

This chapter was published in David Odell Scott, ed., *Democracy: Free Exercise and Diverse Visions and Religion* (Kent, Ohio: Kent State University Press), 2004.

EXPLAINING THE COMPLEXITIES OF RELIGION AND STATE IN THE UNITED STATES:

SEPARATION, INTEGRATION, AND ACCOMMODATION

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The interplay between religion and state in the United States is complex, if anything. The rules that comprise the American system of church-state relations--rules dictated mostly by judicial interpretations of the First Amendment's religion clauses, but also embracing traditions that the High Court chooses not to interfere with--are frequently criticized as inconsistent and confusing. A common criticism, for example, is that students in public schools cannot have prayers in their classrooms¹ or at their football games,² but the U.S. Congress may have its own chaplains to lead its daily prayers. Another is that the Ten Commandments cannot be posted in public school classrooms, yet the U.S. Supreme Court chamber in Washington, D.C. is decorated with a representation of Moses holding the Ten Commandments.³ And how is it that ordained preachers like Pat Robertson and Jesse Jackson can run for President of the United States in the face of the constitutional requirement of separation of church and state? On their face, these seemingly contradictory rules and practices seem rather odd, even bizarre. But understood in the broader, elaborate American framework in which religion and state interact, these apparent inconsistencies can be understood, even justified.

It is suggested here that the American system must be understood as embracing three distinct, yet interrelated sets of rules: *separation* of church and state, *integration* of religion and politics, and *accommodation* of civil religion. All of the various rules, customs, and practices that shape the unique relationship between religion and state in America can be assigned primarily, though not always exclusively, to one of these three categories. Each category is essential to the overall American public philosophy, each one part of a nuanced, interconnected system that has as its goal the Good Society. And, as will be argued in this essay, without some appreciation of these three categories, their interrelationship, and the way in which they combine to promote democratic principles, one is certain to become hopelessly confused by the apparent

1 See *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 US. 203 (1963).

2 *Santa Fe v. Doe*, 530 U.S. 27 (2002).

3 For a discussion of the Ten Commandments in public life, see Derek H. Davis, "The Ten Commandments as Public Ritual," forthcoming in Spring 2002 issue of *Journal of Church and State*.

contradictions in the overall system.

I. Separation of Church and State

“Separation of church and state” has become the customary way of describing the relationship between religion and state in the American system.⁴ Yet the phrase is too broad to accurately describe the whole system, because in many respects there clearly is no “separation.” How can a system that proclaims “In God We Trust” as its national motto, invokes the names of God in its pledge of allegiance, observes a national day of prayer, and sanctions government-paid legislative chaplains be said to have a commitment to the separation of church and state? Obviously, the American tradition of separation of church and state does not mean that a separation of religion from government is required in all cases. So, while the phrase is too broad to embrace the whole system, it nevertheless does accurately describe an important part of the system.

A better way to think of “separation” is as a term that describes an *institutional* separation of church and state. In other words, the Constitution requires that the *institutions* of church and state in American society not be interconnected, dependent upon, or functionally related to each other. The purpose of this requirement is to achieve mutual independence and autonomy for these institutions, based on the belief that they will function best if neither has authority over the other. Affected are the institutional bodies of religion, i.e., churches, mosques, temples, synagogues, and other bodies of organized religion, and the institutional bodies of governmental authority--state and federal governments, but also small local bodies such as school districts, police departments, city councils, utility districts, municipal courts, county commissions, and the like. Consequently, churches and other houses of worship receive no direct governmental funding, nor are they required to pay taxes. Government officials appoint no clergy; conversely, religious bodies appoint no government officials. Governments, even courts, are not allowed to settle church disputes that involve doctrinal

4 The “separation” principle is explained in a large range of ways. Those who see separation as requiring only the prohibition against a national church thus allowing for broader governmental advancement of religion are often called accommodationists. Those who argue for more extensive prohibitions of governmental support of religion are frequently referred to as separationists. Among the best words presenting accommodationists interpretations are Chester James Antieu, Arthur L. Downey, and Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religions Clauses* (Milwaukee: Bruce Publishing, 1964); Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976); Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978); and Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982). Among the best with separationist stances are Leo Pfeffer, *Church, State and Freedom*, 2nd ed. (Boston: Beacon Press, 1967); Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986); Anson Phelps Stokes, *Church and State in the United States: Historical Development and Contemporary Problems of Religious Freedom under the Constitution*, 3 vols. (New York: Harper & Brothers, 1950); and Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case against Religious Correctness* (New York: Norton, 1996).

issues. And religious bodies, unlike the Catholic Church in the Middle Ages, have no authority to dictate law or public policy.

The institutional separation of church and state is observed most frequently, and most controversially, in judicial decisions that limit religious activity in the public schools. Court decisions limiting schools' ability to entertain vocal prayers and scripture readings, to post the Ten Commandments and other religious texts, or to advance a particular religious worldview are intended to protect the sacred domain of religion from state interference. It is important to remember that in the public school context, it is the precepts and practices of *institutionalized* religion that are prohibited from being embraced or proscribed. Courses that teach comparative religion, the historical or literary aspects of religion, or the anthropologized dimensions of religion are permitted, even encouraged. As Justice Tom Clark wrote in *Abington v. Schempp* (1963), "one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. . . . study of the Bible or of religion, when presented objectively as part of a secular program of education [does not violate] the First Amendment."⁵

Likewise, court decisions that place restrictions on the ability of government to fund private religious education are the product of the institutional separation of church and state. Generally, the courts have held that these programs, administered by bodies of institutionalized religion, tend to advance religion in a sectarian manner and therefore violate the Establishment Clause. But funding of "secular" components of private religious schools is permitted. Consequently, the courts have permitted governments to purchase, by way of example, textbooks,⁶ computers,⁷ equipment for diagnostic testing,⁸ and other miscellaneous expenditures on behalf of private religious schools because these aid programs are not endorsements of religion. Programs that provide benefits that might be used for promoting or advancing religion, however, such as teacher stipends,⁹ open-ended subsidies that might be used to purchase religious texts, erect religious statues,¹⁰ or finance field trips in which religious instruction might take place,¹¹ have been held unconstitutional.

The institutional separation of church and state affects other areas of religion-government interaction as well. Government has passed in recent years a set of measures that attempt to provide government funding of churches and other religious institutions that are willing to administer social service programs—soup kitchens,

5 *Abington v. Schempp* at 225.

6 *Board of Education v. Allen*, 392 U.S. 236 (1968).

7 *Mitchell v. Helms*, 530 U.S. 793 (2000).

8 *Levitt v. Pearl*, 413 U.S. 472 (1973).

9 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

10 *Pearl v. Nyquist*, 413 U.S. 756 (1973).

11 *Wolman v. Walters*, 433 U.S. 229 (1977).

drug and alcohol rehabilitation programs, clothing pantries, homeless shelters, youth anti-crime programs, and the like. Theoretically, these programs advance secular ends, thus passing constitutional scrutiny. But they are a bold challenge to prevailing constitutional doctrine which holds that churches, temples, mosques, and other houses of worship are “pervasively sectarian,” which means that their mission and purpose is so pervaded by religion that it is virtually impossible for them to ferret out “secular” aspects of their activity. This legislation, dubbed “Charitable Choice” because program beneficiaries may choose either a government-funded religious or secular provider, is a challenge to traditional “separationist” judicial interpretations of the Establishment Clause. Proponents of Charitable Choice advance the ancient fear that without government aid, religion will suffer, potential recipients of assistance will be ignored, and society will experience moral decline. Opponents counter with the argument that religion thrives best when it relies on private rather than government resources, and that morality is best fostered in a climate of self-sustaining voluntarism rather than government-sustaining inducements.¹²

The institutional separation of church and state is a novel experiment in human history. Most societies throughout history have operated on the assumption that government should be a moral agent, that it must play a leading role in crafting the human being. It became customary in ancient times for governments to sponsor, even require, religious worship and instruction as the means of inculcating morality into citizens’ lives. The American founders were convinced that successful nation-building would be impossible in the absence of a moral citizenry, but they believed that moral training, insofar as it was religiously based, must derive primarily from the faith community, not government.¹³ The Establishment Clause was the founders’ attempt to end government’s coercive role in directing the religious course of citizens’ lives; the Free Exercise Clause reflected their goal of putting religion in the hands of the citizens to enable them to shape their own religious commitments. It was a bold experiment, but one that is now central to the American public philosophy. As Supreme Court Justice Wiley Rutledge once declared, “ We have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.”¹⁴ Justice Rutledge knew better than anyone that *complete* separation between church and state is impossible, but his words are a powerful reminder of how central the principle of separation is to the American way of life.

12 On Charitable Choice legislation generally, see Derek Davis and Barry Hankins, *Welfare Reform and Faith-based Organizations* (Waco, TX: J. M. Dawson Institute of Church-State Studies, 1999).

13 See Chapter Ten, “Virtue and the Continental Congress, in Derek H. Davis, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent* (New York, NY: Oxford University Press, 2000).

14 *Everson v. Board of Education*, 330 U.S. 1 (1947) at 59.

II. Integration of Religion and Politics

Separation of church and state is indeed important to the American way of life, but as noted already, it does not describe all aspects of the interplay between religion and state. This is readily seen in the way that the American system encourages the participation of religious voices in the political process. Were the system one of *total* separation, it would not countenance the active involvement of religious persons, faith communities, and religious organizations who vigorously enter public discourse, seeking to persuade government officials of the merits of framing law and public policy to reflect their distinctly religious outlooks.

The right of churches and other religious bodies to engage in political advocacy and to make political pronouncements has never been seriously questioned throughout this nation's history, from the colonial period down to the present. In the years leading up to the American Revolution, for example, the churches assumed a leading role in the political debate on the question of whether the colonies should go to war with the mother country. In the nineteenth century, the major causes for political action among the churches and other religious groups were slavery, temperance, and non-sectarian education. In the twentieth century, the engagement of religious bodies in the body politic grew to cover a wide range of issues including economic and social justice, war and peace, abortion, civil rights, and world hunger. Today virtually all of the major religious groups in America and many religious coalitions have public affairs offices in Washington, D.C. to lead their lobbying efforts.¹⁵ These groups, for the most part, do not consider these offices to exist for the promotion of their self interests, but as an effective means by which they give witness in public affairs based upon their own understanding of their mission in the world.

Given the time-honored right of religious bodies to be active participants in the American political process, it is not surprising that the United States Supreme Court has not seriously challenged this basic right. The strongest affirmation of this right was given by the Court in *Walz v. Tax Commission* (1970): "Adherents of particular faiths and individual churches frequently take strong positions on public issues, including . . . vigorous advocacy of legal and constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."¹⁶ Likewise, in *McDaniel v. Paty* (1978), a case striking down the last of the state statutes prohibiting ministers from seeking state office, the Supreme Court affirmed the importance and protected status of religious ideas in public debate: "[R]eligious ideas, no less than any other, may be the subject of debate which is uninhibited, robust, and wide-open That public debate of religious ideas, like

15 For excellent treatments of religious lobbying, see Ronald J. Hrebenar and Ruth K. Scott, *Interest Group Politics in America* (Englewood Cliffs, NJ: Prentice-Hall, 1982); Jeffrey M. Berry, *The Interest Group Society* (Glenview, IL: Scott, Foresman, and Company, 1989); Allen D. Hertzke, *Representing God in Washington: The Role of Religious Lobbies in the American Polity* (Knoxville, TN: The University of Tennessee Press, 1988); Jeffrey M. Berry, *The New Liberalism: The Rising Power of Citizens Groups* (Washington, D.C.: Brookings Institution Press, 1999); Daniel J. B. Hofrenning, *In Washington, but not of it: The Prophetic Politics of Religious Lobbyists* (Philadelphia, PA: Temple University Press, 1995); and Luke Eugene Ebersole, *Church Lobbying in the Nation's Capital* (New York, NY: Macmillan, 1951).

16 *Walz v. Tax Commission*, 397 U.S. 664 (1970).

any other, may arouse emotion, may incite, may foment religious divisiveness and strife, does not rob it of its constitutional protection.”¹⁷

Supreme Court pronouncements such as these, however, should not lead one to assume that organized religion in America enjoys an absolute right to participate in the making of public policy, free from governmental interference of any type. These groups are subject to losing their tax exemptions, for example, for “substantial” political expenditures¹⁸ or for endorsing political candidates (“lobbying”).¹⁹ Nevertheless, they enjoy essentially the same rights as secular groups to participate in the political process. The principles of democracy prevail here, such that the rights of every person or group in American society, religious or secular, that wishes to contribute to democratic governance is free to do so, even encouraged to do so, even though such participation constitutes a technical violation of the principle of church-state separation. *Complete* separation would mean banning the activities of the Christian Coalition and approximately 125 other religious lobbies whose sole reason for existence is to influence lawmaking and public policy according to religiously-inspired perspectives. Although many of these lobbies, unfortunately, attempt to issue dictates rather than offer advice, mandates rather than persuasive arguments, the great majority of them have learned to submit their perspectives with some degree of humility, recognizing that America is a democracy shaped by many views, not a theocracy shaped by a few.

While religious *arguments* are commonplace in American political discourse, *legislation* that advances a religious purpose generally is not because of the Supreme Court’s requirement, pursuant to the *Lemon* test, that governmental action reflect a secular purpose, that it not have the primary effect of advancing or inhibiting religion, and that it not create an excessive entanglement between religion and government.²⁰

In terms of political theory, the *Lemon* test reflects the Court’s understanding that the nation is essentially a *liberal* state rather than a *religious* state. However, according to most scholarly accounts of the liberal state, this designation carries requirements that are in addition to the mandates of the *Lemon* test. Most significantly, participants’ dialogue in public discourse within a liberal democracy must be intelligible to other participants. Since religious language is unintelligible to many citizens, it should be translated into secular

17 *McDaniel v. Paty*, 435 U.S. 618 (1978) at 640.

18 Though there is no clear rule for defining “substantial,” one case suggests there is a “safe harbor” if an organization’s lobbying expenses do not exceed 5 percent. *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955). In another case, a court held that a church spending approximately 22 percent of its revenues on members’ medical bills under a church medical plan was engaged in a “substantial nonexempt activity.” *Bethel Conservative Mennonite Church v. Commissioner* 80 T.C. 352 (1983), rev’d., 746 F.2d 388 (7th Cir. 1984). Another court has held that a percentage test is inappropriate. *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975). Still, according to one source, no more than 20 percent of expenditures would be deemed “insubstantial.” See Lynn R. Buzzard and Sherra Robinson, *I.R.S. Political Activity Restrictions on Churches and Charitable Ministries* (Diamond Bar, CA: Christian Ministries Management Association, 1990), 53-59.

19 “Lobbying” is defined in the Internal Revenue Code Section 4911 (d)(1). Various regulations, rulings, and court decisions on the meaning of “lobbying” are explained well in Lynn R. Buzzard and Sherra Robinson, *I.R.S. Political Activity Restrictions*, 42-52.

20 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

language accessible to everyone. Religious motivation might lie beneath the veneer of certain legislation, but the legislation itself must be couched in essentially secular language. By most accounts, this requirement is a logical antecedent to the *Lemon* test, which requires that the final product of public discourse—legislation—carry a secular orientation.

The work of John Rawls, of course, is pivotal for the entire tradition of liberal political thought. In *A Theory of Justice* (1990), he makes the basic points just enumerated in support of a secular basis for the liberal state.²¹ Rawls's work has been highly influential in the United States, and has widespread support among political theorists, albeit in varying degrees.²² In recent years, however, liberal political theory has been challenged by a host of communitarian thinkers, all complaining essentially that Rawlsian liberal theory unnecessarily undermines the viable contributions to the public good that specifically religious viewpoints can make. Among these critics has been Stephen Carter, who argues in *The Culture of Disbelief* that religious arguments and even religion-based legislation should be countenanced in a liberal democratic framework.²³

It is this writer's view, contrary to Rawls and affirming Carter, that religious *arguments* in public discourse generally should be permitted. Common sense may dictate that on many occasions the one advancing a religious argument should translate that argument into secular language in order that it become more intelligible and convincing to others, but that should be the decision of the one advancing the argument. Nevertheless, it is suggested here, contrary to Carter and affirming Rawls, that when the public debate on a particular issue is completed and legislation is to be enacted—when the relative “free-for-all” that is American liberal democracy in which every conceivable viewpoint (religious and secular alike) has been entertained—the *legislation enacted*, consistent with the *Lemon* test, should reflect essentially *secular* aims and effects. The great weight of evidence is that the founding fathers intended, as indicated most demonstrably by their purposive omission of God's name in the Constitution, to create what is generally referred to today as a liberal state. The decision to break with traditional political theory that placed human government under divine authority was the result of their belief that the power to frame a new government derived not immediately from heaven, but from the American people. The founders created a government which was to be “of the people, by the people, and for the people.” This in no way was a denial of their personal religious (mostly Christian) convictions, but the new federal government was to be one in which the people were the responsible parties, not God. The product of

21 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

22 See, for example, Bruce Ackerman, *Social Justice in the Liberal State* (New Haven, CT: Yale University Press, 1980); Thomas Nagel, “Moral Conflict and Political Legitimacy,” *Philosophy and Public Affairs* 16 (Summer 1987): 232; and Kent Greenawalt, *Religious Convictions and Political Choice* (New York, NY: Oxford University Press, 1988).

23 Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize American Devotion* (New York, NY: Basic Books, 1994).

public discourse was to be man's law, not holy law. This always has been, and remains, the essence of a liberal state.

In the modern lawmaking process, politicians, like the founding fathers, may personally hold themselves accountable to God. But whether or not they do, they are in fact accountable to the people. Since the people are of diverse faiths, the product of public debate—legislation—should be religiously neutral (secular) so as to reflect the common good, not merely the good of those who prevailed in the debate. This kind of commitment is what is embodied in the *Lemon* three-prong test and the tradition of American political discourse.

American adherence to the integration of religion and politics also means that potential candidates and officeholders are free to speak about their religious views. They may think it prudent at times to abstain from too much “God-speak,” but the Free Exercise Clause gives them the freedom to speak freely about matters of faith, even, for the most part, when acting in their official capacities. It is unlikely that a candidate for president could be elected in America without some candid talk about his or her religious views. America is diverse in its religious makeup, but it is unmistakably one of the most religious nations on the globe, and the American people generally demand to know their representatives' religious beliefs. The Constitution forbids the administration of formal religious tests for holding public office (and most states have followed suit), but this is different from the unofficial expectation that an officeholder have at least some religious commitments. This expectation is the product of a religious culture, of a body of citizens who “are a religious people whose institutions presuppose a Supreme Being.” This was the perspective of Supreme Court Justice William O. Douglas in 1954,²⁴ but it remains true roughly a half century later.

III. Accommodation of Civil Religion

If in the American system the Establishment Clause is relaxed in sanctioning an integration of religion and politics, it is equally relaxed in accommodating various expressions of civil religion. According to Robert Bellah, the most celebrated scholar on American civil religion, civil religion is about those public rituals that express the nexus of the political order to the divine reality.²⁵ By most accounts, civil religion is a form of religion which gives sacred meaning to national life. It is a kind of theological glue that binds a nation together by allying the political with the transcendent. Civil religion is a way for Americans to recognize the sovereignty of God over their nation without getting bogged down in theological differences.

²⁴ *Zorach v. Clauson*, 343 U.S. 306 (1952) at 313.

²⁵ See generally, Robert N. Bellah, *The Broken Covenant: American Civil Religion in Time of Trial*, 2nd ed. (Chicago, IL: University of Chicago Press, 1975), especially p. 3.

Many Americans affirm the separation of church and state, but this does not remove their belief that the nation—as a civil entity—is still somehow obligated to God. For them, nationhood makes little sense unless it is part of a universe ruled by God; consequently, they believe that the body politic should have a religious dimension. Stated in another way, religion is not merely private; it is inescapably public, too. Bellah acknowledges this, arguing that separation of church and state does not deny the political realm a religious dimension.²⁶

The most common symbols of American civil religion are the national motto, “In God We Trust,” which also appears on U.S. currency; the invocation of God’s name in the pledge of allegiance, recited daily by students in many of the nation’s public schools; observance of a national day of prayer; the utilization of government-paid chaplains in the military, U.S. Congress, and state legislatures; and the frequent allusion to God and America’s religious destiny in political, especially presidential, speeches (every president has acknowledged God in his inaugural address). These civil religious expressions are not promoted exclusively by the state, or exclusively by the religious community. Rather, they are promoted by both, serving to imbed in the national civil order an unmistakable religious quality.

Civil religion is a sociological reality in every society. It manifests itself in different ways in different contexts, but French Sociologist Emile Durkheim (1858-1917) was probably correct in suggesting that every society at its deepest foundations is religious, and the sovereign must act responsibly to respect and acknowledge this, lest the society itself deteriorate and pass into oblivion.²⁷ For most Americans, of course, a nation which takes steps to acknowledge the sovereignty of God, even if in generic, symbolic ways, is not merely accommodating the wishes of the citizenry in the sense of filling a sociological need, but acting to affirm the divine reality. In any case, the accommodation of civil religion can be said to prevent the nation from steering too far in the direction of a secularized culture.

The U.S. Supreme Court occasionally acknowledges the evidence of civil religion in American life. Legislative prayer,²⁸ legislative and military chaplaincies,²⁹ Christmas³⁰ and Hanukkah displays,³¹ and graduation prayers in public schools,³² as expressions of civil religion, have all been challenged as violations of the “separation” requirements of the Establishment Clause. The Court tends to sanction those civil religious traditions that are generic, longstanding, and not likely to offend persons of tender age. Thus, in the case of legislative prayer, the

26 Ibid., 169-70.

27 Emile Durkheim, *The Elementary Forms of the Religious Life*, rev. ed. (New York, NY: Free Press, 1965).

28 *Marsh v. Chambers*, 463 U.S. 783 (1983).

29 *Abington v. Schempp*, 374 U.S. 203 (1963) at 296-97 (Brennan concurring).

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

31 *Allegheny v. Pittsburgh ACLU*, 492 U.S. 573 (1989).

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

Supreme Court has held that the practice is constitutional because it has a long and unbroken tradition in American political life.³³ In the public school context, however, given the impressionability of young persons, similar prayers are prohibited as violations of the institutional separation of church and state. The same contrary set of rules, applied in the respective contexts of legislative halls and public school classrooms, can be said to apply to the posting of the Ten Commandments³⁴ and other sacred texts. Legislative and military chaplaincies are likewise affirmed as longstanding traditions, although it is doubtful that courts would endorse the concept of public school chaplains because of the impressionability and potential for indoctrination of the students they would serve. Holiday displays have been held not to violate the Establishment Clause if their religious message is muted by surrounding secular symbols.³⁵ Prayer offered by a clergyman at a public school graduation ceremony, however, has been held to violate the Establishment Clause as an inappropriate government sponsorship of religion.³⁶

The federal courts have struggled in their efforts to assess the constitutional propriety of these kinds of public acknowledgment cases. The difficulty in evaluating such cases is that the religion advanced is typically nonsectarian, symbolic, and without specific theological content—in short, civil religion. The courts, with lawyers sitting as judges, have not been particularly sophisticated in their ability to distinguish civil religion from traditional religion. Occasionally, the Supreme Court has applied a vague concept called “ceremonial deism” to justify some practices of civil religion,³⁷ but for the most part, the Court has seemed to be totally unaware of the large body of scholarly literature that has appeared in recent decades giving analysis to civil religion as a distinctive form of religion.³⁸ The Court has never defined “ceremonial deism”; the term seems to be mere shorthand for the Court’s judgment that a practice ought to be constitutional because it is not really religious, either because it has culturally lost the significance it once had or because it is used only to solemnize a public occasion.

The increased attention that some courts have given to the civil religion concept has led some legal commentators to suggest that civil religion should be judicially recognized and approved, that indeed civil religion mediates, and is the much-needed compromise to settle the debate between those who believe that a strong

33 *Marsh v. Chambers*, 463 U.S. 783 (1983).

34 *Stone v. Graham*, 449 U.S. 39 (1980).

35 *Lynch v. Donnelly*, 465 U.S. 668 (1984) (Christmas crèche paid for with public monies constitutional when surrounded by Santa Claus, reindeer, elves, and related secular Christmas decorations); *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 1086 (1989) (Jewish menorah displayed on public property constitutional when located next to a Christmas tree and a sign saluting liberty).

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

37 For example, see *Lynch v. Donnelly*, 465 U.S. 668 (1984) at 716 (Brennan, J., dissenting), and *County of Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989).

38 Some of the most significant contributions to the literature are: Will Herberg, *Protestant, Catholic, Jew: An Essay in American Religious Sociology*, rev. ed. (Garden City, NY: Anchor Books, 1960); Sidney Mead, *The Nation with the Soul of a Church* (New York, NY: Harper & Row, 1975); and Russell E. Richey and Donald G. Jones, eds., *American Civil Religion* (New York, NY: Harper & Row, 1974).

adherence to separation of church and state is best for America, and those who believe that more religion should be accommodated in the public sphere.³⁹ It is true that the courts have begun to consider the possibility of carving out a special test that might constitutionally sanction certain expressions of civil religion. In a 1987 case, *Stein v. Plainwell Community Schools*,⁴⁰ a federal appeals court considered the constitutionality of including prayers in high school commencement ceremonies. The plaintiffs, parents of students at two Michigan high schools, argued that the prayers “invoke[d] the image of a God or Supreme Being” and thus violated the First Amendment values of “liberty of conscience, state neutrality and noninterference with religion.”⁴¹ Attendance at the commencement ceremonies was voluntary, and failure to attend did not affect the receipt of a diploma. In one school a student delivered the prayer, at the other a member of the local clergy.

The court concluded that the religion clauses, taken together, guarantee “equal liberty of conscience,” erecting “a neutral state designed to foster the most extensive liberty of conscience compatible with a similar or equal liberty for others.”⁴² Treating commencement prayers as analogous to legislative prayers, the court concluded that *Marsh v. Chambers* (authorizing legislative prayers) governed the case, permitting some accommodation to the nation’s religious traditions. In analyzing the nature of commencement prayers, the court sought to place them within an overall framework of a “civil religion”: “So long as the invocation or benediction on these public occasions does not go beyond ‘the American civil religion,’ so long as it preserves the substance of the principle of equality of liberty of conscience, no violation of the Establishment Clause occurs under the reasoning of *Marsh*.”⁴³ In sustaining commencement prayers generally, the court emphasized that, unlike classroom prayer, they presented little danger of religious coercion or indoctrination. The court, however, found the prayers unacceptable because they were so distinctively Christian that they connoted a governmental endorsement of Christianity. Thus the prayers failed to qualify as permissible invocations and benedictions under a special category of “American civil religion.”

In 1992, in *Lee v. Weisman*,⁴⁴ the U. S. Supreme Court considered a similar case involving commencement prayer. There, a middle school principal had invited a Jewish rabbi to give the invocation and benediction at the school’s commencement ceremony. The rabbi recited nonsectarian prayers, following the school’s instructions

39 For the leading article expressing the view that civil religion should be applied to Establishment Clause adjudication, see Yehudah Mirsky, “Civil Religion and the Establishment Clause,” *Yale Law Journal* 95 (1986): 1237. For a similar view, see Michael M. Maddigan, “The Establishment Clause, Civil Religion, and the Public Church,” *California Law Review* 81 (1993): 293.

40 822 F.2d 1406 (6th Cir. 1987).

41 *Ibid.* at 1408.

42 *Ibid.*

43 *Ibid.* at 1409.

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

that prayers reflect “inclusiveness in sensitivity.” The plaintiff, the father of a fourteen-year-old student of the school, complained that the prayers were an impermissible governmental advancement of religion contrary to the prohibitions of the Establishment Clause.

The Court held that the prayers bore the imprint of the Providence school system and were therefore unlawful advancements of religion. The Court stated that even for those students who objected to the religious ceremony, their attendance was in a “fair and real sense” obligatory, even though attendance was not required as a condition for receipt of a diploma. The Court reasoned that this constituted an indirect coercion, which could be as real as any overt compulsion to participate in the state-sponsored religious activity. The atmosphere of the commencement proceeding was distinguished from that of a state legislature, as in *Marsh*. In the latter, the Court said, adults are free to enter and leave with little comment and for any number of reasons, whereas in the former, children are constrained to attend in its entirety the one most important event of their school year.

Of special interest here is the attention that Justice Anthony Kennedy, writing for the majority, gave to the brief discussion of civil religion set forth in the *Stein* case:

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit, picked up by Judge Campbell’s dissent in the Court of Appeals in this case, that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.⁴⁵

Kennedy’s point here is that “civic religion,” whatever its merits and however it might represent consensus, is religion just the same, and if promulgated by government, violates the Establishment Clause. While Kennedy’s was not an extended inquiry into the nature of civil religion, his recognition of it as a distinctive form of religion that is different from creedal religions at least gives Court-watchers some glimpse of how the Court might adjudicate future attempts to seek a special status for civil religion under the Establishment Clause.^{tim}

A second problem with raising the American civil religion to constitutional status is the risk it poses for civil religion’s becoming a threat to authentic religious faith. A civil religion tends to enshrine the political

45 Ibid. at 2652.

order and, as Senator Mark Hatfield once said, for those of traditional faith, borders on idolatry and “fails to speak of repentance, salvation, and God’s standard of justice.”⁴⁶ Finally, constitutionally establishing a civil religion gives the government, through the courts, a tool to justify and reinforce its own policies. As the standard for acceptability, the civil religion would enjoy a preferred status that could be used to exclude traditional religious advocacy from the public arena.⁴⁷

In summary, civil religion has been for much of American history, and remains, a vital cultural force. It is manifested in our own day in prayers at presidential inaugurations, the invocation used each time the Supreme Court itself hears argument (“God save this honorable court”), Thanksgiving and National Day of Prayer proclamations, the words “under God” in the pledge of allegiance, the phrase “In God We Trust” on coins, various Scripture quotations inscribed on government buildings (“Moses the Lawgiver” is the inscription above the Supreme Court’s bench), and even the ritual benediction, “God Bless America,” used frequently by presidents.

All of these civil religious traditions are violations of a strict notion of the separation of church and state. Yet they form a rich tradition of practices that are culturally and judicially accommodated. Undoubtedly they offend many, but they are for the most part generic practices that are not coercive in the way that, for example, audible school prayers in the public schools are. Indeed, these practices are accepted and celebrated by most Americans, and they contribute to a unique, nuanced, and sometimes contradictory set of concepts, principles, customs, beliefs, and symbols that comprise the American tradition of religion and state.⁴⁸

VI. Conclusion

While contradictory in many respects, the principles of separation of church and state, integration of religion and politics, and accommodation of civil religion combine to provide unique but important contributions to America’s public philosophy. The role of religion in American public life has been controversial since the founding and will likely remain so far into the future. But perhaps the separation-integration-accommodation triad described in this essay removes some of the hard edges from the controversy, because it embraces elements of both conservative and liberal thought, of competing philosophical and theological beliefs, indeed of key arguments advanced by both separationists and accommodationists. The final product can be likened to a tossed salad, a blend of items that perhaps are not so tasty if partaken of separately, but quite savory in combination. Such is the way a democracy should work—disparate elements coming

46 Mark Hatfield, *Between a Rock and a Hard Place* (Waco, TX: Word Books, 1976), 92.

47 Adams and Emmerich, *A Nation Dedicated to Religious Liberty*, 87.

48 This position is consistent with the Supreme Court’s doctrine of “benevolent neutrality,” first expressed in *Walz v. Tax Commission*, 397 U.S. 664 (1970). “Benevolent neutrality” is appropriately sensitive to the institutional difference between religion and government that was intended by the framers while simultaneously allowing for some governmental expressions of religion in public life.

together to produce that which hopefully serves everyone, that which we have come to call the common good, indeed that which we might refer to as the Good Society.