CREATION AND PRESERVATION IN THE CONSTITUTION OF CIVIL RELIGION

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Two of the most basic, distinctive, and ennobling human capacities are our ability to create and our ability to preserve. This is true on a biological level, where procreation exhibits our creative capacities and protecting and nurturing our children enables the preservation of not only the human species, but our identities and values as well.

Creation and preservation are also at the heart of art, culture, politics, law, and religion. We admire a civilization that honors and seeks to preserve and protect the treasures of the past, be they the pyramids of Egypt, the Great Wall of China, the art of Michelangelo, the music of Mozart, the plays of Shakespeare, or treasures of technology and the sacred, like the Guttenberg Bible. These artifacts connect us to the past in a deep and meaningful way, and we regret or even condemn their destruction, whether as a result of war or from contempt or neglect.

We also admire creation and creativity. To create something new, beautiful, useful, or meaningful, especially when it is the

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result of hard work and sustained effort, is among the most valued and valuable human achievements.¹

We often have a heightened sense of respect and reverence for the human capacities to create and preserve when standing in a great library such as the Bodleian in Oxford or the Library of Congress in Washington, D.C., when we stroll through the galleries of a great art museum such as the Louvre, or when we stand before a masterpiece such as Galileo’s Last Supper in Milan. At these times, we stand in awe of the human capacity to create something new and different, as well as the human devotion to its protection and preservation.

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The law creates frameworks for the creation and preservation, as well as the destruction, of social, political, and cultural worlds. Indeed, creating and preserving social worlds surely ranks as important as the greatest achievements in other fields, such as the fine arts, music, literature, and architecture.

One important measure of a good legal system will be its capacity to balance, or even better, harmonize, the capacity to create and the desire to preserve, as well as the tendency and sometimes necessity to destroy. A good legal system will help us preserve what is worth preserving, while enabling creativity and change. It will provide a framework for democratic participation in the process of change, while protecting and preserving society from the excesses of the impulse to change and continually create something wholly new. It will be sensitive to the institutional mechanisms for facilitating change and preservation and the roles of those institutions.

A legal system that is creative only will be chaotic and unstable, in a state of ongoing revolution. A legal system that only preserves will become unresponsive and hidebound, even static.

¹. Former Yale Law School Dean Anthony Kronman, speaking to incoming first year students on their first day of law school, spoke about the satisfaction that comes with creating something new:

Remember the pleasure of creation, which you have demonstrated over and over again, and which has propelled you forward in your lives, to this day and place. Remember the thrill of your own novelty, of your power to reimagine the world as you found it. This power will be tested in the years ahead, for you are coming into the house of the law, where the oldest and most deeply entrenched habits of humankind prevail, and where the forces of institutional life, with their pressure toward concession and conformity, are at maximum strength.

A legal system that does not allow for creation and change will become unresponsive to transformations in political and social conditions and may ultimately die, either by becoming extinct or by being overthrown. A civilization that loses its capacity to create will become enervated and brittle, likely to snap like a dry twig. It will be a good candidate for revolution.

On the other hand, a civilization that has lost its will to value and preserve its own culture will fall victim to enemies, external or internal. It may finally collapse from exhaustion. A legal system that does not allow for preservation will also fall in a fury of incessant change and power struggles. There will be no time for deeply meaningful creation because there will be an ongoing battle about first principles or ground rules.

All legal systems seek to create mechanisms to adjudicate the competing imperatives of creation and preservation. For example, the U.S. Constitution was framed with an eye towards mediating the struggle between creating and preserving. The three branches of government allow for creativity and innovation to come from a variety of directions, while the checks and balances each branch places on the others establish restraints on unbounded creativity. This effort to accommodate both change and stability is also part of the structure of the legislative branch. The U.S. House of Representatives, the people’s chamber, was designed to facilitate change. Representatives are directly elected by the people, in large numbers, every two years, which ensures that they are responsive to and reflective of the moods, opinions, and changes in the electorate. The U.S. Senate, in contrast, is much smaller, with two senators per state (regardless of whether the state is large or small) that serve longer and staggered terms (six years, with one-third elected every two years). The Senate, therefore, was intended to be a force for stability, one that would be more resistant to change and popular moods.

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In the United States today, there are forces at work threatening the concept of civil religion, which is understood as the set of

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3. Id. art. I, § 3, cls. 1–2.
4. Under the original constitutional structure, senators were not elected directly by the people but were rather selected by the state legislatures of the respective states. Id. art. I, § 3, cl. 1 (amended 1913). Direct election of senators by the citizens of each state was adopted in 1913 by the Seventeenth Amendment. Id. amend. XV.
quasi-religious attitudes, beliefs, rituals, and symbols that bind members of a community together.

The ideal of civil religion can be aimed either at finding a lowest common denominator, permitting religion in the public square only when it offends no one or has so little religious valence that it can be dismissed as being only cultural or historical in its significance. On this view, religion is permissible only when it does not matter. Religious symbols or references are only permitted if they are drained of content and significance or when they are contextualized in a way that trivializes them.\(^5\) Permissible religious symbols and expression in public life become pale and anemic, bloodless and cold, not something that, in Silvio Ferrari’s words, can do the work of warming peoples’ hearts.\(^6\)

A second ideal of civil religion can aim at raising the common denominator of tolerance or even reciprocal understanding and respect. This idea, too, is not without its challenges, as the boundaries of which religious and non-religious viewpoints get included raises difficult issues. Rather than endeavoring to excise all religious symbols and talk unless they offend no one, we can create a culture that is less apt to take offense at that with which we do not agree. A recent example of this ideal is the contrasting prayers of the pastor Rick Warren and Joseph Lowry at President Barack Obama’s inauguration.

We can have an ideal of listening to the prayers of others whose faith we do not share, open to the possibility that we may find something valuable, inspiring, or even sacred in their expressions, or we can have the ideal of forcing no one to listen to the prayers of anyone else on the basis that an expectation of respectful silence exacts an unacceptable measure of coercion from the listener.\(^7\)

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\(^7\) See Lee v. Weisman, 505 U.S. 577, 594 (1992) (holding that nonsectarian prayer at school graduation ceremony violated the Establishment Clause and stating, “[i]t is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers . . . are of a de minimis character.”).
1. THE CHALLENGE OF CREATIVE EXCLUSIVITY

One set of forces would emphasize creativity to the exclusion of preservation. This tendency to yield to the latest in fashion and fancy is often labeled and criticized under the rubric “politically correct.” Today, creative forces demand that all evidence of religion should be expelled from public life and that religious viewpoints be silenced or marginalized. Expressing a religious point of view or a religious reason for a public policy is denounced as being impolite, unreasonable, or even irrational. Some insist that the government should exhibit strict “neutrality” with respect to matters involving faith and belief. Some conceptions of “neutral-

8. There are two ways that preservation may be overcome by creation. The first is a change in the views of a majority. References to God in public life will not long endure if a majority comes to believe that references to God should not be allowed. This is a reality of what it means to be a democracy. Even if there are preferences or presumptions granted to the status quo, and even if the costs of collective action delay the change, eventually change will come. Ultimately, a society that neither believes in God nor values tradition should be expected to scrub references to the divine from the public sphere, either from feelings of regret or guilt.

The second way that preservation may be overcome by creation is more problematic. Preservation may be preempted by a powerful political minority. Such preemption is likely to take one of two forms. First, such a minority is most likely to be found in the judiciary, who, acting as self-anointed prophets, may decide that something long viewed as permissible is now impermissible. In the United States, the courts primarily have been the locomotive for removing religious symbols and expressions from public life. Second, a powerful and vocal minority seeks to exact change through the political process. Even a small minority can exercise a remarkable degree of power, especially if it cares deeply about an issue and is focused. It is easier to mobilize a small group that feels strongly about an issue than a large group whose level of concern is comparatively low or diffuse.

Generally, this is unobjectionable, but sometimes the tactics used to impose their new political view take the form of bullying or coercion. In the United States, this is sometimes described as a culture of complaint or the art of taking offense. One labels opponents as racist, sexist, or bigoted in an attempt to intimidate and silence political difference. Such tactics often work.

9. See, e.g., Douglas Laycock, Religious Liberty as Liberty, 7 J. CONTEMP. LEGAL ISSUES 313, 319–20 (1996) (arguing that government must be entirely neutral in matters of religion even when it coerces no one). See generally Douglas Laycock, Substantive Neutrality Revisited, 110 W. Va. L. Rev. 51 (2007), for a continued discussion of Laycock’s ideas concerning government neutrality toward religion. The correct definition and approach of government neutrality toward religion is itself a topic of ongoing debate. Some argue that true government neutrality is actually impossible. See, e.g., David N. Cinotti, The Incoherence of Neutrality: A Case for Eliminating Neutrality from Religion Clause Jurisprudence, 45 J. CHURCH & SR. 499, 499 (2003) (arguing that the “underlying premise [of neutrality]—government action or inaction free of value choice—is impossible”). Others accept neutrality as a course consistent with religious liberty, but assert that it is sometimes not enough. See, e.g., Michael W. McConnell, Neutrality Under the Religion Clauses, 81 NW. U. L. REV. 146, 151 (1986) (“There are occasions when applying facially neutral rules to religious organizations or activities throws the weight of the government against religious practices, especially minority religious practices. There are also occasions when no truly neutral course is available. In such instances, the government may appropriately recognize and make adjust-
"Do not seem particularly neutral, since religious symbols and viewpoints are alone in their expulsion from the public square. On this view, public prayer should be prohibited, “under God” must be deleted from the Pledge of Allegiance, “In God We Trust” must be removed from the currency, and “So help me God” must be forbidden in public oaths. It goes without saying that singing “God Bless America” on public occasions is viewed as impermissible. It might seem odd that the project of expelling religious speech and symbols from the public square is carried on under the banner of neutrality. In reality, this reflects a substantive point of view that is as deeply normative as any religious viewpoint.

There is a certain irony underlying the litigation and debate in the United States about whether the phrase “under God” must be removed from the Pledge of Allegiance. Advocates of removal point out that “under God” was added to the pledge during the height of the Cold War as a way of distinguishing the United States from its principal adversary, the godless communism of the Soviet Union. Thus, “under God” is said to represent an unconstitutional endorsement of religion, since the purpose and effect of the enactment was to advance religion. Meanwhile, in 2000, Russia revised the words of its national anthem to include references to God. The new lyrics begin, “Russia—our holy nation” and later declare, “Native land protected by God!” On the other hand, as Fred Gedicks notes, the original motto of the United States, found on the 1776 Seal of the United States and adopted by Congress in 1782, was *e pluribus unum* (out of many, one), referring to

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the American ideal of taking many people, with different backgrounds and beliefs, and creating one people. It was not until 1956, during the Cold War, that Congress adopted “In God We Trust” as the official motto,\textsuperscript{14} perhaps reflecting a less inclusive attitude.\textsuperscript{15} At about the same time, the words “under God” were inserted into the Pledge of Allegiance.\textsuperscript{16}

It may be a mistake, however, to consider “under God” as a symbol of exclusion. After all, the phrase was used by George Washington in his General Orders to his troops immediately after the Declaration of Independence was published,\textsuperscript{17} and the most famous use of this phrase was by Abraham Lincoln in the culmination of the Gettysburg Address, where he finished by declaring as follows:

It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.\textsuperscript{18}

The Civil War was, in the end, a battle for inclusion and the extension of rights of citizenship and equality. Lincoln’s invocation, “under God,” was intended as a reminder of the Declaration of Independence’s fundamental assertion: “We hold these truths to

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  \item[] 15. See, e.g., William Van Alstyne, \textit{Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall—A Comment on Lynch v. Donnelly}, 1984 DUKE L.J. 770, 771 (describing the Supreme Court’s allowing a municipality’s nativity display as a “trend [that] can be summed up as a movement from one national epigram to another; it is the movement from ‘E Pluribus Unum’ to ‘In God We Trust,’ from the ideal expressed by our original Latin motto—one nation out of highly diverse but equally welcome states and people—to an increasingly pressing enthusiasm in which government re-establishes itself under distinctly religious auspices”).
  \item[] 16. See Gey, supra note 10.
  \item[] 17. On July 9, 1776, the Declaration of Independence was read to American troops, along with the following message:

The general hopes this important event will serve as a fresh incentive to every officer and soldier to act with fidelity and courage, as knowing that now the peace and safety of his country depends (under God) solely on the success of our arms:

And that he is now in the service of a state possessed of sufficient power to reward his merit, and advance him to the highest honors of a free country.


\item[] 18. Abraham Lincoln, U.S. President, Gettysburg Address (Nov. 19, 1863), \textit{in Garry Wills, Lincoln at Gettysburg: The Words That Remade America} 263 (1992) (emphasis added).\end{itemize}
be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”

2. THE CHALLENGE OF PRESERVATIONIST EXCLUSIVITY

The second primary challenge facing civil religion in the United States is the efforts to preserve the meaning in a way that is exclusive or even sectarian. Recent polls indicate that approximately 75 percent of Americans identify themselves as Christians, and conservative, politically-active Christians often view contemporary politics and law as trampling on Christian rights—by taking prayer out of school, banning the display of the Ten Commandments in public buildings, trying to remove “under God” from the Pledge of Allegiance and “In God We Trust” from the nation’s currency, and even taking Christ out of Christmas. Some Christians want a civil religion that in reality reflects the Christian religion, or, more precisely, a particular denominational version of the Christian religion. These groups insist that the United States was founded as a “Christian nation,” and they want to preserve this understanding.

As illustrated above, the extreme forces of creation and the extreme forces of preservation advocate views regarding civil religion that are mutually exclusive. One has the sense, however, that the forces of division on both sides of the spectrum do not

21. See, e.g., Russell Shorto, How Christian Were the Founders?, N.Y. Times, Feb. 11, 2010, available at http://www.nytimes.com/2010/02/14/magazine/14texbooks-t.html (asserting that “[The nation’s Christian conservative activists] hold that the United States was founded by devout Christians and according to biblical precepts. This belief provides what they consider not only a theological but also, ultimately, a judicial grounding to their positions on social questions.”). It is worth noting that the effort to exclude religious symbols from public life often leads to their being interpreted in overtly sectarian ways. For example, the controversy in Alabama over the monument commemorating the Ten Commandments (as described by Fred Gedicks’s paper for this conference, see Gedicks, supra note 12), or the popular outcry to the Ninth Circuit’s holding in Newdow v. U.S. Cong., 292 F.3d 597, 612 (9th Cir. 2002), rev’d sub nom. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004), that “under God” in the Pledge of Allegiance violates the Establishment Clause, illustrate how religious symbols that can be interpreted quite broadly are infused with sectarian significance when they come under attack.

22. See, e.g., Christian Nation, http://christiannation.org (last visited Jan. 14, 2011). This is a highly contestable assertion. The constitution, at least, is assiduous in its avoidance of an invocation of Christ, God, or even the “Creator” of the Declaration of Independence. See generally U.S. Const.
represent the views of either the country’s founders or of a contemporary political majority.


> In the opening years of the twenty-first century, some Americans believe the country has strayed too far from God; others fear that zealots (from the White House to the school board) are waging holy war on American liberty; and many, if not most, seem to think that we are a nation hopelessly divided by religion.

None of these dire views is quite right. The great good news about America—the American gospel, if you will—is that religion shapes the life of the nation without strangling it. Belief in God is central to the country’s experience, yet for the broad center, faith is a matter of choice, not coercion, and the legacy of the Founding is that the sensible center holds. It does so because the Founders believed themselves at work in the service of both God and man, not just one or the other. Driven by a sense of providence and an acute appreciation of the fallibility of humankind, they created a nation in which religion should not be singled out for special help or particular harm. The balance between the promise of the Declaration of Independence, with its evocation of divine origins and destiny, and the practicalities of the Constitution, with its checks on extremism, remains perhaps the most brilliant American success.

24. One article describes, for example, the political and public response to *Newdow* and the Ninth Circuit’s decision that the words “under God” violated the Establishment Clause:

> The day after the decision, House members gathered on the steps of the United States Capitol to recite the Pledge of Allegiance.

> The House of Representatives also voted to deny all courts established by Congress any jurisdiction to hear First Amendment challenges to the pledge of allegiance.

> Both the Senate and the House of Representative passed resolutions denouncing the *Newdow* decision. The Senate’s resolution passed 99-0, and the Senate instructed its lawyers to file a brief seeking reversal of the decision.


> In a poll conducted the day after the Supreme Court granted certiorari for the *Newdow* decision, 92 percent of Americans answered “Yes” to the question “Should the phrase ‘under God’ be recited as part of the Pledge of Allegiance in public schools?”

> In a *Newsweek* poll conducted in June, 2002, immediately after *Newdow* was originally decided, 87 percent of those polled answered “Yes” when asked if the Pledge should contain the phrase “under God.”

Id. at 28 n.14 (citations omitted). On the other hand, opposition to conservative views that the United States is a “Christian Nation” is also strong and abundant. For example, organizations such as Freedom From Religion Foundation, Americans United for the Separation of Church and State, and the American Civil Liberties Union are active in opposing any notion of a Christian America. See, e.g., *Nontracts*, Freedom From Religion Found., http://www.ffrf.org/publications/nontracts/ (last visited Nov. 29, 2010); *Religion and Belief*, American Civil Liberties Union, http://www.aclu.org/religion-belief (last visited Nov. 29, 2010); *Resources*, Am. United for the Separation of Church and State, http://www.aclu.org/resources (last visited Nov. 29, 2010).
As Professor Silvio Ferrari observed in his keynote address at the beginning of this conference, civil religion is based upon a “cluster of historically rooted values and principles [that] constitutes the framework within which national identity is redefined and changes can take place without breaking too sharply with the past.” Thus, civil religion becomes a mechanism for mediating change and continuity, creation and preservation, in a society.

In addition to its capacity to facilitate creation and preservation, the law, and in particular the work of judges, may be most notable for its capacity to destroy. In his masterwork, *Nomos and Narrative*, Robert Cover begins by observing that we live in a nomos—“a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.” Cover calls this process of creating legal meaning “jurisgenesis” and notes that it is decentralized and rooted in communal precepts and narratives. Professor Ferrari cited Cover’s work in his introductory speech at this conference, as well as the International Consortium for Law and Religious Studies (ICLARS) conference in Milan in January 2009.

As described by Cover, there are two patterns at work in forming a nomos. The first pattern he calls paideic or “world creating,” and the second pattern he calls “imperial,” or “world maintaining.” These terms correspond generally to what I have been calling creation and preservation. Cover maintains that normative worlds are never created or maintained exclusively in either a paideic or an imperial mode.

It is the very creation of multiple normative meanings from single texts, events, or symbols that leads to the need for the imperial


27. *Id.* at 11.


30. *Id.* at 12–13.

31. Cover explains:

Any nomos must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible. Law must be meaningful in the sense that it permits those who live together to express themselves with it and with respect to it. It must both ground predictable behavior and provide meaning for behavior that departs from the ordinary.

*Id.* at 14.
virtues of world maintenance. For example, even a single constitutive text, such as the Thirteenth Amendment to the U.S. Constitution (which freed the slaves),\textsuperscript{32} or the Fourteenth Amendment (which guaranteed equal protection and due process of law),\textsuperscript{33} will not have a single normative meaning. As Cover puts it:

Some of us would claim Frederick Douglass [a former slave and staunch abolitionist] as a father, some Abraham Lincoln [the sixteenth president], and some Jefferson Davis [the President of the Confederacy]. Choosing ancestry is a serious business with major implications. Thus, the narrative strand integrating who we are and what we stand for with the patterns of precept would differ even were we to possess a canonical narrative text.\textsuperscript{34}

Thus, one of the functions of courts, and especially the Supreme Court, is to decide among the multiplicity of meanings that are generated by interpretive communities. As Cover explains:

It is the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis—that leads at once to the imperial virtues and the imperial mode of world maintenance. Maintaining the world is no small matter and requires no less energy than creating it.\textsuperscript{35}

Thus, courts respond to jurisgenesis, the “too fertile” proliferation of multiple meanings of a single text or symbol, with an authoritative voice that chooses which meaning will be given official sanction and which will enjoy the coercive imprimatur of the state. This does not depend upon judges having a superior hermeneutical methodology, but rather as Justice Jackson succinctly stated of the Supreme Court, “We are not final because we are infallible, but we are infallible only because we are final.”\textsuperscript{36}

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Cover’s account is instructive on a number of levels. This paper focuses on just one—the distinctive role of judges in this normative dialectic between the forces of creation and the forces of preservation. For our purposes, I wish to highlight a particular challenge facing the judiciary in its confrontation with civil religion and a specific set of seductions that may entice the judiciary.

\textsuperscript{32} U.S. CONST. amend. XIII.
\textsuperscript{33} Id. amend. XIV.
\textsuperscript{34} Cover, supra note 26, at 18.
\textsuperscript{35} Id. at 16.
\textsuperscript{36} Id. at 42 (citing Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).
Since judges have the power to decide among multiple meanings, Cover describes the judges’ power as “jurispathic.” The judge’s job is not so much to create legal meaning, but, rather, to kill it. As Cover explains, “[i]nterpretation always takes place in the shadow of coercion,” or as he put it in the opening sentences of Violence and the Word, “[l]egal interpretation takes place in a field of pain and death.”

Cover makes his point in Nomos and Narrative with characteristic drama: “Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that this one is law and destroy or try to destroy the rest.”

Judges confronted with too much creativity in the elucidation of normative meanings by various communities within the polis, decide for one, put the coercive power of the state behind it, and in so doing destroy or attempt to destroy all other competing meanings. This jurispathic power is illustrated by an example cited by Professor Ferrari. When the Italian Court declares that the crucifix is just, or primarily, a symbol of the universality of human suffering (and thus unobjectionable), it does real violence to the deep religious significance of the cross as a symbol of Christ dying to atone for the sins of the world.

The jurispathic role of courts is to some extent necessary. After all, the law as a normative institution is not just about creation, but preservation as well. A community that is exclusively creative, one that is in the grip of competing jurisgenerative visions, will splinter and fall apart. The center will not hold. One job of the judge is to decide among competing conceptions, even if it means eliminating others. Cover goes on to explain: “But judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence.”

Thus, the jurispathic work of judges is closely related to their “world maintaining” function of preserving a community and maintaining the peace. Therefore, when the Supreme Court

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37. Id. at 40.
38. See id. at 40–41.
39. Id. at 40.
41. Cover, supra note 26, at 53.
42. See Ferrari, Civil Religions: Models and Perspectives, supra note 6.
43. Cover, supra note 26, at 53.
decides the meaning of the Establishment Clause or the Free Exercise Clause, the Court’s role is in a sense creative (the justices may be making it up), in a sense preservationist (they seek to resolve conflicts that may threaten society), and in a sense destructive (they eliminate alternative conceptions that their advocates believed constituted a proper understanding of the law).

The jurispathic character of courts is of particular significance when confronting civil religion because there is special value in allowing society to develop and have multiple jurisgenerative conceptions of what civil religion is and what its precise definition and contours are. These conceptions should be allowed to coexist and compete with each other, to rise and fall with changing societal trends and identifications, and to create normative spheres that can coexist and overlap with each other. For the most part, there is no need for an official account of civil religion. It need not be written in stone.

Generally, the Supreme Court does not have to give its imprimatur of “law” to one conception at the expense of others. When confronted with a text or symbol that bears many interpretations and significations, the Court can avoid taking sides by asserting a single definitive meaning for the symbol or text. When the Court decides to take sides by declaring authoritatively what a symbol or text means, it may be needlessly engaging in the jurispathic work of killing competing interpretations. When confronted with such an invitation, the Court would do well to be attentive to Cover’s final exhortation in *Nomos and Narrative*, that “[l]egal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the *nomos*; we ought to invite new worlds.”

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The primary challenge facing civil religion in the United States, as in the other countries discussed in this conference, is how to accommodate varying conceptions of the content and meaning of civil religion. For France, the challenge is how to accommodate minority and new religions in a system that has given official sanction to a secular conception of *laïcité* that at times appears to cross the line from a neutral framework to a secular fundamentalism that can seem as intolerant as other more familiar sorts of funda-
mentalism. For Italy, the challenge is accommodating religious difference in a state that has historically been characterized by deep religious homogeneity. For the United States, it is addressing the boundaries of pluralism, as religious identity is fluid, religious variety is increasing, and the portion of the non-believing, the anti-believing, and the barely-believing appears to be increasing. As Professor Ferrari observed in his opening address, "The American model seems to be faced with an impossible dilemma between inclusion and efficacy. The growing religious plurality of American society pushes for enlarging the borders of the American civil religion, but this enlargement is bound to dilute its content."

My central recommendation is that in confronting civil religion, courts especially should be wary of their jurispathic tendencies—their proclivity to kill alternative conceptions of civil religion and to adopt a single "official" conception. Courts should endeavor to treat civil religion as a dimension of civil society rather than as a

47. 20 The Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey, Report 1: Religious Affiliation, Chapter 2: Changes in Americans’ Religious Affiliation (2009), http://religions.pewforum.org/reports# (reporting that approximately 44 percent of American adults have changed their religious affiliation from that in which they were raised).
49. According to the General Social Survey, the percentage of the public not affiliated with any religion remained consistent at between 5 percent and 8 percent during the 1980s. In 2007, the Pew Forum reported 16 percent of American adults claiming no religious affiliation. Of that group, 1.6 percent identified itself as atheist, 2.4 percent agnostic, and 12.1 percent as “nothing in particular.” THE PEW FORUM ON RELIGION & PUB. LIFE, supra note 20, at 20.
50. See, for example, RICHARD DAWKINS, THE GOD DELUSION (2006), CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007), and other writings of proselytizing atheists who blame religion for many of society’s ills.
52. Ferrari, Civil Religions: Models and Perspectives, supra note 6.
tool of the state. Thus, courts should strive, when feasible, to abstain from declaring authoritatively what contestable texts and symbols mean, and, when they believe they must act, to adopt a modest posture in declaring definitions and setting boundaries. The primary place where courts should step in is when other instruments of the state try to declare or adopt a single official policy with respect to the meaning of the symbols of civil religion. Here courts can support, rather than undermine, the jurisgenerative capacities of other organs of civil society.53 This would mean treating civil religion not so much as part of the “rules of the game” governing life in the public sphere, but rather as part of the thick normative lives of communities.

Therefore, for example, when confronting challenges to “under God” in the Pledge of Allegiance or the meaning of the La Jolla cross,54 a court can resist the temptation to declare what these words or symbols mean and instead recognize that they mean a great many different things to different groups and different people. Due to the complexity and diversity of meaning, they can be tolerated as components of the society’s civil religion, and their presence does not imply or dictate state sanction of a particular signification. What courts should not do is declare that the words “under God” are essentially meaningless (and therefore permissible), or that they refer to a particular Christian or Judeo-Christian God (and therefore impermissible), or that the cross is a generic symbol of suffering or peace (and therefore permissible), or that it has a single sectarian signification (that renders it impermissible). Instead, courts can abstain and recognize that they are not uniquely qualified or empowered to determine the meaning of symbols. By refraining from taking sides between those who insist upon imposing a single meaning upon those symbols and words, courts can allow differing jurisgenerative visions to coexist and compete with one another. The same symbols and words can mean different things to different groups and people, and courts do not have to give either side the satisfaction of an authoritative, official interpretation.

53. See Cover, supra note 26, at 57–58.
54. See, e.g., Complaint for Declaratory and Injunctive Relief at 8, Trunk v. City of San Diego, 547 F. Supp. 2d 1144 (S.D. Cal. 2007) (No. 06cv1728-LAB (WMC)), available at http://www.aclu.org/files/pdfs/religion/mtsoledadcomplaint20060824.pdf (asserting that “[t]he predominant purpose of the Latin cross’s presence on top of government-owned property on Mt. Soledad is to promote one particular sectarian Christian symbol” and “[t]he predominant effect of the Latin cross’s presence . . . is to promote certain forms of the Christian religion”).
When courts give official sanction to a particular conception of civil religion, this has the jurispathic effect of killing other competing conceptions. Therefore, courts should endeavor to facilitate both creativity and preservation, while avoiding, when possible, wielding a heavy jurispathic hand of destruction.