THE NEW AMERICAN CIVIL RELIGION:
LESSONS FOR ITALY

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I. WHY CIVIL RELIGION?

Alessandro Ferrari nicely delineates the predicament of civil religion in Italy: centered around a Catholicism that is no longer universal enough to be a basis for national identity.1 The problems he describes are not peculiar to Italy. Much of what he complains of has analogues that are familiar to me as a U.S. lawyer who studies the law of religion in the United States. The United States has a civil religion of its own, with its own gaps, incoherencies, and exclusions. Most pertinently here, American civil religion has been changing, responding to increasing religious plurality by becoming more abstract. Perhaps Italy has, in this respect, an American future.

Why is there civil religion at all? What is the point of these bland, watered-down rituals?

The idea of a civil religion is commonly traced to Rousseau,2 with a prominent recent updating by Robert Bellah,3 but the fundamental idea was offered much earlier by Augustine, who wrote: “A people is the association of a multitude of rational beings united by common agreement on the objects of their love.”4 Augustine was transforming an earlier definition by Cicero of a community as an “association of men united by a common sense of right and a community of interest.”5 A people’s character, Augustine thought, was determined by the objects of its love: “the better

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5. Id.
the objects of agreement, the better the people." Augustine did not think that a people united around genuinely attractive objects, even a common sense of justice, could exist in this world: in any earthly republic, good people would be forced to coexist with evil ones. A regime was more like a band of thieves, cohesive out of necessity. It took more recent developments to produce a politics that sought to realize Augustine's ideal in this world—not in the sense of a commonwealth ruled by God, but in the sense of an association united by common agreement on the (worthy!) object of their love.

Why has an Augustinian ideal become practically important today? Charles Taylor argues that cohesion has become more important because of the needs of modern representative democracy:

Traditional despotisms could ask of people only that they remain passive and obey the laws. A democracy . . . has to ask more. It requires that its members be motivated to make the necessary contributions: of treasure (in taxes), sometimes blood (in war), and always of some degree of participation in the process of governance.

This is why states try to inculcate a sense of patriotism.

This imperative toward a common identity, Taylor observes, pushes the state in two different directions. State builders have reached toward secularism, an ethic independent of confessional differences, "as a potential common point of allegiance for citizens, above and beyond their other differences." But at the same time, the imperative to bond citizens together can create "an all-but-irresistible pull to build the common identity around the things that strongly unite people, and these are frequently ethnic or religious identities." In the limiting case, "the logic of democracy can become that of ethnic cleansing." Thus, democracy does not necessarily entail liberalism. "Rather it ups the ante: either the civilized coexistence of diverse groups, or new forms of savagery."

6. Id.
9. Id. at 44.
10. Id. at 46.
11. Id. at 48.
12. Id.
The aim, then, is a middle way between a civic identity so deracinated that it has no roots in the specific history of the people it seeks to bind together, and one so specific that it excludes recent immigrants. Constructing and maintaining this identity is a delicate operation, and its demands shift over time as the pertinent population shifts.

Even when civil religion succeeds in performing its unifying function, it can still generate pathologies. Civil religion in the United States is an example. It does produce a culture in which many people feel that their religious beliefs are somehow associated with patriotism. This has the salutary effect of fostering civic unity and common moral ideals and tempering religious fanaticism. It also has the less attractive effect of encouraging self-righteous nationalism and the idea that whatever the United States does, however repugnant, is somehow divinely sanctioned.13

One must also mention one desideratum that is typically overvalued in the academy: intellectual tidiness. Civil religion is always likely to be somewhat incoherent, because it will have been cobbled together for ends that are not intellectual. That does not mean that there is anything wrong with it. The American civil religion, for example, is decidedly untidy but largely does its job, albeit with the pathologies just mentioned.

More pertinently, American civil religion is changing. It is becoming more abstract and therefore more inclusive. This Comment argues that this is a sensible response to the fragmentation of religion caused by immigration, which is an issue all over the world. In what follows, this Comment describes American civil religion and then offers some possible lessons for Italy.

II. THE OLD AMERICAN CIVIL RELIGION

Here are some familiar and well-settled rules of U.S. Establishment Clause law. The state may not engage in speech that endorses a particular religion, or religion generally.14 The state may not use a religious test for office.15 It may not use a religious test for office.15 A law is invalid if it lacks a secular legislative purpose,16 or if it purposefully discriminates against cer-

16. See Andrew Koppelman, Secular Purpose, 88 VA. L. REV. 87, 95 (2002), and the cases discussed therein.
tain religious practices. Laws may not discriminate among religions.

Yet at the same time, there is a broad range of official religious practices that are tolerated. “In God We Trust” appears on the currency, legislative sessions begin with prayers, judicial proceedings begin with “God save the United States and this Honorable Court,” Thanksgiving and Christmas are official holidays, and, of course, the words “under God” appear in the Pledge of Allegiance. The Supreme Court has sometimes claimed that these practices of ceremonial deism are not really religious, but that is a silly argument, since they are overtly and conspicuously religious.

Only recently has anyone on the Court articulated a principle that purports to distinguish permissible from impermissible deism. The general rule now seems to be that old forms of deism are grandfathered, but newer ones are unconstitutional. Thus, the Court recently held that an official Ten Commandments display is unconstitutional if it was erected recently, but not if it has been around for decades. Justice O’Connor, in her concurrence in a decision concerning the inclusion of the words “under God” in the Pledge of Allegiance, explicitly made the age of a ceremonial acknowledgement relevant to its constitutionality. She thought that constitutionality was supported by the absence of worship or prayer, the absence of reference to a particular religion, and minimal religious content. But the first of her factors was “history and ubiquity.”

The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes. That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation’s history.

20. Compare McCreary County v. ACLU, 545 U.S. 844 (2005) (invalidating recently erected display), with Van Orden v. Perry, 545 U.S. 677 (2005) (upholding forty-year-old display). Justice Breyer, the only judge in the majority in both cases, relied on the divisiveness rationale in explaining his position. See Van Orden, 545 U.S. at 700–04 (Breyer, J., concurring). This Comment argues that there are better grounds for his position than the ones he states.
22. Id. at 37.
and when it is observed by enough persons that it can fairly be called ubiquitous. 23 

The consequence is to make old and familiar forms of ceremonial deism constitutional, but to discourage innovation.

There are two aspects of this area of the law that distinguish it. The first is that it represented a common ground strategy—an effort, in its own time, to understand “religion” in an ecumenical and nonsectarian way. At the time that these elements of civil religion were put in place, the existence of God appeared to be the one aspect of religion that was common to the various religious factions then dominant in U.S. life. This was true of the vague deism embraced in the Declaration of Independence and the speeches of the presidents, beginning with Washington; it was also true of the idea of a “Judeo-Christian” ethic that was invented in the 1950s. 24 This old settlement is part of the background in which contemporary American religion has developed. Its continuation is not an effort by an incumbent administration to manipulate religion or a triumphalist effort to exclude outsiders. It simply recognizes that people are invested, in some cases very deeply, in the status quo. 25

The second is that new manifestations are not at all ecumenical. The United States was once an overwhelmingly Protestant nation. Today it remains majority Christian, but monotheism is no longer universal. There are many Hindus, Buddhists, and atheists. If you add up the Protestants, Catholics, Mormons, Jehovah’s Witnesses, Orthodox Jews, Muslims, and Unitarians in the 2009 Statistical Abstract of the United States, you end up with only 81 percent of the population. 26

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23. Id.
24. See Noah Feldman, Divided By God: America’s Church-State Problem—And What We Should Do About It 164–70 (2005); Mark Silk, Spiritual Politics: Religion and America Since World War II, at 40–53 (1988). Nonsectarian Bible reading was a less attractive and less successful variant, since it quickly became inflected with anti-Catholicism. See Feldman, supra at 61–92, 108–110.
26. U.S. Census Bureau, 2009 Statistical Abstract of the United States 59 tbl. 74 (2008). The Statistical Abstract lists 16.1 percent as “unaffiliated,” which it defines as “atheist, agnostic, and nothing in particular,” but the numbers are in fact a bit more complicated than this suggests. The proportion of U.S. citizens who report having no religious preference doubled in the 1990s, from 7 percent in 1991 (which had been its level for almost twenty years) to 14 percent in 1998. Most of the members of this category, however, are in fact religious. More than half believe in God, more than half believe in life after death, about a third believe in heaven and hell, and 93 percent sometimes pray. The most careful study of this group concludes that the newer members of this group are mostly “unchurched believers” who declare no religious preference in an effort to express their distance from the Religious Right. See Michael Hout & Claude S. Fischer, Why More Ameri-
Today, the invocation of theism, and specifically the erection of a Ten Commandments display, is an intervention in the bitterest religious controversies that now divide us. Douglas Laycock thinks that a lesson of O’Connor’s opinion is that “separationist groups should sue immediately when they encounter any religious practice newly sponsored by the government.” That is precisely the right lesson for them to take. New sponsorship of religious practices is far more likely to represent a contemporaneous effort to intervene in a live religious controversy than the perpetuation of old forms.

The theological content of the civil religion has become steadily thinner. Descriptions by two sociologists, twenty years apart, show the direction of change.

Robert Bellah observed in 1967 that there are “certain common elements of religious orientation that the great majority of Americans share” and that “provide a religious dimension for the whole fabric of American life, including the political sphere.” This orientation, which he labeled “the American civil religion,” included as its tenets “the existence of God, the life to come, the reward of virtue and the punishment of vice, and the exclusion of religious intolerance.” This civil religion does not, however, include such controversial matters as the divinity of Jesus Christ. “The God of the civil religion is not only rather ‘unitarian,’ he is also on the austere side, much more related to order, law, and right than to salvation and love.”

Robert Wuthnow observed in 1988 that the American civil religion described by Bellah had been fragmenting in recent years into two very different visions. A conservative narrative holds that the U.S. government is legitimate because it reflects biblical principles and has the potential to evangelize the world. A liberal narrative holds that the United States has a responsibility to use its vast resources to alleviate the material problems that face the world. In this liberal narrative, “[f]aith plays a role chiefly as a motivating


29. Id. at 4.
30. Id. at 5.
31. Id. at 7.
element, supplying strength to keep going against what often appear as insuperable odds.” The two visions have become increasingly hostile to one another. As a consequence, neither can effectively claim to speak for common U.S. values.

III. THE NEW AMERICAN CIVIL RELIGION

The American civil religion would thus appear to be paralyzed. It is not. A new American civil religion is emerging, readily visible on the statute books, more abstract than its predecessor but with definite consequences.

The most important recent innovation in symbolic endorsement is the Religious Freedom Restoration Act (RFRA) and its cognates, at the federal and state level. The RFRA laws pervasively single out religion for special treatment in the law. They require courts to consider religious (and only religious) accommodation claims, and to grant them unless there is some very strong state interest to the contrary. The Federal RFRA was invalidated by the Supreme Court as applied to state and local government, but continues to apply to federal action. The Religious Land Use and Institutionalized Persons Act protects religion (and only religion) from land use and prison regulations. Similar protections against state law are given by many state constitutions and state Religious Freedom Restoration Acts. There are thousands of exemptions in specific statutory schemes, and the Supreme Court has held that these are permissible even when they are not constitutionally required.

The sentiment in favor of such accommodations is nearly unanimous in the United States. When Congress enacted RFRA, the bill passed unanimously in the House and drew only three opposing votes in the Senate.

It is surprisingly uncertain what the object of all this protection is. None of the RFRAs offer a definition of religion, and some of them reject usage that identifies it with conscience (which is the

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33. Id. at 251.
35. Id.
36. Id. at 3–6.
37. Id.
38. For a survey, see Laycock, supra note 27, at 211–12 & nn.368–73 (2004).
39. See McConnell, supra note 34, at 3–6.
substitute most commonly offered by those who object to singling out religion). The most recent congressional pronouncement on religious liberty, the Religious Land Use and Institutionalized Persons Act of 2000, declares that “[t]he term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”

A vague understanding of “religion” seems unavoidable. The best treatments of the problem of defining “religion” for constitutional purposes, most prominently that of Kent Greenawalt, have concluded that no dictionary definition will do, because no single feature unites all the things that are indisputably religions. Religions just have a “family resemblance” to one another. In doubtful cases, one can only ask how close the analogy is between a putative instance of religion and the indisputable instances.

This process need not yield indeterminacy. The concept of “family resemblance” is drawn from the philosophy of Ludwig Wittgenstein, who famously argued that “the meaning of a word is its use in the language.” Thus, for example, there is no single thing common to “games” that makes them all games, but “similarities, relationships, and a whole series of them at that.”


44. Id. at 31.
that does not mean that it is not circumscribed at all. “[N]o more are there any rules for how high one throws the ball in tennis, or how hard; yet tennis is a game for all of that and has rules too.”

Explaining Wittgenstein’s idea here, Charles Taylor observes with respect to a great many rule-guided social practices:

[T]he “rule” lies essentially in the practice. The rule is what is animating the practice at any given time, and not some formulation behind it, inscribed in our thoughts or our brains or our genes, or whatever. That’s why the rule is, at any time, what the practice has made it.

The rules of appropriate comportment when riding on a bus, for instance, are not codified anywhere. But natives of the culture may understand quite well what they are, and there may be no doubt at all as to how they apply in particular cases, even if they have not been codified and could not be codified.

The definition of religion in U.S. law works just this way. There is no set of necessary and sufficient conditions that will make something a “religion.” Yet it is remarkable how few cases have arisen in which courts have had real difficulty in determining whether something is a religion or not.

One possible way of promoting religious neutrality, while still maintaining a civil religion, is to conceptualize the good of religion at a very high level of abstraction. Neutrality is fluid; it is available in many specifications.

45. Id. at 33.
47. See “Weird Al” Yankovic, Another One Rides the Bus, on “Weird Al” Yankovic (Scotti Brothers 1983). As Jonathan Z. Smith has observed, the term “religion” denotes an anthropological category, arising out of a particular Western practice of encountering and accounting for foreign belief systems associated with geopolitical entities with which the West was forced to deal. Jonathan Z. Smith, Religion, Religions, Religious, in CRITICAL TERMS FOR RELIGIOUS STUDIES 269 (Mark C. Taylor ed., 1998). Arising thus out of a specific historical situation, and evolving in unpredictable ways thereafter, “religion” would be surprising if it had any essential denotation.
48. The list of reported cases that have had to determine a definition of “religion” is a remarkably short one. See Religion, in 36C WORDS AND PHRASES 153-57 (2002 & supp. 2008). Words and Phrases is a 132 volume set collecting brief annotations of cases from 1658 to the present. Each case discusses the contested definition of a word whose meaning determines rights, duties, obligations, and liabilities of the parties. See Words and Phrases, in WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008). Some words have received an enormous amount of attention from the courts. Two examples, drawn at random from the first volume of this immense compilation, each exceed 100 pages: Abandonment, in 1 Words and Phrases 37-147 (2007); and Abuse of Discretion, in Words and Phrases, supra, at 37-147.
The U.S. approach is one defensible specification. The state is agnostic about religion, but it is an interested and sympathetic agnosticism. The state does not say “I don’t know and you don’t either.” Rather it declares the value of religion in a carefully non-committal way: “It would be good to find out. And we encourage your efforts to do that.”

The precise character of the good being promoted is deliberately left vague, because the broad consensus on freedom of religion would surely collapse if we had to state with specificity the value promoted by religion. “Religion” denotes a cluster of goods, including salvation (if you think you need to be saved), harmony with the transcendent origin of universal order (if it exists), responding to the fundamentally imperfect character of human life (if it is imperfect), courage in the face of the heartbreaking aspects of human existence (if that kind of encouragement helps), a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps), contact with that which is awesome and indescribable (if awe is something you feel), and many others. No general description of the good that religion seeks to promote can be satisfactory, politically or intellectually. The establishment clause permits the state to favor religion so long as “religion” is understood very broadly, forbidding any discrimination or preference among religions or religious propositions.

By grandfathering the old civil religion and saying that it could proceed as far as it has and no further, the Supreme Court has essentially declared it immune from further tinkering. The new

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50. See John M. Finnis, Natural Law and Natural Rights 89–90 (1980).
55. Charles Taylor has stated the difficulties for any general theory of religion as follows:

I doubt very much whether any such general theory can even be established. I mean a theory which can gather all the powerful élan and aspirations which humans have manifested in the spiritual realm, and relate them to some single set of underlying needs or aims or tendencies (whether it be the desire for meaning or something else). The phenomena are much too varied and baffling for that; and even if they were more tractable, we would have to stand at the end of history to be able to draw such conclusions.

civil religion, on the other hand, continues to generate new law and new procedures. Religion is a topic about which incumbent administrations must now remain silent. It is even more abstract than Bellah’s Unitarian civic God. It is a negative God, a God without predicates.\textsuperscript{56} It reveals its reverence for the Absolute by omitting all reference to it in public decision making. The aspiration evidently is for an eloquent silence, like a rest in music.

IV. A Model for Italy?

Professor Ferrari’s paper focuses on two persistent questions that plague U.S. as well as Italian law. Can the state symbolically endorse religion, and if so, of what kind? Can the state fund religious activity, either as such or as part of a broader program of funding to which religious claimants are incidentally entitled?

A. Symbolic Endorsement

The Italian state has used the symbols of the Catholic Church as the basis of its civic identity for a long time. With growing diversity,\textsuperscript{57} Catholicism can no longer perform this unifying function. Professor Ferrari’s paper nicely delineates the problem.\textsuperscript{58} It will not do to say, as Italian officials now do, that the crucifix is just a symbol of tradition. This move is bound to produce controversy, because the symbol in question is so inescapably specific. And it has in fact been the occasion of bitter division.\textsuperscript{59}

\textsuperscript{56} See generally Anthony Kenny, Worshipping an Unknown God, 19 Ratio 441 (2006).

\textsuperscript{57} The U.S. State Department reports:

An estimated 87 percent of native-born citizens are nominally Catholic, but only 20 percent regularly participate in worship services. Other significant Christian communities include Orthodox, Jehovah’s Witnesses, Assembly of God, the Confederation of Methodist and Waldensian Churches, the Church of Jesus Christ of Latter-day Saints (Mormons), and other small Protestant groups. Non-Catholic Christian groups, Muslims, Jews, Hindus, Baha’is, and Buddhists constitute less than 5 percent of the population and, with the exception of Jews, are mainly foreign-born. Immigration, both legal and illegal, continues to add large numbers of non-Christian residents, mainly Muslims, from North Africa, South Asia, Albania, and the Middle East. The Ministry of Interior reports that there are 258 places of Islamic worship (mainly "garage" mosques) and 628 Islamic associations concentrated in Lombardy, Veneto, Lazio, Emilia Romagna, and Tuscany. The Jewish community is estimated at 30,000 and maintains synagogues in 21 cities. The most recent data indicate that approximately 14 percent of the population identifies itself as either atheist or agnostic. (Numbers do not add up to 100 percent because of overlapping categories.)

\textsuperscript{58} See generally Ferrari, supra note 1.

\textsuperscript{59} The U.S. State Department reports:

On February 7, 2007, former Justice Minister Mastella said the crucifix was a symbol of traditional Italian culture and values and therefore could be displayed in
The trick loses its persuasiveness when the religious meaning is too overt. The claim that the crucified Christ simply stands for civic values is one that cannot be made with a straight face.60

Given demographic shifts, Italy is going to be pushed in the direction of abstraction, just as the United States has been. Italy’s basic problem is that its civil religion is more specific and less Unitarian than the United States’ has been. There is no obvious way out of this. Due to the religious specificity of the historical symbol, grandfathering will not work as well as it has in the United States, though even in the United States it has not made everyone happy. But some way to move toward greater abstraction must be invented.

This Comment cannot say much about the possibilities of human inventiveness, but one notable experiment was a Milan clinic manager’s attempt to replace crucifixes with pictures of the Madonna, “an image which appeals to Muslim women as well.”61 The manager was promptly overruled and nothing came of the proposal, but it remains intriguing. A Madonna is easily pictured merely as a mother and child, an image that has an appeal that transcends Catholicism. It may be ambiguous enough to satisfy the requirement of increasing abstraction. From across the Atlantic, this author cannot tell if the manager is right, but what he is attempting is the kind of studied vagueness that Italy needs.

B. Funding Religion

U.S. practice also can help with the difficult question of whether the state can permissibly fund religious activities. In Italy, a religious community can receive funding, through a voluntary checkoff on tax returns, if it so requests.62 In order to receive these benefits,
the group must reach an accord with the government. The consequence is that two classes of religion exist in Italy, those that have reached an accord with the government and those that have not. Notably, no accord has yet been reached with Islam.

The pressure to reach such an accord has produced a vexing predicament for the government. Italian Muslims are drawn from many countries, dispersed across Italy, and not cohesive or organized.

Twenty years after the first massive wave of Muslim immigration, Italy’s Muslim community is characterized by the presence of many Muslim organizations, none of which can legitimately claim to represent more than a fraction of it. Moreover, the relationships among these organizations are often characterized by sharp disagreements and even personal hatreds, leaving the country’s Muslim community deprived of a unified leadership.63

The Muslim organization with the largest following, the Union of the Islamic Communities and Organizations of Italy (UCOII), has links with the Muslim Brotherhood and has sometimes endorsed suicide bombings and strong anti-Semitism.64 Most Italian Muslims do not appear to share UCOII’s politicized view of Islam, but it is the organization with the strongest claim to an accord with the government. Such an accord would make UCOII the sole official representative of the country’s Muslim community:

Only UCOII, for example, would choose the curriculum for the teaching of Islam in public schools, appoint imams serving in hospitals, prisons and the military, and celebrate weddings according to the Islamic rite that would have legal value. This position of virtual monopoly that UCOII would gain from such an agreement would not be accepted by minority groups within Italian Islam (such as Shia, Sufis, or Ahmadiyya), nor by all those Sunni Muslims—and they seem to be the majority—who do not share UCOII’s conservative interpretation of Islam. Strong pressures on the Italian authorities to turn down UCOII’s proposals have come, in fact, from various members of the Italian Muslim community and from the Muslim governments whose ambassadors sit on the board of the Rome Grand Mosque and whose ideological and political rivalry with UCOII has always been one of the main challenges to the creation of a unified Muslim leadership in Italy.65

63. Id. at 84. For another analysis that reaches similar conclusions, see James A. Toronto, Islam Italiano: Prospects for Integration of Muslims in Italy’s Religious Landscape, 28 J. MUSLIM MINORITY AFF. 61, 66–68 (2008).

64. Toronto, supra note 63, at 66–68.

Thus, the government has declined to sign an accord with UCOII. But so long as no accord exists, Islam will have a second-class status in Italian law. None of the options are attractive.

In U.S. law, the Supreme Court struggled for years with the question of whether the state may fund religious activities, such as religious schools. For years, it tried to determine whether state funding was directly or indirectly supporting religious activity, without coherent results.\(^66\) It is clear that some direct support must be permissible. The fire department is not required to stand aside and watch the church burn, even though when it puts out the fire, state funds are directly aiding religion.

On this basis, in *Mitchell v. Helms*,\(^67\) a four-justice plurality of the Supreme Court suggested that a valid secular purpose can validate a program that directly aids religious activities. The argument is that equal access is as neutral as anything can be. But there is a danger that such programs will lead to religious oppression, by effectively creating a union of church and state that oppresses non-adherents of the majority creed. Thus, for example, a school voucher program, such as that which the Court upheld in *Zelman v. Simmons-Harris*,\(^68\) could lead to a situation in which the only good schools in a given area are pervasively religious, thereby forcing parents who want a decent education for their children to accept a religious education from a denomination whose doctrines it rejects. Forced religious indoctrination is one of the core evils that the establishment clause is aimed at preventing. Justice O’Connor, concurring in *Zelman*, suggested that the test was whether a program in fact offered “genuine nonreligious options.”\(^69\)

The difficulties of recognizing religions one at a time are avoided by the U.S. approach, which precludes recognizing specific religious groups. In the United States, each church needs to raise its own funds, though contributions are tax deductible. This has an obvious advantage over the Italian solution: the state does not have to decide, at least for funding purposes, what counts as a religion, or how much money each religion should get.

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\(^{68}\) 536 U.S. 639, 639–41 (2002).

\(^{69}\) Id. at 676.
V. Conclusion

The United States and Italy face similar issues, arising from the need to reconcile a unifying national identity with the growing fact of diversity. The appropriate specification of the relation between state and religion will always reflect the particular needs of political life at specific times and places, and depend on local conditions, above all religious demographics. But there is enough typicality to the problems presented that cross-national comparison, and even advice, is possible.