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.

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 Michaelangelo, 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, something beautiful, useful or meaningful, especially when it is the result of hard work and sustained effort, are among the most valued and valuable human achievements.[2]

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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 Bodlein in Oxford, or the Library of Congress in Washington, D.C., or 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 (an experience I had only a few weeks ago). 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.[3]

One important measure of a good legal system will be its capacity to balance, or 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 from the excesses of the impulse to change and continually create something wholly new.

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.

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 collapse 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.

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[2] Former Yale Law School Dean, 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." Anthony Kronman, The Character of Our Community, Welcoming address to entering students at Yale Law School (1997) (transcript available at Yale Law School).

[3] [Cite Cole Durham on law's role in creating social worlds.]

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 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 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 – ensuring that they are responsive to and reflective of the moods, opinions, and changes in the electorate. The Senate, in contrast, was much smaller, with two senators per state (regardless of whether the state was large or small), longer and staggered terms (six years, with one-third elected every two years).[4]

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In the United States today, there are forces at work threatening the concept of civil religion, understood as the set of quasi-religious attitudes, beliefs, rituals and symbols that bind members of a community together.[5]

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 points of view be silenced or marginalized.[6] Expressing a religious point of view or a religious reason for

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[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. Direct election of senators by the citizens of each state was adopted in 1913 by the 17th Amendment.

[5] 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 valience that it can be dismissed as being only cultural or historical in its significance. On this view, religion is permissible only when it doesn't matter. 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.

We can endeavor to excise all religious symbols and talk unless they offend no one, or we can create a culture that is less apt to take offense at that with which we don't agree. 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.

[6]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, even if the costs of collective action delay the change, eventually change

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 "neutrality" 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 U.S. 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.[7] 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 sacred state" and later declare, "God keeps safe this native land!"[8]

On the other hand, it is worth remembering that the original motto of the United States, found on the 1776 Seal of the United States, and adopted by Congress in 1782[9], was *e pluribus unum* (out of many, one), referring to the American ideal of taking many people, with different backgrounds and beliefs, and

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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 pre-empted by a powerful political minority. Such a pre-emption is likely to take one of two forms. Such a minority is most likely to be found in the judiciary, who acting as self-annointed prophets may decide that something long viewed as permissible is now impermissible. In the United States, it has primarily been the courts that have been the locomotive for removing religious symbols and expressions from public life.

The second is a powerful and vocal minority that 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.

In general this is unobjectionable, but sometimes the tactics used to impose their new political view takes 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 or sexist or bigoted in an attempt to intimidate and silence political difference. Such tactics often work.

[7] [Cite petitioner's brief in *Newdow;* academic commentary (e.g., Steven Gey).]

[8] [cite Russia's patriotic anthem.]

[9] H.R. Resolution 396, 1956.

creating one people. It wasn't until 1956, during the cold war, that Congress adopted "In God We Trust" as the official motto, perhaps reflecting a less inclusive attitude. [10]

But maybe it is a mistake to consider "under God" as a symbol of exclusion. After all, the most famous use of this phrase was by Abraham Lincoln in the culmination of the Gettysburg Address, where he finished by declaring:

> "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." (emphasis added).[11]

The Civil War was 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 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."

The Challenge of Preservationist Exclusivity

The second primary challenge facing civil religion in the United States are efforts to preserve the meaning in a way that is exclusive or even sectarian. Recent polls indicate that approximately 75% Americans identify themselves as Christians,[12] 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, by 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.[13]

And so the extreme forces of creation and the extreme forces of preservation advocate views regarding civil religion that are mutually exclusive. But one has the sense that the forces of division on both sides

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[10] See, e.g, William Van Alstyne, 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.").

[11] The Gettysburg Address is widely reprinted. See e.g., Gary Wills, Lincoln at Gettysburg: The Words that Remade America 263 (Simon & Schuster, 1992).

[12] [cite recent Pew poll from early March 2009].

[13] 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. [citations]

of the spectrum do not represent the views of either the country's founders[14] or of a contemporary political majority.[15]

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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."[16] 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."[17] 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 ICLARS conference in Milan in January. I would like to pick up this theme and try to develop it as well.

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.[18]

It is the very creation of multiple normative meanings that leads to the need for the imperial virtues of world maintenance. For example, even a single constitutive text, such as the 13th Amendment to the U.S. Constitution (which freed the slaves) or the 14th Amendment (which guaranteed equal protection and due process of law) will not have a single normative meaning. As Cover puts it, "Some of us would claim Frederick Douglass as a father, some Abraham Lincoln, and some Jefferson Davis. Choosing ancestry is a serious business with major implications. Thus, the narrative strand integrating who we are

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[14] [cite and quote Jonathan Mecham, etc.]

[15] [create footnote. Political response to Newdow when 9th Circuit decided that "under God" violated Establishment Clause; opposition to conservative "Christian America" views.]

[16] Silvio Ferrari, Keynote Address, at 1, Conference on "Civil Religion" in the United States and Europe: Four Comparative Perspectives.

[17] Robert M. Cover, Nomos and Narrative, The Supreme Court 1982 Term Forward, 97 Harv. L. Rev. 4 (1983).

[18] 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.

and what we stand for with the patterns of precept would differ even were we to possess a canonical narrative text."[19]

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.

> 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.[20]

Thus, courts respond to jurisgenesis, the "too fertile" proliferation of multiple meanings of a single text, 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, 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."[21]

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Cover's account is instructive on a number of levels. I want to focus 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.

Because 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 to kill it. As Cover explains, "Interpretation always takes place in the shadow of coercion,"[22] or as he put it in the opening sentences of *Violence and the Word*, "Legal interpretation takes place in a field of pain and death."[23]

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."[24]

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.

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[19] Cover, at 18.
[20] Cover, at 16.
[21] Cover, at 42, citing Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).
[22] Cover, at 40.
[23] Robert Cover, Violence and the Word, 95 Yale L. J. 1601 (1986).
[24] Cover, at 53.

The jurispathic role of courts is to some extent necessary. After all, the law as a normative institution is not just about creation, but also preservation. A community that is exclusively creative, 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."[25]

Thus, the jurispathic work of judges is closely related to their "world maintaining" function of preserving a community and maintaining the peace. Thus, when the Supreme Court decides what the Establishment Clause or the Free Exercise Clause means, 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, what its precise definition and contours are. These conceptions should be allowed to co-exist and compete with each other, to rise and fall with changing societal trends and identifications, to create normative spheres that can co-exist 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 speaking, the Supreme Court does not have to give its imprimatur of "law" to once conception at the expense of others. In this area, Courts should be sensitive to Cover's final exhortation in *Nomos and Narrative*, that "Legal 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."[26]

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The primary challenge facing civil religion in the United States, as well, I believe, 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 *laicite* 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 fundamentalism.[27] For Italy, the challenge is accommodating religious difference in a state that has historically been characterized by deep religious homogeneity.[28] For the U.S., it is addressing the boundaries of pluralism, as religious identity is fluid,[29] religious variety is increasing,[30] and

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[25] Cover, at 53.
[26] Cover, at 68.
[27] [fn, citing conference papers]
[28] [fn, citing conference papers]
[29] [cite recent survey about the large number of Americans who change religious identification during their lifetimes.]

the portion of the non-believing,[31] the anti-believing,[32] and the barely-believing[33] appears to be on the increase. 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."[34]

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. As such, I believe courts should endeavor to abstain when feasible 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 the court can support rather than undermine the jurisgenetic capacities of other organs of civil society.[35]

When Courts give official sanction to a particular conception of civil religion, it has the jurispathic effect of killing other competing conceptions. The Court should endeavor to facilitate both creativity and preservation without wielding a heavy jurispathic hand of destruction.

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[30] [cite data showing, especially increase in Muslim, Buddhist, Hindu.]
[31] [fn citing increase in agnostic and atheist minorities.]
[32] [fn citing proselytizing atheists who blame religion for many of societies' ills; Christopher Hitchens, et al.]
[33] [cite Fred Gedicks, etc. on the phenomenon of the barely believing, who tend to be a relatively quiet minority in the culture war debates.]
[34] [cite Ferrari].
[35] See Cover, at 57-58.