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The New American Civil Religion:
A Model for Italy?

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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 an American lawyer who studies the law of religion in the United States. We have a civil religion of our own, with its own gaps, incoherences, 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.

I. Why Civil Religion?

Why is there civil religion at all? What's 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

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¹ Alessandro Ferrari, *Civil Religion in Italy: A "Mission Impossible"?*, forthcoming.

² JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* bk. 1V, ch. 8, 124-32 (Roger D. Masters ed., Judith R. Masters trans., 1978) (1762).

³ Robert N. Bellah, *Civil Religion in America*, 96 *Daedalus* 1 (Winter, 1967).

⁴ Augustine, *City of God* 19.24, at 890 (Henry Bettenson trans. 1972).

earlier definition by Cicero of a community as an "association of men united by a common sense of right and a community of interest." A people's character, Augustine thought, was determined by the objects of its love: "the better the objects of agreement, the better the people."⁵ Augustine didn't 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.⁶ 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."⁷ 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."⁸ But at the same time, the imperative to bond citizens together can create "an all-but-irresistable pull to build the common identity around the things that strongly unite people, and these are frequently ethnic or religious identities."⁹ In the limiting case, "the logic of democracy can become that of ethnic cleansing."¹⁰ Thus democracy does not necessarily entail liberalism. "Rather it ups the ante: either the

⁵ Id.

⁶ Herbert Deane, *The Political and Social Ideas of St. Augustine* 116-53 (1963).

⁷ Charles Taylor, *Modes of Secularism*, in *Secularism and Its Critics* 43 (Rajeev Bhargava, ed., 1998).

⁸ Id. at 44.

⁹ Id. at 46.

¹⁰ Id. at 48.

civilized coexistence of diverse groups, or new forms of savagery."¹¹

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. American civil religion 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.¹²

I have not mentioned 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 I have just mentioned.

More pertinently, American civil religion is changing. It is becoming more abstract and therefore more inclusive. This, I will argue, is a sensible response to the fragmentation of religion caused by immigration, which is an issue all over the world. In what follows, I will describe America's civil religion and then offer some possible lessons for Italy.

II. The Old American Civil Religion

Here are some familiar and well-settled rules of American Establishment Clause law. The state may not engage in speech that endorses a particular religion, or

¹¹ Id.

¹² See Jeffrey James Poelvoorde, *The American Civil Religion and the American Constitution*, in *How Does the Constitution Protect Religious Freedom?* 141 (Robert A. Goldwin & Art Kaufman eds. 1987). For recent examples of the latter unattractive effect, see Andrew Koppelman, *Reading Lolita at Guantanamo*, 53 *Dissent* 64 (Spring, 2006).

religion generally.¹³ It may not use a religious test for office.¹⁴ A law is invalid if it lacks a secular legislative purpose,¹⁵ or if it purposefully discriminates against certain religious practices.¹⁶ Laws may not discriminate among religions.¹⁷

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 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.¹⁸

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.¹⁹ Justice O'Connor, in her concurrence in a decision concerning the inclusion of the words "under God" in the Pledge of Allegiance,²⁰ 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

¹³ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

¹⁴ *Torcaso v. Watkins*, 367 U.S. 488 (1961).

¹⁵ See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002), and cases discussed therein.

¹⁶ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

¹⁷ *Larson v. Valente*, 456 U.S. 228 (1982).

¹⁸ This is elegantly argued by Frederick Mark Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* 62-80 (1995).

¹⁹ See *McCreary County v. ACLU*, 545 U.S. 844 (2005) (invalidating recently erected display); *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding 40-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). I will argue here that there are better grounds for his position than the ones he states.

²⁰ *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 33-45 (2004) (O'Connor, J., concurring in the judgment).

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," O'Connor wrote. "That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous."²¹ 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 American 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.²² 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.²³

The second is that new manifestations are not at all ecumenical. America was once an overwhelmingly Protestant nation. Today it remains majority Christian, but monotheism is no longer universal. There are a lot of Hindus, Buddhists, and atheists. If you add up the Protestants, Catholics, Mormons, Jehovah's Witnesses, Orthodox, Jews, Muslims, and Unitarians in the 2009

²¹ Id. at 37.

²² See Mark Silk, *Spiritual Politics: Religion and America Since World War II* 40-53 (1988); Noah Feldman, *Divided By God: America's Church-State Problem - And What We Should Do About It* 164-70 (2005). Nonsectarian Bible reading was a less attractive and less successful variant, since it quickly became inflected with anti-Catholicism. See Feldman at 61-92, 108-110.

²³ See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. Rev. 1227 (2003).

Statistical Abstract of the United States, you end up with only 81% of the population.²⁴

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."²⁵ 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 been becoming 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."²⁶ This orientation, which he labeled "the American civil religion,"²⁷ 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

²⁴ U.S. Census Bureau, *Statistical Abstract of the United States: 2009* (129th ed. 2008), tbl. 74, at 59. Further data on non-monotheists are compiled in Frederick Mark Gedicks and Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. Va. L. Rev. 275, 284-85 (2007).

The Statistical Abstract lists 16.1% 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 Americans who report having no religious preference doubled in the 1990s, from 7 percent in 1991 (which had been its level for almost 20 years) to 14 percent in 1998. However, most of the members of this category 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. Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 Am. Sociological Rev. 165 (2002).

²⁵ Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 232 (2004).

²⁶ Bellah, *Civil Religion in America*, supra note __, at 3-4.

²⁷ Id. at 4.

religious intolerance."²⁸ 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."²⁹

Robert Wuthnow observed in 1988 that the American civil religion described by Bellah had been fragmenting in recent years into two very different visions.³⁰ A conservative narrative holds that America's government is legitimate because it reflects biblical principles and has the potential to evangelize the world. A liberal narrative holds that America 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 element, supplying strength to keep going against what often appear as insuperable odds."³¹ The two visions have become increasingly hostile to one another. As a consequence, neither can effectively claim to speak for common American values.

III. The New American Civil Religion

The American civic 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 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

²⁸ Id. at 5.

²⁹ Id. at 7.

³⁰ See Robert Wuthnow, *The Restructuring of American Religion* 241-67 (1988).

³¹ Id. at 251.

Acts.³² 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.³³

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.³⁴

It is surprisingly uncertain what is the object of all this protection. None of the RFRA's offer a definition of religion, and some of them reject usage that identifies it with conscience (which is the 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."³⁵

A vague understanding of "religion" seems to be 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.³⁶

³² For a survey, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 211-12 & nn.368-73 (2004).

³³ All this is documented in Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 3-6, 19-21 (2000).

³⁴ Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 160 (1997).

³⁵ 42 U.S.C. § 2000cc-5(7)(A). Some of the state statutes mandating religious accommodation have similar language. See Ariz. Rev. Stat. Ann. §41-1493 (West 2004); Fla. Stat. Ann. §761.02 (West Supp. 2004); Idaho Code §73-401 (Michie Supp. 2004); 775 Ill. Comp. Stat. Ann. 35/5 (West 2001 & Supp. 2004); Mo. Ann. Stat. §§1.302 (West Supp. 2004); Tex. Civ. Prac. & Rem. Code Ann. §§110.001 (West Supp. 2004). But see 71 Pa. Cons. Stat. Ann. §§2403 (West Supp. 2004) (adopting a more restrictive definition of a substantial burden).

³⁶ See William P. Alston, *Religion*, in 7 Encyclopedia of Philosophy 142 (Paul Edwards ed. 1967); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 Geo. L.J. 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753 (1984); Laurence Tribe, *American Constitutional Law* 1181-83 (2d ed. 1988); Eduardo Peñalver, Note, *The Concept of Religion*, 107

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."³⁷ Thus, for example, there is no single thing common to "games" which makes them all games, but "similarities, relationships, and a whole series of them at that."³⁸ The use of the word "game" is thus not circumscribed by any clear rule. But 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."³⁹

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

the "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.⁴⁰

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.⁴¹

Yale L.J. 791 (1997); 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 124-156 (2006); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 125-139 (2002). Courts in Europe have done no better in devising a definition. Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* 110-26 (2005). Indeed, it appears that no jurisdiction in the world has managed to solve this problem. See T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189 (2003). Lest one think that the neo-Wittgensteinian approach advocated here is an artifact of academic preciousness, note that an analogical criterion is also used by that singularly hardheaded entity, the Internal Revenue Service. See *Defining "Religious Organization" and "Church,"* 868 EST., GIFTS & TR. PORTFOLIOS (BNA) ch. III (2007), available at <http://taxandaccounting.bna.com/btac/>.

³⁷ Ludwig Wittgenstein, *Philosophical Investigations* 20 (G.E.M. Anscombe trans., 3d ed. 1958).

³⁸ *Id.* at 31.

³⁹ *Id.* at 33.

⁴⁰ Charles Taylor, *To Follow a Rule*, in *Philosophical Arguments* 178 (1995).

⁴¹ See Al Yankovic, *Another One Rides the Bus* (Placebo Records 1981).

As Jonathan Z. Smith has observed, the term "religion" denotes an anthropological category, arising out of a particular Western practice

The definition of religion in American law works just this way. There is no set of necessary and sufficient conditions that will make something a "religion." But it is remarkable how few cases have arisen in which courts have had real difficulty in determining whether something is a religion or not.⁴²

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.⁴³

The American 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 noncommittal 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 itself 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),⁴⁴ responding to the fundamentally imperfect character of human life (if it is imperfect),⁴⁵ courage in the face of

of encountering and accounting for foreign belief systems associated with geopolitical entities with which the West was forced to deal. *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.

⁴² The list of reported cases that have had to determine a definition of "religion" is a remarkably short one. See *Religion*, 36C Words and Phrases 153-57 (2002 & supp. 2008). The volume I rely on here, *Words and Phrases*, collects cases from 1658 to the present that discuss the contested meaning of each 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 enormous compilation, each exceed 100 pages: *Abandonment*, 1 Words and Phrases 37-147 (2007); *Abuse of Discretion*, id. at 323-462 and, in the 2008 supplement, 8-25.

⁴³ See Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. OF POLITICS 633 (2004).

⁴⁴ John M. Finnis, *Natural Law and Natural Rights* 89-90 (1980).

⁴⁵ Keith E. Yandell, *Philosophy of Religion: A Contemporary Introduction* 17-34 (1999).

the heartbreaking aspects of human existence (if that kind of encouragement helps),⁴⁶ a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps),⁴⁷ contact with that which is awesome and indescribable (if awe is something you feel),⁴⁸ and many others. No general description of the good that religion seeks to promote can be satisfactory, politically or intellectually.⁴⁹ 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 civil religion, on the other hand, continues to generate new law and new procedures. Religion is a topic that incumbent administrations must now remain silent about. It is even more abstract than Bellah's Unitarian civic God. It is a negative God, a God without predicates.⁵⁰ It reveals its reverence for the Absolute by omitting all reference to it in public decisionmaking. The aspiration evidently is for an eloquent silence, like a rest in music.

IV. A Model for Italy?

Prof. Ferrari's paper focuses on three persistent questions that plague American 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

⁴⁶ Paul Tillich, *The Courage to Be* (1952).

⁴⁷ Immanuel Kant, *Critique of Practical Reason* (1788; Cambridge: Cambridge University Press, 1997); *Religion Within the Limits of Reason Alone* (1794; New York: Harper, 1960).

⁴⁸ Rudolf Otto, *The Idea of the Holy* (2d ed. 1950).

⁴⁹ Charles Taylor has stated the difficulties for any general theory of religion:

I doubt very much whether any such general theory can even be established. I mean a theory which can gather all the powerful élans 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.

Charles Taylor, *A Secular Age* 679 (2007).

⁵⁰ See Anthony Kenny, *Worshipping an Unknown God*, 19 *Ratio* (n.s.) 441 (2006).

such or as part of a broader program of funding to which religious claimants are incidentally entitled? Is it legitimate for religious entities to participate in politics?

A. Symbolic endorsement

The Italian state has for a long time used the symbols of the Catholic Church as the basis of its civic identity. With growing diversity,⁵¹ Catholicism can no longer perform this unifying function. Prof. Ferrari's paper nicely delineates the problem. It won't 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.⁵²

⁵¹ 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.)

International Religious Freedom Report 2008, U.S. State Dept. Bureau of Democracy, Human Rights, and Labor, Sept. 19, 2008, available at http://italy.usembassy.gov/viewer/article.asp?article=/file2008_09/alia/a8091901.htm.

⁵² The 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 public buildings. On February 21, 2008, courts condemned a judge to 1 year's imprisonment and barred him from holding office for having failed to perform his duties after his 2006 refusal to preside in a courtroom where a crucifix was displayed. On January 30, 2008, a local police

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.

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

I can't say much here 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."⁵³ The manager was promptly overruled and nothing came of the proposal, but it is 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, I can't tell if the manager is right, but what he is attempting is the kind of studied vagueness that Italy needs.

B. Funding religion

American practice also can help with the difficult question 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. In order to receive these benefits, the group must reach an accord with the government. The consequence is that there are two classes of religion in Italy, those that have reached an accord with the government and those

officer in Catania appealed the ruling of a civil court stating a crucifix and a statue of Mary could be displayed in public offices. In 2006 the Council of State, the national appeals court for administrative cases, rejected a request made by a mother to remove crucifixes from her children's classrooms. The court determined that the presence of religious symbols in public buildings is not discriminatory as they epitomize civil values.

Id.

⁵³ *Milan Clinic in Crucifix Row*, ANSA English Media Service, May 9, 2007.

which 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," a Hudson Institute report states, "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."⁵⁴ The Muslim organization with the largest following, the UCOII (Union of the Islamic Communities and Organizations of Italy), has links with the Muslim Brotherhood and has sometimes endorsed suicide bombings and strong anti-Semitism. 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

⁵⁴ Lorenzo Vidino, *Islam, Islamism, and Jihad in Italy* (Aug. 4, 2008), available at <http://www.futureofmuslimworld.com/research/detail/islam-islamism-and-jihadism-in-italy>; 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 (2008).

challenges to the creation of a unified Muslim leadership in Italy.⁵⁵

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

In American law, the Supreme Court struggled for years with the question 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 result.⁵⁶ It's clear that some direct support must be permissible. The fire department isn't 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*,⁵⁷ 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 in effect creating a union of church and state that oppresses nonadherents of the majority creed. Thus, for example, a school voucher program, such as that which the Court upheld in *Zelman v. Simmons-Harris*,⁵⁸ 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."⁵⁹

The difficulties of recognizing religions one at a time are avoided by the American 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

⁵⁵ Vidino, *Islam, Islamism, and Jihad in Italy*.

⁵⁶ The case law and its pathologies are well described in Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 22-50 (2007).

⁵⁷ 530 U.S. 793 (2000).

⁵⁸ 536 U.S. 639 (2002).

⁵⁹ *Id.* at 676.

advantage over the Italian solution: the state doesn't have to decide what counts as a religion.

C. Political intervention by the Church

The third issue raised by Prof. Ferrari is whether it is permissible for the Church to throw its influence into live political issues. There seems to be an irresolvable tension between the right of religious citizens to participate in politics and the right of religious minorities to be free from religious domination. Believers claim that they will be disenfranchised if they are forbidden to seek to have laws enacted on the basis of their religious beliefs. Religious minorities claim that laws with religious purposes exclude them from full citizenship. The answer we've arrived at is to allow anyone to participate in politics, but to require that laws have a secular purpose. Because the secular purpose requirement focuses on *what* government is saying rather than on *who* supported any particular law, the participation of the religious is unimpaired. The requirement will, of course, prevent some people from getting what they want in the political process, but any meaningful constitutional restriction will do that.

It is not, in any way, inappropriate for citizens to vote based on their religious beliefs. The establishment clause concern is that the coercive power of the state will be deployed to manipulate the religious beliefs of the citizens, not that the citizens' political behavior will be influenced by their own beliefs. It comes into play only when the state enacts a law that lacks a secular purpose and so is tantamount to an official declaration of religious truth.

This means that one can't complain if the Church publicly offers an opinion about birth control or abortion or anything else. It gets to speak the same as everyone else does.

Prof. Ferrari cites a number of cases where the Church has used its influence to support substantively inhumane, even crazy, positions. I'm in agreement with him on the merits of those cases. But the problem with the Church's involvement is not that the hierarchy has used its lobbying force. It is that it has used that force to promote substantively indefensible ends. The objection is exactly the same as it would be if some well-regarded and influential secular politician took these positions.

Conclusion

All of these complaints are likely to be artifacts of the particular needs of political life at specific times and places, and their resolution will 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.