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IN GOD WE TRUST: THE JUDICIAL ESTABLISHMENT OF AMERICAN CIVIL RELIGION

JAMES J. KNICELY AND JOHN W. WHITEHEAD*

There is therefore a *purely civil profession of faith* of which the Sovereign should fix the articles, not exactly as religious dogmas, but as social sentiments without which a man cannot be a good citizen or a faithful subject.¹

I. INTRODUCTION

In his recent moral history of the American Civil War, Harry Stout, the Jonathan Edwards Professor of History at Yale University, vividly describes the sacraments of *de facto* American Civil Religion.² They include devotion to “sacred monuments” and battlefields (temples shrouded with a sense of “reverential awe”), sentimental allegiance to sacred texts, pledges and songs identifying America with celestial themes, undivided loyalty to the flag as “America’s totem”—an icon worthy to kill for and to be killed—with critics who burn it, “desecrators,” trampling on the divine.³ Presidents and Generals are the *de facto* prophets and priests of the sacred traditions of this civic faith, with West Point, its preeminent seminary. Many of these rites, sacraments, icons, and venerated places were born of the American Civil War—from what Stout describes as the rebirth of the union from “a sort of massive sacrifice on the national altar”—bonded by “a baptism of

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1. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, BOOK IV.

2. HARRY S. STOUT, *UPON THE ALTAR OF THE NATION: A MORAL HISTORY OF THE CIVIL WAR* (2006).

3. *Id.* at xviii-xix, 454.

blood [that unveiled] transcendent dimensions of th[e] union.”⁴ In this milieu, serving country is equated to serving God, and dying for country, dying for faith,⁵ a civil commitment “that deeply and widely binds the citizens of the nation together with ideas they possess and express about the sacred nature, the sacred ideals, the sacred character, and sacred meanings of their country.”⁶

Though less bellicose and jingoistic, and seemingly grounded in a spirit of humility and gratitude aimed more at the development of national character than national redemption, George Washington also fostered a tradition of acknowledging divine providence as a guiding force in the early years of the Republic. His pronouncements of public religion have been said to follow generally the Anglican Book of Common Prayer, frequently attributing founding events to providential superintendence.⁷ In his Circular Letter to the States in 1783, for example, Washington wrote to the Governors of the new states acknowledging both Old and New Testament traditions:

I now make it my earnest prayer, that God would have you, and the State over which you preside, in his holy protection . . . and finally, he would most graciously be pleased to dispose us all, to do Justice, to love mercy, and to demean ourselves with that Charity, humility and pacific temper of mind, which were the Characteristics of the Divine Author of our blessed Religion, and without an humble imitation of whose example in these things, we can never hope to be a happy Nation.⁸

No doubt, Washington’s example of infusing both official pronouncements and personal communications with an evident sense of divine direction during the early period of the country’s founding made him “the architect of a visible and durable public role for religion in American political culture.”⁹ Whether this was borne of political expediency in an emerging nation inheriting numerous and diverse state religious establishments, or a sense of genuine appreciation and necessity for the blessings of God in the formation of the new union, or even a beneficent leader’s restrained emulation of the Royal tradition of divine right, will never be fully known. The sentiments nevertheless frame repeated actions of Washington in his tenure as the first President.

4. *Id.* at xxii. Stout points out the Civil War had “two civil religions . . . each identical in theological terminology and morally opposed.” *Id.* at 468 n.20.

5. *Id.* at xviii.

6. *Id.*

7. JEFFRY H. MORRISON, *PROTESTANT CHRISTIANITY, PROVIDENCE, AND THE REPUBLIC* 156 (2009).

8. George Washington, Circular to the States (Oct. 18, 1780), in 20 *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1791-44* (John C. Fitzpatrick ed., 1931). The sentiments mirror Biblical scriptures found in *Micah* 6:8 and *Philippians* 2:8.

9. MORRISON, *supra* note 7, at 158.

More contemporaneous manifestations of civil religion blossomed during or immediately after major wars. The “Pledge of Allegiance” was “codified” by Congress during World War II as part of rules and customs governing display of the flag, with “under God” added by Act of Congress twelve years later during the Cold War.¹⁰ “In God We Trust” was placed on coinage during the Civil War, and added to all currency in 1957 after its adoption by Congress in 1956 as the National Motto.¹¹ Ongoing expressions of the civic faith recur, as with Washington, in sentiments expressed by individual office holders during the course of public duties in the executive and legislative branches, for example, during State of the Union or Inaugural speeches, proclamations, or in times of national crisis, emergency, or war. Recently, however, *individually* expressed prayers and speeches or performances at government functions or on government property that include sectarian sentiments have been censored or challenged as unlawful Establishments of religion on grounds that sectarian views exceed the limits of permitted expression of governmentally endorsed “civic faith” or are unduly proselytizing or disruptive.¹²

10. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 7 (2004).

11. U. S. Treasury Fact Sheet: Currency and Coins, History of In God We Trust, <http://ustreas.gov/about/education/Pages/in-god-we-trust.aspx> (last visited Jan. 2, 2011).

12. See, e.g., *Joyner v. Forsyth Cnty.*, 2009 U.S. Dist. LEXIS 105360 (M.D.N.C. Jan. 28, 2010) (holding that first come, first serve legislative prayer by clergy at County Commission meetings violated Establishment Clause because majority of content reflected Christian prayer); *McComb v. Crehan*, 320 F. App'x 507 (9th Cir. 2009) (holding that prevention of Valedictorian's speech that allegedly proselytized in mentioning Jesus Christ and scripture did not violate First Amendment or Free Exercise rights although Co-Valedictorian's speech about prayer, God, and faith in non-sectarian terms was permitted); *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (finding censorship of instrumental graduation performance of “Ave Marie” in program containing eight other instrumental music pieces did not violate Equal Protection); *Turner v. Mayor and City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008) (O'Connor, J. sitting by designation) (affirming that City Councilman's Free Exercise and First Amendment rights were not violated when Councilman mentioned Jesus Christ in opening legislative prayer while other Council members invoked Almighty Father, Gracious God and other references to Deities under non-denominational prayer policy), *cert denied*, 129 S.Ct. 909 (2009); *Hinrichs v. Bosma*, 400 F.Supp.2d 1103 (S.D. Ind. 2005) (holding that legislative prayer must be non-sectarian), *rev'd on other grounds* 506 F.3d 584 (7th Cir. 2007); *Klingenschmidt v. Winter*, 2007 U.S. App. LEXIS 22630 (D.C. Cir. Sept. 21, 2007) (holding that Navy Chaplain's failure to follow Navy regulation limiting sectarian prayer did not violate First Amendment and was grounds for dismissal from service); *Gathright v. Portland*, 439 F.3d 573 (9th Cir. 2006) (enjoining city from attempting to eject street preacher from government premises); *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004) (holding that City Council's proselytizing legislative prayer violated Establishment Clause); *Child Evangelism Fellowship, Inc. v. Montgomery Cnty. Pub. Sch.*, 373 F.3d 589 (4th Cir. 2004) (holding that governmental

Over the last sixty years, the Supreme Court's nationalization of the Establishment Clause (when it incorporated the Clause against the states under the Fourteenth Amendment in *Everson v. Board of Education*¹³) has elevated the Court to the role of final mediator of matters of Church and State. When it abandoned 150 years of jurisprudence to assume responsibility for religious affairs in *Everson*, the Court proceeded to de-establish state practices of prescribed school prayer, Bible reading, and funding for religious schools.¹⁴ In more recent years, the Court and the lower Federal judiciary (with few exceptions) have approved state censorship of individually spoken sectarian speech at governmentally sponsored events.¹⁵ The latter has been enjoined on grounds that government

denial of access to certain established communication forums by religious group in public elementary schools was unconstitutional); *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (holding that Celebration of Mass on National Mall by Pope John Paul II did not violate Establishment Clause).

13. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

14. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down state law permitting reimbursement to secular schools for costs of faculty salaries and course materials for secular instruction); *Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (declaring faculty-led reading of Bible in public schools unconstitutional); *Engel v. Vitale*, 370 U.S. 421 (1962) (declaring state prescribed, faculty-led school prayer unconstitutional).

15. But see, e.g., *Doe v. Indian River Sch. Dist.*, 685 F. Supp. 2d 524 (D. Del. 2010) (holding that sectarian references in some School Board members' prayers did not render Board prayer policy unconstitutional); *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009) (stating that "this Court refuses to reduce *Marsh* to a sectarian/non-sectarian litmus test"); *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263 (11th Cir. 2008) (stating that "[w]e read *Marsh* . . . to forbid judicial scrutiny of prayers absent evidence that legislative prayers have been exploited to advance or disparage religion."). For decisions endorsing American Civil Religion, see, for example, *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 426 (2005), where Judge J. Harvie Wilkinson opined:

But in their civic faith, Americans have reached more broadly. Our civic faith seeks guidance that is not the property of any sect. To ban all manifestations of this faith would needlessly transform and devitalize the very nature of our culture. When we gather as Americans, we do not abandon all expressions of religious faith. Instead, our expressions evoke common and inclusive themes and forswear, as Chesterfield has done, the forbidding character of sectarian invocations.

Id. at 287. Likewise, Justice O'Connor, sitting by designation in *Turner*, offered the following in approving a "nondenominational" prayer policy adopted by the City of Fredericksburg, Virginia:

The prayers in both cases [*Marsh* and *Simpson*] shared a common characteristic: they recognized the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize. The Council's decision to provide only nonsectarian legislative prayers places it squarely within the range of conduct permitted by *Marsh* and *Simpson*. The restriction that prayers be nonsectarian in nature is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith.

is either endorsing the private religious expression or that the private individual expression is government speech—speech that is not protected under the First Amendment because the speaker is seen to be imbued with governmental authority, transforming the otherwise private views into a “government” message for which there is no constitutional protection.¹⁶ And while sectarian speech has been censored, the courts have often exempted from censorship individual religious speech that is non-sectarian on grounds that it recognizes, “the rich religious heritage of our country in a fashion that [is] designed to include members of the community, rather than to proselytize.”¹⁷ These judicial declarations that expressions of “civic faith” are permitted to the exclusion of individually expressed sectarian expression are becoming increasingly enshrined in case law—an immovable edifice establishing American Civil Religion, exempt from challenge under the First Amendment, and some would argue, no less a religious creed and establishment of religion than others proscribed by the Establishment Clause.¹⁸ The problem today is not official acknowledgement of the obvious cultural truth that

Turner, 534 F. 3d at 356.

16. See, e.g., *Turner*, 534 F.3d 352 (holding that legislative prayer was “governmental speech” and city’s nondenominational legislative prayer policy did not violate Free Speech and Free Exercise rights); *ACLU of New Jersey, v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (En Banc) (holding that school board’s policy of nonsectarian invocation at graduation ceremonies by local clergy on rotating basis violated Establishment Clause). When challenged, rather than resist, many state and local governments bow to the threat of liability for attorneys’ fees by adopting restrictions or censoring individually-expressed religious sentiments on public property or at publicly sponsored events. And when restrictions on speech that are imposed by government are then challenged, groups that once threatened lawsuits hookup with government to defend them. For example, see *Turner*, where after the American Civil Liberties Union threatened to sue the City Council for allowing a Council member to close his prayer in the name of Jesus, and when the Council member challenged its refusal to let him pray, advocacy groups responsible for the ban joined the City in its defense. *Turner*, 534 F.3d at 354; but see *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (where school board successfully withstood ACLU challenge of policy of allowing students to receive Bibles, except as to elementary schools).

17. *Turner*, 534 F.3d at 356.

18. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 589 (1992) (recognizing that “a civic religion” “has emerged in this country . . . which is tolerated when sectarian exercises are not”); Robert Luther III & David B. Caddell, *Breaking Away from the “Prayer Police”: Why the First Amendment Permits Sectarian Legislative Prayer and Demands a “Practice-Focused” Analysis*, 48 SANTA CLARA L. REV. 569, 587 (2008) (stating that although the Supreme Court in *Lee* has said “that the government may not comprise an official prayer, it follows that individually promulgated and expressed invocations containing some sectarian references, including a deity, does not ‘proselytize’ or ‘disparage,’ in violation of *Marsh*, but is simply a tolerable accommodation of the religious diversity in this country.”).

"[w]e are a religious people whose institutions presuppose a Supreme Being" (as documented by Justice Douglas sixty years ago in *Zorach v. Clauson*¹⁹), or as he indicated, of the "[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths,"²⁰ etc., but the exclusion and censorship of individual sectarian religious expression at public events, while permitting individuals who endorse American Civil Religion to have their say without interference.

The exclusion of individually expressed sectarian speech from publicly sponsored events has been accomplished in deference to the relatively new, and potentially broad and wide-ranging, principle of government speech, that is, read broadly, speech that occurs in government sponsored programs or on government controlled property (the principal basis for the Supreme Court's recent decision in *Pleasant Grove City v. Summum*²¹ where privately-sponsored monuments on government property were perceived to be government speech).²² The federal circuit court rulings on this subject have raised a high bar to any sectarian expression at governmental events, a nearly irrebuttable presumption that the individual religious speech, even though created and spoken by an individual, is not private, but instead, government speech.²³ Conversely, non-sectarian religious speech that is perceived as expressing the common civic faith is permitted.²⁴ This "discerning" approach, based largely on judicial perception, threatens not only to extinguish the virtues of accommodation and diversity of religious expression in the public sphere (values that Washington himself promoted and worked hard to nourish),²⁵ but amplifies the avenues for majoritarian intolerance about which James Madison warned in the *Federalist Papers*.²⁶ In the extreme, as in the American Civil War, it provides a store of dry tinder for the fires of Nationalism when a leader, or a tyrannically fervent majority, co-opt and manipulate the approved civic faith to suppress sectarian dissent in the advancement of xenophobic or other political ends.²⁷

19. *Zorach v. Clauson*, 343 U.S. 306 (1952).

20. *Id.* at 312-13.

21. *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009).

22. *Id.* at 1127.

23. See *Turner*, 534 F.3d at 353 (stating that "[b]ecause the prayers at issue here are government speech, we hold that Fredericksburg's prayer policy does not violate Turner's Free Speech and Free Exercise rights.").

24. *Simpson*, 404 F.3d at 287.

25. MORRISON, *supra* note 7.

26. THE FEDERALIST NO. 10 (James Madison).

27. In the Civil War, both sides prayed to the same God and sought His intervention. In recent times, religious views on foreign wars have been highly

After briefly defining civil religion in the light of history, this Article reviews *de facto* American Civil Religion, its entrenchment in the nation's psyche, its potential social benefits, and the dangers it poses for individual freedom and American society. The Article then turns to the Supreme Court's decision in *Summum* where the Court categorically declared privately-sponsored monuments on government property to be government speech,²⁸ and to other recent cases involving speech on government property or at publicly sponsored events, including legislative prayer. The Article concludes by suggesting that greater scrutiny is needed for application of the government speech doctrine in order to avoid the diminution of precious First Amendment liberties while at the same time arguing that the judiciary should permit individually expressed sectarian sentiments at public events in the interests of accommodation, tolerance and religious diversity, and as a means of avoiding the establishment of a monopolistic American Civil Religion.

II. HISTORICAL EXPRESSIONS OF CIVIL RELIGION

The roots of civil religion have been described as something "eminently social," rather than individual or private.²⁹ Ancient in conception—with Plato's insistence that a civic religion could unite a people³⁰ and the prevalence of city religions throughout ancient Greece and Rome³¹—civil religion is a set of shared understandings within a society that have a transcendent life of their own and are not dependent on the beliefs of any one individual.³² Taken to the extreme, civil religion may descend, as Robert Bellah has written, toward "idolatrous worship of the state."³³

diverse. Although many national religious leaders supported the war in Vietnam, opposition to that war grew in good measure from the sustained, active opposition of religious figures such as the Rev. William Sloan Coffin, Rev. Daniel Berrigan, and Martin Luther King, Jr.

28. *Summum*, 129 S. Ct. at 1127 (stating that "[j]ust as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land.").

29. See Michael Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CALIF. L. REV. 293, 318 (1993) (describing ideas of nineteenth-century sociologist Emile Durkheim) See EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (Joseph W. Swain trans. 1915).

30. JON MEACHAM, *AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION* 24 (2007).

31. WILL HERBERG, *America's Civil Religion: What It Is and Whence It Comes*, in *AMERICAN CIVIL RELIGION* 76 (Russell E. Richey & Donald G. Jones eds., 1974).

32. *Id.*

33. ROBERT N. BELLAH, *Civil Religion in America*, in *AMERICAN CIVIL RELIGION*, *supra* note 31, at 22.

In a 1970 article, John Coleman, of the University of California, Berkeley, suggested a useful typology of civil religion. He wrote that

there are three forms under which civil religion exists: continued undifferentiation with either the church or the state acting as sponsoring agent of the civil religion; a monopoly status for civil religion under the form of secular nationalism; [and] differentiated civil religion.³⁴

Historical manifestations of civil religion and its manipulation for political purposes appear in early civilizations based on the divine right of rulers,³⁵ as well as in the Roman Republic—in the progression from the rule of the Gods, to Deified Emperors, and finally to state-sponsored Roman Christianity.³⁶ It also appears in varying degrees in Japanese Shinto Imperialism,³⁷ in the Jacobin hijacking of the French Revolution,³⁸ and in the secular religions of Soviet and Chinese communism,³⁹ all of which provide comparisons for American Civil Religion.

The concept of rule by divine right of kings traces back to between 3,000 and 2,500 B.C. The tales and hieroglyphics of Gilgamesh, from the city state of Uruk located within the current day borders of Iraq, serve as the earliest documentation of rule by divine right of kings.⁴⁰ Zoroastrianism, which first appeared in the 5th Century B.C. and came to be the dominant religion in Iran and the Middle East, viewed the king as having a direct connection to God. The texts of Zoroastrianism were considered the words of God (and the king, the next God).⁴¹ After marginalizing Zoroastrianism in the 7th Century, rulers adhering to Islamic principles advanced Allah as the only sovereign with the authority to make law.⁴²

34. John A. Coleman, *Civil Religion*, 31 SOCIOLOGICAL ANALYSIS, 67, 69 (Summer 1970).

35. *Id.* at 71.

36. *Id.*

37. *Id.*

38. *Id.* at 73.

39. *Id.*

40. According to legend, Gilgamesh was a half god because, while his father was only a high priest, his mother was believed to be a goddess and his grandfather, on his mother's side, to be a god. W.T.S. Thackara, *The Epic of Gilgamesh: A Spiritual Biography* 1 (1999), available at <http://www.theosophynw.org/world/mideast/mi-stst.htm>.

41. Jalil Mahmoudi, *Social Thought in Ancient Iran*, in PERSIAN STUDIES IN NORTH AMERICA: STUDIES IN HONOR OF MOHAMMAD ALI JAZAYERI 398 (Mehdi Marashi ed. 1994). An early leader, working under this general proclamation, has been quoted as saying, "[r]eligion and kingship are two brothers, and neither can disperse with the other. Religion is the foundation of kingship, and kingship protects religion." *Id.* Legend from Iran confirms the tradition of kings being seen as holding super human divine powers justifying their ability to rule by divine right. *Id.*

42. KHALED ABU EL FADL, ISLAM AND THE CHALLENGE OF DEMOCRACY:

Under true Islam, rulers did not have the authority to make their own laws independent of the will of God, making it impossible to have full separation of religion from government. This posed a problem for the legitimacy of sovereign monarchs and democratic governments alike.⁴³

The early Roman Republic used religion initially as a state cult based on Roman Gods.⁴⁴ Cicero “favored maintaining the ancient system of divination in the interests of public welfare” because it provided a means to show that “the will of the gods accorded with the policies of state adopted by senate and magistrates.”⁴⁵ Rome later gravitated to an emperor cult when

CAN INDIVIDUAL RIGHTS AND POPULAR SOVEREIGNTY TAKE ROOT IN FAITH? 1-2 (2003).

43. Nations such as Turkey, which had a long history of being ruled by traditional Islamic divine right principles, serve as the best models of secular governments in today’s Middle Eastern Islamic world. LLOYD GEERING, *FUNDAMENTALISM: THE CHALLENGE TO THE SECULAR WORLD* 9 (2003). In present-day Turkey, rather than religion controlling government, government now controls religion. *Id.* While citizens of Turkey are free to worship a religion of their choice and participate in religious ceremonies, the state’s role in religion is prevalent. *Id.* Part 2, Chapter 2, Article 24 of the Turkish Constitution states, “[e]ducation and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools.” Const. of the Repub. Of Turk. Part 2 Chap. 2. This history of Turkish secularism can almost certainly be attributed to the long tradition of divine right of kings that existed in the lands of present-day Turkey. GEERING, *supra*, at 9.

44. Augustine in *The City of God* IV.27, available at <http://www.amazon.com/City-God-Modern-Library-Classics/dp/0679783199>, writes of Quintus Mucius Scaevola—a magistrate, *pontifex maximus*, and legal scholar of the 1st Century B.C.—who explained three types of gods handed down to the Roman people in the years of the Roman Republic: one from the poets, a second from the philosophers, and a third from politicians. Of these, the one from poets was said to be for fools (*nugatorium*); the second from philosophers is portrayed at odds with the requirements of civil life (*non congruere civitatibus*); however, the third from politicians was thought by Scaevola to be more useful for purposes of deceiving cities in matters of religion (*expedire igitur existimat falli in religione civitates*). See ERNEST L. FORTIN, *Augustine and Roman Civil Religion: Some Critical Reflections in CLASSICAL CHRISTIANITY AND THE POLITICAL ORDER: REFLECTIONS ON THE THEOLOGICO-POLITICAL PROBLEM* 85, 86 (J. Brian Benestad, ed., 1996) (explaining how the Roman government used religion to control its populace). Whether or not Augustine’s account is historically accurate, the sentiment of the management of religion for civil purposes was clearly shared by other powerful Romans of the era.

45. LILY ROSS TAYLOR, *PARTY POLITICS IN THE AGE OF CAESAR* 77 (1984). Ms. Taylor writes that Cicero, a member of the college of augurs, whose members were charged with interpreting signs or warnings from the gods, did not believe there was any way of ascertaining the will of the gods. Though a skeptic, “he dwelt frequently in his speeches to the people on the ceremonies and ritual of the state cult and sought to show that the will of the gods accorded with the policies of state adopted by senate and magistrates.” *Id.* In

Julius Caesar was deified by order of the Roman Senate in 42 B.C., two years after his assassination, establishing a temple, a special priest, and festivals in his honor.⁴⁶ Beginning with Augustus, subsequent emperors were worshipped as gods, commonly but in varying degrees, with statues and temples.⁴⁷ A third progression began with imperial persecution of Christians until they became so strong in numbers that the civil religion of the empire was revoked, and with Constantine's conversion, "Christianity took over the state cult as its own rightful province."⁴⁸ Then, as one scholar writes, "the empire became Christian; Christianity became imperial."⁴⁹ Rule by divine right expanded in Europe and was frequently supported by biblical

addition to the political establishment's use of augury, the city magistrates "entertained the gods, and incidentally the people, with elaborate dramatic and circus games" and "feasted the gods, and often the people too, at banquets and sacrifices." *Id.* Priests and magistrates were drawn from the same political classes, and many individuals were simultaneously priests and magistrates; both were essentially political posts. *Id.*

46. As Lily Ross Taylor explains,

The state religion, once an instrument used by the senatorial oligarchs to impose their supremacy on the people, had later, and particularly in the era of revolution, served rival groups in party politics. Now, in the control of a supreme ruler, it functioned to support a monarch numbered among the gods of the state.

Id. at 97.

47. The emperor cult came to be important as civil religion to the wider empire. "When the emperor was worshipped as a manifest god and savior by all his subjects, the society of the empire became a quasi-religious society, centered by a common allegiance which was also a common cult." Coleman, *supra* note 34, at 70 (quoting Sir ERNEST BARKER, CHURCH, STATE, AND STUDY 132 (1930)). Inevitably, this requirement met opposition from monotheistic imperial subjects. Early on, Jews were granted an exemption from the requirement. Christians were not similarly exempt. Instead, the emperors, "rightly sensing that Christianity undermined traditional Roman civic and national religion, persecuted Christianity." *Id.* at 71.

48. Still, religious pluralism was not only tolerated in the imperial era, "syncretistic amalgamation" of Roman and indigenous pantheons was accepted and even encouraged. "Any god could rightly claim to his place in the pantheon, so long as his worship was not exclusive. The controlling civic demand was that subject nations also accept the worship of the emperor as a symbol of Roman world-unity." *Id.* at 71.

49. *Id.* at 71 (quoting BARKER, *supra* note 47, at 134). When Constantine's son Constantius assumed an active role in the church in the mid-Fourth Century, taking "the first step toward the stage when the two institutions would be commingled, and where Hellenistic concepts concerning divine kingship would become Caesaropapism," the church fathers protested the abuse of the church's liberty; Hilary of Poitiers, later Saint Hilary, "went so far as to denounce Constantius for enslaving the church, and to yearn for the time of the ancient persecutors, Nero and Decius, when torture and death led to freedom." KARL FREDERICK MORRISON, *Rome and the City of God: An Essay on the Constitutional Relationships of Empire and Church in the Fourth Century*, in TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY, NEW SERIES 1, 7 (1964).

passages from both the Old and New Testament⁵⁰ suggesting that the rule of kings should be followed because they are the selected rulers of God.⁵¹

Japanese Shintoism, which was made the state religion of Japan in 1868, is an example of undifferentiated civil religion sponsored by the state. Its most basic tenet, as in Roman emperor cult, was the divine origin of the imperial dynasty.⁵² Japan promised freedom of religion, but defended the universal requirement of Shinto observance by arguing it was not a religion at all.⁵³ During World War II, Japanese authorities “virtually

50. One such quote comes from St Paul’s epistle to the Romans: “[l]et every soul be subject unto the higher powers, for there is no power but of God, and the powers that be are ordained of God. Whosoever therefore resists the power, resists the ordinance of God. And they that resist shall receive to themselves damnation.” *Romans* 13:1-2 (King James). Quotes from St. Peter’s first epistle are equally compelling in favor of divine rule by kings, which should be unchecked by citizens;

submit yourselves to every ordinance of man for the Lord’s sake, whether it be to the king, as supreme . . . For so is the will of God, that with well-doing you may put to silence the ignorance of foolish men: as free . . . Honour all men. Love the brotherhood. Fear God. Honour the king. Servants be subject to your masters with fear, not only the good and gentle, but also to the froward.

1 *Peter* 2:13, 15, 17-18 (King James).

51. DAVID WOOTTON, *DIVINE RIGHT AND DEMOCRACY: AN ANTHOLOGY OF POLITICAL WRITING IN STUART ENGLAND* 91-97 (1986). Prior to the Enlightenment period, the king was believed to have been chosen by God to express God’s wishes, and it was deemed to be sin to disobey the king. The modern day prevailing concept under which sovereign rule is the product of a contract between man and government, has surety from the special relationship between the king and God, a supreme contract that should not be disturbed by average people. JOHN NEVILLE FIGGIS, *THE THEORY OF THE DIVINE RIGHTS OF KINGS* 5-7 (1896).

52. The Japanese slogan “the whole world under one roof” symbolized a perceived “special divine commission to expand sovereignty and righteousness over ever widening territories” rooted in Shinto belief that Japanese people enjoyed a “peerless national life” that they must share with all humanity and thereby “contribute to the salvation of the world.” Coleman, *supra* note 34, at 71 (quoting D.C. HOLTOM, *MODERN JAPAN AND SHINTO NATIONALISM*, 7, 20 (1947)). Domestically, Buddhism and Christianity were objects of suspicion, the first being closely aligned with the era of the discredited Tokugawa Shogunate’s national government, and the second with Western Imperialism. Coleman, *supra* note 34, at 72. And while Buddhism and Christianity retained some security by nature of sheer numbers, smaller sects, which the authorities labeled “pseudo-religions” (*ruiji shukyo*) or “evil cults” (*jakyō*), were subject to the severest governmental repression—repression that soon expanded to smaller sects of Christianity, such as the Jehovah’s Witnesses and the Holiness Church. Sheldon Garon, *State Religion and Imperial Japan, 1912-1945*, 12 J. JAP. STUD. 273, 300 (1986).

53. Garon, *supra* note 52. Under the Religious Organizations Law of 1939, the government assumed power to disband any religious organization whose teachings or actions were deemed, as Prime Minister Hiranuma Kiichiro put it, “at odds with the spirit of [the] Imperial Way.” *Id.* at 301. A 1940 law

conscripted" religious institutions to "collect donations for the war, console families of the dead, and proselytize on the [Asian] continent in the name of Japanism."⁵⁴ Religious institutions were regulated by the same standards as labor unions, political parties, and most other autonomous organizations.⁵⁵ By means of the Special Higher Police force and "thought procure" established in 1930 to control "dangerous" thought, the wartime Japanese government destroyed any religious groups that refused to accept the state orthodoxy.⁵⁶

Professor Coleman cites the Soviet Union as well as Revolutionary France as principal examples of secular civil religions imposed by the state.⁵⁷ In the Soviet Union, as another author writes, "the quasi-religion of Communism expelled traditional religion from the public space, which it filled with its own symbols, rites, and doctrines."⁵⁸ This Soviet civil religion had its own saints (Lenin), sacred feasts (May Day), and a belief in the state's "special role in unfolding world history as the spearhead of the socialist revolution,"⁵⁹ and was used to justify "severe restrictions on religious and civil liberties"⁶⁰ and open persecution of traditional religions.⁶¹ A similar effort at eradication of private religious expression and practice occurred in the People's Republic of China with the ascendance of Maoism.⁶²

Revolutionary France during the period of Jacobin rule in the 1790's (which culminated in the Reign of Terror) provides another example. Under Jacobin rule, what Rousseau had called the "general will" became a secular religion, which the political

formally elevated the authority of State Shinto over other religions: "[a]fter decades of denying that State Shinto was a religion, the statist Konoe Cabinet declared that it was *the* religion." *Id.*

54. *Id.* at 300.

55. Drawn together under the Imperial Rule Assistance Association, the Ministry of Education, which had gained the power to license all religious groups, compelled the twenty existing Christian denominations to merge into two, and the fifty-six Buddhist sects to organize themselves into twenty-three. *Id.*

56. These actions were accomplished under the authority of the Religious Organizations Law of 1939 and the revised Peace Preservation Law of 1941. *Id.* at 301-02.

57. Coleman, *supra* note 34, at 72-73.

58. Alexander Agadjanian, *Public Religion and the Quest for National Ideology: Russia's Media Discourse*, 40 J. FOR THE SCI. STUDY OF RELIGION 3, 351 (2001).

59. Coleman, *supra* note 34, at 73.

60. *Id.* at 71.

61. *Id.* at 72.

62. Jiping Zuo, *Political Religions: The Case of the Cultural Revolution in China*, 52 SOCIOLOGICAL ANALYSIS 1, 101 (Spring 1991) available at <http://socrel.oxfordjournals.org/content/52/1/99.full.pdf+html?sid=8b30cb4b07f5-4d9a-a925-24603fba7c5a>.

leadership sought to guide and formalize.⁶³ Indeed, the term “civil religion” was seemingly first transcribed in the 1762 publication of Rousseau’s *Social Contract*.⁶⁴ In 1881, during France’s Third Republic, “the state supported the deist religion of the Masons and Comte’s religion of positivism as substitutes for an anti-modern Catholicism,” going so far as to laicize all education in France; in the end, however, secular substitutes have never fully supplanted nominal Catholicism from its place as France’s civil religion.⁶⁵

The French Revolution created a civil religion that foreshadowed modern nationalism, and at the extreme, the fascism of Mussolini and the Nazis.⁶⁶ Coleman, oddly enough, did not attempt to fit these movements into his typology of civil religion.⁶⁷ Nazi civil religion, at least, was clearly undifferentiated and state sponsored⁶⁸—the only seriously debatable question is to what degree it was secular. George Mosse, in his article *Fascism and the French Revolution*, argues that German nationalism primarily “used Christian terminology to express itself,” and that National Socialism was no exception:

[t]here was the ‘resurrection of the Greater German Reich’, ‘the blood of the martyrs’, and constant appeals to providence. Hitler, at one point, called the martyrs of the movement his apostles.

...

The so-called ‘sacred chambers’ (*Weiheraume*) in factories and big businesses which were reserved for party festivities were arranged like a church; where the altar would be, stood Hitler’s bust and the banners of eagles decorated with swastikas as the symbol of unity between the nation and the nazi movement.⁶⁹

The abuses of civil religion by the Nazis, the Jacobins, the

63. George Mosse, *Fascism and the French Revolution*, 25 J. CONTEMP. HIST. 5, 6 (1989).

64. ROBERT BELLAH, *American Civil Religion in the 1970’s*, in AMERICAN CIVIL RELIGION, *supra* note 31, at 255. Along with symbol-laden rites and festivals, the Jacobins pursued an

increasing conformity [so that] the new order would not degenerate into chaos: dress, comportment, and even songs were enlisted to support that effort, and so were a multitude of organizations to which people were supposed to belong. Eventually, the revolutionary armies further strengthened the authority of the revolutionary state. Such conformity was placed in the service of the passion for liberty, closely associated with patriotism and the cult of reason.

Mosse, *supra* note 63, at 7.

65. Coleman, *supra* note 34, at 73.

66. MARCELA CHRISTI, FROM CIVIL TO POLITICAL RELIGION: THE INTERSECTION OF CULTURE, RELIGION, AND POLITICS 198 (Wilfred Laurier Univ. Press 2001).

67. Coleman, *supra* note 34, at 66-77.

68. CHRISTI, *supra* note 66, at 11.

69. Mosse, *supra* note 63, at 9.

Soviets, and Maoists are notorious and need no further catalog in this brief historical survey.

III. AMERICAN CIVIL RELIGION

A. *The Origins of American Civil Religion*

Civil religion may be enshrined in law, or it may appear in the history, habits, and customs of a people. The founding of the American experiment contains both. Despite an almost universal desire to prevent the creation of a national Church, none of the Founders—Christian or deist—argued for the complete abolition of all religious references from American public life.⁷⁰ Distinctly Christian religious establishments existed in many of the states.⁷¹ When reference was made to God, it was largely (as in the Declaration of Independence) to the “Creator,” “Nature’s God,” and the “Supreme Judge of the world,” rather than to a specific sectarian deity.⁷² “It seems unlikely that this lack of Christian reference was meant to spare the feelings of the tiny non-Christian minority.”⁷³ More likely, the Framers were cognizant of the diverse religious traditions in the Colonies, the persecution suffered at the hands of national governments, and the political support needed from all quarters to transform the colonies into a truly “United States.” As Professor Albert has written, “[t]he Clause evolved as a practical necessity of the founding era, designed to neutralize the volatility of the emergent union of religiously diverse and

70. See MEACHAM *supra* note 30, at 18-20 (explaining that private religious beliefs were protected by First Amendment).

71. State-established churches existed and continued for decades after the Constitution and Bill of Rights were ratified. See Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise Clause*, 103 HARV. L. REV. 1410, 1436-37 (1990) (discussing that state-established churches existed and continued for decades after ratification of Constitution and Bill of Rights). Scholars have variously described state establishments as ranging from six to ten at the time of the adoption of the Constitution. A summary of the legal systems in each of the thirteen colonies may be found in Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 883-95 (2005). See also *Sch. Dist. of Abington Twp.*, 374 U.S. at 255, n.20 (Brennan, J., concurring) (stating that “[t]he last formal establishment, that of Massachusetts, was dissolved in 1833”); *Wallace v. Jaffree*, 472 U.S. 38, 99, n.4 (1985) (Rehnquist, J. dissenting) (illustrating that state establishments were prevalent throughout the late eighteenth and nineteenth centuries before citing Mass Const. of 1780, Part 1, Art. III; N.H. Const. of 1784, Art. VI; Md. Declaration of Rights of 1776, Art. XXXIII; R.I. Charter of 1663 (superseded 1842)).

71. *Everson*, 330 U.S. at 15 (citing *Watson v. Jones*, 13 Wall. 679, 730 (1871)).

72. *Id.* at 23.

73. BELLAH, *supra* note 33, at 28.

reciprocally distrustful colonies.”⁷⁴ Thus, by granting a role for the Federal Government in religion, or by emphasizing one doctrine above another, however slight the reference, the Framers would have run the untenable risk of interfering with the various religious traditions that were, in fact, already “established” in many colonies and, indeed, the viability of the proposed political union of the Colonies.⁷⁵

There was to be no national religious establishment, but this also did not mean that the Constitution established a secular state.⁷⁶ The Constitution contained several direct or indirect provisions relating to God and religion in the Attestation Clause, the Oath and Affirmations Clause, the Sundays Excepted Clause, and the Religious Test Clause.⁷⁷ The state constitutions invariably contained more explicit connections between God and government, and laws and legislative acts frequently reflected the tenets of established Christian religions.⁷⁸ The God invoked in American civil discourse at the time of George Washington was the God of the Judeo-Christian tradition with providence expected to guide

74. Albert, *supra* note 70, at 925.

75. Federalism was an issue in the sense that all of the proposed amendments reflected a shared desire to limit the powers of the federal government vis-à-vis the states. But an amendment to restrict federal power by prohibiting federal involvement in religious matters is not the same thing as an amendment designed to preserve state establishments.

Steven K. Green, *Religion Clause Federalism: State Flexibility Over Religious Matters and the “One-Way Ratchet”*, 56 EMORY L.J. 107, 116 (2006) (quoting John Witte, Jr., *Facts and Fiction About the History of Separation of Church and State*, 48 J. CHURCH & STATE 15, 33 (2006)).

76. Seth Barrett Tillman, *Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone’s Melville B. Nimmer Memorial Lecture and Essay*, 114 PENN ST. L. REV. 391, 399-400 (2010).

77. *Id.* at 393-98. Article 11 of a 1790 treaty negotiated with the Bey of Tripoli, did state that “the government of the United States of America is not in any sense founded on the Christian Religion”—thus characterizing America to Muslims as a secular nation.” MEACHAM, *supra* note 30, at 103. Article II, Treaty of Peace and Friendship between the United States and the Bey and Subjects of Tripoli of Barbary, Annals of Congress, 5th Congress, ratified June 7, 1797, states:

As the Government of the United States of America is not, in any sense, founded on the Christian religion; as it has in itself no character of enmity against the laws, religion, or tranquility, of Mussulmen; and, as the said States never entered into any war, or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext arising from religious opinions, shall ever produce an interruption of the harmony existing between the two countries.

Id. For obvious reasons, this language may be more a product of diplomatic necessity than an expression of the nature of religion to the government of the United States.

78. Samuel W. Calhoun, *Getting the Framers Wrong: A Response to Professor Geoffrey Stone*, 57 UCLA L. REV. 1, 8-10 (2009).

and intervene in the affairs of men.⁷⁹ Interwoven into the ideas of the Founders were Enlightenment rights theories, the ideas of civic republicanism, the Book of Common Prayer, and the Bible—foundations that included tenets of sectarian religion, but broader ideas as well.⁸⁰ As George Washington recognized,

The foundation of our Empire was not laid in the gloomy age of Ignorance and Superstition, but at an Epocha when the rights of mankind were better understood and more clearly defined, than at any former period, the researches of the human mind, after social happiness, have been carried to a great extent, the Treasures of knowledge, acquired by the labours of Philosophers, Sages and Legislatures, through a long succession of years, are laid open for our use, and their collected wisdom may be happily applied in the Establishment of our forms of Government; the free cultivation of Letters, the unbounded extension of Commerce, the progressive refinement of Manners, the growing liberality of sentiment, *and above all, the pure and benign light of Revelation*, have had a meliorating influence on mankind and increased the blessings of Society.⁸¹

Yet while the Founders nevertheless laid groundwork that has supported an American Civil Religion (and many of the most sacred rituals, symbols, and heroes of the Republic have their origins in this period), the existence of varying state religious establishments also produced a Bill of Rights with the Establishment Clause that essentially “forbade” a national church.⁸² In this regard, Justice Souter recently observed that, “Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the Clause was ‘not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.’”⁸³ The Framers thus recognized Divine Providence and allegiance to God in the successful founding of the country,⁸⁴ but avoided sectarian references because of the religious establishments in the states.⁸⁵ It was during and immediately after the Civil War that a

79. *Id.*

80. Maddigan, *supra* note 29, at 321.

81. Letter from George Washington, Commander in Chief of the Armies of the United States of America, to the governors of all the states on disbanding the army (June 8, 1773) in WRITINGS OF GEORGE WASHINGTON 214-15 (Lawrence B. Evans ed., Knickerbocher Press 1908) (emphasis added).

82. Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RIGHTS J. 73, 125 (2005).

83. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 880 (2005) (citing ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 13 (1988) (emphasis omitted)).

84. *McCreary Cnty.*, 545 U.S. at 893-94 (Scalia, J., dissenting).

85. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32 (1998).

national civil religion became even more firmly established in custom and practice, as well as in law.⁸⁶

Prior to the Civil War, citizen allegiance rested largely at the state and local level—with Americans generally saying “the United States *are* a republic.”⁸⁷ Before the war, American flags were confined to merchant and naval ships, and virtually non-existent in homes and churches.⁸⁸ It was the Civil War that created a modern nation-state in an America where before there had been many separate nations under one federal government.⁸⁹ And it is the American Civil Religion that has, since the Civil War, served “primarily [as] a justification of that historical development.”⁹⁰

At first, the war was a limited one aimed at the very practical goal of preserving the Union. Eventually, however, it became a “moral crusade for freedom.”⁹¹ With both sides looking to God for providential guidance, many Americans turned to religion—and such religious ideas were not restricted to the preacher’s pulpit.⁹² The culmination of this process occurred with Lincoln’s Second Inaugural Address, now a sacred part of American Civil Religion.⁹³ In a rare acknowledgment of God’s critical nature, Lincoln noted wearily that the war was perhaps God’s judgment on the nation for its sin of slavery, and wisely refrained from claiming that God was on the side of the Union.⁹⁴ What is now seen as a messianic-like role, it was Lincoln’s wisdom to plead eloquently with the nation to return to its providential destiny and “strive on to finish the work we are in, to bind up the nation’s wounds.”⁹⁵ Indeed, in modern parlance, Lincoln’s inaugural address was far more sectarian than those that have recently been censored by the federal courts.⁹⁶ He liberally relied on the Holy Scriptures to persuade, warning that “[w]oe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by

86. MARK NOLL, *THE CIVIL WAR AS A THEOLOGICAL CRISIS*, 25 (Univ. of North Carolina Press, 2006).

87. STOUT, *supra* note 2, at xxi.

88. *Id.* at 28 (citing CECELIA O’LEARY, *TO DIE FOR THE PARADOX OF AMERICAN PATRIOTISM* 20-25 (Princeton 1999)).

89. Herbert Richardson, *Civil Religion in Theological Perspective*, in *AMERICAN CIVIL RELIGION*, *supra* note 31 at 161, 168.

90. *Id.*

91. STOUT, *supra* note 2, at xvi.

92. *See generally id.* at xxi-xxii (arguing that horror of war drove individuals to subconsciously link patriotism to Christianity).

93. *Id.* at 270.

94. *Id.* at xvi.

95. Abraham Lincoln, President of the United States, Second Inaugural Address (Mar. 4, 1865).

96. *See, e.g., McComb*, 320 Fed. Appx. at 507 (dismissing claim of valedictorian censored in part for including two scripture verses in valedictory at high school graduation ceremony and mentioning Jesus Christ).

whom the offense cometh," and also, "the judgments of the Lord are true and righteous altogether."⁹⁷

The war continued, however, with many coming to see it as a baptism by blood—where casualties became martyrs for the Union and sacrifice part of the messianic destiny of the nation-state.⁹⁸ For Horace Bushnell, a prominent Northern clergyman at the time, the bloodshed was "something mystically religious and moral that was creating a nation where only inchoate states and loose confederations had previously existed."⁹⁹ For the North, the preservation of the Union became an all-encompassing goal—to be accomplished at any cost.¹⁰⁰ To bind the Union—from New York to Chicago and down to New Orleans—there had to be a unifying force driving men to fight for the *idea* of a nation. For the South, this Union worship was often viewed as a form of idolatry.¹⁰¹ Yet the South too found it crucial to appeal to God and articulate its mission in transcendent, moral terms.¹⁰² The Confederacy made its civil religion much more overtly Christian—"substituting a gospel of the stars and stripes for the gospel of Jesus Christ."¹⁰³ Despite calls for a Christian Republic in the North—to ensure God would continue to side with the Union—Lincoln maintained the non-sectarian civil religion inherited from the Founders.¹⁰⁴

Lincoln's death made him a martyr for the Union cause, entrenching his memory in the American psyche. Immediately after the war, the focus turned to his moral achievements—some calling him a "moral genius" and others noting his Christ-like lack of malice or revenge toward the South.¹⁰⁵ "Through his death, an

97. Lincoln, *supra* note 95.

98. STOUT, *supra* note 2, at 250.

99. *Id.* at 249.

100. *Id.* at 459.

101. *Id.* at 54.

102. *See id.* at xxi-xxii (explaining views held by many southern preachers that God supported Confederate States and that Lincoln was guilty of idolatry for worshiping the idea of a union above God).

103. *Id.*

104. *Id.* at xi-xxii (introducing role of religion in Civil War and discussing Lincoln's speeches and public stance on God and the War).

105. *Id.* at 453. Given the bloodshed and deep antagonism between North and South during the Civil War, one of the most surprising aspects of dialogue during the war was the virtual absence of a demonizing of the other side—neither side, for example, referred to the other as the Antichrist (as many had called King George III during the Revolution). *Id.* at 94. This phenomenon suggests either the brilliance and compassion of Lincoln or points to perhaps an even greater desire that some would say is central to the American Civil Religion—the hope of uniting Christians, Jews, and others under an American creed that would make the post-war livable together. It could be argued that it was only because of the emerging national religion that the Union was able to recover from the Civil War as a whole. Certainly, without such moral inspiration, the Southern states may never have fully rejoined the American project—and, ultimately, the North American continent could have been

innocent Lincoln became transformed from the prophet of America's civil religion to its messiah."¹⁰⁶ With his message that America was the world's last best hope, many have seen Lincoln as one who brought into being what God had ordained and the Founders (like Old Testament prophets during America's "Exodus" period) had prepared the way for—a united republic committed to bringing about God's will on earth.¹⁰⁷ Lincoln's Second Inaugural Address became a national sermon, not only "explain[ing] America to itself, but also explain[ing] it to the world."¹⁰⁸ In addition, his Gettysburg Address represented the Civil War's "innermost spiritual meaning."¹⁰⁹ Together, these two documents stand as evidence of the formation of a Union, "under God," bound by transcendent moral ideas rather than religious or ethnic unity.

B. *A Glimpse of the Sociology of American Civil Religion*

Civil religion is arguably the primary source from which Americans draw their personal and group identity.¹¹⁰ For example, on November 26, 1963, the headline across the front page of the *New York Times* was solemn: "New York Like a Vast Church."¹¹¹ Two years earlier, President John F. Kennedy had concluded his inauguration address by calling on the American people to ask God's blessing, "knowing that here on earth God's work must truly be our own."¹¹² This sentiment was hardly an attempt to establish a broad-based civil religion, but to appeal to deeply held individual convictions to improve society. In the context of Kennedy's subsequent assassination, the mourning of the nation and its near universal participation in a decidedly Catholic funeral,¹¹³ sociologist Robert Bellah in his 1967 essay "Civil Religion in America" declared that America did, indeed, have a civil religion.¹¹⁴ Bellah's arguments, which were heavily influenced by Durkheim,¹¹⁵ viewed this civil religion then as co-existing with the many sectarian, ecclesiastical religions of the nation's populace, except that this supposedly "larger" religion served to bind a vastly

fractured into much smaller ethnic and religious nations under a weak, struggling federal government.

106. *Id.* at 455.

107. See BELLAH, *supra* note 33, at 30 (arguing that Lincoln "embodied [national meaning] for Americans").

108. STOUT, *supra* note 2, at 428.

109. *Id.* at 270.

110. SIDNEY MEAD, *Nation with the Soul of a Church*, in AMERICAN CIVIL RELIGION, *supra* note 31, at 45, 70.

111. RICHARD PIERARD, CIVIL RELIGION AND THE PRESIDENCY 1 (Academie Books, 1988).

112. BELLAH, *supra* note 33, at 21-22.

113. PIERARD, *supra* note 111, at 19.

114. BELLAH, *supra* note 33, at 21.

115. See generally *id.* (acknowledging Durkheimian ideals).

diverse group of believers together.¹¹⁶ This has, no doubt, changed even in the last few decades when successive waves of immigration have altered social perceptions. However, many adherents of American Civil Religion still perceive the United States primarily as a Christian nation.¹¹⁷ During the Civil War, a powerful movement for a “Christian amendment” developed that would have had the Constitution acknowledge, not just God, but Jesus.¹¹⁸ In one brief foray shortly after the Civil War, even the U.S. Supreme Court declared, with little enduring effect, that America is a “Christian Nation.”¹¹⁹

Despite the perception of many Americans, the American Civil Religion is *not* Christianity—though Christianity, and more specifically Protestantism, has served as a substantial source of influence.¹²⁰ Every single presidential inaugural address has mentioned God—but none have mentioned Jesus or made any sectarian references.¹²¹ It has been argued that the God of American Civil Religion evolved to have “almost nothing in common with the God of Christianity” but instead, became “understandable and manageable, comforting, and an American jolly good fellow.”¹²² Quite notably, and in contrast with the just God of the Old Testament, reflected also in the New Testament, this God is virtually never critical or condemning—and seems

116. *See id.* at 26 (stating that American Civil Religion transcended religious differences of populace). “Rather than simply denounce what seems in any case inevitable, it seems more responsible to seek within the civil religious tradition for those critical principles which undercut the ever present danger of national self-idolization.” ROBERT N. BELLAH, *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONALIST WORLD* 168 (1991).

117. Michael Lind, *America is not a Christian nation*, SALON.COM, http://www.salon.com/news/opinion/feature/2009/04/14/christian_nation (last visited Jan. 2, 2011).

118. *See* STOUT, *supra* note 2, at 373 (pointing to influence of Christianity on American Civil Religion during Civil War); in ordaining the Constitution of the Confederate States of America, its Preamble invoked “the favor and guidance of Almighty God.” *See* Yale Law School, Avalon Project, Constitution of the Confederate States; March 11, 1861, http://avalon.law.yale.edu/19th_century/csa_csa.asp (last visited Jan. 2, 2011) (referencing Confederate Constitution).

119. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

120. BELLAH, *supra* note 33, at 28.

121. Maddigan, *supra* note 29, at 322.

122. PIERARD, *supra* note 111, at 287. In *Van Orden v. Perry*, the Supreme Court recognized a dual purpose behind the State of Texas’ display of the Ten Commandments on its State Capitol grounds:

Texas has treated her Capitol grounds monuments as representing the several strands in the State’s political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government. We cannot say that Texas’ display of this monument violates the Establishment Clause of the First Amendment.

Van Orden v. Perry, 545 U.S. 677, 692 (2005).

often in full support of the American cause regardless of any moral shortcomings.¹²³ On the other hand, it is evident as well that in times of national strife and war such as the Civil War period, "[b]y linking patriotism to Christianity and paying lip service to the superiority of the eternal over the temporal, ministers and people could embrace the new faith without fully acknowledging exactly what they were doing."¹²⁴

While the American Civil Religion borrows from religious traditions in such a way "that the average American [sees] no conflict between the two,"¹²⁵ the Religion is not a least-common-denominator among major religious groups.¹²⁶ Rather, it is American, and has its own creation story, rituals, martyrs, totems, and sacred texts.¹²⁷ At its very core, and in spite of the clarion call of the Declaration of Independence, the realistically beautiful, yet highly practical, design of the Constitution, and the noble sentiments of Francis Scott Key written as the Flag withstood assault at Fort McHenry, adherents of the American Civil Religion imbue the Declaration, Constitution, and Flag with sacred origin, transforming them into a sort of "Holy Trinity" of the American Civil Religion.¹²⁸ Instead of the viewing the Declaration of Independence as a document that recognizes, as Thomas Jefferson did that: (1) individuals possess a right to life, liberty, and pursuing happiness from their Creator that pre-exists entering into civil society;¹²⁹ (2) the people have the right to self-government; and (3) the governed have the right to sever

123. CONRAD CHERRY, *GOD'S NEW ISRAEL: RELIGIOUS INTERPRETATIONS OF AMERICAN DESTINY* 17 (Univ. of N. C. Press, 1998).

124. STOUT, *supra* note 2, at xxii.

125. BELLAH, *supra* note 33, at 34.

126. Yehuda Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1247 (1986).

127. See Deborah K. Hepler, *The Constitutional Challenge to American Civil Religion*, 5 KAN. J.L. & PUB. POL'Y 93, 102-04 (1996) (discussing traditions of American Civil Religion).

128. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 11 (Princeton Univ. Press, 1988).

129. Madison regarded free exercise of religion as an "inalienable right" and a "duty" that is "precedent both in order of time and degree of obligation, to the claims of Civil Society." *Id.* In his *Memorial and Remonstrance* to the Virginia legislature, Madison argued that:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Id. This view comports with the rights declared in the Declaration of Independence and the subsequent Virginia Declaration of Rights authored by George Mason, with assistance from Madison. *Id.*

themselves from any government that is based on the divine right of kings—the Declaration is instead frequently viewed in more transcendently inspirational terms as a commission to propagate the democratic form of government abroad.¹³⁰

The Constitution is also portrayed as having sacred and transcendent origins, a “divinely inspired” document that has permeated American culture since the Founding.¹³¹ In fact, one common belief during the years of the early Republic held that the Constitution was the most recent major covenant between God and his people since the Abrahamic Covenant.¹³² In a 1987 speech to the Church’s 157th Semiannual General Conference entitled “Our Divine Constitution” based on Joseph Smith’s revelation that God “‘established the Constitution of this land,’” Ezra Taft Benson, the President of the Church Of Jesus Christ Of Latter-Day Saints (LDS), declared that it was drafted “‘by the hands of wise men whom I raised up unto this very purpose.’”¹³³ Benson went on to suggest that LDS members should

Reverence the Constitution of the United States as a sacred document. To me its words are akin to the revelations of God, for God has placed His stamp of approval upon it . . . I testify that the God of heaven sent some of His choicest spirits to lay the foundation of this government, and He has now sent other choice spirits to help preserve it.¹³⁴

In civil religion, the Flag is also said to be the “title deed of freedom,” whose “blue is the blue of heaven, loyalty, and faith.”¹³⁵ Elements of all three are reflected in The American’s Creed written in 1918 by William Tyler Page, a native Virginian whose ancestors arrived in 1650. It begins “I believe in the United States of America,” and concludes “I therefore believe it is my duty to my Country to love it; to support its Constitution; to obey its laws; to respect its flag, and to defend it against all enemies.”¹³⁶ Page

130. See, e.g., John J. Patrick, ERIC Digest, Teaching the Declaration of Independence, <http://www.ericdigests.org/2003-4/independence.html> (last visited Jan. 2, 2011) (stating that teacher should “emphasize that the Declaration of Independence has global significance because it set a standard for liberty and justice under law to which all people in the world may aspire.”).

131. LEVINSON, *supra* note 128, at 14.

132. *Id.* at 11.

133. Benson’s authority for this statement is Section 101:80 of The Doctrine And Covenants Of the Church of Jesus Christ Of Latter-Day Saints, based on a revelation of God given to Joseph Smith, the Prophet, at Kirtland, Ohio, December 16, 1833. See Doctrine and Covenants 101, <http://scriptures.lds.org/dc/101/80#80> (last visited Jan. 2, 2011) (indicating where Benson’s quote came from).

134. Benson’s speech is published in an article, Ezra Taft Benson, *Our Divine Constitution*, ENSIGN, Nov. 1987, at 4.

135. Ruth Apperson Rous, *I am the Flag*, USFLAG.ORG, <http://www.usflag.org/g/iamtheflag.html> (last visited Jan. 2, 2011).

136. William Tyler Page, *The American’s Creed*, USFLAG.ORG,

described it as “the summary of the fundamental principles of the American political faith as set forth in its greatest documents, its worthiest traditions, and its greatest leaders.”¹³⁷ Commingling too closely the distinctly Judeo-Christian aspirations of the unique value of each of God’s creation, on the one hand, with the political right of each person to life, liberty, and the pursuit of happiness, on the other, may easily transform a universal religious truth into faith in a “political truth” that is no less deserving of worship than that which is traditionally reserved to the Creator.

It has been said, perhaps unfairly, that the novitiate seminaries for American Civil Religion are the public schools, where the foundations of American ideals are often taught without distinction and meant to be established.¹³⁸ The Code of Virginia requires, for example, that “Virginia’s unique role in the history of the United States, the Declaration of American Independence, the general principles of the Constitution of the United States, including the Bill of Rights, the Virginia Statute of Religious Freedom, the charters of April 10, 1606, May 23, 1609, and March 12, 1612, of The Virginia Company, and the Virginia Declaration of Rights shall be thoroughly explained and taught by teachers to pupils in public elementary, middle, and high schools.”¹³⁹ Students are further required to learn the history and principles of the flag of the United States, as well as the Pledge of Allegiance and the appropriate etiquette and conventions for respecting the dignity and appropriate display of such flags.¹⁴⁰

Most would not find fault with these requirements and in fact would deem them properly taught for an educated citizenry. Instilling awareness and knowledge of American history, traditions, and leaders is necessary for the advancement of a cohesive national character and culture. If that history, however, is viewed as infallible, the traditions, inerrant, and the heroes revered to xenophobic ends, instruction may morph into state worship. And when public officials motivated by patriotic sentiment, whether in the executive, legislature, or the judiciary, intervene to inhibit or prohibit free speech that expresses differences or dissent from these traditions, there may arise a formal, coercive establishment of civil religious exercise imposed by raw state power.

Other earmarks of American Civil Religion are seen in the national calendar which includes religious holidays, as well what some would view as the holy days of the civil religion—Flag Day,

<http://www.usflag.org/americancreed.html> (last visited Jan. 2, 2011).

137. *Id.*

138. JOHN F. WILSON, *PUBLIC RELIGION IN AMERICAN CULTURE* 126 (Temple Univ. Press, 1979).

139. VA. CODE ANN. § 22.1-201 (West 2010).

140. *Id.* at § 22.1-202.

the Fourth of July, and Thanksgiving.¹⁴¹ Memorial Day is a day set aside to remember and honor those who have sacrificed and given their lives to the defense of freedom. Some view it more cynically, however, as a rite for a “cult of the dead . . . [dead who] symbolically elaborat[ed] sacrifice of human life for the country.”¹⁴² The Office of the President is also intimately linked with the Civil Religion. One observer contends its occupant serves, all at once, as its “principle prophet, high priest, first preacher, and chief pastor.”¹⁴³ And for those who serve in office, including the President, loyalty oaths under Article VI of the Constitution are viewed as “creedal affirmations of [the] Constitutional Faith.”¹⁴⁴

While all this describes how the American Civil Religion may be perceived and variously manifested, the spiritual heart of the creed lies for many in one central idea: that America is a nation, chosen by God, to bring about his will on earth and serve as an agent for liberty. America was founded, the creed holds, to be an example of and primary actor in spreading its form of civic republicanism.¹⁴⁵ America is also to be a refuge to the world—allowing those who accept its promise of liberty to come and participate in this great historical experiment.¹⁴⁶ As Bellah observed, “Europe is Egypt; America, the promised land.”¹⁴⁷ The God of the American nation is, Jefferson said, “as Israel of Old,” bound to the American nation and endowing them with the sacred rights of “life, liberty, and the pursuit of happiness.”¹⁴⁸ America is seen, essentially, as “God’s New Israel.”¹⁴⁹ The American way of

141. STOUT, *supra* note 2, at xix.

142. W. Lloyd Warner, *An American Sacred Ceremony*, in AMERICAN CIVIL RELIGION, *supra* note 31, at 89, 111.

143. PIERARD, *supra* note 111, at 25; “Martin E. Marty has suggested that there are two forms of civil religion—the ‘priestly’ and, the ‘prophetic.’ Marty maintains that most politicians tend to assume the priestly role. [Journalist James] Reston sees the role of the fourth estate as a prophetic one in creative tension with the politicians.” Leo Sandon, Jr., *James Reston: Prophet of American Civil Religion*, THE CHRISTIAN CENTURY, Jan. 5-12, 1977, at 15.

144. LEVINSON, *supra* note 128, at 90.

145. See WILSON, *supra* note 138, at 29-30 (differentiating between the “exemplary” strand of America’s mission—the isolationist view that America is to stand as an example to the world—and the “emissary” strand—that American civilization needs to be spread throughout the world). See generally Jim Wallis, *Dangerous Religion: George W. Bush’s Theology of Empire*, SOJOURNERS MAGAZINE, Sept.-Oct. 2003, at 20 (noting that to the consternation of many, President George W. Bush followed the Wilsonian emissary tradition).

146. See generally MEACHAM, *supra* note 30, at 24-25 (illustrating foundation of his thought).

147. *Id.* at 25.

148. *Id.* at 22.

149. See generally CHERRY, *supra* note 123, at 19 (arguing that “history of American Civil Religion is history of conviction that American people are God’s New Israel, his newly chosen people.”). Professor Robert Wuthnow

life—unique in being founded on a creed—is thus a *prophetic* idea, an idea recognized by Sidney Mead in his essay *Nation with the Soul of a Church*, that the *nation* is God’s “primary agent for meaningful activity in history.”¹⁵⁰ And throughout American history—from Manifest Destiny and westward expansion to the victories against totalitarianism in the 20th Century—this notion that America is God’s chosen nation elected to bring liberty to the world has seemed self-authenticating.¹⁵¹

Philosopher and law professor Martha C. Nussbaum proposes a secular antidote to this viewpoint, arguing that “this emphasis on patriotic pride is both morally dangerous, and ultimately, subversive of some of the worthy goals patriotism sets out to serve . . . devotion to worthy ideals of justice and equality.”¹⁵² She offers a “cosmopolitan” paradigm for Americans as “citizens of a world of human beings” with allegiance to what is right and just for humanity, rather than to parochial state concerns.¹⁵³ This devotion to humanistic universality has sparked disagreement on a number of levels. Professor Benjamin R. Barber notes that “America’s civic nativism is . . . [already] a celebration of internationalism, a devotion to values with cosmopolitan reach.”¹⁵⁴ Professor Hilary Putnam suggests that patriotism of the “best kind” is “indispensable,” because without it, there is “no way to distinguish between what should be saved and what should be scrapped from our various traditions.”¹⁵⁵ Arguing that overbearing cosmopolitanism is no less dangerous than unrestrained patriotism, Professor Michael Walzer observes that

[t]he crimes of the twentieth century have been committed alternately, as it were by perverted patriots and perverted cosmopolitans. If fascism represents the first of these perversions, communism in its Leninist and Maoist versions, represents the second . . . A particularism that excludes wider loyalties invites immoral conduct, but so does a cosmopolitanism that overrides narrower loyalties.¹⁵⁶

And drawing from Odysseus’ epic journey home, poet Robert Pinsky attempts a more uncomfortable answer: “It is the appeal of

points to “Herman Melville’s much-read novel *White-Jacket*, for example, [which] described Americans as ‘the Israel of our time’ and the nation as a ‘political Messiah’ sent as an advance guard to ‘bear the ark of the liberties of the world.’ Wuthnow, *Divided We Fall: America’s Two Civil Religions*, THE CHRISTIAN CENTURY, Apr. 20, 1988, at 395, 396.

150. MEAD, *supra* note 110, at 68.

151. PIERARD, *supra* note 111, at 60.

152. MARTHA C. NUSSBAUM, FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 4 (Joshua Cohen ed. 1996).

153. *Id.*

154. *Id.* at 33.

155. *Id.* at 96-97.

156. *Id.* at 126-27.

unknown coasts and islands that counterbalance the love of our Ithaca—which is itself an unknown island, terrible and alluring.”¹⁵⁷ Or is it? Judge (now Professor) Michael W. McConnell returns with a familiar refrain:

What better models of cosmopolitan virtue can we find for our children than those we celebrate in our public holidays, whether Washington or Lincoln or King? The particular pride of being an American is based on self-evident truths of universal application and in the appropriation of parts of the cultures of peoples, our ancestors, from every corner of the globe. What a mistake it would be to cast this aside!¹⁵⁸

C. Is an American Civil Religion Necessary and Inevitable?

Many of those who have studied and described the American Civil Religion, including Bellah, have become ardent supporters of the concept—describing it as necessary and inevitable in a pluralistic society.¹⁵⁹ By emphasizing what Americans have in common, the Civil Religion has “been an effective deterrent to the destructive forces present when individuals derive their identity and sense of community from small and diverse groups.”¹⁶⁰ As a nation so diverse—much more so than perhaps even the Founders could have envisioned—the uniting force of a Civil Religion binds a diverse nation together and drives it toward a common goal. The Civil Religion may also serve to legitimize the government and the law. Phillip Hammond, Bellah’s co-author, describes how the early courts had to frame legal institutions in the form of morality and the sacred.¹⁶¹ To avoid conflict in a religiously diverse nation, however, not just one religion could be chosen to provide this moral foundation—hence the need for a non-sectarian civil religion.¹⁶² And even if Civil Religion is found to be undesirable, it may be nonetheless unavoidable—it may be, as Durkheim describes, a transcendent social force with a life of its own.¹⁶³ Prominent political commentator Rabbi Yehuda Mirsky noted that a public religion responds to a direct need for religious symbols and rhetoric “in a disestablished republic.”¹⁶⁴

Many scholars have also noted the positive effect Civil Religion has had in fostering an appreciation for liberty and

157. *Id.* at 90.

158. *Id.* at 83.

159. See generally, BELLAH, *supra* note 33, at 29 (noting that civil religion is important in setting precedents among other pluralistic religions).

160. Hepler, *supra* note 127, at 94.

161. ROBERT N. BELLAH & PHILLIP E. HAMMOND, *VARIETIES OF CIVIL RELIGION* 151-61 (1980).

162. *Id.* at 103-04.

163. Mirsky, *supra* note 126, at 1248.

164. Hepler, *supra* note 127, at 104.

republican values in the American citizenry. According to Jon Meacham in *American Gospel*, the American Civil Religion is unique in fostering “a habit of mind and heart that enables all Americans to be at once tolerant and reverent.”¹⁶⁵ Meacham argues that the American Civil Religion—emphasizing the importance of the individual and his or her moral virtue—is the reason why America has far fewer problems than other nations in maintaining a free society.¹⁶⁶ Without Civil Religion, patriotism could devolve to its basest form—blind nationalism based on ethnic and religious divisions. Instead, American patriotism is infused with the noble goals of fostering liberty and establishing a “City on the Hill.”¹⁶⁷ Meacham argues that these foundational ideals—derived from Civil Religion—are what allowed the relative success of the Civil Rights movement.¹⁶⁸ Thus, from the Civil War to the Civil Rights era, throughout America’s most tumultuous times, the unifying nature of the Civil Religion has arguably had some impact on holding the nation together in the face of division and strife.

The recent affirmation of the constitutionality of the Pledge of Allegiance to the Flag by the Ninth Circuit Court of Appeals in *Newdow v. Rio Linda Union School District*¹⁶⁹ stresses that the Pledge “has the permissible secular effect of promoting an appreciation of the values and ideals that define our nation. The recitation of the Pledge is designed to evoke feelings of patriotism, pride, and love of country, not of divine fulfillment or spiritual enlightenment”¹⁷⁰ and that the phrase “under God” in the Pledge has “the predominant purpose and effect of adding a solemn and inspiring note to what should be a solemn and inspiring promise of allegiance to our Republic.”¹⁷¹ In short, the court found the Pledge to be designed to be a predominantly patriotic exercise, not a religious activity.¹⁷²

165. MEACHAM, *supra* note 30.

166. *Id.* at 31.

167. Maddigan, *supra* note 29, at 321.

168. MEACHAM, *supra* note 30, at 191. President Lyndon B. Johnson’s 1965 inaugural address reiterated the central tenet of the American Civil Religion that America is “a Promised Land that [will] illuminate the world,” and used these ideas to rally Americans around his transcendent vision for the “Great Society.” *Id.* Throughout his presidency, Johnson asked what God would have us do, and compared the events in Selma, Alabama to Lexington, Concord and Appomattox. *Id.* 195-96.

169. 597 F.3d 1007, 1021 (9th Cir. 2010).

170. *Id.* at 1018.

171. *Id.* at 1019.

172. *Id.* at 1014. The Ninth Circuit majority described the purpose of the Pledge as follows:

The Pledge of Allegiance serves to unite our vast nation through the proud recitation of some of the ideals upon which our Republic was founded and for which we continue to strive: one Nation under God—the

Despite the apparent need for some form of Civil Religion to bind a diverse, hugely expansive republic, like any ecclesiastical creed, Civil Religion is easily susceptible to abuse. Rousseau expressed concerns that such a national religion could become "an idolatrous fraud perpetrated on naïve believers."¹⁷³ Bellah also worried about the way in which such religious nationalism "was used to support an idolatrous worship of the state."¹⁷⁴ Sidney Mead in his famous essay *Nation with the Soul of a Church*, warned that "our attitude toward the nation [may become] idolatrous," and emphasized that the state must not become God, lest it be able to abuse its power without recourse.¹⁷⁵ Mead did contend that such idolatry was unlikely because of religious pluralism—no one religious group could ever gain a monopoly on the civil religion.¹⁷⁶ Mead, however, seems to overlook the possibility that the American religion itself could develop into a state-sanctioned religion, with its own ultimate tenets, monopolizing the beliefs deemed acceptable in public discourse.¹⁷⁷

Perhaps the most dangerous consequence of civil idolatry is its tendency to gloss over the faults and moral failings of a country—allowing past injustices, and the lessons learned from them, to fade from the collective memory. Meacham posits that the emphasis on America as God's chosen people can offer "automatic justification for any course the country wishes to take."¹⁷⁸ Even Bellah, an ardent supporter of the Civil Religion, warned that it could fall into "laudatory self-congratulation."¹⁷⁹ Such national aggrandizement, he worried, could also slip into imperialism.¹⁸⁰

Founding Fathers' belief that the people of this nation are endowed by their Creator with certain inalienable rights; indivisible—although we have individual states, they are united in one Republic; with liberty—the government cannot take away the people's inalienable rights; and justice for all—everyone in America is entitled to 'equal justice under the law' (as is inscribed above the main entrance to our Supreme Court).

Id. at 1012.

173. Hepler, *supra* note 127, at 103.

174. *Id.* at 106.

175. MEAD, *supra* note 110, at 70.

176. *Id.* at 70-1.

177. Throughout American history, Christian ministers often warned against worship of the state. In 1930 James M. Beck, in an address to the American Philosophical Society, criticized Americans for putting the Constitution in the same league as the Bible in being "infallible and omnipotent." LEVINSON, *supra* note 128, at 14. From abroad, a number of Irish Protestants during the Civil War viewed the primary American sin as "vain-glorious devotion offered to the idol of the Constitution." NOLL, *supra* note 86, at 98.

178. MEACHAM, *supra* note 30, at 27.

179. Richardson, *supra* note 89, at 164.

180. *Id.* He pointed to Richard Nixon's Second Inaugural Address, noting how the address glossed over America's moral failings in Vietnam and was essentially a "sustained hymn to American innocence." BELLAH, *supra* note 33,

Social philosopher Will Herberg considered this a “super religion” that validates America’s choices “without in any sense bringing them under judgment.”¹⁸¹ The danger of blindly believing God is always on America’s side can lead to a nation—as some say the South was—deaf to criticism and doomed to follow any misguided policy adopted under the guise of national interest.

In addition to concerns of idolatry, groups on opposing ends of the religious spectrum have throughout American history worried about the specific content of the American Civil Religion. And establishing a balancing act between these two groups—preventing the Civil Religion from being exclusive while maintaining some substance that has relevance to the Judeo-Christian majority—has often become a source of confusion for the courts and government.¹⁸² On the one hand, some traditional Christian groups have complained that the civil religion is a “watered-down” version of Christianity devoid of any true meaning—and therefore relevance.¹⁸³ With feelings that the Civil Religion is “a fantastic degradation and parody of religion,” the risk of alienating the Judeo-Christian majority remains a real concern.¹⁸⁴ Following President Eisenhower’s inaugural parade, a writer for the *Episcopal Church News* commented on a display trying to encompass the religious diversity of the country: “Standing for all religions, it had the symbols of none.”¹⁸⁵ To some, dissatisfaction with this “empty and broken shell” of religion can only lead to two acceptable results: a more sect-specific civil religion or an abandonment of faith in the American creed altogether.¹⁸⁶

On the other end of the spectrum, religious and non-religious groups whose beliefs fall outside the “watered-down” Judeo-Christian mold of the civil religion risk alienation.¹⁸⁷ Some see “government-imposed unity around religious beliefs” as a clear violation of the Establishment Clause.¹⁸⁸ An atheist, for example, may feel excluded by “the absorption of ‘Christian ethnocentrism’”

at 262. The danger of such an attitude was evident in the creation of the inaugural speech itself—Nixon’s Inaugural Committee had consciously chosen not to mention Lincoln’s Second Inaugural because it might remind of the potentially embarrassing subject of American slavery. *Id.* at 260-1.

181. PIERARD, *supra* note 111, at 287.

182. Mirsky, *supra* note 126, at 1252.

183. CHERRY, *supra* note 123, at 15.

184. Mirsky, *supra* note 126, at 1254.

185. MEACHAM, *supra* note 30, at 178.

186. ROBERT BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 142 (The Univ. of Chi. Press 1992) (1975).

187. CHERRY, *supra* note 123, at 15.

188. The Harvard Law Review Association, *Developments in the Law—Religion and the State: III. Accommodation of Religious Public Institutions*, 100 HARV. L. REV. 1639, 1659 (1987).

in public institutions and the “ceremonial deism” that underlies America’s transcendent historical aspirations.¹⁸⁹ Echoing Justice O’Connor’s concurrence in *Lynch v. Donnelly*,¹⁹⁰ the majority opinions in *Marsh v. Chambers*¹⁹¹ and *Lynch*,¹⁹² to some, stand as a message to non-Christians that their ideas are generally not welcome in the body politic.¹⁹³ Even among Christians, the Civil Religion can often come into conflict with the dictates of traditional religion—for example, when a Catholic naval officer swears to defend the nation and is put in charge of nuclear weapons, despite the Pope’s insistence that they not be used.¹⁹⁴ And in such cases, the Civil Religion requires such dissenters, if they object, to “speak softly and stay out of sight.”¹⁹⁵

Additionally, because the Civil Religion stems so much from the *European* immigrant experience in America, minority communities—whether Christian or not—may also feel isolated by a Civil Religion with philosophical origins almost entirely European.¹⁹⁶ As Charles H. Long in his essay *Civil Rights—Civil Religion* noted, “the religion of the American people centers around the telling and retelling of the mighty deeds of the white conquerors.”¹⁹⁷ The current day manifestation of his phenomenon has likewise had an impact on new waves of immigrants.¹⁹⁸

189. *Id.*

190. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

191. *See Marsh v. Chambers*, 463 U.S. 783, 795 (upholding constitutionality of the practice of legislative prayer).

192. *See generally Lynch*, 465 U.S. at 672 (allowing city’s display of Christmas decorations on public grounds, so long as such displays have secular purpose).

193. Mirsky, *supra* note 126, at 1238.

194. *See Pacem in Terris, Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity and Liberty*, Apr. 11, 1967, available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/document_s/hf_j-xxiii_enc_11041963_pacem_en.html (last visited Jan. 2, 2011) (stating that nuclear weapons must be banned); *see also* Thomas J. White Center on Law & Government, *Nuclear Weapons, Lethal Injection, and American Catholics: Faith Confronting American Civil Religion*, 14 NOTRE DAME J.L. ETHICS & PUB POL’Y 7, 8-18 (2000) (explaining that Navy planned to remove Catholic officers from command positions on nuclear submarines when Catholic Bishop first circulated letter on nuclear weapons).

195. *Id.* at 16.

196. *See generally* Charles H. Long, CIVIL RIGHTS—CIVIL RELIGION: VISIBLE PEOPLE AND INVISIBLE RELIGION, in AMERICAN CIVIL RELIGION, *supra* note 31, at 212 (stating that American civil religion overlooks non-European religions).

197. *Id.* at 214.

198. KAREN I. LEONARD, ET AL., IMMIGRATION FAITHS: TRANSFORMING RELIGIOUS LIFE IN AMERICA (Walnut Creek, CA: AltaMira Press 2005); J. N. Iwamura, *Critical Faith: Japanese Americans and the Birth of a New Civil Religion*, AMERICAN QUARTERLY, Sept. 2007, at 937. One might argue that religious and ethnic minorities need not fear—that they retain their First Amendment rights and will not be persecuted for views that run contrary to

Perhaps one of the primary reasons the American Civil Religion has worked relatively well since the Civil War in binding the nation together is that most Americans do not see it in conflict with their own private religious traditions.¹⁹⁹ It appears that

throughout much of our history, we have addressed religion's somewhat ambiguous status in our constitutional system by simultaneously erecting a more or less formally secular state while publicly embracing 'civil religion' as a 'religion of the republic' resonant with Judeo-Christian values and beliefs, but sufficiently generic to unify large portions of the populace and become deeply intertwined in our public rituals and ceremonies.²⁰⁰

To the extent, however, that the American Civil Religion becomes legally exclusive and coercive—that is, coercive in demanding adherence to its own creed—Americans are subjected to deprivations of civil liberties and forced to make unnecessary choices of conscience. Recent court decisions declaring private sectarian expression at publicly sponsored events as contrary to the American “civic faith” are troubling, not only because doctrinally they exempt government’s expression of this American “civic faith” from constitutional scrutiny (under the government speech doctrine), but also because they discriminate against some citizens by prohibiting them from expressing their own individual faith on government property or at governmentally sponsored events, when other citizens are permitted to make faith statements that support tenets of American Civil Religion.²⁰¹ Much of this exclusion is being advanced in the name of “government speech.”

Eurocentric Judeo-Christian values. The danger, however, is not that dissenters may be persecuted for *what* they believe, but rather what they *do not* believe. The early Christians in Rome were persecuted not because they worshiped Christ, but because “they refused to sacrifice to Caesar as the state cult required.” PIERARD, *supra* note 111, at 37.

199. See BELLAH, *supra* note 33, at 34-35 (stating that civil religion was built up without any unpleasant struggle).

200. Bruce G. Peabody, *Analogize This: Partial Constitutional Text, Religion, And Maintaining Our Political Order*, 2010 CARDOZO L. REV. DE NOVO 101, 105, available at http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=140:peabody2010204&catid=18:other-de-novo-articles&Itemid=20 (last visited Jan. 2, 2011).

201. MORRISON, *supra* note 7.

IV. "GOVERNMENT SPEECH," AMERICAN CIVIL RELIGION, AND PRIVATE RELIGIOUS EXPRESSION²⁰²

A. Monument Speech as "Government Speech"

In its 2009 decision in *City of Pleasant Grove v. Summum*,²⁰³ the Supreme Court of the United States charted new ground in the area of government speech, admitting that "[n]o prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of *privately donated*, permanent monuments for installation in a public park."²⁰⁴ The request to display a permanent religious monument in a city park came from the Summum religion and was based on equal access principles arising from Pleasant Grove's decision to permit a private group to display a monument with the Ten Commandments.²⁰⁵ Writing for the majority and synthesizing the court's earlier decisions, Justice Samuel Alito declared unequivocally that governmental entities have "the right to speak for [themselves]," "to say what [they] wish," and "to select the views that [they] want to express," even when joining in a venture with a private party to advance what the Court viewed to be a public message.²⁰⁶ Justice Alito discerned that monuments located on public property categorically send a governmental message and are thus government speech.²⁰⁷ He also declared: "A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."²⁰⁸

At least three members of the majority expressed discomfort with categorical government speech. Justice Breyer viewed "the 'government speech' doctrine [as] a rule of thumb, not a rigid category."²⁰⁹ Joined by Justice Ginsburg, Justice Stevens also expressed doubt about "the recently minted government speech

202. A portion of the discussion contained in Part IV(C) of this Article (relating to political safeguards against abuse of the constitutional exemption offered by the government speech doctrine reflects sentiments expressed in a Brief of *Amicus Curiae* filed by the authors of this Article in *Summum*). Brief of Rutherford Institute as Amicus Curiae Supporting Respondent, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665).

203. *Summum*, 129 S. Ct. at 1131.

204. *Id.*

205. *Id.* at 1129.

206. *Id.* at 1131 (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998)).

207. *Id.* at 1129.

208. *Id.* at 1131.

209. *Id.*

doctrine.”²¹⁰ Observing that the decision in the *Sumnum* case was a departure from the ordinary application of the doctrine—in situations involving coerced speech or compelled participation in the funding of offensive messages—Stevens qualified his views on government speech saying, “recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages.”²¹¹

210. *Id.*

211. *Id.* The concept of “government speech” (absent the terminology) was arguably first employed in early Establishment Clause cases where the Court held that governmental action advancing a religious message—such as the prescribed New York Regent’s prayer, *Engel v. Vitale*, 370 U.S. 421 (1962), or Bible reading in schools, *Abington Sch. Dist.*, 374 U.S. at 205, or the posting of the Ten Commandments, *Stone v. Graham*, 449 U.S. 39 (1980)—had the purpose or effect of establishing religion. The term “government speech” was mentioned directly in more of the recent Establishment Clause cases involving private expression. *See, e.g.*, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J. concurring in part and dissenting in part) (stating that “government speech about religion is not *per se* suspect . . .”); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (stating that “[t]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise clauses protect.”). The issue, surfaced in earlier Free Speech cases as “compelled speech.” *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977) (addressing “Live Free or Die” on New Hampshire license plates); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (analyzing compelled union dues to advance political causes); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (reviewing use of mandatory dues to advance political and ideological causes or beliefs). The origin of “government speech” *qua* government advancing its own message context is more generally recognized as beginning with *Rust*, where the Court upheld laws requiring medical providers to distribute to persons seeking abortions certain state-promulgated information on family planning and counseling and the risks and dangers of abortion. *Rust*, 500 U.S. at 203. Later, in *Bd. Regents Univ. Wisconsin Sys.*, the Court ruled that the First Amendment allowed a public university to use a student-funded activity fee to support extracurricular student speech, provided the program was viewpoint neutral. *Bd. Regents Univ. Wisconsin Sys.*, 529 U.S. at 221. And in *Legal Servs. Corp. v. Velazquez*, the Court said that “advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542-43 (2001). There have been other cases relating to government’s ability to make decisions regarding messages in government-funded programs. *See, e.g.*, *Nat’l Endowment for the Arts*, 524 U.S. at 587-88 (allowing government to allocate competitive funding for artistic productions according to criteria that would be impermissible for regulation of speech); *Rosenberger*, 515 U.S. at 833 (1995) (stating that where government speaks for itself, it “may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted”). In *Johanns v. Livestock Marketing Ass’n*, as will be discussed in the text that follows, the Court found that a Department of Agriculture program promoting beef and beef products through a targeted tax on beef producers to be “government speech.” *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 557 (2005). In *Rumsfeld v. Forum for Academic*

The reserved support for the government speech doctrine in the *Summum* concurrences reflected earlier qualms elaborated in *Johanns v. Livestock Marketing Ass'n*.²¹² In that case, the Court rejected a challenge by several agricultural associations to a Department of Agriculture program advertising and promoting beef and beef products through a targeted tax on all beef producers.²¹³ The majority found that the program constituted government speech because the statutory scheme and the process by which the promotions were made demonstrated that “[t]he message set out in the beef promotions is from beginning to end a message established by the Federal Government.”²¹⁴ Justices Souter, Breyer, and Ginsburg disagreed, reasoning that the assessments would be more appropriately analyzed as permissible economic regulation, and not as government speech.²¹⁵ Justice Kennedy was likewise cautious, agreeing with Justice Souter that the Department of Agriculture program was not government speech, leaving “for another day the difficult First Amendment questions that would arise if the government were to target a discrete group of citizens to pay even for speech that the government does ‘embrace as publicly as it speaks.’”²¹⁶

*B. The Ill-Defined and Potentially Indefinable Boundaries of
“Government Speech”*

The term “government speech” has to date been mentioned in seven Supreme Court free speech cases, more often as a shield protecting individual liberty interests under the Bill of Rights against allegations of governmentally “compelled speech.”²¹⁷ Its

and *Institutional Rights, Inc.*, 547 U.S. 47 (2006), involving a challenge to a statute requiring on campus military recruitment as a condition of Federal higher educational subsidies, the Court noted the protection against compelled speech runs to private speech, but not the funding of “military recruiters’ speech [which] is clearly Government speech.” *Id.* at 61 n.4. Scholarly commentary on “government speech” appears to have begun in the late 1970s, with a series of articles by Professors Yudof, Nowak, Shiffrin, Zeigler, and Laycock, which are listed in Luther III & Caddell, *supra* note 18; see also, Randal P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1422 (2001); Leslie Gielow Jacobs, *Who’s Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 97 (2002).

212. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

213. *Id.* at 567.

214. *Id.* at 556.

215. *Id.* at 569 (Breyer, J., concurring); *id.* (Ginsburg, J., concurring).

216. *Id.* at 570.

217. *Pleasant Grove City v. Summum*, 129 S. Ct. at 1125 (2009); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005); *United States v. United Foods*, 533 U.S. 405 (2001); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Board of Ed. v. Southworth*, 529 U.S. 217 (2000); *Board of Ed. of*

more definitive extension in the *Summum* case to include governmental endorsement of *private speech*, following the more limited endorsement in the *Johanns* case, presents a new doctrinal dimension deserving of careful scrutiny.

Justice Breyer articulated the difficulties with the government speech doctrine in the pre-*Johanns* case, *United States v. United Foods, Inc.*²¹⁸ “Nearly every human action that the law affects, and virtually all governmental activity, involves speech” and the Court “has distinguished among contexts in which speech activity might arise, applying special speech-protective rules and presumptions in some of those areas, but not in others.”²¹⁹ In this type of situation, he cautioned, applying First Amendment analysis to every type of government program, particularly those dealing with commercial regulation, may pose “a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect.”²²⁰ Faulty analysis could lead to “less First Amendment protection” in some instances and also create “an incentive to increase the Government’s involvement in any information-based regulatory program, thereby unnecessarily increasing the degree of that program’s restrictiveness.”²²¹

Justice Alito acknowledged in *Summum* “the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint.”²²² Justice Souter likewise noted that

the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause’s stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.

The tips of these legal icebergs are evident in numerous (and likely to be legion) federal circuit court cases dealing with political, social and religious speech. To date, government speech has been claimed to be transmitted through religious symbols in public parks and public buildings, marketing programs, candy canes, license plates, plays and radio programs, graduation speeches, and

Westside Cmty. Sch., v. Mergens, 496 U.S. 226 (1990).

218. *United States v. United Foods, Inc.*, 533 U. S. 405 (2001).

219. *Id.* at 424.

220. *Id.* at 425.

221. *Id.* at 429.

222. *Summum*, 129 S. Ct. at 1125.

legislative prayer.²²³ Almost all of the courts addressing these

223. See, e.g., *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003) (holding that candy canes distributed with messages at Christmas are not government speech per se); *Cochran v. Veneman*, 252 F. Supp. 2d 126 (M.D. Pa. 2003), *aff'd sub nom. Cochran v. Sec'y of Agric.*, 2005 WL 2755711 (3rd Cir. 2005) (reversing initial finding in light of the *Johanns* ruling that Dairy Act promotional program constituted private speech and thus compelled speech was subject to First Amendment scrutiny); *Modrovich v. Allegheny Cnty.*, 385 F.3d 397 (3d Cir. 2004) (holding that Ten Commandments plaque donated by private group for display at courthouse constituted impermissible government speech); *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786 (4th Cir. 2004) (finding that "Choose Life" license plates were not government speech); *Simpson*, 404 F.3d 276 (4th Cir. 2005) (deciding that County program inviting outside ministers to provide legislative prayer was government speech); *Pelts & Skins LLC v. Landreneau*, 365 F.3d 423 (5th Cir. 2004), *cert. granted, vacated*, 544 U.S. 1058 (2005), *on remand*, 448 F.3d 743 (5th Cir. 2006) (remanding in light of *Johanns*, the initial finding that program promoting advertising of alligator products reflected private rather than governmental interests and not a governmental message crafted, controlled, and expressed by an agency); *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (holding that 'Choose Life,' as it is to appear on the face of Tennessee specialty license plates, is a government-crafted message because Tennessee "sets the overall message to be communicated and approves every word that is disseminated" on the 'Choose Life' plate.); *Adland v. Russ*, 307 F.3d 471, 489 (6th Cir. 2002) (finding that Ten Commandments monument donated by private group was government speech that violated the Establishment Clause); *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757 (7th Cir. 2001) (agreeing that choice of campus play was government speech because University required performance was advertised in a school sponsored news paper; was subject to University control and took place on the campus of the University); *KKK v. Curators of the Univ. of Missouri*, 203 F.3d 1085 (8th Cir. 2000) (holding that public underwriting acknowledgements constituted government speech where KKK barred from serving as a group underwriter by public radio station that denied their support); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (finding that Arizona's failure to approve a "Choose Life" special license plate violated the Coalition's Free Speech rights); *Paramount Land Co. LP v. California Pistachio Comm'n*, 491 F.3d 1003 (9th Cir. 2007) (finding that factual differences in actual oversight between the beef promotion scheme in *Johanns* and the pistachio scheme in this case were legally insufficient to justify injunction); *Wells v. City and Cnty. of Denver*, 257 F.3d 1132 (10th Cir. 2001) (holding that there was no cause of action where City of Denver prohibited a sign promoting atheist views in a Christmas display as the message advanced by the City "is the City's message to the community."); *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (finding that Florida license plate program is structured to benefit the organizations that apply for and sponsor the plates, not the State itself, and there is insufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech); *Alder v. Duval Cnty. Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000) (holding that neutral mechanism whereby the students elect speaker to give an unrestricted message does not establish an utterance of the state and the student's speech is her own.); *People For The Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005) (permitting District's Commission on Arts and Humanities decision to deny group's sponsorship

issues have reviewed factors such as the message to be communicated, the means by which the communication is made, and who crafts and controls distribution of the message.²²⁴ More problematic now, however, in light of *Summum*'s transformation of a "private" message (the Eagles' Ten Commandment's monument) into a "constitutionally exempt governmental message," is the effect of permitting government to exclude or regulate *competing* private messages in a public forum or governmental event in the name of "government speech." Permanent monuments are vastly different from the unlimited universe of situations where government sponsors or controls events on its property, but nevertheless permits private individuals to promulgate and fashion event-related messages to be spoken. In what situations does privately-promulgated speech in that context become government speech? And by what criteria? And if government "control" is the only touchstone, will the unique, privately composed speeches of individual private speakers inexorably be subject to censorship whenever presented on government property or at governmentally-sponsored events?

C. *The Need for Bright Lines*

Justice Alito foresaw some of the line-drawing difficulties in determining what is, and what is not, government speech, but dismissed them with scenarios presenting relatively obvious answers.²²⁵ Yet the Court's decision to rationalize the *Summum*

package as regulation of government speech); *Avocados Plus Inc. v. Johanns*, 421 F. Supp. 2d 45 (D.D.C. 2006) (finding that Beef Act and the Avocado Act identical in all relevant aspects, with the Secretary exercising same degree of control over Avocado Board as he does over Beef Board).

224. See cases cited *supra* note 223 (summarizing decisions around the country).

225. He raised, and dismissed, three obvious potential problems: The first example being "the Vietnam Veterans Memorial Fund [which] is a private organization that obtained funding from over 650,000 donors for the construction of the memorial itself" whose donors, he said, "expressed a wide range of personal sentiments in contributing money for the memorial"; the second, where "a painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings," but, he said, "it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same 'message'"; and the third, the temporary display of a cross by the Ku Klux Klan on the grounds of the Kentucky State Capitol in *Capitol Square Review*, which he said "involved a very different situation—a request by a private group, the Ku Klux Klan, to erect a cross for a period of 16 days on public property that had been opened up for similar temporary displays, including a Christmas tree and a menorah." *Summum*, 129 S. Ct. at 1138. In a subsequent case involving school censorship of an instrumental performance of "Ave Maria" at a high school graduation, Justice Alito dissented from the Court's denial of a writ of certiorari and seemed to recognize that viewpoint discrimination principles apply in circumstances where private speech occurs at publicly sponsored events. See *Nurre*, 580 F.3d

decision using the government speech doctrine greatly amplifies the likelihood that a myriad of free speech claims involving government property or government sponsored events will now include government speech defenses. The defense may arise where government officials seek to exclude and restrict potentially controversial speech, or limit access to forums open to other private speakers privileged by government to speak, but under restrictions or censorship it may now seek to impose in the name of "government speech."

More than one jurist has properly recognized that "[w]hat is, and what is not, 'government speech' is a nebulous concept, to say the least."²²⁶ The complexities that arise from private speech on government property are readily apparent in the many lower court cases involving alleged "governmental messages."²²⁷ This is because "[s]peech in fact can be, at once, that of a private individual and the government."²²⁸ The complex inter-relationships between government and the private sector, and the continuous intersection of government with individuals on public property and at public events, frequently create ambiguities as to whether a message is essentially a private or a public one.²²⁹

at 356 (finding censorship of instrumental graduation performance of "Ave Marie" in program containing eight other instrumental music pieces not violation of Equal Protection).

226. *Sons of Confederate Veterans v. Comm'r of the Virginia Dep't of Motor Vehicles*, 305 F.3d 241, 251 (4th Cir. 2004) (Gregory, J., dissenting from the denial of rehearing *en banc*).

227. See cases cited *supra* note 223 (summarizing Circuit cases).

228. *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing *en banc*).

229. The lack of certainty concerning the applicability and boundaries of the government speech doctrine is confirmed by the wide range of diverse opinions in the federal circuits. Aside from the numerous differing opinions produced by the Tenth Circuit in the *Summum* case, the Fourth Circuit has also struggled for coherence on the doctrine. See, e.g., *Sons of Confederate Veterans*, 305 F.3d 241 (4th Cir. 2004) (analyzing Confederate Flag on Virginia license plates); *Planned Parenthood*, 373 F.3d 580 (4th Cir. 2004) (reviewing Choose Life message on South Carolina license plates). The panel decision in *Sons of Confederate Veterans*, written by Judge Karen L. Williams, was unanimous, but the petition for rehearing *en banc*, denied by a vote of six to five, revealed the uncertainties. Judges J. Harvie Wilkinson III and J. Michael Luttig wrote opinions concurring in denial, while Judges Paul V. Niemeyer and Roger L. Gregory each wrote separate dissenting opinions. *Id.* at 242, 244, 247. In *Planned Parenthood*, the panel hearing the case published three separate opinions, and on petition for rehearing *en banc*, denied by a vote of eight to five, Judge Wilkinson wrote an opinion concurring in the denial and Judge Dennis W. Shedd wrote an opinion dissenting from denial of rehearing *en banc*, which was joined by Judge Williams. *Id.* at 581. A similar pattern occurred in *Summum* in the Tenth Circuit where the court was split on a petition for rehearing *en banc* six to six, with three Judges issuing highly diverse opinions as to the proper rationale for decision. *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1171, 1174, 1178 (10th Cir. 2007).

Government may be merely accommodating private speech, facilitating or even endorsing the advancement of a private message, or it may be promulgating a truly governmental message.

Conversely, the voice of government may very easily be advanced in league with private entities in a manner that evidences no discernable connection of a message with government though it is very much a governmental message.²³⁰ Private entities may thus assume roles as government advocates or unidentified surrogates, disseminating messages that are difficult to trace to a public author. The line between public speech and private speech rights may thus be extremely difficult to discern. Chief Judge Tacha of the Tenth Circuit identified the difficulty in the Tenth Circuit's consideration of *Summum*:

[The government ownership] approach is an unprecedented, and dangerous, extension of the government speech doctrine. To make government ownership of the physical vehicle for the speech a threshold question would turn essentially all government-funded speech into government speech. But this would be an absurd result. No one thinks *The Great Gatsby* is government speech just because a public school provides its students with the text. This is because the speech conveyed by the physical text remains private speech regardless of government ownership.²³¹

230. See Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 983-84 (2005) for examples of the government's use of private actors to advance its anti-drug message. The White House Office of National Drug Control Policy reviewed the scripts of more than 100 episodes of television shows such as "E.R.," "Beverly Hills 90210" and "Cosby" to make sure the programs conveyed the "proper" anti-drug messages, in exchange for which the networks received more than \$20 million worth of credit for required public service broadcasting. *Id.*

231. *Summum*, 499 F.3d at 1179 (Tacha, C.J., response to dissent from denial of rehearing *en banc*). The difficulty in determining whether private speech takes on a government character was reviewed in *Wells*, 257 F.3d 1132 (10th Cir. 2001), where the City and County of Denver erected a Christmas display on the steps of the City and County Building through the sponsorship of private business entities. An atheist group requested to place a Winter Solstice sign "inside" the "Christmas display area" denigrating God and religion. Analyzing the question under the government speech rubric, the Court asked, who is the speaker? And if the speaker is the City or County, does it control the content of the display? And if it does, is it government speech? Two judges concluded that the government was the speaker because Denver owned and maintained the entire display, erected the fence surrounding the display, provided video cameras, motion detectors, and a security guard to protect the display. The Court also found that "in Denver's view, the display is the City's message to the community," *id.*, at 1139, even though the cost of the display was paid for by six corporate sponsors. The third member of the Tenth Circuit panel dissented, in part because "the holiday display is not solely government speech, but contains private speech . . ." She suggested that:

To accept the view that government ownership of property, or control of a public event or forum, means that all speech in such circumstances is categorically government sponsored, and therefore, government speech, opens the door for mass viewpoint discrimination, leaving government free to "accept any private message as its own [or censor] without subjecting the message to the political process, a result that would shield the government from First Amendment scrutiny *and* democratic accountability."²³² To ensure political accountability, therefore, it is important to require government to demonstrate that it intends not only to control all of the private speech occurring on its premises, but that it has specifically crafted the messages to be propagated. If it did, there would be no First Amendment claim for viewpoint discrimination; if it did not, the speech would be private speech, or as Judge Michael Luttig and others have suggested, a "hybrid" of government and private speech²³³ (where government has opened access to government property for messages with both private and public content). These latter situations demand careful scrutiny. The more appropriate and critical inquiry in most instances will, and should, be whether a particular private message is a government-crafted or adopted message that is intended to be advanced to the exclusion of all other messages and otherwise meets constitutional requirements banning viewpoint discrimination.²³⁴

Equality of access and government neutrality toward the expression of viewpoints in the public square lies at the heart of the First Amendment. As Professor Schauer has observed:

[A]lthough . . . drawing distinctions is an inevitable part of the legislative, regulatory, and judicial enterprises, there remains a pervasive American suspicion of official valuation of ideas and enterprises. And while the libertarian culture that such attitudes of

To a passerby, the billboard does not appear to be from Denver, but from the sponsors, all of whom are private entities. The billboard shows that those private corporations have co-sponsored the holiday display, also making the display their speech as well as Denver's speech.

Wells, 257 F.3d at 1155.

232. *Summum*, 499 F.3d 1170, 1180 (Tacha, C.J., response to dissent from denial of rehearing *en banc*) (emphasis added).

233. Although the Supreme Court has never recognized in so many words the concept of public-private "hybrid speech," the idea that speech can be both private and governmental at the same time has been recognized in the federal circuits. See, e.g., *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing *en banc*) (stating that "the particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both.").

234. See, e.g., *Johanns*, 544 U.S. at 560 (holding that the beef advertising campaign constituted "government speech" because the "message set out in the beef promotions is from beginning to end the message established by the Federal Government.").

distrust engender is hardly restricted to freedom of communication, this skepticism about the ability of any governmental institution reliably to distinguish the good from the bad, the true from the false, and the sound from the unsound finds its most comfortable home in the First Amendment.²³⁵

Writing in a similar vein in a case involving a state legislature's decision to deny the Confederate Flag symbol on a vanity license plate, Judge J. Harvie Wilkinson, III, expressed concern that "[w]hen a legislative majority singles out a minority viewpoint in such pointed fashion, free speech values cannot help but be implicated."²³⁶ Moreover, the affront is more readily apparent when the private speech being favored or disfavored falls into certain categories. For example, in *Planned Parenthood v. Rose*, involving a state-promulgated "Choose Life" license plate, Judge Wilkinson noted that "[i]t is one thing for states to . . . celebrate birds and butterflies, military service, historical events and scenic vistas. It is quite another for the state to privilege private speech on one side—and one side only—of a fundamental moral, religious, or political controversy."²³⁷ He continued:

The fact that Americans have deep differences of opinion . . . is all the more reason to recognize the unifying force of the First Amendment principle—namely, that none of us has the right to compel assent to our views, but that all of us have the right to express them. The state's failure to be neutral on the right to speak about our most divisive issues will give rise to great resentment. The confidence that all are treated equally with respect to belief, conscience, and expression enables Americans to transcend difference and to make '*e pluribus unum*' the lasting legacy of our nation.²³⁸

This suggests that rigorous scrutiny should be applied to any claim that speech can be censored or prohibited because it is

235. Frederick Schauer, *The Exceptional First Amendment* 24 Faculty Research Working Papers, JFK School of Government, Paper No. RWP05-021 (2005), available at <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP05-021>.

236. Judge Wilkinson explained his concern as follows:

[T]he First Amendment was not written for the vast majority It belongs to a single minority of one. It is easy enough for us as judges to uphold expression with which we personally agree, or speech we know will meet with general approbation. Yet pleasing speech is not the kind that needs protection The Constitution that houses the First Amendment also shelters the Fourteenth, an everlasting reminder that a nation betrothed to liberty and equal justice under law must remain vigilant to realize both.

Sons of Confederate Veterans, 305 F.3d at 242 (Wilkinson, C.J., concurring in the denial of rehearing *en banc*).

237. *Planned Parenthood*, 373 F.3d at 581 (Wilkinson, J., concurring in the denial of rehearing *en banc*).

238. *Id.* at 581-82.

government speech. Government should be required to make clear when it contends that it seeks to advance a private message (other than through monument speech), just what message it is specifically seeking to advance, what are its reasons for doing so, and what is the basis for denying access to other groups or messages in the same forum or with similar content. Otherwise, the government speech doctrine provides an unrestricted and convenient device to advance state orthodoxy and silence disfavored views, diluting First Amendment protections and the vitality of free speech.²³⁹ If government is to speak through private means, or permit domination of the public square by such means, it should be required as a constitutional matter to adopt formally the privately-promoted message as its own, and state a compelling, viewpoint-neutral justification for doing so.

There is a further sound reason for the requirement that government clearly identify speech as its own: political accountability.²⁴⁰ Individuals generally have no constitutional right to challenge government speech under the Free Speech Clause.²⁴¹ The justification for the government speech exemption is that government speech is ordinarily subject to the political scrutiny and accountability that is part and parcel of the First Amendment's Petition Clause:

The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."²⁴²

Yet when the government hides its actions and messages from political accountability behind the veil of private party speech, it transgresses the constitutional and democratic values that purportedly undergird the government speech doctrine. When the

239. It is important to remember that "[t]he First Amendment is often inconvenient Inconvenience does not absolve the government of its obligation to tolerate speech." *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701 (1992) (Kennedy, J., concurring in judgment).

240. See *Planned Parenthood*, 361 F.3d at 795-96 (stating that "[t]he government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process.").

241. See *Summum*, 129 S. Ct. at 1129 (U.S. 2009) (stating that "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.").

242. *Legal Servs. Corp.*, 531 U.S. at 541-42 (quoting *Bd. of Regents of Univ. of Wis. Sys.*, 529 U.S. at 235).

political safeguards that justify government speech are removed, the justification for exemption of government speech from constitutional scrutiny under the Bill of Rights disappears. In such circumstances, the protective shield of the government speech doctrine should be set aside to avoid discriminatory decision-making.

When government grants access to public property for speech in which it participates with private groups, that speech should not benefit from a constitutional exemption unless: (1) it is transparently advanced by government on the public record as its own; and (2) the private message adopted as its own advances a legitimate, rationally-related, non-discriminatory governmental purpose.

By cloaking public messages with private voices, government may surreptitiously distort discourse in the public square, deceptively skewing the political process. Non-transparent governmental communication more easily permits government to avoid the repercussions of unpopular speech. And while the government is likely to associate itself with a popular message, it is all too easy without strict scrutiny for it to minimize the political ramifications of an unpopular message simply by advancing its interests covertly through a private speaker.²⁴³ These methods contradict the political accountability that is “so essential to our liberty and republican form of government.”²⁴⁴ As Justice Souter has asked, if “[n]o one hearing a commercial for Pepsi or Levi’s thinks Uncle Sam is talking behind the curtain . . . [w]hy would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?”²⁴⁵ The “First Amendment harm cannot be mitigated by the possibility that a few cognoscenti may actually understand how the [government speech] scheme works.”²⁴⁶ The possibilities for government deception into the everyday lives of this country’s citizens through an unprincipled government speech doctrine, particularly in an age of anonymous technological communication, are of imperative constitutional concern.

If government is clearly advocating on the public record a private message that it has either adopted as its own or crafted, the speech should be constitutionally exempt. But if government cannot provide a relatively minimal evidentiary showing that the message is truly its own, and define what that message is, there should be no exemption from constitutional scrutiny. False labeling or deliberate ambiguity in advancing a private party’s speech to prevent First Amendment scrutiny is constitutionally

243. *Turner*, 534 F.3d at 356.

244. *Alden v. Maine*, 527 U.S. 706, 751 (1999).

245. *Johanns*, 544 U.S. at 577-78 (Souter, J., dissenting).

246. *Id.* at 579.

mendacious. Indeed, it is entirely at odds with the substance and purposes of the First Amendment. An indiscriminate government speech doctrine based on legal fictions must be evaluated with great care and scrutiny under principled standards.

V. "OUR CIVIC FAITH"—JUDICIAL ESTABLISHMENT OF CIVIL RELIGION?

A. "Government Speech" and Freedom of Religious Expression

The impact of the government speech doctrine has implications for both the Religion Clauses and religious Free Speech. Justices Stevens, Ginsburg, and Souter have warned of one reading of the doctrine that could impact Establishment Clause decisions: "the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups."²⁴⁷ On the other hand, the doctrine likewise poses a threat to free speech interests by providing a new justification for stifling individual religious expression on public property or at public events. For example, in *Hinrichs v. Bosma*,²⁴⁸ the District Court in a legislative prayer case involving the Indiana House of Representatives advanced the government speech doctrine to find that "the House prayers are government speech . . . given with the Speaker's permission, whether he chooses to monitor the content or not. They reflect government speech, not private speech, a fundamental distinction in First Amendment law."²⁴⁹ The *Hinrichs* Court relied upon a Fourth Circuit holding that legislative prayer—even though individually promulgated and spoken by individual speakers—is categorically government speech, a holding that provides government extraordinary latitude in infringing individual free speech and viewpoints.²⁵⁰ Cases involving censorship of other kinds of speeches at governmental events may also easily be collapsed into a broad and indiscriminate rubric of "government speech," summarily removing protections under the Free Speech Clause.

247. *Sumnum*, 129 S. Ct. at 1142 (Souter, J., concurring).

248. *Hinrichs*, 400 F. Supp. 2d at 1105 (S.D. Ind. 2005), *rev'd*, 440 F.3d 393 (7th Cir. 2006).

249. *Id.* at 1129. Notably, on appeal, the Seventh Circuit studiously avoided collapsing the analysis of government speech under the Free Speech and Establishment Clauses, summarily disposing of the "government speech" argument in its last footnote by dismissing the Free Speech claim on grounds that "individuals have sharply restrained speech and free exercise rights when speaking on behalf of the government, rather than for themselves alone." *Id.* at 402 n.5.

250. *Simpson*, 404 F.3d at 288 (4th Cir. 2005); *cf. Turner*, 534 F.3d at 353. (4th Cir. 2008).

In the Fourth Circuit legislative prayer case, *Simpson v. Chesterfield County Board. of Supervisors*,²⁵¹ Simpson, a Wiccan priestess, brought an action challenging the constitutionality of the County Board's policy restricting potential prayer-givers to representatives of Judeo-Christian or monotheistic religions. She had been excluded from a list of local religious leaders available to provide non-sectarian invocations prior to public sessions of the county board of supervisors.²⁵² Holding in favor of the Board, however, the Fourth Circuit upheld the county's selection of, and instructions to, participating clergy as permissible legislative prayer under the rubric set out in *Marsh v. Chambers*,²⁵³ which does not inquire into the content of legislative prayer unless the "prayer opportunity" has been abused.²⁵⁴

Although the case was decided under *Marsh*, the court was forced to resolve Simpson's allegation that the persons selected by the County to pray resulted in a denominational preference, and thereby discriminated and denied equal protection of the law.²⁵⁵ With very little analysis, and without using the framework of the

251. *Simpson*, 404 F.3d 276 (4th Cir. 2005).

252. *Simpson* argued that the County's policy violated equal protection principles set forth "in *Larson v. Valente*, 456 U.S. 228 (1982) (finding 'denominational preference' to violate the Establishment Clause), as well as *Lemon*, 403 U.S. at 612-13 (creating a general framework to evaluate Establishment Clause challenges)." *Id.* at 280.

253. The Fourth Circuit found the county board's policy of selecting clergy was permissible where "the selection of the minister from one denomination, to the exclusion of other clerics . . . [did not matter so long as the selection did not] stem from an impermissible motive." *Simpson*, 404 F.3d at 285. The court found the county's policy exceeded the *Marsh* standards where, "[i]n contrast to *Marsh*'s single Presbyterian clergyman, the County welcomes rabbis, imams, priests, pastors, and ministers. Chesterfield not only sought but achieved diversity. The first-come, first-serve system led to prayers being given by a wide cross-section of the County's religious leaders." *Id.* As to the county's instructions to the clergy regarding the content of the invocations, the court found that "Chesterfield has aspired to non-sectarianism and requested that invocations refrain from using Christ's name or, for that matter, any denominational appeal." *Id.* at 284. The court found that the invocation "is a blessing . . . for the benefit of the board, rather than for the individual leading the invocation or for those who might also be present. In other words, Chesterfield's invocations are directed only at the legislators themselves." *Id.*

254. *Marsh*, 463 U.S. at 794-95. The *Marsh* Court stated that:

[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id.; see also, *Luther III & Caddell*, *supra* note 18 (stating that "[c]ourts should continue to focus on the 'prayer opportunity' and not the 'content of the prayer' when analyzing legislative prayer cases.").

255. *Simpson*, 404 F.3d at 280.

Fourth Circuit's four-factor test for government speech,²⁵⁶ the panel stated that despite the fact that religious leaders in their *individual* capacities created the content of invocations, the invocations were *government* speech,²⁵⁷ indeed, a constructive government-prescribed prayer. Quoting the magistrate's finding, the panel found that the "avowed purpose of the invocation is simply that of a brief pronouncement of simple values presumably intended to solemnize the occasion" and that it was not "intended for the exchange of views or other public discourse . . . or the exercise of one's religion."²⁵⁸ Since "to a degree" the content of the invocation was governed by the Board's established guidelines, the Board regulated the content of what is or is not expressed when it enlisted private entities to convey its own message and was, therefore, government speech.²⁵⁹ Despite the fact that the County invited a diverse group of clergy to give their own individually expressed invocations,²⁶⁰ the *Simpson* majority went further, however, to endorse civic religion as the only permitted and legitimate expression of legislative prayer:

We cannot adopt a view of the tradition of legislative prayer that chops up American citizens on public occasions into representatives of one sect and one sect only, whether Christian, Jewish, or Wiccan. In private observances, the faithful surely choose to express the unique aspects of their creeds. But in their civic faith, Americans have reached more broadly. *Our civic faith seeks guidance that is not the property of any sect. To ban all manifestations of this faith would needlessly transform and devitalize the very nature of our culture. When we gather as Americans, we do not abandon all expressions of religious faith. Instead, our expressions evoke common and inclusive themes and forswear, as Chesterfield has done, the forbidding character of sectarian invocations.*²⁶¹

The majority's uncharacteristically summary finding that legislative prayer is government speech was apparently motivated by a desire to paper over the dramatically different views of the

256. In *Planned Parenthood*, the Fourth Circuit applied a four factor test to determine whether the speech at issue was government or private. This test considers,

(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech.

Id. at 792-93.

257. *Simpson*, 404 F.3d at 288.

258. *Id.* at 287 (emphasis added).

259. *Id.*

260. *Id.* at 279 ("Instead of choosing a single chaplain to provide the invocations, the Board invites religious leaders from congregations within Chesterfield County.").

261. *Id.* at 287 (emphasis added).

judges of the Circuit on government speech.²⁶² Taking a cue from the court's finding that the invocation is only "a blessing . . . for the benefit of the board,"²⁶³ Judge Niemeyer's separate concurrence made explicit that the scrutiny given to "the government's own speech" and to "the government's own prayer" is different under the First Amendment and "more relaxed than the analysis for scrutinizing government prohibitions or impositions of speech *on the people* . . . [and] government prescriptions or proscriptions of prayer *for the people*."²⁶⁴ Drawing from the Preamble of the United States Constitution, no less, Judge Niemeyer argued that the structure of the Constitution and its emphasis on "We the People" is aimed at preserving the people's liberty, but that "when members of a governmental body participate in a prayer for themselves and do not impose it on or prescribe it for *the people*, the religious liberties secured *to the people* by the *First Amendment* are not *directly* implicated, and the distinct, more tolerant analysis articulated in *Marsh* governs."²⁶⁵ Thus, the distinction drawn by Judge Niemeyer lies between "*nondenominational* prayers for the purpose and benefit of [*a legislative*] body" and "prescribed prayer for *the people*."²⁶⁶

A subsequent Fourth Circuit legislative prayer case, *Turner v. Mayor and City Council of Fredericksburg*,²⁶⁷ also raised significant government speech issues in the context of legislative prayer. In that case, the Reverend Hashmel Turner, an elected member of

262. See *supra* note 29; see also *Bredesen*, 441 F.3d at 370 (holding that "Choose Life," as it is to appear on the face of Tennessee specialty license plates, is a government-crafted message because Tennessee "sets the overall message to be communicated and approves every word that is disseminated" on the "Choose Life" plate); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) (finding that Arizona's failure to approve a "Choose Life" special license plate violated the Coalition's Free Speech rights); *Women's Emergency Network*, 323 F.3d at 937 (finding government attachment to message on Florida specialty license plates insufficient to hold that messages represent government speech).

263. *Simpson*, 404 F.3d at 284.

264. *Id.* at 288 (Niemeyer, J., concurring).

265. *Id.* at 289 (Niemeyer, J., concurring).

266. *Id.* (first emphasis added). Earlier, in *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), the Fourth Circuit ruled that a prescribed dinner prayer for cadets at the Virginia Military Institute violated the Establishment Clause and in *Wynne*, 376 F.3d at 292, that legislative prayer at the Great Falls, South Carolina, Town Council meetings was proselytizing in nature, and therefore, exceeded prayer that was otherwise permitted by *Marsh*, 463 U.S. at 783. In a subsequent Fourth Circuit case, *Turner*, 534 F.3d at 352, the Mayor and Council argued that dicta in the *Wynne* decision prohibited legislative prayer containing mention of Jesus Christ, thereby justifying a City policy requiring legislators to give only nondenominational prayers. *Turner*, 534 F.3d at 352.

267. *Turner v. Mayor and City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008).

the City Council of Fredericksburg, Virginia, participated with other City Council members in a decades-old rotation of offering prayer before each City Council meeting. Turner typically closed his prayers "in the name of Jesus Christ."²⁶⁸ After the Fourth Circuit decided yet another legislative prayer case, *Wynne v. Town of Great Falls*,²⁶⁹ the American Civil Liberties Union demanded that Reverend Turner cease use of the name of Jesus Christ in his prayers, contending that legislative prayer could not contain sectarian references without violating the Establishment Clause.²⁷⁰ Under this pressure, the City Council adopted a policy by a three to one vote (with Reverend Turner abstaining) requiring that all prayers be "nondenominational."²⁷¹ When Turner requested to rejoin the prayer rotation, and indicated he could not as a matter of conscience cease closing his prayers in the name of Jesus, the Mayor refused to call on him to pray, even though other council members were permitted under the policy to pray to "Almighty God," "Father," and "Heavenly Father."²⁷² Turner sought to declare the policy unconstitutional on grounds that the Council's policy discriminated against his right to free speech based on viewpoint and constituted an Establishment of Religion in that the Council was prescribing the content of individual Council members' prayers.²⁷³

The District Court found that the "central purpose of the program in which the speech occurs"²⁷⁴ was the conduct of City Council business, with the prayer listed on the official agenda for each meeting. For Establishment Clause reasons, it found that "the local government can (and must, to comply with the Establishment Clause) exercise editorial control over the speech's

268. *Id.* at 354.

269. In *Wynne*, the Fourth Circuit enjoined the Town Council of Great Falls, South Carolina, from offering prayers before each council meeting that specifically invoked the name of Jesus Christ. After a trial, the District Court concluded that the Town Council had insisted upon invoking the name "Jesus Christ" to the exclusion of deities associated with any other particular religious faith at Town Council meetings, preferring Christianity over other religions and thus violating the Establishment Clause. "Government speech" was not used as a justification for the decision in the *Wynne* case. *Wynne*, 376 F.3d at 294.

270. Turner ceased offering prayer on the rotation while the City Attorney studied the matter. After months of study, the City Attorney opined that the City Council could "continue its current practice of offering the official prayer to a non-denominational 'God,' without invoking the name of a specifically Christian (or other denominational) deity." *Turner v. City Council of Fredericksburg*, 2006 U.S. Dist LEXIS 56786, at *4 (E.D. Va. Aug. 14, 2006).

271. *Id.*

272. *Id.* at *3.

273. *Id.* at *14.

274. *Id.* at *8.

content.”²⁷⁵ It identified Councilor Turner as the speaker, “a government official, acting in his official capacity.”²⁷⁶ It also determined that “the ultimate responsibility for the content of the speech, rested upon the City Council on whose behalf the prayer is offered” and “[t]he prayer may not be offered without the Mayor’s permission.”²⁷⁷ Then, relying on *Simpson*, the court ruled that Councilor Turner’s prayer was government speech, with no protection under the First Amendment.²⁷⁸

The Fourth Circuit affirmed in an opinion written by Justice Sandra Day O’Connor.²⁷⁹ Notwithstanding the fact that there was no allegation or finding in the record that Turner was attempting to proselytize in his prayers, as seemed to be required for intervention under *Marsh*, Justice O’Connor rejected the claims of viewpoint discrimination and free speech infringement, holding that the legislative prayer is government speech and that governments are free to determine the means and method by which legislative prayer is offered, whether or not individual speech interests are implicated:

In *Marsh*, the legislature employed a single chaplain and printed the prayers he offered in prayerbooks at public expense. By contrast, the legislature in *Simpson* allowed a diverse group of church leaders from around the community to give prayers at open meetings. Both varieties of legislative prayer were found constitutional. *The prayers in both cases shared a common characteristic: they recognized the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize.*²⁸⁰

Justice O’Connor rejected Turner’s assertion that the Council’s policy requiring non-denominational prayer violated constitutional proscriptions against governmentally-prescribed prayer announced in *Engel v. Vitale*,²⁸¹ and *Lee v. Weisman*.²⁸² Her answer: “The Supreme Court of the United States has treated legislative prayer differently from prayer at school events.”²⁸³

275. *Id.*

276. *Id.*

277. *Id.*

278. Turner’s argument that the City’s “nondenominational” policy violated the Establishment Clause by prescribing the content of prayers was rejected because under *Simpson*, Councilor Turner’s prayer is government speech, without protection under First and Fourteenth Amendments. *Turner*, 534 F.3d at 353.

279. *Id.* at 356 (emphasis added).

280. *Id.* at 356.

281. *Engel*, 370 U.S. at 425.

282. *Lee v. Weisman*, 505 U.S. 577 (1992).

283. *Turner*, 534 F.3d at 356. *See also Nurre*, 580 F.3d at 1087 (holding there was no constitutional violation when defendants school prevented student from playing instrumental version of “Ave Maria” at her public high school’s commencement ceremony); *McComb*, 320 Fed. Appx. at 507 (holding that defendants did not violate Free Speech and Free Exercise rights by preventing

Perhaps the most troubling aspect of the *Simpson* and *Turner* rulings was that the underlying rationale was tantamount to a judicial establishment of American Civil Religion. The *Simpson* panel declared:

[o]ur civic faith seeks guidance that is not the property of any sect When we gather as Americans, we do not abandon all expressions of religious faith. Instead, our expressions evoke common and inclusive themes and forswear, as Chesterfield has done, the forbidding character of sectarian invocations;²⁸⁴

and the *Turner* panel likewise opined,

the rich religious heritage of our country . . . [is] designed to include members of the community, rather than to proselytize.²⁸⁵

The holdings stand for the proposition that individually expressed prayer or other speech with sectarian components can be outlawed, while individually expressed “nondenominational” prayer or speech can be expressed with impunity, notwithstanding that the latter may not be truly non-denominational in content. Moreover, the underlying creed is a “civic faith” that lawfully permits government to exclude expression of other creeds. The Fourth Circuit panels in *Simpson* and *Turner* have thus not only approved extraordinarily broad legislative discretion banning individual speech when there was no finding of proselytization—arguably favoring religious messages from some speakers based on content to the exclusion of other religious messages—they have in the process declared the establishment of a “civic faith,” a faith that government is “free” to establish with constitutional impunity because it has been determined to be government speech. Speakers who agree with it and tailor their speech to fit the prescribed “civic faith” are free to speak; those who do not may be lawfully silenced and censored, even though their speech may not proselytize.

B. “Government Speech” under the Establishment and Free Speech Clauses.

The indiscriminate definition of government speech in the *Summum* case and the summary definitions of government speech in the *Simpson* and *Turner* cases in the Fourth Circuit, do not adequately serve the interests of protecting precious constitutional liberties. Perhaps most troubling about Justice Alito’s rationale in *Summum* is the failure of the Court’s majority to require

student from making a proselytizing graduation speech); *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 178-79 (3d Cir. 2008) (holding that the Establishment Clause would be violated if the school allowed the football coach to engage in prayer with his team while on one knee with heads bowed).

284. *Simpson*, 404 F.3d at 287.

285. *Turner*, 534 F.3d at 356.

government to identify the message it seeks to advance. Instead, monument speech became government speech simply because the City “‘effectively controlled’ the messages sent by the monuments in the Park by exercising ‘final approval authority’ over their selection.”²⁸⁶ Moreover, “[e]ven when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways.”²⁸⁷ It is possible, Justice Alito explained, that “the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.”²⁸⁸ Moreover, the message may change over time, or be altered by the addition of other monuments. Thus, if government displays virtually *any* otherwise reasonable non-prohibited message, it is *ipso facto* government speech and thus exempt from constitutional restriction.

The implications for the legions of non-monument government speech are virtually unlimited. Free speech implies minimal governmental intervention in the individual propagation of ideas. But the boundaries that government imposes to restrict the use of public places and property, and the means to propagate ideas, may greatly inhibit a speaker and his or her message. Government *monopolization* of speech or of a forum empowers officials to silence individual expression completely. A potential consequence of the Court’s choice to rest its government speech rationale on “government control” of premises or events is thus that privately promulgated religious speech spoken at government controlled events may be readily censored in almost all circumstances. It is one thing for government to advance a message openly and notoriously, thereby allowing it to be challenged and revoked through the political process—even messages with elements of Civil Religion like the Pledge of Allegiance, or “In God We Trust”²⁸⁹—but it is quite another for

286. *Summum*, 129 S. Ct. at 1134. The Court’s apparently expanding view on how government control and supervision trumps Free Speech interests is seen in yet another recent Free Speech case in which a student released from school and standing on a public sidewalk holding a sign “Bong Hits 4 Jesus” at an Olympic torch parade was disciplined even though he was not on school property or under the control of school officials. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

287. *Summum*, 129 S. Ct. at 1135.

288. *Id.* at 1136.

289. The same is true when the context of government sponsorship of symbolic speech contains religious elements. See *id.* at 1125 (holding that a Ten Commandments monument in a city park among diverse structural and other community displays is a form of government speech and not subject to scrutiny under the Free Speech Clause); *Van Orden*, 545 U.S. at 677 (holding that a Ten Commandments monument among numerous other monuments on Texas State Capital grounds does not violate Establishment Clause); *Lynch*, 465 U.S. at 668 (holding that Nativity scene in city Christmas display with

privately promulgated messages to be deemed to be government speech simply because they occur at governmentally sponsored events or on government property. The latter, of course, results in the exemption of officials from the strictures of constitutional scrutiny and allows censorship of disfavored messages and the advancement of "preferred" messages, including "preferred" religious messages that are truly private in origin.

It appears that Justice Alito may not subscribe to the ultimate extension of the *Sumnum* rationale. In *Nurre v. Whitehead*,²⁹⁰ a recent case involving school censorship of a student instrumental performance of "Ave Maria" at a high school graduation ceremony, the Court denied certiorari,²⁹¹ but Justice Alito dissented, finding that the Ninth Circuit's decision in the case "authorizes school administrators to ban any controversial student expression at any school event attended by parents and others who feel obligated to be present because of the importance of the event for the participating students."²⁹² Although the case did not expressly involve specific assertions of government speech, it did so implicitly. Justice Alito advocated plenary review because of the case's "potentially broad and troubling implications,"²⁹³ specifically commenting:

When a public school administration speaks for itself and takes public responsibility for its speech, it may say what it wishes without violating the First Amendment's guarantee of freedom of speech. But when a public school purports to allow students to express themselves, it must respect the students' free speech rights. School administrators may not behave like puppet masters who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings.²⁹⁴

In a world where speech in government settings is deemed to be government speech because government controls the event, and otherwise is deemed to be private *only* if government specifically invites all comers to participate without restriction, the opportunity for government censorship is virtually unrestricted. The harm is more egregious where government permits a private speaker to deliver a religious message that comports with civil religion but censors another speaker at the same event because her religious message is deemed to depart from civil religion or to be sectarian, or proselytizing.²⁹⁵

diverse symbolic elements does not have effect of endorsing Christianity and does not violate Establishment Clause).

290. 130 S. Ct. 1937, 1940 (Alito, J., dissenting).

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 1939 (citation omitted).

295. This is illustrated in cases where some private religious speech was

Professors Amar and Brownstein have pointed out that the rush to exclude the *Summum* monument may fail to account for unintended consequences, such as the brick memorials, courtyards, and walkways on public school grounds, where parents and students are invited to display individualized message.²⁹⁶ Justice Alito seems to dismiss such concerns: “if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message,” forum principles *might* apply.²⁹⁷ But the devil is in the details. Without strict scrutiny, the “government control” rationale transmogrifies speech every time into government speech. Already messages with religious content, whether it be a cross on a brick next to the name of a Columbine High School victim, or a scripture verse, or even the Ten Commandments among seventeen other bricks containing secular messages or displays, would very likely be government speech if government restricted the categories of messages that could be displayed.²⁹⁸ On the Establishment Clause side, by characterizing all monuments as government speech, it may be difficult, if not impossible, to justify permitting the display of any private or public symbols, monuments and/or memorials or government

censored and other private religious speech was permitted to be advanced or where religious speech was deemed to be too controversial or beyond Civil Religion. See, e.g., *Nurre*, 580 F.3d at 1087 (holding that there was no constitutional violation when defendant school prevented student from playing “Ave Maria” at her public high school’s commencement ceremony but allowed eight other instrumental musical selections, one of which had religious lyrics); *McComb*, 320 Fed. Appx. at 507 (holding that the school did not violate Free Speech and Free Exercise rights by preventing student from making an allegedly proselytizing graduation speech while permitting another religion-based speech); *Turner*, 534 F.3d at 353 (holding that city’s policy requiring legislative prayers to be nondenominational did not violate Free Speech and Free Exercise rights when other prayers mentioned deities); *Simpson*, 404 F.3d at 278 (affirming grant of summary judgment to legislative board approving prayer that did not allow prayer leaders to use name “Jesus Christ” and required leaders to avoid denominational appeal).

296. Vikram Amar & Alan Brownstein, *Does a Minority Religion Have a Right to Join Majority Religions in Placing Its Own Monument in a Public Park?*, FINDLAW (Apr. 25, 2008), <http://writ.news.findlaw.com/amar/20080425.html>.

297. *Summum*, 129 S. Ct. at 1138.

298. *Compare* *Fleming v. Jefferson Cnty. Sch. Dist.*, 398 F.3d 918 (10th Cir. 2002) (holding that tile with message “4/22/99 Jesus Wept” can be excluded from Columbine High School memorial because it was school supervised, done with school approved funding, and displayed permanently on school grounds); *with* *Demmon v. Loudon Cnty. Pub. Sch.*, 342 F. Supp. 2d 474 (E.D. Va. 2004) (holding that school engaged in impermissible viewpoint expression with a religious viewpoint when school removed bricks inscribed with the Latin cross purchased by parents and relatives of school students and graduates from the school’s “walkway of fame” located on school property as limited public forum had been created by the school).

property that contain a religious message, except in the midst of multiple other monuments. Indeed, in the extreme, each grave marker on individual grave containing a religious symbol at Arlington National Cemetery might conceivably be deemed to advance a "government message."

As previously noted, the disturbing and emerging exclusion of private speech with sectarian religious content at publicly sponsored events and on public property as government speech or "government-sponsored" speech carries with it a monopolistic framework in which all branches and levels of government, root, stem, and branch, are empowered—by the federal judiciary and ultimately the Supreme Court—to censor private messages. When it involves religion, it allows judgments to be made between and among private persons as to the content of the religious message being advanced. Here, the bar to "denominational" or "sectarian" speech casts individual religious adherents outside the gate of participation in significant public events in civil society, leaving only the expression of the doctrines of American Civil Religion, and similar secular philosophies, theories and opinions, unimpeded to reign supreme in the public square. This exclusionary orthodoxy, now being advanced in a variety of cases throughout the country, portends grave consequences for freedom of inquiry and social equality, let alone the ultimate distortion of civil discourse.

Generalized governmental religious platitudes, overbearing government-speak, and judicially-created legal fictions threaten to stifle the marketplace, and diversity, of *individually expressed* religious ideas and opinions and how they may apply to national issues or problems. Would, for example, Martin Luther King, Jr. be permitted to speak at a governmental event of the peaceful civil disobedience of Jesus Christ without censorship of this sectarian reference? Or would he instead be constrained, as the Federal District Court required in the Indiana legislative prayer case, to invoke "a divine appeal [that was] wide-ranging, tying its legitimacy to common religious ground."²⁹⁹ With the federal courts now installed as the final arbiters of all things religious, reaching even into the legislative branch,³⁰⁰ the Speaker of the Indiana House of Representatives was enjoined by the Federal District Court to

advise persons offering such a prayer (a) that it must be non-sectarian and must not be used to proselytize or advance any one

299. *Hinrichs*, 400 F. Supp. 2d at 1127.

300. See generally James J. Knicely, "First Principles" and *The Misplacement of the "Wall of Separation," Too Late in the Day for a Cure?*, 52 DRAKE L. REV. 171 (2004) (noting that *Everson* federalized relationship between religion and states and allowed Court to override state-prescribed religious practices).

faith or belief or to disparage any other faith or belief, and (b) that they should refrain from using Christ's name or title or any other denominational appeal.³⁰¹

This reasoning is based on the fiction that an individual offering a prayer at a public event is speaking a message for the government, when in fact the reasonable observer (at least the omniscient reasonable observer) would recognize the prayer as that of the individual who spoke it.³⁰²

By excluding individually expressed religious viewpoints from public events, the only freedom for persons of religious conscience—be they Wiccan, Christian, Jew, Muslim, or Nativist,—is to bow to government orthodoxy and compromise conscience in giving individually promulgated prayers, or to accept exclusion from the exercise of liberties granted to other citizens. The vehicle for this incursion is not really the government's ostensibly unlimited and unchecked power to define the message it wishes to advance on its own property, but a jurisprudential fiction that attributes government sponsorship and endorsement to views that are decidedly *not* promulgated by government at all.³⁰³

Thus, an indiscriminate and broadly fashioned view of what is, and is not, government speech permits individual *religious* expression at public events on government property to be freely censored (regardless of the content of the speech of other speakers

301. *Hinrichs*, 400 F. Supp. 2d at 1131.

302. See, e.g., *Mergens*, 496 U.S. at 250 (stating that “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” (emphasis added)); *Nurre*, 130 S. Ct. at 1939 (Alito, J., dissenting) (stating that “when a public school purports to allow students to express themselves, it must respect the students’ free speech rights. School administrators may not behave like puppet masters who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings.”); *Doe ex rel. Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605, 613 (8th Cir. 2003) (reasoning that “[a]n objective Norfolk Senior High student would undoubtedly perceive Scheer’s comments [prayer at graduation] as his own private remarks.”); *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1333 (11th Cir. 2001) (announcing that [this Court has] “rejected the argument that the state’s role in providing a vehicle for a graduation message by itself transformed the student’s private speech into state-sponsored speech.”); *id.* at 1341 (stating that “[w]hat turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message.” (citation omitted)).

303. Cf. *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 375 (1985), *rev’d*, 521 U.S. 203 (1997) (finding “symbolic union” of church and state when school district provided remedial education classes to parochial school students at public expense), *overruled in part by* *Agostini v. Felton*, 521 U.S. 203, 223-228 (1997) (rejecting *Grand Rapids* presumption of “symbolic union” between church and state for state remedial education program conducted on parochial school premises).

in the same forum). The Court's broad rationale in *Sumnum* permits government speech in nearly every instance to trump individual religious expression and to remove most individually expressed religious speech at government sponsored events from the public square. It threatens individual rights of religious adherents; it promotes the tyranny of majoritarianism; it forsakes principles of accommodation and tolerance; and it bears the tendency of absolute power to corrupt—inexorably *prescribing* a wall of religious orthodoxy based on the lowest common denominator of faith—a stultifying state religion dead to the uniquely American social dynamic of rich, healthy, tolerant, and vitally alive expression.³⁰⁴ As the Supreme Court declared in *Lee v. Weisman*,³⁰⁵

If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, *neither does it permit the government to undertake that task for itself.*

...

[P]recedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. *The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.*³⁰⁶

James Madison noted that one of the merits of limited governmental involvement with religion was a religious message that was free to flourish.³⁰⁷ This legitimate rationale against an Established Church has legitimate application against establishment of governmental orthodoxy that, in effect, promotes

304. Alexis De Tocqueville worried in his 1831 survey of emerging America that its democratic institutions would compel members of the community "to live alike," in private as well as public life. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, VOLUME II 215 (Knopf 1956) (1851). He came to reject this hypothesis, however, recognizing that "no state of society or laws can render men so much alike, [because] education, fortune, and tastes will always interpose some differences between them." *Id.* Despite concern over democracy's proclivity to social uniformity, De Tocqueville observed that Americans "will set up, close by the great political community, small private societies, united together by similitude of conditions, habits, and customs." *Id.*

305. *Lee*, 505 U.S. at 589-90.

306. *Id.* (emphasis added).

307. James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, <http://www.law.gmu.edu/assets/files/academics/founders/madison'smemorial.pdf>.

American Civil Religion. Thus, by proscribing prayers in government meetings that mention the name of “Jesus Christ,” while permitting the mention of other names for God (as well as prayer advancing discernible characteristics of certain religions), government discriminates against selected religious adherents, opening the forum to speakers who espouse a governmentally favored philosophical or religious message, but closing it for those who do not.

In contrast to the Bill of Rights’ preference for free exercise of religion, the court system’s declaration of a “civic faith” grants preferred free exercise status to adherents of tenets of American Civil Religion, as well as secular philosophies and theories that compete for the spiritual allegiance of the citizenry. Society is left with platitudinal judicial endorsements of legislative prayer and “ceremonial deism”³⁰⁸ and is instructed that these serve to solemnize public events, in token recognition of supposed general ties that bind the community together, where no persons (except perhaps adherents) are made to feel excluded. In reality, this patronizing judicial makeover of religious expression discriminates based on viewpoint and denies a societal outlet for expression to all but those who serve the state religion.³⁰⁹ Moreover, it diminishes the wit of the American people who, in the judiciary’s view, are apparently either too naive or unsophisticated to distinguish between private speech and government sponsorship, or to know that government does not endorse everything it permits to be spoken on public property.³¹⁰

But there is an even darker side to this judicial makeover. The judiciary’s approbation of the American Civil Religion in a time of religious and cultural diversity not only emasculates the expression of diverse values but grants to government indiscriminate tentacles of monopoly and its proclivity to the

308. See Robert Luther III, *Unity Through Division: Religious Liberty and the Virtue of Pluralism in the Context of Legislative Prayer Controversies*, 43 CREIGHTON L. REV. 1, 33 (2009) (concluding article “by rejecting the ‘ceremonial deism’ model of legislative prayer advanced by Justice O’Connor (and others) and proposing a ‘unity through division’ model that would permit speakers to pray according to their consciences and forbid government from excluding speakers on the basis of their theologies.”) (citing *Elk Grove Unified Sch. Dist.*, 542 U.S. at 37 (O’Connor, J., concurring)).

309. See, e.g., *Lynch*, 465 U.S. at 673 (recognizing that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any” (citations omitted)); Luther, *supra* note 308, at 22 (writing that “the idea that government can exclude speakers of particular faiths or prefer faiths of ‘Judeo-Christian traditions’ is antithetical to ecumenism and certainly does not comport with the United States Supreme Court’s recent ‘neutrality’ framework.”).

310. *Van Orden*, 545 U.S. at 696 (Thomas, J., concurring) (stating that “[t]elling either nonbelievers or believers that the words ‘under God’ have no meaning contradicts what they know to be true.”).

intolerance, oppression, and totalitarianism inherent in a “religious” establishment.³¹¹ American Civil Religion contains a potentially explosive mix of God and country that reaches to every street and lane in the land and poses a far greater threat to civil liberties, and indeed to the country, than any individually expressed “denominational” speech or prayer. The latter, in its own simple way, contains the means not only to defuse and confront potentially destructive governmentally-approved and monopolistic religious rituals that intermingle with genuine patriotism, but to contribute to the diverse, disparate, and vigorous expression that has been characteristic of American democracy.³¹²

The choice is otherwise a censorship that narrows the spectrum of free speech and undermines not only the social dynamic, but by the walls it erects, establishes the intolerant orthodoxy it ostensibly seeks to prevent. Thus, the emerging argument that individual religious expression containing “denominational” references spoken at public events is unprotected because it is government speech—and that government can at the same time permit and encourage expression at such events of a deity and sacred elements associated with American Civil Religion—should be viewed with great caution and careful scrutiny.

311. Already, scholars are suggesting adherence to the established civil religion has a disproportionate impact on election results. Ronald Wimberley, a professor of sociology at North Carolina State University, recently suggested that he can predict who will win the Presidency based on a 1984 general election survey showing “voters are four times as likely to prefer a presidential candidate who they perceive to uphold the values of America’s civil religion—regardless of whether those voters are religious themselves.” John Green, senior fellow in religion and American politics at the Pew Forum on Religion & Public Life in Washington, D.C. agrees that “[a]t some minimal level a candidate has to associate with these ideas or they’ll have a difficult time winning.” In the 1984 survey, “voters were four times as likely to prefer Reagan over Mondale precisely because they perceived Reagan as holding a stronger version of the nation’s civil religion.” Yonat Shimron, *Our civil religion*, THE NEWS & OBSERVER, May 2, 2008, <http://www.Newsobserver.com/2008/05/02/43152/ou-civilreligion.html#storyline=misearch>.

312. It has been suggested that the real teaching of *Marsh* is that courts in their consideration of challenges to legislative prayer should focus initially on the “legislative practices and motivations behind the prayer opportunity” and only move to parse the content of particular prayers in the face of explicit and intentional proselytization. See *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 211 (5th. Cir. 2006) (Clement, J., concurring in part, dissenting in part) (noting the majority’s misreading of *Marsh* regarding school board’s practice of opening its meetings with sectarian Christian prayer); see also Luther and Caddell, *supra* note 18, at 573 (noting that where lower federal courts have failed to adopt consistent framework for determining Constitutional legislative prayer, a return to *Marsh* sets an appropriate balance between permissible legislative prayer and proselytizing).

VI. CONCLUSION

Woodrow Wilson once declared that “[t]he history of liberty is a history of limitations of government power, not the increase of it.”³¹³ The judicial declaration of a “civic faith” threatens liberty at several levels. The broad and indiscriminate definition of “government speech” provides no check on government’s power to restrict privately promulgated speech at publicly sponsored events, but rather facilitates censorship. It also discourages accommodation, tolerance, and appreciation of the country’s pluralism—qualities that have made America great. And it discriminates against those Americans who want to express their worldview and beliefs, but unlike other Americans who have liberty for such expression, are forbidden to speak because of alleged sectarian content.

Madison warned of the danger of a monopoly on religious and other speech in Federalist No. 10, where he said: “the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.” Put another way, “[m]adness is diluted in larger seas.”³¹⁴ Limiting expressions of legislative prayer and religious views at public events and in public programs to a seemingly grand, judicially declared “civic faith”—mandating “inclusion” and “evoking common and inclusive themes” and “forswearing the forbidding character of sectarian invocations”—removes the solvent of diverse speech from this discourse and may contribute to civic madness. As Professor Stout concludes:

For the Civil War to achieve its messianic destiny and inculcate an ongoing civil religion, it required a blood sacrifice that appeared total Americans in the North and the South came to believe that their bloodletting contained a profound religious meaning for their collective life as nations By condoning the logic of total war in the name of abolition—and victory—Americans effectively guaranteed that other atrocities in other wars could likewise be excused in the name of “military necessity.”³¹⁵

Similar concerns were recognized more contemporaneously by writer E.J. Dionne and Theologian Richard John Neuhaus in the

313. Woodrow Wilson, Address to New York Press Club, Sept. 9, 1912, in FRANK R. STRONG, JUDICIAL FUNCTION IN CONSTITUTIONAL LIMITATION OF GOVERNMENTAL POWER 3 (1997).

314. GARRETT WARD SHELTON, THE POLITICAL PHILOSOPHY OF JAMES MADISON 62 (2001).

315. STOUT, *supra* note 2, at 459-60. As examples of “other atrocities,” Stout refers to actions taken against Native Americans in the West, quoting among others, General William Tecumseh Sherman’s response to the Fetterman massacre in December 21, 1866: “We must act with vindictive earnestness against the Sioux, even to their extermination, men, women and children.” *Id.* at 460 (citation omitted).

wake of September 11, 2001, when patriotic sentiments understandably reached great heights in the wake of the attacks on New York City and the Pentagon. Dionne commented:

A turn to civil religion can be noble because it calls society to higher standards, but forging too close a bond between religion and our own society's immediate needs and political interests can also be dangerous, particularly for religious faith itself.³¹⁶

Neuhaus likewise observed:

[There] is always a very real danger, that the conflation of biblical religion and patriotism and the national sense of crisis and the need for a commanding set of truths that will congeal the allegiance of people in pursuit of a purpose that is attended by a high cost, there will always be a temptation to turn civil piety or the commanding truths of the public square into a sort of religion, and that, it seems to me, is something that we need to resist even while we recognize that American society, like any society, does have a need for commanding truths in public.³¹⁷

No less should the judiciary be aware of the dangers of establishing a monopoly on the propagation of religious speech based on a misguided interpretation of what is, and is not, government speech at public events. As Professor Stout observes, American Civil Religion "is religious *and* ideological, cultural *and* theological. For that reason, it exerts enormous power on the loyalties and perceptions of its citizens: a power that can be even greater than traditional theistic beliefs and rituals."³¹⁸

Without a nuanced and discriminate approach, judicially-approved governmental action to prohibit *individually* expressed religious sentiments at public events will leave American Civil Religion by default as the established national religion that the First Amendment prohibits. Sealing out non-conforming religious expression allows for too dangerous a concentration of civil religion close to the fires of politics or nationalism, threatening the blessings of liberty. Lost in this mix is the wisdom of Madison who, instead of advocating civil religion as the salvation of the Republic, argued that diversity of viewpoints was the source of its protection.³¹⁹ The cleansing of individual religious expression under the fiction that it is government speech, or because it is perceived as failing to advance "our civic faith,"³²⁰ is an ill-advised jurisprudence threatening not only principles set forth in the Bill

316. Colloquy, Pew Forum on Religion & Public Life, God Bless America: Reflections on Civil Religion After September 11 (Feb. 6, 2002), available at <http://pewforum.org/events/index.php?EventID=22> (last visited Jan. 2, 2011).

317. *Id.*

318. STOUT, *supra* note 2, at xx.

319. THE FEDERALIST NO. 10, *supra* note 26.

320. *Simpson*, 404 F.3d at 287.

of Rights, but the Republic itself.

