so far, we can see several central factors in the play of offer and counteroffer, acceptance and refusal, and toleration and persecution that make up the early struggle between the pagan and Christian dispensations and their alternating offers of “peaceful coexistence.” They help fill in the central thesis of this portion of Smith’s book: that each side in that era’s culture war “held out terms of mutual accommodation that seemed fair and reasonable *to them*, but that for discernible reasons were not . . . accepted by the other side.”<sup>80</sup> The factors identified here are hardly novel or surprising. They are common ingredients in many cultural-political struggles, including our own. Setting them out clearly may nevertheless be useful, both in understanding Smith’s book and in setting a foundation on which we can expand on or add detail to the argument he presents there.

The very familiarity of these common features may be significant in its own right. These factors are easily recognized when looking at some historical event, but may be less visible when applied to our own situation—especially for those who are actively engaged in the struggles of our own time.<sup>81</sup> Setting out these factors with respect to events occurring over several centuries and multiple regimes may make those factors more perspicuous when applied to current events. And it may incline us to greater charity toward the combatants on both sides, while making clearer the extent to which apparently sincere and novel arguments and reactions are, from another perspective, rehearsals of long-familiar steps in an old dance.

First, then, taking Smith’s account as a given, the actions taken by each regime are not simply coercive, oppressive, or persecutory. Purely arbitrary or bigoted persecution occurs, of course, but is better associated with unstable tyrannies than with relatively stable and longer-lasting political regimes. Coercion

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<sup>79</sup> *Id.* (quoting AMBROSE, *EPISTLE 18* ¶ 31, <https://people.ucalgary.ca/~vandersp/Courses/texts/sym-amb/ambrep17.html> (last visited June 27, 2020) [<https://perma.cc/GJD4-JV6B>]).

<sup>80</sup> *Id.* at 131.

<sup>81</sup> *Id.* at 259. For a discussion of the value of the past, for Simone Weil and C.S. Lewis, in offering a picture of human life in which “[o]ur attachments and our passions do not so thickly obscure” our vision, see Jacobs, *supra* note 11, at 95–96 (quoting WEIL, *supra* note 11, at 44–45).

and persecution, or prosecution, are less likely to occur, or to command much attention or resources, with respect to minority groups that are viewed as inconsequential and unthreatening. And before any of those actions take place, a reasonably well-functioning society that contains a plurality of groups and views is likely first to attempt to secure the loyalty and cooperation of that group. In each of the cases we have examined, the first step taken by the ruling regime was not hostility or violence but an attempt at “peaceful coexistence . . . on fair and mutually acceptable terms.”<sup>82</sup>

Second, the compromises offered were reasonable and fair *from the perspective of the ruling dispensation*. Built into its view of acceptable compromise was a set of premises about the basic values of that society, and what was needed for the preservation of those basic values and, by extension, of the society itself. Again, at least for a society that was—from the kind of distance of time and space that can momentarily bracket vast areas of internal injustice and inequality, such as imperial conquest, the reliance on slave labor, and the subordinate status of women, and focus instead political and cultural elites—reasonably stable and pluralistic, these values were not, or would not have been seen by the ruling regime as, inherently unreasonable. To the contrary, they would have been understood as natural, reasonable, and essential for society to survive and flourish. The compromises would have been seen as demanding little or nothing that they would be unable to do easily: a few grains of incense thrown on the altar, “a small gesture of respect,”<sup>83</sup> or actions of reciprocity and civic community that any decent citizen should have no trouble performing.

Third, the compromises were viewed as unacceptable by the side to which they were offered. Because each side “failed fully to grasp and credit the other side’s commitments,” the offeror proposed compromises that seemed easily acceptable but proved impossible.<sup>84</sup> To the side faced with the offer, the fact that the dominant regime presented it *as* reasonable and easy to comply with may have encouraged and exacerbated rejection. The compromise might seem, from the perspective of the side faced with the offer, unreasonable and unbearable—not a small sacrifice

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<sup>82</sup> SMITH, *supra* note 1, at 136.

<sup>83</sup> *Id.* at 150 n.103.

<sup>84</sup> *Id.* at 136.

but “a betrayal of the faith.”<sup>85</sup> The fact that such an offer was presented as reasonable would fuel the suspicion that the offer was a “sham,”<sup>86</sup> the leading edge of a greater effort to wipe the offerees out—a “first experiment on [their] liberties.”<sup>87</sup>

Fourth, this pattern of offer and refusal could lead to a cycle of suspicion, reaction, hostility, and ultimately coercion or persecution. The rejection of a “reasonable” offer would confirm the regime’s view that it faced an “inflexible, dogmatic” group that is “undeserving of accommodation.”<sup>88</sup> That rejection would seem even more bewildering and hostile, and thus deserving of a hostile response, if it appeared to go against the offeree’s prior willingness to live under those terms, just as many Christians *did* show a willingness to cast their grains of incense on the altar of the Roman gods. It would naturally encourage efforts to take a more assertive position with respect to that group: to lay down strict rules lest a group of this sort poison the body politic. And that response would, in turn, confirm the suspicion of the other side that the initial offer *was* a sham and the harbinger of greater restrictions, reinforcing its decision to refuse and resist.

This pattern could arise despite and alongside the fifth point: at any given time, the “logic of persecution” could be such that the persecuting side could be seen, or view itself, as “not gratuitously vindictive or malicious” in its actions but sensible and “entirely rational.”<sup>89</sup> Given the values and goals of a state or a political and cultural regime, there are always “limits to what [can] be accommodated.”<sup>90</sup> Where a group appears to pose a threat to those values, not least in what are seen as “troubled times”—and we *often* view the present as troubled—it makes sense to address that threat, as one would excise the harmless growth that may indicate a tumor.<sup>91</sup> No special hostility or bigotry was required and none might be perceived, at least by the regulatory actor. It is, of course, easier to accept that point from the distance of centuries than to

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<sup>85</sup> *Id.* at 140.

<sup>86</sup> *Id.* at 152.

<sup>87</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, [Ca. 20 June] 1785 para. 3, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-08-02-0163> (last visited June 27, 2020) [<https://perma.cc/7X83-G3NQ>].

<sup>88</sup> SMITH, *supra* note 1, at 153.

<sup>89</sup> *Id.* at 154.

<sup>90</sup> *Id.* at 156.

<sup>91</sup> *Id.*

apply it to one's own time. And, as the fourth point suggests, the dynamic of offer and refusal, regulation and reaction, could soon enough add an extra edge to the responses of both sides.

This leads to the sixth point: over time, such contests became struggles for *power* rather than efforts to arrive at terms of peaceful coexistence. Such a perspective would seem especially natural if individual disputes—over whether a statue would remain in place or be removed, for instance—were viewed as one piece of a larger, “providential” struggle between good and evil,<sup>92</sup> or as one battle in a larger, inevitable narrative of irreversible “progress[.]”<sup>93</sup> Even if a particular compromise is not seen that way at first, the seeming obstinacy of the refusal of one side and the seeming persecution resulting from that obstinate refusal will soon convince each side that there is little room and no more time left for “just getting along.”<sup>94</sup>

In this way, the ancient culture war became, in a way that Smith suggests is true again today, and that may *always* be true of such contests, “a struggle for ‘domination’—for control of the cultural and political community and the self-conception by which the community constitutes and governs itself.”<sup>95</sup> The language of offer and counteroffer with which Smith describes the efforts at peaceful coexistence between pagans and Christians emphasizes the hope of coexistence. But it may obscure the obvious truth that it is much better to be in the position of the dominant group *making* the offer than that of the subordinate group faced with little choice but to accept or reject it, or at best to beg for the chance to make a counteroffer. As I will suggest below, things may be different when both sides are in equipoise and neither is in a realistic position to take control. Any hint of instability will lead to a more combative stance.

Again, we may view this observation critically or sympathetically. “Americans,” Smith writes, “with their historic commitment to liberty, are unlikely to sympathize with a party that strives for ‘domination.’”<sup>96</sup> But with enough distance the matter may look different. It is at least understandable that both sides should end up fighting for the strategic high ground rather

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<sup>92</sup> *Id.* at 162 (emphasis omitted).

<sup>93</sup> *Id.* at 12–13.

<sup>94</sup> *Id.* at 157.

<sup>95</sup> *Id.* at 265 (quoting JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 52 (1991)).

<sup>96</sup> *Id.* at 265 n.32.

than seeking to share that power or work out some *modus vivendi*. And one may observe sympathetically, as Smith does, that in war—cultural or otherwise—“the likely alternative to *dominating* is *being dominated*.”<sup>97</sup> From that perspective, “[w]e may be more sympathetic” to those who “are struggling to avoid being dominated, culturally and politically.”<sup>98</sup>

This power struggle is in large measure a contest over who gets to define the baseline values against which a “reasonable” offer of compromise is made and against which the side that rejects the offer may be seen as undeserving of further accommodation or outreach. We can thus see the seventh point: that cultural and political power struggles are “in large measure a struggle to control public symbols.”<sup>99</sup> It is unsurprising that so much of the contest between pagans and Christians involved control over symbols such as the Altar of Victory, or that they fought over which religion would receive “imperial approval,” even if the other faith was still tolerated.<sup>100</sup> Each side, struggling to occupy the position of the dominant party that *offers* compromises, sought through power over symbols to “create a conception of the city” as pagan—or Christian.<sup>101</sup>

That so much should be seen as turning on tangible or intangible symbols, and that control over these symbols should have played out as a part of a larger struggle for political and cultural control, suggests an eighth and final point: the importance and malleability of the scope of “public” and “private.” This point is commonly recognized today.<sup>102</sup> But while it is often discussed by scholars, at any given moment the public may have a more fixed view of what constitutes public or private—and those who are intellectually aware of the complexities of these questions may ignore or forget them when they engage as advocates in the culture wars themselves. So time and distance, again, may help.

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 265; see also *id.* (noting that in a culture war, “each side struggles ‘to monopolize the symbols of legitimacy’” (quoting HUNTER, *supra* note 95, at 147)).

<sup>100</sup> *Id.* at 174–75.

<sup>101</sup> *Id.* at 176.

<sup>102</sup> See, e.g., Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEORETICAL INQUIRIES L. 1, 2 (2014) (“Possibly too much has been written about the public/private distinction.”). See generally Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

The shifting and potentially expanding notion of what constituted a “public” matter deserving of the state’s attention and regulation is clearly visible in the struggles between Christians and pagans in the Roman Empire. The Altar of Victory was unquestionably a “public symbol,” one that served an obvious role in the civic structure, and it had been placed there by Augustus.<sup>103</sup> It was also a shrine, next door to and not in the Senate House.<sup>104</sup> But both sides saw it as clearly public in every sense and of immense actual and symbolic importance.<sup>105</sup> Both sides fought over forms of support that were “perceived to be *public* in nature.”<sup>106</sup> This entailed a fight not just over actual public support, but over what *constituted* “public” support and not private action. Thus, to continue or cut off funding for pagan temples and vestal virgins was alternately argued to be the continuation of private bequests, or the use of funds that had “long been deemed part of the public treasury” and should be treated as coming from the emperor’s “own funds.”<sup>107</sup>

In other cases, the contestation over what constituted public and private concerned arenas, like the marketplace, that could be seen as both, or neither. Commercial transactions had to proceed through “authorized markets,” in which market participants were required to “give specific divine honours to the Caesars.”<sup>108</sup> Nor was this the only restriction. Rather, as Gibbon wrote:

The innumerable deities and rites of polytheism were closely interwoven with every circumstance of business or pleasure, of public or of private life; and it seemed impossible to escape the observance of them without at the same time renouncing the commerce of mankind and all the offices and amusements of society.<sup>109</sup>

The closer the connection between spaces such as the marketplace and the rites and requirements of the dominant regime, the more the dissenter in such a space “found himself encompassed with infernal snares.”<sup>110</sup> Similarly, occupations that we might today see as public *or* private, but in which one’s private views might be seen

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<sup>103</sup> SMITH, *supra* note 1, at 175.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 174.

<sup>107</sup> *Id.* (quoting AMBROSE, *supra* note 68, ¶ 3).

<sup>108</sup> *Id.* at 141 (quoting WINTER, *supra* note 32, at 286).

<sup>109</sup> 2 GIBBON, *supra* note 33, at 90.

<sup>110</sup> SMITH, *supra* note 1, at 142 (quoting 2 GIBBON, *supra* note 33, at 91).

as irrelevant to the performance of those occupations, ended up coming within the vortex of the power struggle, as with Julian's edict barring Christians from serving as teachers, which were not public positions but were thought to raise public concerns about the fitness of those who occupied them.<sup>111</sup>

These factors played out recurrently throughout the stages of struggle for social, political, and cultural control between the pagans and Christians. Given the nature of human conflict, it will be no surprise that we can see the same thing playing out in our own contemporary culture wars.

## II. OFFER, COUNTEROFFER, AND POWER STRUGGLE IN RELIGIOUS EXERCISE

Smith argues that current cultural struggles, particularly those centering around the relationship between law and religion, represent "a renewal of the fourth-century struggle between Christianity and paganism."<sup>112</sup> He acknowledges that the parallel he finds is necessarily a simplified picture, an "artificial imposition upon a complex and messy reality,"<sup>113</sup> and that his use of the "pagan" label to describe a set of religious and cultural beliefs is intended to be "provocative."<sup>114</sup> It will surely be treated as such, and no doubt will produce much useful and thoughtful criticism, as well as more questionable praise or scorn for his thesis depending on one's alliances in the culture wars.

In this Essay, I avoid directly disputing Smith's language and basic diagnosis. It is an important and seriously offered diagnosis, not merely a clever rhetorical framing. It arguably "provide[s] insights that more conventional accounts of our situation do not,"<sup>115</sup> and helps us see our own moment with a greater sense of historical continuity rather than as something wholly new and urgent. This is not simply a clever repackaging of a standard account of the culture wars. In particular, Smith's attempt to understand and describe the values and assumptions of both "pagan" and "Christian" worldviews, and his focus on the distinction between transcendent and immanent understandings of existence, are not simply echoes of a description of left versus

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<sup>111</sup> *Id.* at 169.

<sup>112</sup> *Id.* at 259.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 11.

<sup>115</sup> *Id.*

right, liberty versus equality, tradition versus progress, or other standard dichotomies. Whether his account is completely correct or not—and there is surely much to question about it—it offers a valuable new lens, one that does not entail enrolling in one camp or the other or map neatly onto standard legal and political divisions.

All that said, his basic description of the modern culture wars will be familiar to those who toil in this field. Many of us have attempted to understand the current state of religious liberty through the lens of the culture wars.<sup>116</sup> Smith’s modern parallel to Pliny the Younger, the legal scholar Douglas Laycock, has worried over these questions for some time.<sup>117</sup> Readers familiar with this literature will not be startled by the suggestion that “[t]he contemporary fight over religious freedom is one battleground—a central one, as it happens—in the larger and essentially religious struggle to define and constitute America.”<sup>118</sup>

In this Part, I do not summarize all of Smith’s arguments or relitigate individual cases and controversies in law and religion. My goal instead is to draw on the factors identified in Part I and see what additional details or insights they might add to this now-common way of understanding modern disputes—legal, scholarly, and discursive—concerning religious liberty.

Smith’s fundamental point is that the culture war “was and is a struggle for ‘domination’—for control of the cultural and political community and the self-conception by which the community constitutes and governs itself.”<sup>119</sup> One “theater[ ]” in that struggle involves the relationship between law, religion, and the Constitution.<sup>120</sup> It includes struggles over religious displays and other “expressions of public religiosity.”<sup>121</sup> But it also includes

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<sup>116</sup> For examples from my own work, see generally Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301 (2016) [hereinafter Horwitz, *Against Martyrdom*]; Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014) [hereinafter Horwitz, *Hobby Lobby*]; Paul Horwitz, *Positive Pluralism Now*, 84 U. CHI. L. REV. 999 (2017) (book review) [hereinafter Horwitz, *Positive Pluralism*].

<sup>117</sup> For collections of his scholarly work and public commentary in this area, see generally 3 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: RELIGIOUS FREEDOM RESTORATION ACTS, SAME-SEX MARRIAGE LEGISLATION, AND THE CULTURE WARS (2018); 4 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: FEDERAL LEGISLATION AFTER THE RELIGIOUS FREEDOM RESTORATION ACT, WITH MORE ON THE CULTURE WARS (2018).

<sup>118</sup> SMITH, *supra* note 1, at 302–03.

<sup>119</sup> *Id.* at 265.

<sup>120</sup> *Id.* at 266.

<sup>121</sup> *Id.*

disputes over the accommodation of religion, an area in which we see both increased controversy over particular claims to religious accommodation and “rising opposition to religious accommodation” itself.<sup>122</sup>

Much of this struggle centers around sex.<sup>123</sup> Although one of the leading controversial cases, *Burwell v. Hobby Lobby Stores, Inc.*,<sup>124</sup> concerned women’s access to contraceptive care, no single issue stands alone. The struggles accompanying *Hobby Lobby*, and the argument about religious accommodation that surrounded that case, were tied to the broader issue of gay rights and same-sex marriage.<sup>125</sup> Contestation over those issues, combined with the constitutional recognition of same-sex marriage rights,<sup>126</sup> has in turn led to struggles over religious accommodation. This conflict has most prominently manifested over the question of whether businesses that provide allegedly artistic and personalized services will be obliged to provide them for same-sex weddings and similar celebrations.<sup>127</sup> These have all been live issues for some time,<sup>128</sup> and before them came fights over contraception and abortion. All of them are connected, not discrete, areas of cultural, political, and legal contestation.<sup>129</sup>

That *both* sides see these as connected matters suggests that this is not simply a matter of individual cases or issues. Rather, what is at stake is a clash of worldviews. Each individual dispute is part of a larger war, one in which “fundamental human rights”

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<sup>122</sup> *Id.* at 304, 316–18; see also Horwitz, *Against Martyrdom*, *supra* note 116, at 1302; Horwitz, *Hobby Lobby*, *supra* note 116, at 154–56.

<sup>123</sup> See Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 412–19 (2011); see also GEOFFREY R. STONE, *SEX AND THE CONSTITUTION*, at xxvii (2017) (“We are in the midst of a constitutional revolution. . . . It has bitterly divided citizens, politicians, and judges. It . . . has dominated politics, inflamed religious passions, and challenged Americans to rethink and reexamine their positions on [key] issues . . . . And, best of all, it is about sex.”).

<sup>124</sup> 573 U.S. 682, 689–90 (2014).

<sup>125</sup> See Horwitz, *Hobby Lobby*, *supra* note 116, at 159–60.

<sup>126</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

<sup>127</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723–24 (2018).

<sup>128</sup> See, e.g., *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* (Douglas Laycock et al. eds., 2008).

<sup>129</sup> See, e.g., Douglas Laycock, *The Campaign Against Religious Liberty*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 231, 254 (Micah Schwartzman et al. eds., 2016) (discerning “the same fundamental and reciprocal structure” of dispute in “sexual issues” such as “abortion, same-sex marriage, contraception, emergency contraception, sterilization, [and] in vitro fertilization”) [hereinafter, *CORPORATE RELIGIOUS LIBERTY*].

are opposed to a connected set of “grave evils.”<sup>130</sup> To win any one battle is insufficient. Although each side may with complete sincerity view the stakes of any particular issue as high, much of the fervor comes from the belief that the issue does *not* stand alone and that defeat on one issue would portend disaster across a range of others.<sup>131</sup> Thus, the degree of fervor with which each issue is debated often seems to outstrip the facts or immediate implications of the dispute.<sup>132</sup>

All this is consistent with Smith’s basic thesis. As in the early contests between the pagans and Christians, modern struggles over law and religion, at least on cases with a salient culture-war element, are at bottom a struggle for power involving a clash of “competing sanctities.”<sup>133</sup> As G.K. Chesterton put it, we face “a fight of creeds masquerading as [a debate over] policies.”<sup>134</sup>

Through the pagan-Christian lens, Smith offers a novel account of the contest over religious accommodation. Religious accommodation is “an approach with a discernibly Christian character.”<sup>135</sup> This is true not just in a “genealogical” sense related to the Christian roots of Western or American history.<sup>136</sup> It is true in a deeper “logical or structural” sense.<sup>137</sup> “Christian” here means not Christian belief or history alone but a particular conception of religion as transcendent. Religious accommodation is thus seen as support for the “recognition of a transcendent authority” separate from, and at least equal to, any claims of authority made by the “secular” state.<sup>138</sup>

Rendered in individualist terms in light of American religious and political history, this transcendental vision of religious accommodation translates to a view that “within wide bounds,” individuals must be free “to judge what the transcendent truth and

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<sup>130</sup> *Id.* at 254.

<sup>131</sup> See, e.g., Perry Dane, *Doctrine and Deep Structure in the Contraception Mandate Debate* 2, 7 (SSRN Working Paper, Aug. 5, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2296635](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2296635) (noting the “raising [of] rhetorical stakes” in the contraception mandate debate and arguing that “both sides [saw] larger stakes” in the controversy, ultimately amounting to different visions of the “proper spheres of government and religion”) [<https://perma.cc/AGG8-XJE6>].

<sup>132</sup> See SMITH, *supra* note 1, at 316–18.

<sup>133</sup> *Id.* at 254.

<sup>134</sup> GILBERT K. CHESTERTON, *WHAT’S WRONG WITH THE WORLD* 19 (1910); SMITH, *supra* note 1, at 254.

<sup>135</sup> SMITH, *supra* note 1, at 310.

<sup>136</sup> *Id.* at 311, 313.

<sup>137</sup> *Id.* at 313.

<sup>138</sup> *Id.* at 310–11.

its corollary obligations might be,” and the state must “refrain from interfering with—or, put positively, [must] *accommodate*—matters within that jurisdiction over which the state ha[s] no authority, or no ‘cognizance.’”<sup>139</sup> The *locus classicus* of this view in the American canon is Madison’s *Memorial and Remonstrance*. There, Madison argues that each person owes a duty to “the Creator” that “is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.”<sup>140</sup> Accordingly, where religion is concerned, “no mans [sic] right is abridged by the institution of Civil Society and . . . Religion is wholly exempt from its cognizance.”<sup>141</sup>

By contrast, the modern “pagan” view, which supports a view of the sacred as immanent in the world rather than transcendental, rejects the view of “*two cities*,” heavenly and earthly, in favor of “*the city*,” the “fully and exclusively sovereign city.”<sup>142</sup> It is thus “unwilling as a public matter to recognize or defer to any higher or supposedly transcendent authority.”<sup>143</sup> The “pagan” may well support religious accommodation. But she will do so “*not* out of deference to a higher authority, but out of solicitude”—as a matter of respect not for the individual’s divine obligation, but for her conscience.<sup>144</sup> Even this view, which remained fairly strong until recent years, is increasingly fragile today.

One need not fully agree with this account, even if one takes as a given both Smith’s pagan-Christian framework and the assertion that it is being played out again in a modern context. Although I find Smith’s *general* framework intriguing, I am not sure I find this specific account completely convincing. I am not sure that a belief in a specific transcendent authority necessarily translates into legal and political respect for “transcendent religiosity” in general,<sup>145</sup> or that Smith’s description of accommodation as a belief that “government should respect people’s religious commitments”<sup>146</sup> requires much by way of allegiance to either a transcendent *or* an immanent understanding

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<sup>139</sup> *Id.* at 314.

<sup>140</sup> Madison, *supra* note 87, para. 1.

<sup>141</sup> *Id.* For discussion, see SMITH, *supra* note 1, at 12–13.

<sup>142</sup> SMITH, *supra* note 1, at 315.

<sup>143</sup> *Id.* at 316.

<sup>144</sup> *Id.* at 328.

<sup>145</sup> *Id.* at 263.

<sup>146</sup> *Id.* at 304.

of the world.<sup>147</sup> Nor am I certain that a “pagan” belief in immanent religiosity leads inexorably to hostility to accommodation, or that all modern opposition to religious accommodation is based on a rejection of the transcendent or an acceptance of immanent religiosity. My own strong support for religious accommodation is closer to what Smith describes as a position of religious and “civic agnosticism,” under which the fact that religious claimants “*might* be right” in claiming an overriding duty to a creator deserves to be taken seriously.<sup>148</sup> That argument for accommodation is particularly strong if one also holds a legal pluralist view that the state is only one form of authority, one form of constitutive institution, and that its reach should not be endless and effectively extinguish competing authorities.<sup>149</sup>

For present purposes, however, while noting my reservations, I do not attempt to show Smith is wrong, let alone that I am right. Rather, my focus here is on the struggle for power in the area of religious exercise, and the relevance of the factors noted in Part I in enriching our understanding of that struggle.

The starting point here is the basic thesis that each dispensation does not simply seek immediate victory. Rather, the relationship between the contending sides is a play of proposed compromises, each reasonable from its own perspective but failing “fully to grasp and credit the other side’s commitments,”<sup>150</sup> and their concomitant rejection, leading to the cycle of reaction and counter-reaction that is precisely what makes culture wars so intractable.

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<sup>147</sup> I also have some doubts about whether a Christian understanding of religious transcendence necessarily requires the law to “respect” competing religious obligations. For relevant argument, see Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL’Y 569, 588–89 (2017) (arguing that in the early republic, natural rights were recognized but not necessarily treated as judicially enforceable or inconsistent with the legislative view of the public interest, and citing the right of free exercise of religion, which recognized “the unconstitutionality of religious persecution” but did not result in strong judicial authority “to determine the proper bounds of natural liberty when governmental powers collided with religious concerns,” a question that turned largely on “legislative or customary judgments” to which judges deferred).

<sup>148</sup> SMITH, *supra* note 1, at 338.

<sup>149</sup> For versions of both arguments, see PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 287–90 (2013); PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 154–59 (2011).

<sup>150</sup> SMITH, *supra* note 1, at 136.

Taking as a given Smith's account of religious accommodation as a "Christian" position, if not all its details, the demand for accommodation seems eminently reasonable, a request for small sacrifices. It follows a simple principle:

[G]overnment should affirmatively try to leave space for people to live in accordance with their diverse understandings of the sacred. So if a particular law would require a person or group to violate a sincerely held religious commitment, then a just and humane government will, *if reasonably possible* (because sometimes it will *not* be reasonably possible), find ways to excuse compliance by those people whose religion would be burdened.<sup>151</sup>

This does not seem much to ask. Indeed, it is reasonable *by definition*. It allows for accommodation but acknowledges others' rights and interests. Depending on its terms, a state religious accommodation statute may expand the rights of potential claimants but will not license absolutely anything.<sup>152</sup> A legislative accommodation excusing a closely held company from direct compliance with the contraceptive mandate may be statutorily and constitutionally permissible but it will take place in the context of "an existing, recognized, workable, and already-implemented [government] framework to provide coverage" to female employees of that company seeking contraceptive coverage.<sup>153</sup> Rights of refusal to provide personalized services for same-sex weddings will be available, as they may in other cases where the vendor of such services strongly objects to endorsing a particular message or view, but, *ex hypothesi*, "the services offered by these professionals [will be] readily available from other providers, and . . . no sensible same-sex couple would actually want the services of a provider who is religiously opposed to their union."<sup>154</sup> Even if one takes seriously and respectfully the claim that accommodation in each of these cases works a dignitary or even some tangible harm, it is possible to understand that from the perspective of the pro-accommodation side, these requests may be thought of as reasonable, limited in scope, and requiring only small sacrifices from the other side. That may be especially true in light of the

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<sup>151</sup> *Id.* at 305 (footnote omitted).

<sup>152</sup> *Id.* at 317.

<sup>153</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 537 U.S. 682, 737–38 (2014) (Kennedy, J., concurring).

<sup>154</sup> SMITH, *supra* note 1, at 301.

stakes as perceived by that side: the need to obey “a higher law or obligation—something like the law of God—that is independent both of government and of [the claimant’s] own preferences.”<sup>155</sup>

One can say exactly the same thing about the offered compromise from the perspective of the “pagan” dispensation. From that perspective, there is no doubt that invidious discrimination against religion is unconstitutional and wrong. In that sense, the legal default is respect for religion, transcendent or otherwise, not opposition to it.<sup>156</sup> And many religious accommodation claims will—at least for many “pagans” or modern constitutionalists—be respected as a matter of conscience, as a matter of equal treatment for people of different creeds, cultures, and so on, or as a reasonable legislative effort to respect pluralism and diversity. All that will be asked of the religious claimant is to respect and obey the law like any other citizen, after all the considerations of a “tolerant and humane community” have been taken into account.<sup>157</sup> The religious citizen will be asked not to discriminate against others on the basis of certain protected categories and not to disobey laws—public accommodations laws, nondiscrimination laws, laws ensuring the provision of basic contraceptive services—that embody fundamental national commitments. Those laws will still leave ample room for nonparticipation, in an individual or “private” capacity, with views and individuals one considers objectionable. The wedding cake vendor will be required to sell cakes to same-sex couples but not to open a wedding cake store in the first place or attend same-sex weddings on her own time.

In that light, any sacrifices demanded of the religious objector again seem small. As with the accommodationist or “Christian” compromise, the sacrifices involved will be even more reasonable in light of the stakes: the constitutional and moral values of equality and dignity, especially for disadvantaged or vulnerable groups that have long been treated unequally by law and society.

From the perspective of the group being *offered* the compromise, the reaction will be very different. Take the offer made by the “pagan” dispensation. From the perspective of a secular thinker, the legal regime merits obedience as the product of public reason and democratic deliberation. No other model is “credible

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<sup>155</sup> *Id.* at 323.

<sup>156</sup> *See id.* at 303.

<sup>157</sup> *Id.* at 326.

for anyone of a critical and informed disposition.”<sup>158</sup> While the state ought to “respect and promote” religion and religious liberty, any claimed religious authority is still “subordinate to the authority of the state.”<sup>159</sup> Thus, the rejection of religious accommodation—when, in a given case, it *is* ultimately rejected—should be the end of the matter. From the perspective of a religious integralist, for whom religion imbricates every action and the *state* is the newcomer, with an imperfect and ultimately secondary claim to authority, we can expect a very different response.

Conversely, from the “pagan” perspective, the “Christian” offer of a regime of religious accommodation can easily be viewed as involving a claim of the right to become “a law unto himself,”<sup>160</sup> regardless of the sincerity of the assertion that one is obeying a duty imposed from on high and not simply serving one’s own desires. In both cases, not only will the premise that the sacrifice involved is small be hard to understand or accept; the stakes involved for each will make it even harder to accept the terms that have been offered.

This is one part of the story. Just as important is the point emphasized throughout Smith’s book: that what is at issue is not simply a set of offered and rejected compromises but a struggle for dominance. Each side seeks to be the regime *making* the offer rather than the group faced with the hard and not entirely voluntary choice of *taking* it, or of rejecting it and facing the threat of punishment or lawless status. Although the contest involves elections and judicial nominations rather than regicide or revolution, Twitter rather than torture,<sup>161</sup> its existence is no less plain.

This is one way to understand two closely related but seemingly conflicting facts. On the one hand, it is widely agreed that the rhetorical pitch and volume of contemporary rhetoric over law, religion, and politics in the culture-war arena have become

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<sup>158</sup> *Id.* at 222 (quoting LUC FERRY, A BRIEF HISTORY OF THOUGHT: A PHILOSOPHICAL GUIDE TO LIVING 97 (Theo Cuffe trans., 2011)).

<sup>159</sup> Andrew Koppelman, “Freedom of the Church” and the Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145, 146, 156 (2013). For an anti-accommodationist argument taking an even stronger view of state sovereignty, see Jean L. Cohen, *Freedom of Religion, Inc.: Whose Sovereignty?*, 44 NETH. J. LEGAL PHIL. 169, 170–71 (2015).

<sup>160</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 885 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

<sup>161</sup> The ancients may have had the better side of that particular comparison.

nasty, polarized, ill-tempered, and accusatory. Both sides are routinely accused of intolerance.<sup>162</sup> The language of bigotry is regularly invoked to marginalize the other side as irrationally and invidiously refusing the offered compromise.<sup>163</sup> Arguments on both sides are pursued with “evangelical zeal” and seemingly little regard for “sober appeal[s] to facts.”<sup>164</sup> This does not describe everyone in our society,<sup>165</sup> but it is characteristic of many of the loudest and most active voices in the debate. Those voices in turn may “make it harder than it once was to remain neutral or undecided.”<sup>166</sup> Those who take such a position may constitute a large if diffuse percentage of the population, but they are marginalized in public debate, represented by no interest group or political party.

On the other hand, the fierceness of the debate and the heightened nature of the rhetoric can obscure the fact that both sides *agree* on a great many things. As Smith notes, “Virtually everyone at least purports to be in favor of religious freedom.”<sup>167</sup> Although the meaning of that term may be contested and an increasing number of voices may question it altogether, it is still true that in many cases, agreement is widespread and sincere. Conversely, virtually every advocate of religious accommodation agrees that the kinds of things that critics of accommodation worry about—especially racial discrimination—fall outside the realm of “reasonable” accommodation<sup>168</sup> and should be opposed. Thus, many scholars who criticize religious accommodation joined the broad coalitions that came together to support the religious claimant in the prisoner case *Holt v. Hobbs*.<sup>169</sup> And many of those

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<sup>162</sup> SMITH, *supra* note 1, at 301, 358.

<sup>163</sup> *Id.* at 359.

<sup>164</sup> *Id.* at 317. Smith’s focus in offering that description is on opponents of accommodation, not its supporters. But others, such as Laycock, find it on both sides. See 4 LAYCOCK, *supra* note 117, at 706–10, 733, 736, 771–79, 863. And each week brings fresh evidence that both sides are capable of heated rhetoric that may easily outstrip the cold facts.

<sup>165</sup> See generally Paul Horwitz & Nelson Tebbe, *Religious Institutionalism—Why Now?*, in CORPORATE RELIGIOUS LIBERTY, *supra* note 129, at 211–16 (collecting and discussing public opinion data).

<sup>166</sup> SMITH, *supra* note 1, at 248.

<sup>167</sup> *Id.* at 302.

<sup>168</sup> *Id.* at 305 & n.9.

<sup>169</sup> 574 U.S. 352, 355–56 (2015); see Brief of Amicus Curiae Alliance Defending Freedom in Support of Petitioner at 2, *Holt*, 574 U.S. 352 (No. 13-6827); Brief of Americans United for Separation of Church and State as Amicus Curiae in Support of Petitioner at 1–3, *Holt*, 574 U.S. 352 (No. 13-6827).

who support religious accommodation make a point of emphasizing that they support racial antidiscrimination law, and take great pains to distinguish it from modern cases involving accommodation in other areas.<sup>170</sup> Finally, and despite growing disagreements about religious accommodation, both those who unapologetically favor it and those who are dubious but acknowledge that there are cases where it is appropriate agree that there are limits to what can be accommodated.<sup>171</sup>

Increasingly, that position is categorized as falling on the “pagan” side and described in terms of harm to third parties, including dignitary harms.<sup>172</sup> But accommodationists, too, insist that there are cases in which it is not “reasonably possible . . . to excuse compliance [with generally applicable laws] by those people whose religion would be burdened.”<sup>173</sup> Those limits may not be put expressly in terms of harm to third parties or dignitary harms. But the practical limits agreed upon by accommodationists can often be understood in those terms.<sup>174</sup> And on the other side of the ledger, there are cases in which both sides differ as to the reasons but agree that the state should accommodate the religious objector. Although the Vietnam draft exemption cases<sup>175</sup> can rightly be understood as marking a “subtle transition” in the views of the “pagan” party, in which conscience becomes equal or superior to religion as a ground for accommodation,<sup>176</sup> they can also be read as indicating an area of continuity in which most people on both sides support—albeit for different reasons—the long-standing tradition of exempting peaceful and sincere religious groups like the Quakers from certain generally applicable obligations.<sup>177</sup>

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<sup>170</sup> See, e.g., Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & PUB. POL’Y 206, 234–35 (2010).

<sup>171</sup> *Holt*, 574 U.S. at 355–56.

<sup>172</sup> SMITH, *supra* note 1, at 319 n.75.

<sup>173</sup> *Id.* at 305 (emphasis omitted).

<sup>174</sup> Thus, Smith cites as an easy case religious human sacrifice, noting that “nearly everyone would consider it unreasonable for the government to exempt the [believer] from the murder laws.” *Id.* at 305 n.9. It is hard to deny that harm to others is the key ingredient in that limitation. And although accommodationists’ insistence that they have no desire to undo laws barring racial discrimination could be read in terms of the historically unique position of race or the clear instructions of the Civil War Amendments, dignitary values surely figure in this position as well.

<sup>175</sup> See generally *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

<sup>176</sup> SMITH, *supra* note 1, at 330–31.

<sup>177</sup> *Id.* at 305.

What to make of this curious combination: a wide area of agreement, and an increasingly shrill focus on areas of disagreement, with each side accusing the other of being intolerant and unreasonable *despite* the fact that both sides seem able to agree on at least *some* basic rules and limits? It can perhaps best be understood as lending support to the basic thesis that what is occurring is not simply a struggle over outcomes or even ideas but rather is fundamentally a struggle for control, a “larger and essentially religious struggle to define and constitute America.”<sup>178</sup> As with the original pagan-Christian conflict, it can be understood not as a rejection of the very idea of compromise but as a power struggle over who will occupy the high ground and thus set the *terms* of the compromise: to determine who gets to *make* the offer and who must *take* it. On this view, it is beside the point that there may be areas of practical agreement despite fundamental differences of worldview. What matters is who gets to shape the offer, to judge whether the other side has complied with it or conversely is subject to the “logic of persecution,” and to determine the boundaries and bases of what constitutes an “unreasonable” accommodation of religion. Neither side may be hostile either to religion or to values such as equality and dignity.<sup>179</sup> But both understand that it makes all the difference who gets to define those terms and their application. It matters who gets to define the values that constitute the American “city” itself.

From this perspective, it follows that we will see a rejection of what, from the perspective of each side, seems like reasonable compromises and small sacrifices: the modern equivalents of “a few grains of incense.” This perspective, rather than reinforcing the view that one or both sides are being harsh and unreasonable, may encourage a greater degree of understanding and sympathy for each side and (up to a point, anyway) for the heated nature of its rhetoric. Each side’s rejection of the other will stem not from sheer malice but from the failure “fully to grasp and credit the other side’s commitments.”<sup>180</sup>

As we saw earlier, however, a compromise offer is not a single-shot game. It is a *dynamic* process, involving a series of moves and reactions that ultimately nudge each side toward the logic of

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<sup>178</sup> *Id.* at 302–03.

<sup>179</sup> *Id.* at 339.

<sup>180</sup> *Id.* at 136.

persecution. Each side understands that behind an offer of compromise—often, for both sides, a compromise that involves some degree of religious accommodation but within certain limits—stands a larger worldview. Each side seeks to name and to control the values of the larger society—or the “city,” as Smith calls it, with a backward glance to Rome and to Augustine’s account of the earthly and heavenly cities.

As the renewed coalition of groups in cases like *Holt v. Hobbs* or the *hoasca* case<sup>181</sup> suggests, there may be cases in which both sides are willing to work together despite their larger disagreements, at least as long as their opposing worldviews are obscured by the technical language of legal doctrine. But when the disputes approach the heart of those differing worldviews and the values they hold dear—often centering around sexuality and thus making perspicuous different views about morality, the nature of personhood, and the position of the state on these matters—coexistence takes a back seat to conflict.

Even where the proffered compromise is acceptable, each side will suspect, with good reason, that the larger goal is the ascendancy of a comprehensive worldview—“Christian” or “pagan,” in Smith’s terms, or “transcendent” or “immanent,” but more commonly described with terms like “secular” or “religious,” “conservative” or “progressive”—that, once it has the commanding heights, will not stop there. So it may reject even an acceptable compromise. That rejection will be viewed as unreasonable. The conclusion that it is unreasonable will lead to the conclusion that the refusal can only be understood as a product of bigotry or hostility. Thus, Martin Castro, chairman of the United States Commission on Civil Rights, asserted that “[t]he phrases ‘religious liberty’ and ‘religious freedom,’” which we can here understand to stand in for the accommodationist position, “will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”<sup>182</sup> And the other side will see not a reasonable set of limitations on religious exercise, but an

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<sup>181</sup> See generally *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

<sup>182</sup> U.S. COMM’N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016) (Chairman Martin R. Castro statement).

outright “war on religion.”<sup>183</sup> These kinds of reactions will beget counter-reactions and escalations in rhetoric and action. And so the cycle goes.

It is easy to understand why each side may reject the compromise offered by the other side, especially as long as an implicit premise is that one side has the power to make or withdraw the offer and to set the terms of what is reasonable or not. Once that happens, it is equally easy to understand why the two sides will move farther apart and be increasingly likely to attribute bad faith and “unshakeable obstinacy”<sup>184</sup> to each other. If each side embodies a significantly different worldview in which different values are defined or prioritized differently, and in which the very question of whether we live in “one city” or two is at issue, it is understandable that each side will perceive the other as wanting a “total win,”<sup>185</sup> and that each side will be incentivized to *seek* a total win.

One last and increasingly important factor is worth noting. It may be seen as following naturally from the logic of each side’s worldview and values, or as a strategic part of the power struggle. Indeed, given that even strategic choices can be sincere and that even calculated moves by individual strategists may quickly be absorbed into the sincerely held worldview of a larger group, it will often be both.

This is the struggle, one that we saw in the historical Christian-pagan contest, to define the scope of what is “public” or “private” and thus subject to greater or lesser forms of regulation. It is a contest over the boundaries of the walls of the “city.”<sup>186</sup> As we saw in Part I, historically much of this debate involved the rituals or “small sacrifices” that could be imposed as a condition

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<sup>183</sup> Sarah Lipton-Lubet, *Contraceptive Coverage Under the Affordable Care Act: Dueling Narratives and Their Policy Implications*, 22 AM. U. J. GENDER, SOC. POL’Y & L. 343, 344 (2014) (quoting Mitt Romney). Douglas Laycock makes a similar but less heated observation. See Laycock, *supra* note 8, at 862 (“[M]any Americans are becoming hostile to religious liberty. . . .”); *id.* at 877 (arguing that possible compromises and accommodations can be difficult because of “bureaucratic rigidity and indifference,” but that this rigidity “is sometimes stiffened by a more generalized hostility to religion and to religious liberty, and that hostility is becoming more widespread because of the culture-war issues”).

<sup>184</sup> SMITH, *supra* note 1, at 2 (quoting PLINY THE YOUNGER, *THE LETTERS OF THE YOUNGER PLINY* (Betty Radice trans., 1963)).

<sup>185</sup> Laycock, *supra* note 8, at 879.

<sup>186</sup> SMITH, *supra* note 1, at 340.

for entry into the marketplace and other common spaces, around the fitness of pagans or Christians for particular offices, and around public symbols.

Today, this battle often involves the expansion of the “public sphere” through public accommodations laws. As Smith acknowledges, both accommodationists and their opponents have often understood certain spaces, such as the marketplace, “to have both public and private dimensions.”<sup>187</sup> As I noted above, accommodationists have long argued, both on sincere grounds and as a matter of demonstrating the reasonableness of their own proffered compromise, that racial discrimination should be understood as a public concern subject to regulation. As other issues, such as same-sex marriage, have moved to the forefront, the logic that supported public accommodations laws prohibiting racial discrimination has extended to issues in which more members of the “Christian” party, as Smith defines it, will find themselves in conflict with the law. Those whose “religious views conflict with” these expanded “public policies” will thus face new restrictions on their ability to act consistently with those views in “the domain of business, or economic activity.”<sup>188</sup>

The current primary example is the set of cases involving services for same-sex wedding ceremonies, such as wedding cakes or photography. With a little imagination, one can have sympathy for each side’s perspective. From the “Christian” or transcendent religious perspective, the choices involved are “private” in important senses and were treated as such until recently. They involve new issues not previously faced by these vendors, who did not set up in the marketplace with any particular intention of refusing services as such, and thus naturally give rise to new dilemmas and sometimes new refusals to provide services. They often involve services that are readily available from other vendors, who are eager to provide them for both commercial and conscience-driven reasons. Even if the business owner attempts to “be delicate and respectful in expressing [her] religious reservations”<sup>189</sup> and offers to provide every possible service except

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 361–62.

the one that most centrally implicates her religious beliefs,<sup>190</sup> she may find herself either forced into compliance despite her religious views or squeezed out of business.

From the “pagan” or “immanent” perspective, one can understand why the idea that the business owner’s choice is wholly private seems absurd. On this view, the marketplace has long been understood as having “both public and private dimensions,” and we have long insisted that it comply with basic values of nondiscrimination. Those values have been logically and democratically expanded to include new categories. A business owner who balks at this will be viewed as suddenly rejecting a law she has long been required, and willing, to follow. The conclusion that such refusals cause serious harms to dignity and equality—harms that outweigh the relatively trivial desire not to provide the same services that the business owner has offered to countless others—will be logically “understandable” and “plausible.”<sup>191</sup>

Given the reasonableness of each of these competing perspectives, it is understandable that both sides have fought over the definition of public and private, through both the expansion of public accommodation statutes and the passage of religious freedom legislation that provides carve-outs in some of these new areas. It makes sense that each side, viewing the other as engaged in an imperial move to define the line between public and private and thus the boundaries of the “city,” will be unyielding in its opposition to the other.

All of this resembles the struggle Smith describes as having taken place over the marketplace and other common spaces in ancient Rome. There, too, public customs, values, and laws “permeated Roman imperial society,” making it impossible to separate the values and rites of the ruling regime “from entertainment, from commerce, from governance, . . . and so on.”<sup>192</sup> Then as now, the argument that the religious objector could simply choose not to run a business might seem unconvincing, particularly as the scope of what constituted an “authorized market,” subject to rules informed by the values of the regnant

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<sup>190</sup> See, e.g., *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018) (describing the owner’s willingness to sell any products except cakes for same-sex weddings).

<sup>191</sup> SMITH, *supra* note 1, at 361.

<sup>192</sup> *Id.* at 139 (quoting STEVEN J. FRIESEN, *IMPERIAL CULTS AND THE APOCALYPSE OF JOHN: READING REVELATION IN THE RUINS* 203 (2001)).

regime, expanded.<sup>193</sup> From our vantage point, we can understand why rules of conduct in the marketplace that seemed minor to the pagan dispensation would feel to Christians like a set of “infernal snares.”<sup>194</sup>

Similarly, we saw earlier that one of the most “controversial measure[s]” advanced by Julian was his insistence that Christian teachers be banned from teaching because their lack of belief in the gods made them “morally unfit to teach the classics.”<sup>195</sup> Such an edict would be perfectly logical from the pagan perspective. How could someone do a proper job as a teacher if she rejected the values required for the proper education of the city’s youth? The restriction could also be viewed as reasonable because Christians could still do plenty of other jobs.

We could easily imagine a “milder” version of this rule. Julian could have allowed Christians to teach the classics—provided that they taught the classical texts, and expressed the values and beliefs voiced by those texts, in the same way that a pagan teacher who shared those values would. Doubtless, just as *some* Christians were willing to cast “a few grains of incense” on the altar in order to participate in Roman life, *some* Christians would have accepted this bargain. But it is equally obvious that for many, this would be an unacceptable compromise and little different from the harsher edict promulgated by Julian.

The modern equivalent can be found in an increasingly active area of contestation: that involving occupational training and licensing. Of course Christians, or members of any other faith, transcendent or otherwise, are not prohibited from teaching or other jobs *because* they are Christian. But as the codes and practices of many professions, either directly or through state regulation, take on more explicitly the values of the ruling regime, new conflicts arise under which it may be difficult both to live and act in a way that is consistent with certain religious beliefs *and* to continue practicing as a doctor, a pharmacist, a lawyer, or, to bring us full circle, a teacher.<sup>196</sup>

In sum, even if one has doubts about Smith’s characterization of the modern “pagan” and “Christian” perspectives on religious exercise, his broad point seems apt. These are not simply disputes

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<sup>193</sup> *Id.* at 141.

<sup>194</sup> *Id.* at 142.

<sup>195</sup> *Id.* at 169.

<sup>196</sup> *See id.* at 341 & nn. 138–40, 342 nn. 141–43.

about individual cases or topics. Nor, despite areas in which both sides support religious accommodation and despite the general absence of outright hostility to religion, can these disputes be resolved by appeals to “reason” or compromise. Each side at least *starts* with a willingness to compromise. But the nature of the compromise offered by each, and the underlying values and assumptions that ground it, are different in each case.

As highly salient culture-war issues arise, it is the differences and not the common ground that will draw attention. The cycle of rejection, reaction, and accusation that follows from these differences will encourage both sides to reject the idea of compromise, unless and until they are in a position to set its terms. Given their fears that the other side disrespects their way of life or fundamental beliefs, they will find coexistence plausible and attractive only once they believe their existence itself is not under threat. That will require them to occupy the seat of power: to “control . . . the cultural and political community and the self-conception by which the community constitutes and governs itself,”<sup>197</sup> and thus the values and terms under which any “peaceful coexistence” takes place. This fight for control of the city will inevitably involve a struggle to define the very boundaries of that city: what constitutes the “private” space in which people are free to believe and act as they please, and what is “public” and subject to the public values and rules of the dominant regime.

It is hardly surprising, then, that free exercise and the accommodation of religion have become increasingly hotly contested issues, and that these issues can be understood not as discrete disputed issues but as a larger power struggle that closely resembles, even if it is not identical to, the historical contest between pagans and Christians.

Smith argues that struggles over free exercise and religious accommodation can be understood not just in terms of practical effects but also as a symbolic war in which accommodation is “a *constitutive* symbol” that represents a vision of the kind of transcendently religious community that “America is.”<sup>198</sup> Of course, one can just as readily understand arguments *against* accommodation in symbolic terms, as a statement about the fundamental values that characterize the American community

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<sup>197</sup> *Id.* at 265.

<sup>198</sup> *Id.* at 315.

and its laws. It is not surprising, then, that another battleground, both in the ancient past and today, is over religious and other symbols themselves. I turn to that issue next.

### III. STRUGGLES TO DEFINE THE COMMUNITY: NON-ESTABLISHMENT AND RELIGIOUS DISPLAYS

It is a commonplace observation that much of the action in Establishment Clause litigation over the past several decades has shifted from questions of funding to questions of public symbols.<sup>199</sup> The Supreme Court's emphasis on neutrality and equal access to funding, developed over a series of cases and subject to certain lingering caveats, seems to have attained a level of stability on the Court and to have lessened *some* of the heat in funding controversies.<sup>200</sup> Unlike the state of affairs during the Founding Era, "the prevailing judicial and scholarly consensus seems to be that government-sponsored religious messages are more problematic than government funding of religion and, more broadly, that expressive harms are the chief harms with which the Establishment Clause should be concerned."<sup>201</sup>

Doctrinal stability is unlikely to hold where it is at odds with social conditions and the state of public argument. Thus, it is unlikely that the relative clarity of these cases is the cause of this consensus. More likely, it reflects underlying differences between conditions during the height of debate over funding in the past

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<sup>199</sup> See, e.g., Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771 (2001) ("To put the matter simply, the emerging trend is away from concern over government transfers of wealth to religious institutions, and toward interdiction of religiously partisan government speech.").

<sup>200</sup> For discussion, see generally Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133 (2017). The most recent cases in this line are *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024–25 (2017), which held that Missouri could not bar a church school from equal participation in a funding program providing grants to ensure safer playground surfaces, and *Espinoza v. Montana Department of Revenue*, 207 L. Ed. 2d 679 (2020), in which the Court held that religious schools could not be excluded from a state program supporting private school scholarships despite Montana's asserted interest in complying with a state constitutional provision prohibiting aid to sectarian schools. The caveats include a potential distinction between direct and indirect aid to religion, see, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002), and an emphasis on the role of "true private choice" in many funding schemes, *id.* at 653.

<sup>201</sup> Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1876 (2004); see *id.* at 1876 n.255 (arguing that "the opposite was true at the time of the framing" (citing Lupu, *supra* note 199, at 777)).

century and conditions today, such as the decline of open combat between Protestants and Catholics.<sup>202</sup> Whatever the reason, there is more controversy over government religious symbols than over government funding of religion.

We might think of struggles over religious symbols in terms of competing dispensations, and the compromises offered by each side and accepted or refused by the other. If modern debates, like the ancient one, constitute a struggle for “control of the cultural and political community and the self-conception by which the community constitutes and governs itself,”<sup>203</sup> we can expect that struggle to play out in the area of religious symbols just as it has with religious accommodation. Indeed, such a struggle seems not only possible but likely. “[I]n the struggle to define America, symbols and discourse are crucial.”<sup>204</sup> Thus, each side—Christian and pagan, religious and secular, liberal and conservative, or however one wishes to frame the divide—will “struggle[] to monopolize the symbols of legitimacy” in our society.<sup>205</sup>

Smith examines “three partly overlapping theaters of that struggle” for “mastery within the city”: “symbols or expressions of public religiosity, public recognition and ratification of the norms of sexuality, and the Constitution itself.”<sup>206</sup> In this Part, I focus primarily on public religious symbols, and briefly on disputes over the meaning of “the Constitution itself.” I again work from within Smith’s framework. I find it useful for understanding the current state of debate but also raise questions about his precise treatment of these issues. More so than in the last part, I find much to question here. Even if one accepts Smith’s acknowledgment that his interpretation is necessarily “an artificial imposition upon a complex and messy reality,” there are reasons to worry that the reality is too messy to bear the interpretation he imposes on it.<sup>207</sup> Before raising those questions, however, it would be helpful first to set out Smith’s interpretation.

For Smith, the culture wars form the context in which these struggles play out in the modern era. They arose after a period of relative common ground on religion and its relation to the

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<sup>202</sup> See, e.g., Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 641–42 (2011).

<sup>203</sup> SMITH, *supra* note 1, at 265 (quoting HUNTER, *supra* note 95, at 52).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* (quoting HUNTER, *supra* note 95, at 147).

<sup>206</sup> *Id.* at 266.

<sup>207</sup> *Id.* at 259.

prevailing culture: a period stretching from the Founding Era to the mid-to-late twentieth century, in which there was a “prevalent public philosophy or national self-understanding” that our nation and its symbols were “pervasively if sometimes amorphously Christian in . . . culture and substance.”<sup>208</sup> This understanding was the basis of what Robert Bellah calls the “American civil religion.”<sup>209</sup> The “guiding narrative” provided by the American civil religion drew heavily on the Bible, starting with the Protestant understanding of Scripture and expanding over time to include Catholic and Jewish visions as well.<sup>210</sup> All these understandings were grounded in “a transcendent religiosity.”<sup>211</sup>

In that sense, notwithstanding the increasing move away from sectarianism and toward “an increasingly inclusive civil religion,” this dispensation was “Christian” in the broad sense in which Smith uses it in this book.<sup>212</sup> Like other dispensations we have seen, it did not seek to *eliminate* whatever a “pagan” or “immanent” religiosity would include by way of symbols and public rituals and displays. But the idea that “[w]e are a religious people whose institutions presuppose a Supreme Being”<sup>213</sup> was still the starting point. Any tolerance for or positive inclusion of immanent or pagan symbols was based on the implicit requirement that the minority accept the dominant transcendent vision, or at least accept its manifestation in public statements, displays, and rituals.

The “dissolution of this guiding narrative” led to a state of division between “two broad and contending camps.”<sup>214</sup> One “maintained continuity with the old, biblically oriented civil religion, while the [other] challenged it.”<sup>215</sup> The struggle between them “for control of the cultural and political community” is what we now describe as the modern culture wars.<sup>216</sup> Given that this is a contest to establish which understanding will constitute “the character of [our] community,” it is unsurprising that “the culture

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<sup>208</sup> *Id.* at 260–61.

<sup>209</sup> *Id.* at 261 (citing ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL 3* (Univ. of Chicago Press 1975)).

<sup>210</sup> *Id.* at 263.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

<sup>214</sup> SMITH, *supra* note 1, at 263.

<sup>215</sup> *Id.* at 264.

<sup>216</sup> *Id.* at 265.

wars have been in large measure a struggle to control public symbols.<sup>217</sup> We have not come far from the contest over symbols, such as the dispute over the Altar of Victory, that formed a major part of the war for mastery over the Roman city.

Typically, this dispute is treated as a contest between “supporters of ‘religious’ symbols and expressions” and “proponents of a ‘secular’ public square.”<sup>218</sup> Smith offers a different take. That take rests on his excavation of the “Christian” and “pagan” dispensations, broadly understood, and his effort to show that they continue in existence under the “religious” and “secular” labels. The continued relevance of the ancient dispute between dispensations becomes apparent once we take into account “the ambiguous or equivocal character of the term ‘secular’ ” and the “transcendent” and “immanent conceptions of ‘religion.’ ”<sup>219</sup>

If the traditional or “Christian” understanding of our community is one of transcendent authority, the competing “pagan” understanding emphasizes *immanent* or “*inner-worldly*” sources of moral authority.<sup>220</sup> On this view, rather than a stark contrast between “religious” and “secular” views of the public square, we actually have a contest between a position favoring “Christian” or transcendent public religious displays and messages, and a “pagan” or immanent view. We should understand the modern pagan camp as holding two positions. The first is one of increasing resistance to “transcendent public religious symbols.”<sup>221</sup> The second position is not one of opposition to government symbols and government expression as such. Any community will inevitably want its government to say something about “*who we are*, or what kind of community we live in.”<sup>222</sup> Rather, it is one that permits only those government symbols that are consistent with an immanent or pagan understanding of religiosity.

Here, Smith does two useful and important things. The first influences the second and leads to something of a change of position from earlier work. First, he examines and rejects the argument that we have paid too much attention to the dispute over symbols.<sup>223</sup> That argument suggests that the heat of the dispute

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 275.

<sup>219</sup> *Id.* at 276.

<sup>220</sup> *Id.* at 266 (quoting HUNTER, *supra* note 95, at 124).

<sup>221</sup> *Id.* at 268.

<sup>222</sup> *Id.* at 272.

<sup>223</sup> *Id.* at 267–71.

is disproportionate to its actual importance—they are just symbols, after all—and that our time, attention, and resources might “be better spent on matters that actually affect people in coercive or material ways.”<sup>224</sup>

Of course, one answer is that we just *do* care about public symbols and messages. But there is good reason to do so. We live in a constructed social and political community, in which much of the construction work is done by symbols—not least *public* symbols, which are “expressive and constitutive not just of particular private speakers or groups, but of the community.”<sup>225</sup> Disputes over these questions are existential, not trivial.<sup>226</sup> To borrow the title of a recent book, fights about what our public symbols and expressions will include or exclude are ultimately “a war for the soul of America.”<sup>227</sup>

This leads Smith to a second conclusion. In this book, he takes a much more sympathetic position on a major area of contestation in Establishment Clause law: the meaning and value of the so-called “endorsement test,” which asks whether a government message involving religion treats some Americans as “outsiders” or “not full members of the political community.”<sup>228</sup> In previous work, Smith has criticized that test as “doctrinally deficient and without theoretical justification.”<sup>229</sup> He has argued that a pluralistic culture cannot possibly ensure that everyone feels like an insider, and that because the inevitability of alienation from at least some government actions or messages “is inherent in a pluralistic culture, the aspiration to abolish that phenomenon, or to develop a conception of ‘political standing’ that includes a right not to feel like an ‘outsider,’ constitutes a utopian vision rather than a realistic basis for formulating constitutional doctrine.”<sup>230</sup> Indeed, because the full version of the endorsement test casts

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<sup>224</sup> *Id.* at 270.

<sup>225</sup> *Id.* at 271.

<sup>226</sup> *See id.* at 272.

<sup>227</sup> *See generally* ANDREW HARTMAN, *A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS* 1 (2d ed. 2019). Debates over the fate of various statues and other public symbols in the United States during the summer of 2020 reinforce the point.

<sup>228</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); *see also* *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring) (adding the idea of the reasonable objective believer to the endorsement test).

<sup>229</sup> Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 268 (1987).

<sup>230</sup> *Id.* at 313.

doubt on the very reasonableness of the loser in a religious symbol case, that test, which “[sets] out to avoid alienation and offense to real human beings, . . . ends up adding insult to injury.”<sup>231</sup>

Here, however, Smith’s acknowledgment of the constitutive importance of symbols, and thus the legitimate nature of the struggle for control over those symbols, leads him to a more sympathetic treatment of the “no endorsement” idea. If American civil religion is a vital part of who we are, then debates over religious displays by government are about more than the kinds of “potentially divisive political issues” that arise every time government takes a position, and thus create winners or losers, with a normal but not constitutionally significant sense of alienation.<sup>232</sup> In a statement that surely is meant to include himself, Smith concludes, “[I]n this sense, as Justice O’Connor perceived but her critics sometimes did not, [public] religious expressions may have a more fundamental alienating effect than other sorts of controversial public statements typically have.”<sup>233</sup>

Armed with this sympathy for the seriousness of the claims on both sides of the fight over religious symbols, Smith offers a thesis about the precise nature of that dispute and its treatment by the courts. Building on his definitions of “secular” and “religious” and his distinction between transcendent and immanent religion, Smith suggests that “the current struggle over public symbols turns out to be more complicated than it initially appears. In prohibiting endorsements of ‘religion,’ the ‘no endorsement’ doctrine *might* mean that government is forbidden to endorse *traditional or transcendent religion*. Conversely, ‘secular’ expressions of more immanent religiosity might be permissible.”<sup>234</sup>

According to this thesis, “conventionally ‘religious’ public symbols and expressions,” such as “under God” in the Pledge of Allegiance, might be forbidden.<sup>235</sup> But a host of other public symbols and expressions would remain: a religiously denuded version of the Pledge, the American flag, the national anthem, and so on.<sup>236</sup> These symbols are not merely “secular.” They “still

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<sup>231</sup> Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 572 (2001); see also Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120, 150–51 (2008).

<sup>232</sup> SMITH, *supra* note 1, at 273.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 276.

<sup>235</sup> *Id.* at 276–77.

<sup>236</sup> *Id.* at 277.

seek . . . to stir citizens' feelings of reverence and devotion" and serve "a *sacralizing* or consecrating function."<sup>237</sup> The Court shows no signs of objection to this sort of "this-worldly sacralization."<sup>238</sup> Traces of sacralization appear in various decisions, such as Justice Brennan's statement in *Texas v. Johnson* that the flag is "virtually sacred to our nation as a whole."<sup>239</sup> In short, the Court has "embraced, wittingly or unwittingly, a conception of the political community formed in immanently religious terms."<sup>240</sup> Where the Court *does* permit religious symbols or language, it is most likely to do so when those expressions "are at least susceptible of being interpreted in more immanent or this-worldly terms."<sup>241</sup> The result "is to remove the transcendent or Christian stratum of American civil religion, thereby leaving the immanent or pagan substratum."<sup>242</sup>

This is an intriguing reinterpretation of the culture wars over public religious expression. Although it will require an imaginative stretch for many readers, it is not without support. It is true that the more openly *sectarian* a governmental expression is, the less likely it is to be upheld: and a sectarian expression, at least given the long history of Christianity in the United States, is more likely to be a transcendent one. It is also true that the kinds of government religious expressions with which the Court is most comfortable are rendered acceptable in part by treating them as having "lost their religious significance" and serving a more general solemnizing function.<sup>243</sup> That does not necessarily make such statements expressions of *immanent* religiosity. But it can be read as suggesting that whatever form of ostensibly "religious" sacralization *is* permitted, it does not include openly and explicitly transcendent forms of religiosity.

Finally, it is clearly true that many forms of "civil religion" broadly understood—on which I have more to say below—are treated as uncontroversial by "Christians" and "pagans" alike. Thus, despite a polemical attack on any form of American civil religion that is openly religious and a purported rejection of "civil religion" *tout court*, Frederick Gedicks asserts that "[o]ne can fall

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> 491 U.S. 397, 418 (1989).

<sup>240</sup> SMITH, *supra* note 1, at 278.

<sup>241</sup> *Id.* at 279.

<sup>242</sup> *Id.* at 281.

<sup>243</sup> *Id.* at 279.

in love with human dignity, with freedom of speech, with equal opportunity, and even with the separation of church and state.”<sup>244</sup> Although he describes this position as “abandoning the religious part [of civil religion] and retaining the civil part,”<sup>245</sup> it is hard to describe this position as nonreligious, at least in Smith’s terms, and possible (although not necessary, as I argue below shortly) to think of it in terms of immanent religiosity.

So there is something to Smith’s heterodox account. One might round it out by asking the same questions I pursued in the first two parts of this Essay: What does the dispute over religious symbols and expressions look like from the perspective of competing dispensations? And what compromises or offers does each side make to the other from the commanding heights that it occupies, or seeks to occupy? A relatively simple story can be told here.

For the “Christian” or “transcendent” dispensation, the entrenchment of transcendent religious symbols does not demand the elimination of competing secular or immanent symbols. For one thing, both Christians and pagans are free to worship, as it were, at the altar of common-ground symbols such as the flag or the Constitution. Civil religion itself, even if it remains transcendent, can be expanded to include a wider set of “communions”: mostly monotheistic, perhaps, but even that might be subject to negotiation.<sup>246</sup> Indeed, Smith writes that “a central feature of any contemporary Christian society under conditions of modern pluralism is that it is unlikely to sponsor any official account of what transcendence is and requires—any official orthodoxy.”<sup>247</sup> Finally, from the perspective of the “Christian” dispensation, the

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<sup>244</sup> Frederick Gedicks, *American Civil Religion: An Idea Whose Time Is Past*, 41 GEO. WASH. INT’L L. REV. 891, 891–92 (2010).

<sup>245</sup> *Id.* at 892.

<sup>246</sup> See SMITH, *supra* note 1, at 263 (quoting WILL HERBERG, PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 87 (1955)). In arguing that the Constitution does not forbid the “public acknowledgment of the Creator,” Justice Scalia asserted that the Establishment Clause “permits th[e] disregard of polytheists and believers in unconcerned deities,” as well as “devout atheists,” but clearly allows the monotheistic “acknowledgement of a single Creator.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting). But Scalia’s dissent hardly need be taken as the final word on the “Christian” position on public religious symbols. And despite its emphasis on monotheism as the baseline, even his dissent does not appear to disallow civil religious statements, such as those of presidents in inaugural prayers, acknowledging and praising the views of people of all faiths.

<sup>247</sup> Smith, *supra* note 1, at 378.

pagan is free to ignore the public religious symbol or expression. Any obligations are limited to mere courtesies, such as standing, or unobtrusively staying seated at a public event, not as a form of obeisance but out of simple good manners.<sup>248</sup>

This resembles, and is even less burdensome than, the ancient pagan suggestion that Christians who wanted to be good citizens need merely sprinkle a few grains of incense on the altar at public ceremonies without having to change their religious beliefs. Like that compromise, however, as Smith recognizes, such public expressions “may have a more fundamental alienating effect” than the offeror recognizes, and thus one may anticipate resistance to even a mild form of truly religious and transcendent civil religion.<sup>249</sup>

For the “pagan” or “immanent” dispensation, the fact that transcendent religious symbols or displays are forbidden to *government* does not mean they must be eliminated from the public square, let alone the private sphere. Churches and religious individuals need not hide the Light under a bushel. Their architecture, signs, and statements can be as prominent and transcendently religious as they please. They can, if they wish, imbue immanently sacred “secular” symbols with transcendent religiosity. If pagans and Christians alike can “fall in love with” the display of the Constitution at the National Archives, then Christians can go further and see in it the guiding hand of Providence. At least in the United States, it is unlikely that the rise of immanence and decline of transcendence will forbid government workers from wearing yarmulkes, turbans, hijabs, or crucifixes, as other governments have advocated.<sup>250</sup> Leaving aside the most ardent separationists, whose arguments are routinely rejected by judges, many pagans would agree that a political candidate or office-holder can even make deeply religious, but officially personal, public statements. In exchange for this largesse, “Christians” must merely accept that the symbols and

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<sup>248</sup> See *Lee v. Weisman*, 505 U.S. 577, 637–39 (1992) (Scalia, J., dissenting).

<sup>249</sup> SMITH, *supra* note 1, at 273.

<sup>250</sup> See generally, e.g., Ralf Michaels, *Banning Burqas: The Perspective of Postsecular Comparative Law*, 28 DUKE J. COMP. & INT'L L. 213 (2018); see also Oriana Mazza, Note, *The Right To Wear Headscarves and Other Religious Symbols in French, Turkish, and American Schools: How the Government Draws a Veil on Free Expression of Faith*, 48 J. CATH. LEGAL STUD. 303 (2009).

messages of their deepest commitments are permanently barred from taking a place in our array of public symbols and rituals. They must give up the Altar of Victory.

From the pagan perspective, that is not asking much. But given the depth of commitment of some religious believers, their view that they are uniquely shut out from expressing some beliefs through official public action, along with the fact that such symbols “help to constitute and define the community” of which they are a part, makes it understandable that they may resist this settlement.<sup>251</sup> Thus, the story Smith tells about religious symbols, like his story of religious accommodation, can indeed be told in terms of competing Christian and pagan dispensations, the compromises each would offer, and the reasons each side might reject that offer, which in turn encourages the dynamic of conflict described above.

I have thus far offered a mostly descriptive and fairly supportive description of Smith’s argument. I have suggested that his account of disputes over public religious symbols is consistent with his larger narrative of a contest between would-be pagan and Christian dispensations and that this account has some power to illuminate our current disputes. That said, I am much more dubious about this account than I am about his application of the same framework to the accommodation debate. There is nothing wrong as such with “an artificial imposition” of an interpretation “upon a complex and messy reality.”<sup>252</sup> But too schematic or artificial a vision may lend more coherence to events and ideas than is warranted, and thus offer a false sense of clarity. I worry that this may be true here. I explore this concern in two steps, first asking questions about the “civil religion” framework that animates much of Smith’s discussion and then asking directly about the law of public religious symbols.

“Civil religion” is a complex term with no single definition.<sup>253</sup> In broad terms, it can be said to “refer[ ] to the widely held body of beliefs that are tied to the nation’s history and destiny. Although it possesses no formal creed, it is a kind of generic faith that relates the political society as well as the individual citizen to the realm

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<sup>251</sup> SMITH, *supra* note 1, at 273.

<sup>252</sup> *Id.* at 259.

<sup>253</sup> See Ellis M. West, *A Proposed Neutral Definition of Civil Religion*, 22 J. CHURCH & STATE 23, 23 (1980) (“The voluminous literature on civil religion indicates that the term has a multiplicity of meanings.”).

of ultimate meaning and existence.<sup>254</sup> But what it means to call it a “faith,” and how to define the term “civil” or identify the nature of the “religiosity” at work, are fraught questions.<sup>255</sup>

Smith’s discussion of civil religion adopts the definition employed by Robert Bellah: “that religious dimension, found I think in the life of every people, through which it interprets its historical experience in the light of *transcendent reality*.”<sup>256</sup> This is a reasonable choice: Berger is one of the most influential writers on civil religion, and his definition is widely used. His work is also conveniently congenial to Smith’s thesis. Drawing on Bellah’s definition allows Smith to emphasize the idea of civil religion as grounded in “a transcendent religiosity.”<sup>257</sup> He notes that Berger’s definition supports the transcendent understanding of religion because it is based on “a species of Christianity, or at least a biblically based form of public religion.”<sup>258</sup>

Berger’s is not the only available understanding of civil religion, however.<sup>259</sup> For one thing, civil religion includes not only religious ceremonies that have been woven into the fabric of our national identity but also nonreligious ceremonies and concepts—a whole “system of rituals, symbols, values, norms, and allegiances”—that help invest our national identity with common

<sup>254</sup> Richard V. Pierard, *The Role of Civil Religion in American Society*, in THE OXFORD HANDBOOK OF CHURCH AND STATE IN THE UNITED STATES 479, 480 (Derek H. Davis ed., 2010).

<sup>255</sup> See, e.g., West, *supra* note 253, at 23–24 (discussing how disciplinary and political views affect the definition of civil religion); *id.* at 27–37 (exploring possible definitions of “civil” and “religion”).

<sup>256</sup> SMITH, *supra* note 1, at 261 (quoting BELLAH, *supra* note 209, at 3).

<sup>257</sup> *Id.* at 263. For another definition of civil religion that similarly emphasizes the transcendent, see West, *supra* note 253, at 39 (“A civil religion is a set of beliefs and attitudes that explain the meaning and purpose of any given political society in terms of its relationship to a *transcendent, spiritual reality*, that are held by the people generally of that society, and that are expressed in public rituals, myths, and symbols.”). The original passage is italicized in full; I have rendered it in normal type except for the emphasis on transcendence.

<sup>258</sup> SMITH, *supra* note 1, at 261.

<sup>259</sup> For an excellent discussion of the history of civil religion in the United States and its multiple manifestations, one that Smith notes as well, see generally PHILIP GORSKI, *AMERICAN COVENANT: A HISTORY OF CIVIL RELIGION FROM THE PURITANS TO THE PRESENT* (2017). For another fascinating recent book, one that discusses the varieties of American civil religion through the lens of foreign policy, see WALTER A. MCDUGALL, *THE TRAGEDY OF U.S. FOREIGN POLICY: HOW AMERICA’S CIVIL RELIGION BETRAYED THE NATIONAL INTEREST* (paperback ed. 2019). It is worth seeking out the paperback rather than the hardcover edition of this book because of its excellent preface addressing developments since the book’s original publication in 2016, particularly the election of President Donald Trump.

ties of creedal and sentimental significance.<sup>260</sup> A more secular and immanent vision of civil religion defines it as a “democratic egalitarian faith,” under which “[t]he humane values of equality, freedom, and justice can exist and be affirmed without depending on a transcendent deity or a spiritualized nation.”<sup>261</sup> Indeed, a variety of definitions and distinctions have been offered for civil religion, not all of which emphasize the transcendent.<sup>262</sup>

To be sure, the presence of such definitions supports Smith’s description of the revival of immanent or pagan understandings of “the city” and its practices. Indeed, one critical discussion of contemporary civil religion might be especially pleasing to Smith, insofar as it is strikingly similar to much of his book’s broader description of current trends in modern “paganism.” Walter McDougall writes that such a

new civil religion will be spiritual inasmuch as it pays lip service to a godhead with no qualities whatsoever except to be ecumenical, androgynous, nurturing, and affirming. It will be humanitarian to the point that it even suppresses freedoms of speech, assembly, and religion in the name of therapeutic equality.<sup>263</sup>

But the presence of competing visions of civil religion itself, some more immanent and some more transcendent, also complicates any clear story here. That complexity increases when it becomes clear that they do not march in neat chronological order from transcendent to immanent, but vary in prominence at different times, sometimes coexisting and sometimes competing.<sup>264</sup>

The complexity increases still further when we consider that both immanent and transcendent versions of civil religion can take many forms<sup>265</sup> and contain internal tensions, conflicts, and contradictions. Barack Obama, whose political success and positions on social issues are treated by Smith as “victories for the devotees of immanence,”<sup>266</sup> also “drench[ed] his presidency in civil religion,”<sup>267</sup>

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<sup>260</sup> Pierard, *supra* note 254; *see id.* at 481 (noting that some treatments of civil religion “emphasize the deity, whereas others see the nation itself as the reference point of highest loyalty and final judgment”).

<sup>261</sup> *Id.* at 482.

<sup>262</sup> *See, e.g., id.* at 481–82.

<sup>263</sup> MCDUGALL, *supra* note 259, at 353.

<sup>264</sup> *See id.*

<sup>265</sup> *See generally* MARTIN E. MARTY, *Two Kinds of Two Kinds of Civil Religion, in AMERICAN CIVIL RELIGION* 139 (Russell E. Richey & Donald G. Jones eds., 1974).

<sup>266</sup> SMITH, *supra* note 1, at 344.

<sup>267</sup> MCDUGALL, *supra* note 259, at 348.

including transcendent religiosity. At least until it became politically inconvenient, he worshipped under a pastor with a distinctly prophetic conception of God's interaction with the nation and the world.<sup>268</sup> Both transcendent and immanent civil religion can end up compromised, neither offering a standard "by which to judge [and justify] the nation" nor constituting us as a whole "people."<sup>269</sup> McDougall argues that American civil religion, whether immanent or transcendent, often ends up striking Devil's bargains, allowing Americans "to feel good about doing well."<sup>270</sup> It is hard to see this longstanding version of civil religion as saying much about a sacredness that lies "outside the world."<sup>271</sup> Finally, it is hardly clear what direction American civil religion is taking. Despite the seeming rise of paganism or immanent religiosity, Donald Trump, a "secular, worldly" figure, offered "by far the most spiritually drenched [inauguration] in the 228 years of the presidency."<sup>272</sup> Given our unsettled culture and politics, it is unclear which of the many past "dispensation[s]" of American civil religion might re-emerge or what form a new one might take.<sup>273</sup>

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<sup>268</sup> *See id.*

<sup>269</sup> SMITH, *supra* note 1, at 261 (quoting BELLAH, *supra* note 209, at 2, 174).

<sup>270</sup> MCDUGALL, *supra* note 259, at 31. He writes:

[T]he ACR [American Civil Religion] brooks no divergence between ideology and interest because the American Dream that venerates life and liberty also venerates opportunity, prosperity, and the pursuit of happiness. To freedom-loving Americans God's material blessings are simply a birthright. In other words, Americans want to feel good about doing well. So historians distort reality whenever they pit idealism against realism or ideology against economics because civil religion is omnivorous and digests any antimony. But civil religion is always in more or less flux because each generation must re-imagine the national God who blesses whatever foreign policy posture Americans, or at least their elites, believe the times demand.

*Id.*; *see also id.* at 259 (arguing that "the appeal of every version of American Civil Religion" is that it provides "the right to feel good about doing well"); *id.* at 340–50 (arguing that the kind of American civil religion most characteristic of what Smith would call pagans or believers in the immanent—one "[l]ed by increasingly apostate elites" concentrating on universal human rights and other progressive values and championed by modern liberal or progressive presidents such as Clinton and Obama—involved "a grand [elite] bargain" in "which big business agreed to support radical social equality, in exchange for which cultural authorities agreed to tolerate radical economic inequality"); *id.* at 353 (predicting that if a modern, politically progressive immanent civil religion emerges, it "will be transnational, administrative, and egalitarian in every corner of life except the ones that count most—namely, power and wealth").

<sup>271</sup> SMITH, *supra* note 1, at 112 (emphasis omitted).

<sup>272</sup> MCDUGALL, *supra* note 259, at xii.

<sup>273</sup> *Id.* at xi–xv.

These complexities do not all contradict Smith's arguments. But they suggest that our messy reality cannot be captured by the simple picture he paints of civil religion. We need not take Berger as offering the authoritative definition of civil religion. Had Smith chosen a different one, it would be harder to draw a stark distinction between transcendent and immanent versions of civil religion and to depict the latter as a new or revived competitor with the former. Rather than attempt to arrive at a single definition, one might instead emphasize the competing conceptions of civil religion, their historical contingency, and the ways in which different conceptions and definitions mix as well as compete. Or one might conclude that civil religion defies definition. Under any of these approaches, it is harder to speak about a neat Christian-pagan or transcendent-immanent contest over civil religion.

What of the *law* with respect to public religious symbols? Recall that Smith's thesis is that "[i]n prohibiting endorsements of 'religion,' the 'no endorsement' doctrine might mean that government is forbidden to endorse traditional or transcendent religion," while "'secular' expressions of more immanent religiosity might be permissible."<sup>274</sup> "[G]eneric [religious] expressions," sometimes including the invocation of God, that are "at least susceptible . . . of an immanent interpretation" are more likely to be upheld than expressions that are "more obviously sectarian" or transcendent.<sup>275</sup>

It is true that the Court does not blink at public symbols, such as the display of the flag, that "stir citizens' feelings of reverence and devotion."<sup>276</sup> It is equally true that courts are more likely to frown on openly sectarian governmental religious statements. But does the transcendent-immanent distinction really capture what is going on in these cases?

One problem here concerns judicial rhetoric. How deeply should we read the Supreme Court's statements on these questions? Not very, surely. The justices may write strategically, taking the sting out of something like a ruling striking down a flag-burning statute by offering a fulsome tribute to the flag. They may write honestly but without much sincerity. Or they may be sincere but shallow, throwing around evocative language without thinking much about its deeper implications. A judicial robe is hardly proof against

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<sup>274</sup> SMITH, *supra* note 1, at 276 (emphasis omitted).

<sup>275</sup> *Id.* at 279–80.

<sup>276</sup> *Id.* at 277.

shallowness. And all this is true without even considering the role of law clerks, with their youth and callowness, in the writing process.

To be sure, the culture in which judges live leaves its traces on the language they use, whether they mean it to or not. Nonetheless, one should avoid reading more meaning into their choice of words than really belongs there. The justices may use terms like “sacred” or “consecrate” not falsely but casually, and certainly without any considered conclusions about the immanent or transcendent nature of sacredness. We should generally be cautious about finding deeper social significance in what justices write, just as we should hesitate before drawing conclusions about musical genius and creative intention from the lowing of a particularly euphonious cow.

Another problem lies between rhetoric and substance. It is true that outright sectarianism in government speech or funding raises Establishment Clause problems.<sup>277</sup> But it is not clear how much we can conclude about the cases that lie in the middle ground, the ones Smith focuses on.<sup>278</sup> The proposition that government statements involving “more immanent religiosity might be permissible” may have less to do with the kind of religiosity involved than with the the bland, lowest-common-denominator nature of these statements. Such statements can be consistent with either an immanent *or* a transcendent reading.<sup>279</sup> In any case, they involve the kinds of symbols that, from the justices’ perspective, may seem both least objectionable and least worth spending judicial capital on, in the event that citizens are angered by a decision invalidating such a practice.

It is true that court decisions upholding such practices often rely on rationales that minimize the religiosity of a statement or symbol.<sup>280</sup> And it is understandable that these rationales will be

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<sup>277</sup> Although that may have more to do with history, precedent, and political equality than with transcendent religiosity. See David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 561 (2002).

<sup>278</sup> SMITH, *supra* note 1, at 276–81.

<sup>279</sup> *Id.* at 276.

<sup>280</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 680, 682 (1984) (noting that a public Christmas display “principally take[s] note of a significant historical religious event long celebrated in the Western World,” and inclusion of a crèche in that display “merely happens to coincide or harmonize with the tenets of some . . . religions” (ellipsis in original) (citation omitted)); *id.* at 691–92 (O’Connor, J., concurring) (finding that a city’s sponsorship of a Christmas display had a secular legitimate

“unconvincing both to serious nonbelievers and to serious believers.”<sup>281</sup> But even those opinions in which justices offer secular justifications for religious symbols or displays often also contain statements that are more consistent with transcendent religiosity. They uphold particular religious statements or symbols not *because* they are secular or have been stripped of religious significance, but because they have both secular *and* religious significance.<sup>282</sup> These opinions often focus on history. But that does not necessarily mean they accept the public religious statements under dispute *only* as a historical statement or hallowed but secularized practice. They also employ history in order to conclude—in a way that is consistent with *transcendent* religiosity—that “official references to the value and invocation of Divine guidance” are permissible whether the official was a long-dead Framers or a “contemporary leader[ ].”<sup>283</sup>

Thus, a justice who insists that holidays like Christmas and Chanukah must be celebrated as “secular holidays” for government to be involved may also acknowledge that those holidays necessarily have “both religious and secular dimensions.”<sup>284</sup> Likewise, even when insisting that a cross in a war memorial is “intended simply to honor our Nation’s fallen soldiers,” the Court will acknowledge forthrightly that the cross is “certainly a Christian symbol.”<sup>285</sup> Although he rejected the proposition that the words “under God” make the Pledge of Allegiance a “religious exercise,” Chief Justice Rehnquist also emphasized that to some of “the millions of people

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purpose as a “[c]elebration of public holidays, which have cultural significance even if they also have religious aspects,” adding that Christmas “has very strong secular components and traditions”); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35, 40 (2004) (O’Connor, J., concurring) (contending that government references to religion are permissible where, although they “speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes”).

<sup>281</sup> Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 235 (2004).

<sup>282</sup> See, e.g., Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 94 (2007) (arguing that the 2005 Ten Commandments decisions “made clear that displays having historical as well as religious significance generally do not violate the Establishment Clause”).

<sup>283</sup> *Lynch*, 465 U.S. at 675.

<sup>284</sup> *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 614 (1989) (plurality opinion).

<sup>285</sup> *Salazar v. Buono*, 559 U.S. 700, 715 (2010) (plurality opinion).

who regularly recite the Pledge,” the phrase could mean “that God has guided the destiny of the United States” or that “the United States exists under God’s authority.”<sup>286</sup>

In sum, Smith is right that the Court has rejected outright sectarianism in government religious symbols. He is right, too, that when the Court upholds such symbols it generally emphasizes the possibility of a “secular,” but still solemnizing or “sacred,” understanding of the symbol. But, in keeping with the mixed nature of most such symbols, the Court has not always done so in ways that reject transcendent religiosity or require that a symbol have *solely* immanent significance. I find it unlikely that the Court has reflected deeply on these distinctions in its judgments. But its language at least allows for transcendent understandings of constitutionally permissible public religious symbols, even if it requires that transcendent religiosity not be the sole or primary purpose or effect of these expressions.

Finally, it is likely that the current Court will increasingly and more openly acknowledge the transcendent meaning of permitted government religious symbols. Consider *Town of Greece v. Galloway*,<sup>287</sup> in which the Court upheld a town board’s prayer practice. As is typical of his jurisprudence, Justice Kennedy combined the central holding—that we must look to “historical practices and understandings” to determine the Establishment Clause’s meaning—with various side-constraints, such as that prayer policies should avoid a “course and practice” of “denigrat[ing] nonbelievers or religious minorities.”<sup>288</sup> And he offered bland statements, consistent with immanent religiosity although not necessarily in conflict with transcendent religiosity, about the solemnizing and conciliatory function of legislative prayer.<sup>289</sup> Nevertheless, the Court permitted long-established public religious symbols and practices on historical grounds alone, even though a practice might have been rooted in transcendent religiosity and many might still understand it that way; and it affirmed that some of those practices could include openly sectarian, *transcendent* statements.<sup>290</sup>

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<sup>286</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in the judgment).

<sup>287</sup> 572 U.S. 565 (2014).

<sup>288</sup> *Id.* at 576, 583 (citation omitted).

<sup>289</sup> *See, e.g., id.* at 575, 582–83.

<sup>290</sup> *Id.* at 578–82.

The historical approach is likely to take on a greater role in government religious display cases given recent personnel changes on the Supreme Court.<sup>291</sup> If it does, it will free up the justices to acknowledge more frankly the transcendent religiosity of the government religious symbols and statements they uphold. They will be freer to reject Justice O'Connor's arguments that religious displays can be approved *only* if they have been leached of religious content and to insist instead that a religious statement can indeed be strongly *religious*, even if it has other purposes.<sup>292</sup> I make no judgment here about whether this trend is good or bad.<sup>293</sup> My point is simply that it complicates Smith's conclusion that the Court has "remove[d] the transcendent or Christian stratum of American civil religion."<sup>294</sup> At a minimum, I suspect his conclusion will have a short shelf life.

Thus, while much of Smith's account is illuminating, I fear that with respect to religious symbols, his "imposition" of order is *too* "artificial" to help make sense of the "complex and messy reality" we confront.<sup>295</sup> It may be that the law in this area is messy *because* of the contest between dispensations that frames Smith's project. His account may help us see aspects of that contest that are hidden within the murk of the Court's opinions. But I doubt it can do more than that.

I close this section, and offer a segue to the next and final part, with some observations on Smith's provocative conclusion to his discussion of debates over "[s]ymbols, [s]ex, and the Constitution."<sup>296</sup> Smith argues that the symbols debate (and the debate over sexuality, which I have omitted here) is connected to a larger issue: "If the Constitution has been employed to make public symbols and sexual norms less Christian and more pagan,

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<sup>291</sup> See Paul Horwitz, *The Religious Geography of Town of Greece v. Galloway*, 2014 SUP. CT. REV. 243, 250–53. For more recent evidence from the Supreme Court, see *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087–89 (2019) (relying in part on history and tradition to uphold the constitutionality of the "Bladensburg Cross").

<sup>292</sup> For a recent example, see Transcript of Oral Argument at 59, *Am. Legion*, 139 S. Ct. 2067 (2019) (No. 17-1717), 2019 WL 955301 (question by Justice Kavanaugh treating the war memorial cross in that case as indisputably a "religious symbol").

<sup>293</sup> For one version of my views on that question, offered before some of the most recent developments on the Court, see HORWITZ, *THE AGNOSTIC AGE*, *supra* note 149, at 262–66.

<sup>294</sup> SMITH, *supra* note 1, at 281.

<sup>295</sup> *Id.* at 259.

<sup>296</sup> *Id.* at 258.

the deployment of the Constitution for those ends has had the effect of making the Constitution itself a more pagan instrument.”<sup>297</sup>

The Constitution, on his view, is not itself “an overtly Christian document.”<sup>298</sup> Rather, it is agnostic, “deliberately avoid[ing] any meaningful acknowledgment” of a transcendent God—or a pagan immanent spirit, for that matter.<sup>299</sup> Smith has written that the agnostic structure of the Constitution accomplished “what for centuries many had thought impossible—namely, to take a mass of individuals and groups embracing a multitude of different faiths and, without suppressing their differences, to hold them together as a single community.”<sup>300</sup> Now, however, the “pagan” legal turn with respect to religious symbols, along with changes in the legal status of “Christian norms of sexual morality and marriage,” has rendered the Constitution neither agnostic nor “Christian” but pagan.<sup>301</sup> Smith paints the result in technically neutral but distinctly dire terms:

In doing so, for better or worse, the Court has transformed the nation’s most fundamental law—one that once stood majestically above the fray of contesting religious and secular conceptions of the community, and hence could serve as an anchor for the allegiance even of citizens who found themselves in the situation of being a political or cultural or religious minority—into a partisan instrument in the struggle between transcendent and immanent conceptions of the city.<sup>302</sup>

Notwithstanding the seeming neutrality of “for better or worse,” it is hard to read this as anything other than a lament. And it raises the obvious question: *Was* the Constitution ever, in theory or in practice, “above the fray”? How could it possibly regain a position above the fray today? And how does this thesis, along with the lament for the lost agnosticism of the Constitution, comport with Smith’s broader argument?

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<sup>297</sup> *Id.* at 295.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* For a more detailed discussion, see generally Smith, *Our Agnostic Constitution*, *supra* note 231.

<sup>300</sup> STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 103 (2014).

<sup>301</sup> SMITH, *supra* note 1, at 299.

<sup>302</sup> *Id.* at 299–300.

Skepticism about laments like this usually focuses on the present. No matter what golden age of consensus we once enjoyed, the skeptic says, conditions of pluralism and polarization today make real common ground impossible. But we might just as easily ask whether the Constitution was *ever* in this happy position. Even in his short account here, Smith notes that “a faction” during the drafting and ratification period “wanted to acknowledge Christianity in the nation’s fundamental law,” and that the post-Civil War period saw competing constitutional amendments that would have made the Constitution either explicitly secular or explicitly Christian.<sup>303</sup> And a longer account of American history would record many “ugly, even violent” acts of religious repression, contestation, combat, and bigotry.<sup>304</sup> Both the proposed constitutional amendments and the legal disputes that ensued once the Religion Clauses became a matter for judicial review suggest that the Constitution was always a part of this contest. Can we then really say that it was ever “majestically above the fray”?

Could we say it today? The value of the agnostic Constitution, Smith argues, is that although “almost all Americans would in different times and circumstances find themselves out of harmony with positions taken by national, state, or local governments,” they would at least have the comfort of an overarching agnostic Constitution that refuses “to put its imprimatur on either Christian or secular (or pagan) conceptions of the community.”<sup>305</sup> But his reference to a “struggle between transcendent and immanent conceptions of the city” reminds us that “the city” in any given era is not a clearly demarked territory but a label for the reigning authority and the scope of its power.<sup>306</sup> Nationalizing forces in culture, politics, and media, quite apart from any legal developments, have pushed us toward a conception of our “city” as the entire nation—as a singular *The United States*.<sup>307</sup> Under those conditions, it seems natural that the nation as a whole will be the subject of partisan contestation between Christians and pagans,

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<sup>303</sup> *Id.* at 295–96.

<sup>304</sup> SMITH, *supra* note 300. For a response to Smith’s relatively cheery account in that book, see Horwitz, *supra* note 2, at 951–53.

<sup>305</sup> SMITH, *supra* note 1, at 296–97.

<sup>306</sup> *Id.* at 300.

<sup>307</sup> For discussion, see Minor Myers, *Supreme Court Usage & the Making of an ‘Is,’* 11 GREEN BAG 2D 457, 457–58 (2008).

or between transcendent and immanent views in the American “city.” As its governing law, the Constitution will inevitably be a part of that contest.

This view seems more consistent with Smith’s general narrative. *Pagans and Christians in the City* is the story of a “recurring” and “centuries-long struggle” stemming from the fact that each offered compromises the other side could not accept, leading to “a struggle for ‘domination’—for control of the cultural and political community and the self-conception by which the community constitutes and governs itself.”<sup>308</sup> If he is right about that, it seems hard to believe that the Constitution ever was, or could be today, above the fray. Surely it was always subject to being a partisan instrument in the recurring battle. Even if one accepts Smith’s historical description, the *longue durée* perspective he offers in this book encourages us to view any momentary harmony as a brief pause in a longer conflict. If his book as a whole suggests anything, surely it is that if the Constitution ever *was* above the fray, that was the exception. Its current status as a field of combat is the norm we ought to expect.

#### CONCLUSION: THE POLITICAL DYNAMIC OF THE “CHRISTIAN-PAGAN STRUGGLE”

In this Essay, I have glossed Smith’s book mostly on its own terms and argued that it offers insight into our ongoing and vexing struggles over religious liberty, on and off the courts. If its use of the “Christian” and “pagan” labels is deliberately provocative, it is also instructive, at least if one keeps in mind Smith’s broad definitions of those terms. Although I am less convinced by his application of the Christian-pagan or transcendent-immanent distinction to the debate over religious symbols and civil religion than by his application of that distinction to the religious accommodation debate, both are unquestionably useful. They offer a new lens with which to view culture-war conflicts that are real, but whose terms can become so tired and familiar as to arrest one’s understanding rather than advance it.

If I have added anything new to Smith’s account from this more or less internal perspective, it is to provide a more detailed description of the dynamic of offer and refusal, counteroffer and counter-refusal, and conflict that Smith identifies first in the

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<sup>308</sup> SMITH, *supra* note 1, at 1, 130–31, 265.

ancient Christian-pagan battle and then again in our own times.<sup>309</sup> It is worth quoting Smith again. In both eras, each side in the culture wars takes its turn as the reigning dispensation. From that position, it “[holds] out terms of mutual accommodation that seem[] fair and reasonable *to them*, but that for discernible reasons [are] not . . . accepted by the other side.”<sup>310</sup> That each side at some point is, or seeks to be, not just a side but a ruling dispensation, and that the conflict has as much to do with the compromises that are offered as with a more fundamental clash of positions, are both neglected insights into the present culture wars.

One value in drawing on the ancient Christian-pagan struggle to understand this dynamic is that, for most of us, that past is distant enough for one to feel little emotional identification with either side.<sup>311</sup> From a disinterested perspective, one can see that each side thought of itself as offering a reasonable and acceptable compromise. Each side, whether in or out of power, understood itself to be seeking a “peaceful coexistence [that] should be possible on fair and mutually acceptable terms.”<sup>312</sup> It did so by offering what it saw as a compromise that—from *its* perspective—asked relatively little of the other side: just a few grains of incense. It saw its own actions not as “gratuitously vindictive or malicious” but as fair and reasonable.<sup>313</sup> The very fact that the other side—understandably and reasonably, from *that* perspective—saw the offer as unacceptable fueled a sense that it was the *other* side that was foolish, malicious, and potentially dangerous. Faced with what looks from one’s own perspective like an “inflexible, dogmatic” group, it is natural to conclude that the other side is “undeserving of accommodation”: so unlikely to be satisfied with *any* offer that there is little use in trying.<sup>314</sup>

It is natural that the logic of persecution should follow from such premises. It is natural, too, that the result is “a struggle for ‘domination’—for control of the cultural and political

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<sup>309</sup> See *id.* at 130–31.

<sup>310</sup> *Id.* at 131.

<sup>311</sup> This is so, I think, despite the many contemporary authors Smith cites who take strong positions for one side of the battle or the other. Those authors are not so much engaged in yesteryear’s battles as they are using the past to fight the conflicts of the present day.

<sup>312</sup> SMITH, *supra* note 1, at 136.

<sup>313</sup> *Id.* at 154.

<sup>314</sup> *Id.* at 153.

community.”<sup>315</sup> Nor, given the importance of the perceived stakes and the ways in which a dominant culture will permeate all manner of public and private customs and institutions, is it surprising that these battles should not only occur within particular borders—such as the official apparatus of the “city”—but also include battles over the borders themselves: over what is public and what is private.

Two millennia is perhaps not enough time to get full emotional distance from these disputes. But it is a start. That distance may help us understand our own times and our own conflicts better. That is so not just in the sense, ably pursued by Smith in his book, that we are facing many of the *same* struggles over the same issues: over “Christianity” and “transcendence,” broadly conceived, and “paganism” and “immanence.” It is also true in that the ancient contest between the pagans and the Christians better helps us understand the *dynamics* of modern-day struggles for cultural dominance.

Not least, it may help us to understand these dynamics more sympathetically. Observing the ultimate failures of mutual understanding in the ancient struggle, we may be slower to see our side as reasonable and the other side as stubborn, calculating, and undeserving of accommodation. We may accept the possibility that our opponents are acting in good faith *from their perspective*. We may see that despite good faith, each side fails “fully to grasp and credit the other side’s commitments,” and thus offers “reasonable” compromises—surrendering the ability to fully honor one’s deep religious commitments, on the one hand, or accepting less than the full measure of dignity and equality that is every person’s right, on the other—that are understandably unacceptable.<sup>316</sup> We may thus better understand the dynamic of conflict and power struggle that ensues.

None of this provides an answer. Maybe there is none to be had. “[C]onflict is the name of our condition, and moreover, naming it does nothing to ameliorate it or make it easier to negotiate.”<sup>317</sup> Even recognizing that the other side is reasonable by its own lights and is offering a sincere compromise will not make that compromise any more palatable if it fails to grasp our

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<sup>315</sup> *Id.* at 265.

<sup>316</sup> *Id.* at 136.

<sup>317</sup> Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2332 (1997).

deep commitments and demands more than we can give. One may conclude that the other side is reasonable and acting in good faith and *still* believe just as strongly that the only answer is to win, although Smith's history suggests that it won't be a final victory. Winning is, after all, "like, better than losing."<sup>318</sup> For scholars and noncombatants, however, there may be at least some value in naming and understanding our condition. Even some of the combatants may approach the field of battle differently if they understand it better.

In that spirit, two aspects of the dynamic of the Christian-pagan conflict that are not covered by Smith are worth exploring. Both are descriptive. Neither is especially hopeful. Indeed, the second point suggests that the field of conflict is even wider than the one Smith depicts in his book. Still, both may help us understand the current conflict better.

First, we might add further detail and nuance to the dynamics, or political economy, of the conflict Smith describes. The picture I draw is itself an effort to impose an interpretation on a "complex and messy reality."<sup>319</sup> To the extent that it gets things right, however, it adds detail to the general story Smith tells.<sup>320</sup>

Consider, then, the question whether and why any of the compromises described in Smith's book were ever acceptable to both sides.<sup>321</sup> At a minimum, it seems true that some periods of

<sup>318</sup> BULL DURHAM (Orion Pictures 1988).

<sup>319</sup> SMITH, *supra* note 1, at 259.

<sup>320</sup> I have explored some of these issues in past writings. See Horwitz, Hobby Lobby, *supra* note 116, at 159–60; Horwitz & Tebbe, *supra* note 165.

<sup>321</sup> The list of compromises here may include not only those offered by the ancient or present-day Christians or pagans but also Smith's description of the Constitution *itself* as a compromise, and his description of various calm moments in the history of American church-state relations. Such moments include the relative placidity of church-state relations in the mid-twentieth century, a period of what William Lee Miller called "[p]iety along the Potomac," see generally WILLIAM LEE MILLER, PIETY ALONG THE POTOMAC: NOTES ON POLITICS AND MORALS IN THE FIFTIES (1964); see also HERBERG, *supra* note 246. This was the period in which it was still possible for a separationist justice to declare that "[w]e are a religious people whose institutions presuppose a Supreme Being" without provoking the kind of fierce response we might see today. *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952). Justice Douglas's statement itself was a shift from the Court's earlier pronouncement that "[w]e are a Christian people." Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 281–82 & n.40 (2007) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (quotation and citation omitted)); see also Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1020–22 (1991) (discussing the consensus and "optimism" of this era, the presence of inter-faith "alliance[s] which transcended denominational boundaries," and "the taming effect

church-state, or Christian-pagan, relations in American history seem to have been calmer and less conflict-ridden than others.<sup>322</sup> Sometimes, in other words, the compromises offered by the ruling dispensation *seem* to have been accepted and to have worked relatively well. At other times, that compromise is rejected, both sides are at loggerheads, and the broader culture is characterized more by conflict than by common ground. Why are some periods relatively successful in keeping the peace while others—arguably including our own—are not?

Despite considerable literature on law and social change, our discussion of these issues often focuses “on the longer temporal sweep of social and legal development” while giving us too little information about the nature of those moments within “the life cycle of social and legal change,” in which particular issues move from being relatively uncontested to a state of “foregrounded contestation.”<sup>323</sup> It tells us too little about the moves, mechanisms, institutions, and incentives of those moments of deep contestation: in short, about the political economy of moments such as this one.

I would argue that periods of relatively successful compromise are most likely under two conditions. The first is unsurprising. Peace is more likely to prevail when one side has most of the power and represents the shared views of both most of the people *and* most of the elites who are in a position to offer and enforce compromises. The need for consensus between the people and the governing elites is an especially important factor that has

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that America’s ‘toleration’ but ‘separation’ model of church/state relations [had] on American religion,” while acknowledging criticisms of the era as one of “shallow complacency” and “a religion that had become only bland Americanism,” and noting the “complex inner dilemmas” that lay beneath the “public veneer” of the then-prevailing consensus).

<sup>322</sup> See, e.g., Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1070 (1996) (describing Herberg’s account of the Eisenhower era as one in which it seemed that “the United States had solved the problem of religious conflict, and that it had achieved substantial consensus on religious matters,” while noting the existence of “another fault line, just below the surface and ready to erupt”). That fault line, which is treated by Smith in his discussion of the “[s]truggle over [s]exuality,” SMITH, *supra* note 1, at 282–94, was the imminent “dramatic reaction against some of the traditional values of all three [major Judeo-Christian] faiths,” not least sexual values, Laycock, *supra*; see also Laycock, *supra* note 8, at 839 (emphasis omitted) (“Religious liberty has become much more controversial in recent years.”); Horwitz, Hobby Lobby, *supra* note 116, at 155 (internal quotation marks omitted) (“In the space of a few short years, the basic terms of the American church-state settlement have gone . . . from being taken for granted to being up for grabs.”).

<sup>323</sup> Horwitz, Hobby Lobby, *supra* note 116, at 157, 185–86.

garnered considerable attention of late.<sup>324</sup> Where there is widespread public consensus and that consensus is shared by those who are in a position to justify (or rationalize), enforce, and entrench it, the ruling dispensation is more likely to succeed. It may offer a relatively thin compromise, and the compromise may seem reasonable only to the party in power, but the history Smith provides suggests that it will put *something* on the table.

The second condition under which compromise succeeds may be more surprising. It is more possible at moments when *neither* dispensation is securely in power and neither side is certain who will win. When one side is certain that it is about to achieve a strong political victory, taking a “hard line” may seem like a viable and attractive approach.<sup>325</sup> By contrast, when it is uncertain which dispensation will prevail, compromise may be preferable to uncertainty and there will be greater incentive to find a common-ground solution.<sup>326</sup> Although the point is rarely put directly, it clearly has mattered in recent culture-war arguments. Many recent discussions of free exercise law and the possibility of legislative compromise between religious liberty and LGBTQ rights have focused on the question whether compromise is still possible, or whether changes in the legal and cultural consensus have rendered compromise less necessary and less attractive.<sup>327</sup> If the battle for power has much to do with the desire

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<sup>324</sup> For recent attempts to understand these issues, spurred by the rise of populism and the election of Donald Trump, see generally, for example, ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* (2018); JOHN SIDES ET AL., *IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA* (2018). For pre-Trump analyses of the divide between elites and the larger public, see, for example, CHRISTOPHER HAYES, *TWILIGHT OF THE ELITES: AMERICA AFTER MERITOCRACY* (2012); CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960–2010* (2013).

<sup>325</sup> See, e.g., Horwitz, *Positive Pluralism*, *supra* note 116, at 1019–23 (discussing Mark Tushnet’s argument, before Donald Trump’s election and in seeming confidence that he would lose, that liberals should “tak[e] a hard line” rather than “trying to accommodate the losers” (quoting Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/5NYG-P54P>])).

<sup>326</sup> Cf. Alex Y. Seita, *Uncertainty and Contract Law*, 46 U. PITT. L. REV. 75, 108 (1984) (“The uncertainty of prevailing in court provides an incentive for a risk-averse party to compromise even though he sincerely believes that he is the aggrieved or innocent party.”).

<sup>327</sup> See, e.g., Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717, 728–30 (2017–18) (noting a brief window in which compromise over the contraceptive mandate “temporarily brightened” because of a court-created greater equilibrium between the contending

to be the side *offering* the compromise rather than the one faced with the choice whether to accept it or not, then not knowing who will be the offeror and who will be the offeree is a good moment for some kind of negotiated settlement.

Each type of peace—the peace made possible by the certainty that one holds power, and the peace made necessary because *neither* side knows who will hold power—is different and will result in different forms of compromise. But each provides the possibility of some stability and calm, however momentary. When the moment passes, we can expect the conflict to take on a fiercer and more uncompromising cast.

The current moment looks unpromising, despite the relative uncertainty presented by the division between elites and populists, the sudden shift in power in 2016, and uncertainty about whether and when it will suddenly shift again. The reason has much to do with the political economy of our current debates. We are arguably in a period of uncertainty about who will win. This suggests that compromise ought to be possible and attractive. But each side has strong incentives to argue that we are actually in the *first* type of situation—the situation in which one side is clearly dominant—and that *it* is the party in the driver's seat. Each side thus argues that the *other* side should accept whatever compromise it may deign to offer.

For the “pagans,” that means “Christians” will have some religious freedom, especially the freedom to believe and, within “reason,” practice what they wish in the private and noncommercial sphere but subject to the constraints of antidiscrimination law and other legal regimes. Conversely, the “Christians” invite the “pagans” to accept their victories on issues such as same-sex marriage while accepting the right of business owners and others

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sides, and arguing that with the election of Donald Trump and the decisive shift in the balance of power, both sides lost any incentive to compromise); Mary Anne Case, *Why “Live-and-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 472 n.36 (2015) (arguing that the prospect of a definitive ruling favoring the constitutionality of same-sex marriage meant that “the religious right has lost much of its chance to propose compromise” on this issue); Horwitz, *Positive Pluralism*, *supra* note 116, at 1019 (arguing that “pluralist interventions in a culture-war cycle require a very specific hospitable environment” in which “there is enough heated disagreement to make an alternative to the shouting seem attractive” and in which “both sides agree that there *is* a war, and think of either side as having a serious chance of winning it, leaving them amenable to compromise and coexistence,” and adding that the window for compromise on culture-war issues “may already have closed”).

to refuse to provide service to some customers, to subsidize contraceptive services, and so on. Whatever the actual balance of power may be, each side has a strong incentive to describe itself as holding the reins, and thus to insist that it need not accept the compromise offered by the other side but in fact is in a position to offer the compromise of *its* choice.

A variety of factors encourage this state of affairs. For one thing, there is arguably not one “city” but two. Each side occupies its own citadel. Because of physical sorting, online balkanization, and radically different information sources,<sup>328</sup> each side is convinced that it occupies the “real” city, the “real America,” and that the other side is in no position to bargain. This conviction is reinforced by through both online and offline discussion. Each side offers ever more strategic and rhetorically tilted narratives and arguments, seeking to galvanize its own side rather than persuade the other.<sup>329</sup> It is enhanced by electoral politics. That includes the work of interest groups, which naturally want to gain or retain influence and raise money. Everyone today who receives mail from candidates, parties, or interest groups is familiar with the standard pitch, which argues simultaneously that they are on the verge of a great victory and that this victory is in mortal peril (and thus in desperate need of a donation).

In short, each side has every incentive to argue that it is always *almost* winning and always gravely threatened. Each side encourages its adherents to believe that they are the ones who have won, or are about to win, the culture wars and that their adversaries are unreasonable, unprincipled, and pose a clear threat. Under these circumstances, it is unsurprising that the struggle for “control of the cultural and political community” not

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<sup>328</sup> On these and other factors, see Horwitz, *Positive Pluralism*, *supra* note 116, at 1005 nn.29–32 (collecting sources).

<sup>329</sup> See, e.g., MATTHEW PRESSMAN, ON PRESS: THE LIBERAL VALUES THAT SHAPED THE NEWS 249 (2018) (arguing that mainstream media in the mid-to-late twentieth century were professional but generally drifted in a liberal direction and that economic and other factors have encouraged a more adversarial form of liberal-leaning journalism, even in mainstream newspapers, that represents a departure from the professional norms that once prevailed, a strategy that “suggest[s] that major news organizations are giving up on a large percentage of the population”). See generally YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018) (arguing that conservative media and online discussions form a feedback loop favoring conservative views and encouraging confirmation bias and radicalization).

only persists but has grown more bitter.<sup>330</sup> The political economy of the modern culture war has made it a perpetual motion machine. Things always change. But the current dynamics of our institutions and debates offer little reason to hope they will change any time soon.

The argument here is meant to add detail and nuance to Smith's broader narrative of the recurring conflict between "Christians" and "pagans." It uses a microscope to augment Smith's generally telescopic treatment. And I would add one further detail to that picture. In focusing on the constitutive value of symbols and their role in "battles over who we are," Smith focuses mostly on religious symbols.<sup>331</sup> He argues that they are especially important because "religious expressions may have a more fundamental alienating effect than other sorts of controversial public statements typically have."<sup>332</sup>

If that was ever the case, it may no longer be. Increasingly, at least in legal scholarship, the field of battle has expanded to take in other statements and symbols. An argument gaining steam among some writers on (and participants in) the broader culture wars suggests that the Constitution "imposes a broad principle of government nonendorsement," under which constitutional provisions such as the Equal Protection Clause, taken in combination with the First Amendment, should be read as "prohibit[ing] any [government] endorsement that abridges full and equal citizenship in a free society."<sup>333</sup> At a minimum,<sup>334</sup> this is an argument for limitations on any government speech that undermines the Constitution's "[c]ommitments to full citizenship, equal citizenship, and the maintenance of a free society."<sup>335</sup> Claims of this sort are quickly becoming more visible and popular in American constitutional scholarship.<sup>336</sup>

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<sup>330</sup> SMITH, *supra* note 1, at 131, 265.

<sup>331</sup> *Id.* at 272 (emphasis omitted).

<sup>332</sup> *Id.* at 273.

<sup>333</sup> Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 650 (2013) (emphasis omitted).

<sup>334</sup> *See id.* at 695–96 (noting the difficulty of determining the precise boundaries of the government nonendorsement principle).

<sup>335</sup> *Id.* at 702.

<sup>336</sup> *See, e.g.*, COREY BRETTSCHEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY 4 (2012); Michael C. Dorf, *Same-Sex Marriage, Second-Class-Citizenship, and Law's Social Meaning*, 97 VA. L. REV. 1267, 1283 (2011); Christopher L. Eisgruber & Lawrence G. Sager, *Chips off Our Block?: A Reply to Berg, Greenawalt, Lupu and*

This development is consistent with Marc DeGirolami's recent suggestion that given "the common theological, political, and cultural assumptions prevalent in American society across time," and the relation of both freedom of speech and freedom of religion to that larger "social superstructure," it is natural that both ultimately follow the same course of development—and that, in our own time, "the rights of free speech and religious liberty are likely to suffer similar fates."<sup>337</sup> The same disputes that have been so salient in law and religion in recent years are likely to recur in the area of free speech. Indeed, we have already seen a "migration of the 'weaponization' accusation from religious freedom to free speech over only a short span of years."<sup>338</sup> Likewise, as the government nonendorsement scholarship suggests, we are witnessing the application of the Establishment Clause-centered idea that some religious expressions have a "fundamental alienating effect" across a wider field of government speech.<sup>339</sup>

This should not be surprising, given the argument of Smith's book. If public symbols are understood to be "expressive and constitutive not just of particular private speakers and groups, but of the community," and thus part of a broader "battle[ ] over *who we are*," then it makes sense that our disputes over symbols will take in more ground than religion alone.<sup>340</sup> If our debates over religion have increasingly emphasized expressive and dignitary harms,<sup>341</sup> then it is unsurprising that people may come to believe that other government statements and symbols are *also* "fundamental[ly] alienating"<sup>342</sup> and equally deserving of legal redress. Moreover, if Smith is right in seeing a movement to

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*Tuttle*, 85 TEX. L. REV. 1273, 1281–83 (2007); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159 (2012); Micah Schwartzman & Nelson Tebbe, *Charlottesville's Monuments Are Unconstitutional*, SLATE (Aug. 25, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/08/charlottesville\\_s\\_monuments\\_are\\_unconstitutional.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/charlottesville_s_monuments_are_unconstitutional.html) [<https://perma.cc/UB9J-WBR6>]. For discussion, see Paul Horwitz, *A Close Reading of Barnette, in Honor of Vincent Blasi*, 13 FIU L. REV. 689, 713–15 (2019).

<sup>337</sup> Marc O. DeGirolami, *The Sickness Unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL'Y 751, 801, 804 (2019).

<sup>338</sup> *Id.* at 804.

<sup>339</sup> SMITH, *supra* note 1, at 273.

<sup>340</sup> *Id.* at 271–72. As I noted earlier, debates over public statues and symbols in the summer of 2020 support this argument and make clear that such debates are hardly limited to the realm of legal scholarship.

<sup>341</sup> See, e.g., Steven D. Smith, *Die and Let Live?: The Asymmetry of Accommodation*, 88 S. CAL. L. REV. 703, 708 (2015).

<sup>342</sup> SMITH, *supra* note 1, at 273.

expand the walls of the “city” so that things once thought of as belonging to the “private sphere” are now part of the “public domain,” then we can expect these battles over other symbols to embrace not only government speech but also speech within the marketplace.<sup>343</sup> And so we have, as fights over statues on campus, taking a knee at professional football games, and objectionable speech by corporate executives and others all demonstrate.

The legal and cultural war over symbols is thus unlikely to stop with religious symbols alone. Our civil religion and the fights over it have always included a wider range of values, symbols, rituals, and norms than just the narrowly religious. The struggle for power, including the power to define ourselves as a community, that Smith describes in the area of religion is ultimately part of a broader battle for control over our symbolic and discursive space in general. As large as it is, Smith’s canvas may not be large enough. We should expect more of the same. We cannot know whether the “city” will become “pagan” or “Christian” or for how long. All we can expect is that it will continue to be hotly contested ground.

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<sup>343</sup> *Id.* at 340 (emphasis omitted).