Notre Dame Law Review

Volume 78 | Issue 1 Article 2

12-1-2002

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ESSAYS

THE LIMITS OF SECULARISM: PUBLIC RELIGIOUS EXPRESSION IN MOMENTS OF NATIONAL CRISIS AND TRAGEDY

*William P. Marshall**

I generally start teaching the issue of school prayer by asking my students to join me in saying the prayer at issue in the Regent's Prayer case, *Engel v. Vitale*.[1] Then I ask if any have had a religious experience. Invariably the answer is no (although occasionally someone will suggest that the exercise, if anything, may have been anti-religious). Nevertheless, most in the class will argue, for one reason or another,[2] that reciting the prayer in public schools is unconstitutional.

I then ask the students to imagine a public school class in Concord, New Hampshire on the day that one of the school's teachers is launched into space in the Challenger shuttle.[3] At the point the spacecraft disintegrated, I inquire, would it have been constitutional for the substitute teacher to lead the class in prayer? Almost all say

* Kenan Professor of Law, University of North Carolina School of Law. I am grateful to Anna Pond for her research assistance. I would also like to thank Adrienne Davis, Kevin Haynes, Brad Campbell, and Robert Tuttle for their helpful suggestions and the participants at a workshop at Boston University for offering numerous, insightful comments.

1 370 U.S. 421 (1962). The prayer is, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

2 Some students argue that the heart of the constitutional violation in *Engel* was that the prayer was state-authored while others maintain that the key to the violation was that the prayer was state-led.

3 This example is, as far as I know, only a hypothetical. For an account of the town of Concord's reaction to the Challenger explosion, see Bob Drogin, *New Hampshire Town Reeling From Shock, Grief*, L.A. TIMES, Jan. 30, 1986, at 1.

yes, even though they are already alert to the obvious inconsistency.[4] This, needless to say, sets up the punch line. How can a government-sponsored exercise with little or no religious content be readily perceived as unconstitutional while a government-sponsored exercise with real religious meaning and force is less constitutionally problematic?

All of this became more than an academic exercise after September 11. After that date, prayer and religious reference became an unabashed part of public life with a vengeance. This is not to say that, prior to September 11, displays of religiosity had been excluded from the public domain. Far from it. They have always been a part of the American experience.[5] But there was a new depth to the public religious experience. The frequent references to God and religion were more sincere than the rote homage of the Regent's Prayer. The singing of *God Bless America* on the Capitol steps and then later in publicly sponsored vigils around the country sounded in hymn rather than in hollow incantation.[6]

The turn of the Nation to these public, governmentally fostered displays of religion can be explained on a number of grounds. Some of the reasons are expected. People turn to religion for comfort in times of grief, and they look to religion for meaning in times of fear.[7]

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4 There are the occasional students who, wary of inconsistency, will argue weakly that even in this circumstance the prayer would be unconstitutional, but generally their hearts are not in it.

5 "Prayers offered at civic assemblies and invited from citizens by public officials boast a lineage as venerable as the Constitution itself." Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 35 (1993).

6 A prominent example of a government-sponsored religious event was the Prayer for America held on September 23, 2001, at Yankee Stadium in New York City. According to published reports, the event was replete with prayers, inspirational music, and a "sea . . . of American flags." Robert D. McFadden, *A Nation Challenged: A Day of Prayer*, N.Y. TIMES, Sept. 24, 2001, at B7.

7 *See* PETER L. BERGER, THE SACRED CANOPY 58 (1967) (noting that humanity's need for meaning may become "even stronger than the need for happiness" in times of crisis and upheaval); ERWIN R. GOODENOUGH, THE PSYCHOLOGY OF RELIGIOUS EXPERIENCES 7–9 (1965) (arguing that chaos is often the genesis of religious belief); *see also* CLARKE E. COCHRAN, RELIGION IN PUBLIC AND PRIVATE LIFE 156 (1990) (noting the human need for religious outlets to confront the problem of death). *See generally* MIRCEA ELIADE, THE SACRED AND THE PROFANE (Willard R. Trask trans., 1959).

Empirical evidence also supports this assertion. *See* GEORGE GALLUP, JR. & D. MICHAEL LINDSAY, SURVEYING THE RELIGIOUS LANDSCAPE: TRENDS IN U.S. BELIEFS 44 (1999) ("Eight out of ten Americans do find solace in prayer during times of crisis."); *id.* at 56 ("Even more Americans (94%) think that reading the Bible and spending time in meditation or prayer is needed during tough times.").

The desire to engage in public religious exercises is also understandable. Religion, for most people, is a communal enterprise.[8] And an attack upon the Nation is, by definition, an attack upon our collective selves.

In this case, moreover, there was an additional factor at work. Religion stood near the center of the national trauma.[9] The events of September 11 were carried out by people willing to die for their religious beliefs and were directed at the United States ostensibly in part because of the country's lack of spirituality.[10] The attacks, in short, struck at the core of the Nation's religious identity. It is therefore only natural in these circumstances that the country would choose to respond with strong affirmations of religiosity—that we would seek to express our grief deeply and communally as well as send the strong message to others and to ourselves that we were not the materialistic, godless society described by our attackers.

The desire, or perhaps, the need, to engage in public religious observance, while certainly explicable, is also controversial. First, any affirmation of a national spirituality or religiosity seems inconsistent with the notion that ours is a secular society.[11] Second, even if the need for public religious expression is deeply driven, state-sponsored religious exercise transgresses policy and constitutional norms of religious freedom and non-establishment.

This Essay will attempt to grapple with these issues. Part I begins the discussion by noting the seeming contradiction that underlies the relationship between religion and society in the United States. Although we are, by both constitutional mandate and tradition, a secular society, we are simultaneously also a deeply religious culture. For this reason, as Part I points out, the secularism with which the American experiment is often associated may be more accurately described as a veneer rather than as an embedded fixture. Part II presents the arguments that support the maintenance of this secular veneer. Why is it that explicit state-sponsorship of religion may be problematic when religion itself is so integral to our social structure? Part III turns

8 *See* Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 734 (1986).

9 *See* Richard John Neuhaus, *Religious Freedom in a Time of War*, FIRST THINGS, Jan. 2002, at 75 ("The war against terrorism is—more than it is politic for world leaders to say in public—also a war of religion.").

10 *See, e.g.*, Thomas L. Friedman, Editorial, *Eastern Middle School*, N.Y. TIMES, Oct. 2, 2001, at A25 ("The Islamic terrorists think . . . that we are basically a godless nation, indeed the enemies of God.").

11 County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) ("The Constitution mandates that the government remain secular . . . .").

to constitutional doctrine. This Part canvasses the efforts in First Amendment jurisprudence to reconcile (or perhaps adjust) the constitutional prohibitions on state-sponsorship of religion with the pervasive manifestations of the Nation's religiosity that exist in the culture. It then goes on to ask whether these jurisprudential efforts, if sincerely applied, would serve to insulate the post-September 11 state-sponsored religious exercises from constitutional attack. The Part concludes that they would not. Finally, Part IV attempts to grapple with the constitutional issues raised by the post-September 11 events directly. Can the state endorse undeniably religious activities that affirm our Nation's religiosity without violating constitutional prescriptions? The Essay concludes that, in limited circumstances, it can.

I. OUR NATIONAL RELIGIOUS IDENTITY

Officially, of course, we are a secular nation.[12] We have no national religion, and our constitutional law is agnostic with respect to matters of ultimate Truth.[13] Our culture espouses the principle of religious tolerance as a fundamental American value, suggesting that the absolute rejection of claims of sectarian primacy enjoys popular, as well as legal, support. Our politics deems it improper for politicians to clothe their candidacies with claims of divine will.[14]

The true story, however, is far more complex. While religion holds no official status in the culture, its influence cannot be overemphasized.[15] The omniscient (or was it prescient?) Alexis de Toc-

12 *Id.* The commitment to this secularism is, however, not universal. At times in history, for example, it has been maintained that we are a Christian nation. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) ("[T]his is a Christian nation."). More recently, leading, thoughtful commentators have questioned whether in our pursuit of secularism we have overly marginalized religion. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 86 (1993) (arguing that religion has been inappropriately marginalized in public culture and discourse); RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 10 (1984) (same).

13 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."); *see* Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 72 (1996) ("[T]he Court has set forth a clear principle regarding laws passed with a primarily religious purpose: They may not stand . . . .").

14 *See* Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 695–96 (1992); William Safire, *God Bless Us*, N.Y. TIMES, Aug. 27, 1992, at A23.

15 Robert Bellah goes so far as to argue that the American myth itself is deeply religious. "In the beginning, and to some extent ever since, Americans have interpreted their history as having religious meaning. They saw themselves as being a

queville wrote that while "[r]eligion in America takes no direct part in the government of society . . . it must be regarded as the first of their political institutions . . . . [Americans] hold [religion] to be indispensable to the maintenance of republican institutions."[16] Justice Douglas made the same point more succinctly: "[w]e are a religious people whose institutions presuppose a Supreme Being."[17]

The deep religiosity of the American people is borne out statistically.[18] Ninety-six percent of Americans believe in God,[19] and that figure has remained largely constant for the past sixty years.[20] Three in five Americans consider God a very important part of their lives,[21] and 87% of Americans describe religion as being either "very important" or "fairly important."[22] Sixty-nine percent of Americans belong to a church.[23] Indeed, the United States is significantly more religious than most other western nations.[24] While 96% of Americans believe in God, in England, the comparable figure is 61%.[25] In Canada it is 70%.[26] When asked to gauge the importance of religion in their lives, 58% of Americans said religion was "[v]ery important" and 38% said "[f]airly important.[27] Only 9% said that religion was "[n]ot very important."[28]

The American embrace of religion, moreover, is not merely a private phenomenon. Religion is deeply embedded in our public cul-

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'people' in the classical and biblical sense of the word. They hoped they were a people of God." ROBERT BELLAH, THE BROKEN COVENANT 2 (2d ed. 1992).

16 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 305–06 (Phillips Bradley ed., Henry Reeve trans., 1945).

17 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

18 *See, e.g.*, Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37 (2000) (discussing the flourishing of diverse religious traditions in the United States); *see also* A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 2 (1985) (describing high rates of churchgoing and high belief rates in religion generally among Americans).

19 GALLUP & LINDSAY, *supra* note 7, at 119 ("[N]early all people in this country believe in God (96%).").

20 *Id.* at 25.

21 *Id.* at 9.

22 *Id.* at 10.

23 *Id.* at 12 ("[N]early seven in ten Americans (69%) are members of a church or synagogue.").

24 REICHLEY, *supra* note 18, at 2.

25 GALLUP & LINDSAY, *supra* note 7, at 119.

26 *Id.*

27 PRINCETON RELIGION RESEARCH CTR., RELIGION IN AMERICA 53 (1996), *cited in* William P. Marshall, *The Culture of Belief and the Politics of Religion*, 63 L. & CONTEMP. PROBS. 453, 459–60 (2000).

28 *Id.*

ture. We celebrate holidays such as Thanksgiving.[29] The names of our cities, counties, and parks are replete with religious reference.[30] Presidents seek God's guidance in their inaugural addresses,[31] the Supreme Court asks for God's blessing at the outset of its proceedings,[32] and the Congress employs a full-time chaplain.[33] Our currency affirms, "In God We Trust."[34]

Perhaps most importantly, Americans take their public commitment to religion seriously. We believe freedom of religion to be one of our most fundamental rights, if not the most fundamental right. We value our religious diversity and our religious traditions. Indeed, we attempt, even in the most separationist aspects of our Establishment Clause doctrine, to protect religion and not to diminish it.[35]

The claim that we are a godless state is thus not only inflammatory—it is also inaccurate. Our secularism, such as it is, is not anti-religious—rather it complements, perhaps fosters, the fact that we are

29 *See* 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 451–54 (1950) (noting that as far back as the Continental Congress of 1775, American political bodies issued Thanksgiving Day proclamations); *see also* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 51 (1982) (noting that the first House of Representatives endorsed both the Establishment Clause and a resolution asking the President to issue a Thanksgiving Day proclamation on the same day).

30 *See infra* Part III.C.

31 *See* JOHN F. WILSON, PUBLIC RELIGION IN AMERICAN CULTURE 49–53 (1979).

32 *See* GERALD W. JOHNSON, THE SUPREME COURT 20 (1962) (noting that the practice of invocation was borrowed from England).

33 *See* 2 U.S.C. § 84-2 (2000) (providing for compensation for a chaplain of the House of Representatives); Order of the President Pro Tempore of the United States Senate, Dec. 20, 2000, *reprinted in* 2 U.S.C.A. § 60a-2 (2000) (as listed in reference material following § 60a-2) (providing for compensation for a chaplain of the Senate).

34 *See* 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 568 (1950) (recounting that in response to "suggestions for the broader recognition of religion," Secretary of the Treasury (and future Chief Justice) Salmon P. Chase ordered the Philadelphia mint to prepare "a motto expressing in a few words the recognition of the trust of our people in God," a motto that, in 1864, became, "In God We Trust"). Interestingly, in 1907, President Theodore Roosevelt ordered the phrase removed because he believed it came dangerously close to sacrilege. Congress, however, restored the motto by an act passed on May 18, 1908. *Id.* at 568–70. "In God We Trust" replaced "E Pluribus Unum" as the official motto of the United States in 1956. Act of July 31, 1956, Pub. L. No. 84-851, 70 Stat. 732 (codified as amended at 36 U.S.C. § 302 (2000)).

35 *See* Mitchell v. Helms, 530 U.S. 793, 868 (2000) (Souter, J., dissenting) ("The establishment prohibition of government religious funding . . . is meant . . . to protect the integrity of religion against the corrosion of secular support . . . ."); Lee v. Weisman, 505 U.S. 577, 589–90 (1992) ("[T]hese same Clauses exist to protect religion from government interference.").

a religious nation. The simple and direct answer to those who question our Nation's religiosity is that they misunderstand our secularism.

Still, responding to an attack on our collective spirituality by stating that "you are wrong" or that "we are a secular state that, for complicated reasons, deeply values religion but feels that it needs to privatize religion in order to protect it" or even by reciting statistics on church membership seems rather sterile.[36] The more satisfying response, both for external and (perhaps more importantly) internal purposes, would be to demonstrate that religiosity—not simply to talk about it.[37] This is exactly what occurred—in the halls of Congress, in the public schools, in city-sponsored services, and elsewhere.[38] The country resoundingly affirmed its religiosity and did so in a deeply religious manner.[39] Still, a nagging question persists. In affirming religious identity through state-sponsored practice, do we begin to compromise it?

II. THE NEGATIVES IN GOVERNMENT AFFIRMATIONS OF NATIONAL RELIGIOUS IDENTITY

Even if it is true that underneath our secular exterior lies the heart of a religious nation, it is not immediately obvious that publicly affirming that religiosity would be either wise or appropriate under any circumstances. The secular veneer, after all, is not accidental and serves a significant purpose. In fact, there are numerous reasons why publicly affirming our national religious identity through govern-

36 *See* EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 21–33 (Joseph Ward Swain trans., 1965).

37 There is, of course, some irony in this. The affirmation of religiosity in response to the religious attack plays into the premises of the attackers' motivations—that the war is actually about the superiority of competing religious visions.

38 The spontaneous attempts at spiritual responses later became efforts to turn the outbreak of public religiosity into something more permanent. The House passed several resolutions reflecting the prevailing religious sentiment: designating *God Bless America* as the national hymn, H.R. Res. 3051, 107th Cong. (2001), and condoning public school displays of the words "God Bless America" as expressions of national support, H.R. Con. Res. 248, 107th Cong. (2001). The last measure also was passed in the Senate. S. Con. Res. 79, 107th Cong. (2001). At the same time, some local communities found in the September 11 events a reason to return to school prayer. For once, however, civil liberties groups generally avoided the ready-made public relations trap, and the legality of these practices went unchallenged.

39 *See, e.g.*, Johnny Mason, *A Divine Diversion from Devastation*, HARTFORD COURANT, Sept. 20, 2001, at B3; Natalie Lawrence, *Assembling the Flocks: Local Congregations Bond Together in Prayer for Victims*, TULSA WORLD, Sept. 19, 2001, at 1.

ment-sponsored ritual is problematic.[40] These reasons merit brief discussion.

First, religion is often divisive. To many adherents, religious truths hold no room for compromise. How then are disparate religious traditions to agree on a common core of understanding from which a national religious identity can be forged? Indeed, the very process of attempting to discover a national religious core would be highly troublesome. Consider, for example, the struggle that would likely occur if the wording of a non-denominational school prayer were left to the political process. When a governmental message purports to represent the collective religious identity of the American people, the stakes that all religious views have in the outcome are immeasurably high.[41]

Second, and relatedly, is the danger of the government getting it wrong. The government, after all, is ill-equipped to ascertain religious principles,[42] and when its inquiry is nothing less than defining a national religious core, the ramifications of its failure are enormous. After all, concerns of institutional competency arise when government attempts the relatively minor tasks of defining religion for purposes of constitutional analysis[43] or determining religious sincerity for purposes of adjudicating religious claims.[44]

Third, government sponsorship of religion can be harmful to religion. In the words of Daniel Conkle, "government 'support' for religion is illusory because it tends to degrade and cheapen religion."[45] The initial American evangelical position, after all, was that the separation of church was necessary to preserve religion's purity and integrity.[46] Roger Williams and others maintained that state affirmation

40 *See generally* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996) (noting that any deist acknowledgment or action on the government's part is naturally exclusive of diverse points of view).

41 *See* Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 838–40 (1983) (arguing that state-sponsored prayer would either be sectarian and divisive or so non-denominational as to make the prayer devoid of content).

42 *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

43 *See* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 241 (1989) (noting that defining religion necessarily imposes limitations on it, excluding other religious beliefs in violation of the Establishment Clause).

44 *See* United States v. Ballard, 322 U.S. 78 (1944).

45 Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1181 (1988).

46 *See* ELWYN A. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES: THE DEVELOPMENT OF CHURCH-STATE THOUGHT SINCE THE REVOLUTIONARY ERA 15–26 (1972) (de-

and endorsement of religion weakened religion by fostering its dependence upon the state.[47] A veneer of secularism, accordingly, allows our religiosity to remain vibrant.

Fourth, any effort to uncover a national religious core may undermine the benefits of religious pluralism. Some of the social value provided by American religion derives precisely from its disunity. Diverse religious traditions help develop moral choices by allowing differing perspectives to inform public debate.[48] Additionally, diverse religious groups serve as mediating institutions between individuals and government[49] and "act as critical buffers between the individual and the power of the State."[50] Forging unity in religious identity through government sponsorship or imprimatur undercuts these benefits.

Fifth, articulating a national religious core creates the possibility of real or perceived sect preference. Religious traditions in the United States are immensely diverse.[51] The possibility of finding a common denominator underlying all belief systems is virtually impossible. Any public expression of religious affirmation will inevitably fail to be comprehensive. And those groups whose religious beliefs are outside the governmental practice will fairly be able to claim that the government has engaged in sectarian preference to their detriment.

Sixth, public displays of religiosity may offend many whose religious traditions do not conform to the prevalent religious culture. The resulting alienation of the non-conforming believers can result in

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tailing the involvement of Isaac Backus, a New England pastor, in advocating the evangelical theory of separation of church and state).

47 *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 6 (1965) ("When the imagination of Roger Williams built the wall of separation [between the churches and the world, it was] the dread of the worldly corruptions which might consume the churches . . . ."); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 469 (1991) ("Any powers exercised by the civil government must have been granted by the people. The people, however, were not invested with any power by God to rule the church—the bride of Christ—or to keep it pure." (citations omitted)).

48 *See* Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87, 88 (1996).

49 *See, e.g.*, CARTER, *supra* note 12, at 37; Jonathan Van Patten, *In the End Is the Beginning: An Inquiry into the Memory of the Religion Clauses*, 27 ST. LOUIS U. L.J. 1, 84 (1983) ("The diversity of private associations, including religious associations, provides a balance in the extended republic against the domination of any particular group.").

50 Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (citations omitted).

51 *See* Stein, *supra* note 18, at 52–54.

breaking the bonds of social community rather than in fostering those bonds.[52]

Seventh, entwining religion and patriotism is troublesome even when some common religious understanding can be asserted. If history is any indication, the juxtaposition of these two powerful forces does not allow for much in the way of tolerance of non-conformity, much less dissent.[53] Religion in the hands of the state frequently has been used as a tool of oppression. The state in the hands of religion has been frequently used as a force to quell dissent.[54] Indeed, even beyond concerns of persecution, religion-state alignment is problematic because it eliminates the dynamic of competing moral authorities. When church and state are one, the ability of religion to raise moral authority against state excesses becomes compromised.[55] Religion instead serves only to reinforce, not to check, state power.

Finally, the events of September 11 and the public's turn to religion in the following days once again illustrate the one incontrovertible truth about religion: religion's potential for good is matched only by its potential for harm. On the one hand, religion is one of the most positive influences in society. On the other, it is a potentially powerful and destructive force fostering divisiveness, persecution, hate, and death.[56] Placing the power of the government behind religion is not always placing government support behind the forces of good.

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52 Justice O'Connor originally raised this concern in *County of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the judgment); *see also* Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1052 (1986).

To be sure, I have always found the offensiveness/alienation rationale not only unpersuasive but also ultimately inconsistent with general speech clause principles that minimize the constitutional relevance of offensiveness. *See* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351 (1991).

53 Thomas Curry maintains that, as a matter of history, the government's promotion of religious unity violates the central purpose of the Establishment Clause. THOMAS J. CURRY, FAREWELL TO CHRISTENDOM (2001). According to Curry, the framers' central wisdom was realizing that the European experience in which religion was advanced by official state power was harmful to both religion and the state. *Id.* at 25.

54 *See* CARTER, *supra* note 12, at 83–85.

55 *Id.* at 81 (noting that the philosopher Sören Kierkegaard maintained that "when Christianity becomes a part of the state, it ceases to be Christianity").

56 Both sides of religion appear to be recognized in the First Amendment. The concern of the Amendment appears both to be protection of religious liberty through free exercise and anti-establishment limitations and restriction of the power of religion through the anti-establishment provision.

III. Doctrinal Attempts To Navigate Troubled Waters

The dangers in governmental affirmations of religion are thus considerable. Not surprisingly, an awareness of those dangers has not been lost in the forging of constitutional doctrine. First Amendment law is relatively settled on the theoretical position that explicit state sponsorship of religion is impermissible.[57] The state-sponsored religious exercises following September 11 might, therefore, initially be viewed as violating constitutional norms.

There are, however, doctrinal cracks in the secular veneer. The constitutional commitment to secularism has, at times, not been rigorously enforced. The First Amendment has not demanded that, for example, Thanksgiving be declared unconstitutional, that Corpus Christi and Zion National Park be renamed, or that the Court cannot begin its sessions with "God Save This Honorable Court." Rather, the jurisprudence has adopted a number of approaches in which the prohibition on state-sponsored religion may be maintained in theory while allowing significant state sponsorship of religion to remain in practice.[58] A review of some of these approaches might therefore be helpful in assessing the post-September 11 events.[59]

A. Secularization

The first approach claims that a particular governmental demonstration of religiosity is permissible because the practice in question has become "secularized," i.e., devoid of religious meaning through repetition and public acceptance.[60] Thus, in the crèche cases, for example, the Court has indicated that certain symbols of Christmas have attained secular status and, therefore, do not raise establishment concerns.[61] Similarly in *McGowan v. Maryland*,[62] the Court held that the rationales underlying Sunday closing laws had evolved so as to be now

57 *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000); Lee v. Weisman, 505 U.S. 577, 587 (1992).

58 A notable exception to the trend is the recent Ninth Circuit case, Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002) (judgment stayed on June 27, 2002, pending en banc review), striking down "under God" in the Pledge of Allegiance. *But see* Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437, 442–48 (7th Cir 1992) (upholding the use of "under God" in a similar challenge).

59 Of course, one should always be skeptical about searching for assistance on any religious issue in Supreme Court doctrine. In a constitutional world in which doctrinal morass is the rule rather than the exception, Establishment Clause jurisprudence still stands out for its lack of intelligibility.

60 County of Allegheny v. ACLU, 492 U.S. 573, 616 (1989).

61 *See id.*; Lynch v. Donnelly, 465 U.S. 668, 685 (1984).

62 366 U.S. 420 (1961).

based upon secular considerations. The secularization approach is not without its critics. The notion that religion can become secularized has been soundly condemned as demeaning religion.[63] But whatever the merit of this approach, it would be difficult for the secularization argument to encompass the undeniably religious post-September 11 vigils, prayers, and memorials.

B. De Minimis Establishment

Some forms of public religiosity, such as religious place names, have been thought to avoid constitutional scrutiny on de minimis grounds.[64] Under the de minimis approach, even public religious practices that technically violate the Establishment Clause can be upheld on grounds that they are too trivial to warrant judicial invalidation. The notion that there can be de minimis constitutional violations is, of course, itself, a troubling proposition.[65] And, indeed, in this respect, it is worth noting that in other Establishment Clause contexts constitutional law has recognized injury in even the most minor alleged violations.[66] Nevertheless, even if a de minimis analysis were valid, it, like the secularization approach, would not easily reach the post-September 11 examples that were, by design, non-trivial religious actions.

C. Cultural Heritage or De Facto Establishment

A third approach suggests that particular religious rituals and symbols may be constitutionally permissible because they are an embedded part of the culture—a phenomenon that Mark DeWolfe

63 Epstein, *supra* note 40, at 2165.

64 Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring) ("It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.").

65 As Steven Epstein argues, "whether a violation of the Establishment Clause is 'de minimis' cannot be reduced to normative inquiry; it is rather a matter of perspective. It is all too simple for those in the religious mainstream to argue that pledging allegiance to a nation 'under God,' whose motto is 'In God We Trust,' produces at most a de minimis endorsement." Epstein, *supra* note 40, at 2168 (citations omitted). But, as Epstein continues, a far more different perception might be reached if "God" in the Pledge of Allegiance or in the Motto were replaced by the word "Allah." *Id.*; *see also* Newdow v. U.S. Congress, 292 F.3d 597, 607–08 (9th Cir. 2002) (judgment stayed on June 27, 2002, pending en banc review).

66 Flast v. Cohen, 392 U.S. 83, 106 (1968) (allowing taxpayer standing to challenge a federal government expenditure alleged in violation of the Establishment Clause).

Howe termed de facto establishment.[67] The cultural heritage argument may be thought of as a blend of the secularization and the de minimis approaches. Geographical names like St. Paul, Zion, and Corpus Christi and holidays like Thanksgiving have by such longstanding usage become so much a part of the secular culture that their religiosity assumes a de minimis quality. Because the cultural heritage approach does not appear to add any content to its secularization and de minimis components, it would also not appear to address the religiosity of the post-September 11 events.[68]

D. Ceremonial Deism

Related to both secularization and cultural heritage, but applying only to religious practices purportedly used to solemnify state ceremonial events, is the argument of ceremonial deism. As coined by Justice Brennan's dissent in *Lynch v. Donnelly*,[69] ceremonial deism refers to religious practices that "through rote repetition [lack] any significant religious content."[70] Such practices include references to God in the Pledge of Allegiance and religious references in inaugural addresses.[71] Again, as with secularization, ceremonial deism, precisely because it lacks significant religious content, would appear inapplicable to the post-September 11 prayer services.

E. Historical Practice

Still another argument that could be used to justify governmental affirmation of religiosity is historical practice. The leading, and actually only, case that has sustained a religious practice on these grounds is *Marsh v. Chambers*.[72] In that case, the Court held that a religious practice—a chaplain leading a prayer at the outset of a legislative session—could be sustained on the grounds that the practice existed at the time of the Nation's founding. Numerous historical examples, of

67 HOWE, *supra* note 47, at 11.

68 The cultural heritage argument should be distinguished from the historical practice position that will be discussed below.

69 465 U.S. 668 (1984).

70 *Id.* at 716. Dean Eugene Rostow of Yale Law School originally authored the term "ceremonial deism" in a 1962 Meiklejohn Lecture at Brown University. *See* E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1216 n.161 (1994).

71 Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437, 442–48 (7th Cir. 1992) (upholding "under God" in the Pledge of Allegiance). *But see* Newdow v. U.S. Congress, 292 F.3d 597, 607–12 (9th Cir. 2002) (striking down "under God" in the Pledge of Allegiance) (judgment stayed on June 27, 2002, pending en banc review).

72 463 U.S. 783 (1983).

course, exist for governmental affirmations of religiosity in times of war. The *Battle Hymn of the Republic* from the Civil War is a far more religious (and far more explicitly sectarian) song than is *God Bless America.* Nevertheless, *Marsh* is weak precedent for expanding the historical practice inquiry. First, the case was explicitly limited to its facts and has not been extended though the Court has had numerous opportunities to do so.[73] Second, the opinion also appeared to be influenced by the minimal religious content in the legislative prayer. The Court did not give much credence to the contention that the prayer had significant religious meaning. Finally, *Marsh,* if expanded to apply to any matter with some historical pedigree, could fully eviscerate Establishment Clause doctrine.[74] An argument from history, in short, could be used to sustain the post-September 11 events, but if so, it would take much of the Establishment Clause with it.[75]

F. Civil Religion

A final doctrinal move, albeit one seemingly rejected by the Supreme Court,[76] would be to defend the post-September 11 rituals and services as an aspect of American civil religion. Under this approach, the government's actions can be seen as something other than a religious (meaning theological) exercise; they may be explained as its engaging in activities reflective of a set of "areligious" precepts that bind the Nation together. As explained by its leading proponent, Robert Bellah, civil religion constitutes "a set of beliefs, symbols, and rituals" that provide "the fabric for the whole of American life."[77] These beliefs, symbols, and rituals reflect the Nation's collective beliefs about the relationship of citizen, community, and nation to the existential human condition.[78] Accordingly, civil religion, like other religious belief systems, serves to construct collective meaning for social commu-

73 The practice of holding prayer at graduation ceremonies, such as the one that occurred in *Lee v. Weisman,* 505 U.S. 577 (1992), also has substantial historical pedigree.

74 School prayer, for example, would seemingly survive an Establishment Clause challenge if historical precedent could shield a practice from constitutional attack. *See Lee,* 505 U.S. at 631–32 (Scalia, J., dissenting).

75 Whether the Establishment Clause should be interpreted in accordance with historical practice is outside the bounds of this Essay. For an argument in favor of deferring more to history and tradition in Establishment Clause interpretation, see generally Steven Smith, *Separation as a Tradition,* 18 J.L. & POL'Y (forthcoming 2002).

76 *Lee,* 505 U.S. at 589.

77 ROBERT BELLAH, BEYOND BELIEF 171 (1970); *see also* Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church,* 81 CAL. L. REV. 293, 321 (1993) (citing BELLAH, *supra*).

78 Maddigan, *supra* note 77, at 321.

nities.[79] It thus serves the functional roles of religion by bringing order to individual belief systems and shielding the individual from feelings of chaos and isolation in times of crisis.

Civil religion is purportedly non-theological. This does not mean, according to its advocates, that all references to God must be excised. Rather, many of the symbols and rituals of civil religion may include references to God; the phrase (and song) "God Bless America" being but one example. Nevertheless, under the civil religion understanding, these references are not constitutionally problematic because, theistic allusion aside, the rituals and symbols do not have true theological content. Michael Maddigan explains the argument as follows: "[t]he God acknowledged in civil religion's rituals is not the God of any traditional religion. Civil religion's prayers are not the prayers of any particular church. No doctrine of 'traditional' religion is promoted or offended by these invocations. The God of the civil religion is *sui generis*."[80]

Ignoring, or at least distinguishing, Supreme Court precedent[81] for the moment, the civil religion approach is initially promising as a device to measure the post-September 11 public religiosity. If the underlying purposes of the post-September 11 events were both to affirm America's spiritual identity and to allow the American public to share the communal religious experience that is often sought in times of crisis, then the civil religion analogy would seem to be exactly on point.[82]

Moreover, if it were assumed that civil religion was distinct from true religion, then many of the concerns we have discussed with respect to the government's affirming theological religion would vanish. First, for example, because in its support of civil religion the government is not prescribing religious truth, its action would not undermine, theoretically, the constitutional prohibition on government

79 DURKHEIM, *supra* note 36, at 466–67.

80 Maddigan, *supra* note 77, at 323.

81 The case rejecting civil religion as a basis for upholding government-supported religious practice, *Lee*, 505 U.S. at 577, is potentially distinguishable from the post-September 11 events. *Lee* addressed the constitutionality of prayer at a public school graduation ceremony, and the Court has traditionally been most reluctant to uphold state-sponsored religion in the public school context. *See, e.g.*, Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317, 1366 (1997) (describing Supreme Court cases striking down various "state-sponsored religious practices in public schools").

82 For a powerful critique of civil religion as little more than "idolatry", see GARRY WILLS, BARE RUINED CHOIRS: DOUBT, PROPHECY, AND RADICAL RELIGION 259–60 (1972), and Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 71 (1998) (quoting WILLS, *supra*).

pronouncement of religious orthodoxy. Second, because with civil religion the government action is descriptive rather than prescriptive, theoretically, it would not promote religious divisiveness or sect preference. Third, because the government is not fostering religion through its actions, Roger Williams's concern of state influence corrupting religion, theoretically, would not be implicated.

Unfortunately, what may be true in theory may not be true in practice. Whether its genesis is descriptive or theological, the government sponsorship of religious ritual could still have significant effects on pluralism and the vitality of religious independence. No matter how one casts it, the force of the government would stand behind a religious vision, whether that vision be a reflection of national culture or an officially sanctioned religious belief. Moreover, the problems inherent in government authorship of religious practice do not diminish even if the practice is conceived of as a reflection of our Nation's religious identity rather than some ultimate Truth. How is the government to be trusted to ascertain even the descriptive core? Moreover, if the government's purpose were to reflect the religious mainstream by ascertaining a common denominator of religious beliefs, then the problems of division between religious factions competing for their views of the national religious identity and the alienation of religious minorities would still persist. Furthermore, framing the enterprise as a search for a common national religious identity could actually heighten divisive fervor by directly uniting religious identity with patriotism.[83]

Finally, two other objections to the civil religion approach in this context are notable. The first is whether the theological aspects of civil religion can be so thoroughly excised that its exercise becomes uncontroversial. The Regent's Prayer in *Engel v. Vitale*,[84] after all, held little, if any, more religious content than what is contemplated by civil religion. Yet any school prayer will inevitably raise passionate theological dissent. No matter how one frames it, there is theistic content in civil religion, and, as shown by the school prayer example, defining that content will likely raise the divisiveness, the institutional competency, and the other concerns with government support of religion discussed previously.[85] Secondly, and alternatively, if all religiosity can be completely removed from civil religion, then its appropriateness as

83 Safire, *supra* note 14 ("[T]he name of the Lord is being used as a symbol for the other side's immorality, much as the American flag was used in previous campaigns as a symbol for the other side's lack of patriotism.").

84 370 U.S. 421 (1962).

85 *Lee*, 505 U.S. at 589 (holding that the government may not define the limits of civil religion); *see supra* Part II.

a response to an attack on our spirituality should be questioned. "We believe in a theologically antiseptic God" is not much of an answer to those who claim we live in a godless society.

IV. THE LIMITS OF SECULARISM

Virtually all of the previous approaches have one element in common. They minimize, if not completely deny, the religious significance of the governmental practice in question.[86] As such, they are little more than shell games. There are elements of religiosity in all of the practices that these approaches seek to justify. Christmas might be secularized for some, but to others it remains a religious holiday. The fact that cities have names such as Corpus Christi might be characterized as de minimis in one sense but the words still mean "Body of Christ" in another. The official invocation of the Supreme Court referencing God, or the presidential practice of concluding speeches with the words "God Bless America" and like phrases, might be perceived as part of a non-theological civil religion, but they can also be interpreted as decidedly theological.

It is certainly possible that the post-September 11 rituals can similarly be stripped of their religiosity and squeezed into one of these approaches. The obvious benefit would be that the governmental practice could be sustained without doing obvious harm to the constitutional principles at stake. However, in order to do so, the shell game of de-religification (if I may be allowed to author a new word) would have to be taken to new heights. It would also miss much of the point of the post-September 11 exercises. After all, the post-September 11 rituals were deeply religious in nature. Their purpose was to affirm a deep national religiosity, not to hide or deny it.

The real question is whether the post-September 11 events are constitutionally valid on their own terms.[87] Are there circumstances

86 To the extent the historical tradition argument would allow a truly religious exercise to be sustained, it might be an exception. As noted previously, however, the *Marsh* Court seemed to be influenced by the relatively minor religious content of the legislative prayer in upholding its validity. Marsh v. Chambers, 463 U.S. 783, 795 (1983).

87 There is, of course, a simple cynical answer to this question, i.e., realistically no court would ever be inclined to hold prayer services such as those that took place after September 11 unconstitutional. The purity of constitutional law, after all, is always limited by a reality check. *See* Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting) (noting that the suggestion that a court could enforce constitutional limits on war powers is "wholly delusive"). Indeed, the real motivation behind the Court's upholding legislative prayer in *Marsh* may have been the Court's awareness that Congress would likely never accede to a decision holding its own

in which it is permissible for the state to engage in unabashedly religious activity? Are there times when it is appropriate for the state to pierce through the secular veneer?

Before answering this question, it is worthwhile once again to revisit the policies that underlie the secular model. Notably the policies are instrumental. They do not suggest that secularism itself is somehow of a higher constitutional order than any religious system. Nor could they. Adopting a hierarchical system in which secularism is maintained as the preeminent worldview would create its own establishment.[88]

The problem is that a regime of secularism, although supported by instrumental policies and not by a claim of ideological superiority, works as if it is the chosen ideology. Consequently, there is an immediate tension between secularism and the goals secularism is designed to achieve.[89] A constitutional regime based upon a purportedly religiously neutral secularism is neither secular nor neutral. A view that morality may be fostered without religion is itself a religion-laden precept.[90] The conclusion that a state may be neutral among religions is not neutral to those religious belief systems that reject the possibility of neutrality.[91]

There is, of course, no solution. Secularism can ultimately provide only a second-best neutrality because it cannot avoid its own primacy. Accordingly, this recognition of secularism's limitations may make the case for piercing its veneer more sympathetic. Some public acknowledgment of religion might be justified as a counterbalance to an otherwise secular dominance that itself raises anti-establishment concerns.

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prayers unconstitutional. Nevertheless, it is still worthy to investigate whether the constitutionality of the post-September 11 events should be upheld other than on a realpolitik basis.

88 *But see* Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992).

89 For example, the perceived dominance of secularism has led to religious divisiveness. Indeed the cry of combating government-enforced secularism has been one of the rallying points in the rise of the religious right. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 341–42 (2001) (noting that the religious right believed "'that the country had fallen into the hands of secular elites who were hostile to traditional faith and its norms'" (quoting ROBERT BOOTH FOWLER ET AL., RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE AND STRATEGIC CHOICES 142 (2d ed. 1999))).

90 Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 774–75 (1993).

91 *See* Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 582 (1993).

The devil, of course, is in the details. Accepting a doctrine that might allow for state-sponsored religious activity in limited circumstances does not identify what those circumstances are. Moreover, as we shall see, the instances in which relaxing the restrictions on state-sponsored religious activity might seem most appropriate may also be the same instances in which relaxing those strictures is most problematic.

One instance in which state-sponsored religious activity might be justifiable has already been discussed.[92] An attack upon the Nation's religious identity literally cries out for religious response: the assertion that we are a godless, materialistic culture requires an answer. There are, however, problems in relying on this rationale, not the least of which is the potential for abuse. Many, for example, saw the Communist threat as being an atheistic challenge to American values. Those persons sought, and in many cases succeeded, on that basis to infuse the public culture with religious references.[93] It is therefore not difficult to envision that in contemporary culture some will claim that economic depression, civil unrest, or culture wars should be considered an attack on religious identity, requiring some publicly sponsored religious exercise in response.

A second rationale is that basic human needs may require a relaxation of the prohibition against state support of religious exercise in times of crisis. Humanity most looks toward religion for comfort and meaning in times of upheaval and stress.[94] The fact that the government would wish to apply religious balm to societal wounds is only natural. Indeed, it should be no surprise that government efforts to inject public endorsements of religion have historically been most prominent in times of crisis—particularly in wartime or following the deaths of presidents.[95] Softening the restrictions on state-supported religion during crisis periods could therefore be seen as an appropriate response to basic human needs.

The crisis argument, however, can cut both ways. Because both state and religion are at their most influential point in times of crisis, the dangers in church-state concert are at their highest. At one end of

92 *See supra* notes 8–10 and accompanying text.

93 Epstein, *supra* note 40, at 2121. For example, the words "under God" were added to the Pledge of Allegiance in the 1950s as a direct response to the Communist threat. 100 CONG. REC. 6348 (1954) (statement of Sen. Ferguson (quoting President Eisenhower's statement at his signing ceremony)).

94 WILSON, *supra* note 31, at 47.

95 *Id.* at 62–64. Abraham Lincoln, *Second Inaugural Address*, *in* SPEECHES AND WRITINGS 1859–1865: PRESIDENTIAL MESSAGES AND PROCLAMATIONS 687 (D. Fehrenbacher ed., 1989).

the spectrum, the prominence of the state events responding to crisis means that participating religions will likely seek center stage both because of the obvious visibility[96] and because the imprimatur of state support would become so powerful in these moments. What better time is there to be associated with the government than when a nation is rallying around its government to combat external threat?

At the other end, those religions that, because of particular beliefs, are unable to participate in the state events will feel disfavored. For example, the convening of varied religions in memorial services that occurred after September 11 was praised as a triumphant public display of American religious diversity. Ecumenism, however, necessarily leaves many religions out, i.e., those religions that do not share ecumenism's precepts. As Timothy Hall has noted, ecumenism "is a religious vision with respectable credentials. It is nevertheless a particular religious vision [that is] the implacable foe of religious sectarianism."[97] Disfavored treatment, moreover, will not be the only harm suffered by non-ecumenist religion. Most citizens will want to be seen as rallying for their government in times of international crisis. Yet if a non-ecumenist religion stays true to its principles, it risks both alienating its adherents and sending a message of disassociation with the rest of the American community. If, on the other hand, the non-ecumenist religion bows to the demand for solidarity created by the state-sponsored event, it is sacrificing its integrity to the state.[98]

A third rationale pertains to public grief. Religion and death are inextricably bound together. Indeed, fear of death may be the singularly most powerful reason that humanity seeks religion,[99] and providing comfort in times of loss may be one of religion's most essential functions. Significantly, the religious response to death is more often communal than individualistic. Funerals and memorial services serve

96 *See Billy Graham Fulfills Prophesy*, SELAH CYBERMAG, Oct. 2, 2001, *at* http://www.selah.co.za/stories2.htm (arguing that the worldwide broadcast of Billy Graham's sermon at the National Prayer Service fulfilled a biblical prophesy that the Gospel must be preached to all nations before the coming of Christ).

97 Hall, *supra* note 5, at 88.

98 The problems that can be created in these circumstances are illustrated by a controversy that grew out of the Yankee Stadium prayer service. *See supra* note 6 and accompanying text. A number of Lutheran pastors filed formal charges calling for the expulsion of one of their brethren for participating in the Yankee Stadium prayer event. According to the pastors' complaint, a Lutheran minister's participation with non-Christians constituted idolatry. Stephanie Simon, *Lutherans Accused of 'Idolatry'*, WASH. POST, Dec. 2, 2001, at A9.

99 COCHRAN, *supra* note 7, at 33 ("We ask, and we look to religion to answer, the meaning of death."); GOODENOUGH, *supra* note 7, at 6–7; RUDOLF OTTO, THE IDEA OF THE HOLY (John W. Harvey trans., 2d ed. 1950).

societal interests by promoting continuity and solidarity.[100] They bring divergent actors together in a display of public grief. These forces, of course, are in even greater play when the deaths in question result from an attack on that community or involve the community's leaders. In those cases, the need for communal response becomes that much greater.[101]

Again, of course, opening the door to state sponsorship of religious memorial services has its risks. State and church both have often skillfully captured the momentum generated at memorial services for their own purposes. At times, such as with the *Gettysburg Address*, the interplay of church and state themes may be beneficent.[102] At other times, as is often the experience in the Middle East, both religion and the state may use themes of religious martyrdom to promote less noble ends.

There are no happy solutions. On the one hand, one cannot be sanguine about any approach that permits state-sponsored religious exercise. Even in the most sympathetic circumstances, the harms to the constitutional values fostered by secularism will be substantial and the risks of serious abuse by ambitious political or religious leaders manifest. On the other, suggesting New York City acted unconstitutionally in sponsoring its post-September 11 memorial service seems like secularism in the extreme.

One possible compromise is to employ something like an exceptional circumstances test that would require a number of factors—such as a national crisis and public mourning combined with a limited temporal nexus between the precipitating event and the state re-

100 COCHRAN, *supra* note 7, at 155 (recognizing that funerals for public figures such as Gandhi and Martin Luther King, Jr. brought the public together in a religion-affirming ritual).

101 Theoretically, I suppose, one could envision a state-sponsored memorial service without a religious component. The value of such a service, however, is dubious. First, removing any mention of religion from a memorial service would necessarily be so stilted and artificial that one would doubt its efficacy in accomplishing its intended goal of community healing. Second, the forced exclusion of religion from an event at which its presence would be so expected might easily be perceived as an unnecessary dogmatic hostility towards religion and, as the recent uproar over the Ninth Circuit's invalidation of the use of "under God" in the Pledge of Allegiance indicates, Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002) (judgment stayed on June 27, 2002, pending en banc review), would be far more likely to promote divisiveness than cure it. *See generally* Conkle, *supra* note 45, at 1183–87 (noting that the invalidation of traditional religious practices may have such an exclusionary effect on the mainstream religious political community as to offset whatever benefits the invalidation might have as to religious and nonreligious minorities).

102 GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 38 (1992).

sponse—in order to sustain a state-supported religious exercise.[103] One can hope that there may be some jurisprudential advantage in such an approach. First, such a test would (or should) likely proscribe any effort to make the state-sponsored practice routine. There is a difference between a city sponsoring a one-time prayer service for the victims of the World Trade Center bombing and its implementing a daily school prayer as an ongoing September 11 memoriam. Second, it may also be true, as has been creatively argued in another context, that the development of an "extraordinary circumstances" doctrine[104] might serve to check a potentially slippery slope by setting the bar for doctrinal qualification at a very high level.[105]

Nevertheless, such an approach can, and should, be criticized as compromising constitutional values when they may be most needed—similar to soundly condemned doctrinal efforts under the Speech Clause which were used to limit speech rights in times of war.[106] Moreover, the pressures to expand the doctrine in favor of allowing more state-sponsored religion will be constant and substantial. Claiming God is on your side is good (in the Machiavellian sense of the word) politics[107] and the possibility that sectarian forces will seek state imprimatur will always be considerable.[108] In the end, even a limited doctrine allowing governmental sponsorship of religious practice only in exceptional circumstances may prove unsuccessful. For the moment, however, it seems equally implausible that no governmentally

103 Whether a relevant factor in this analysis should be if the precipitating event involved an attack on national religious identity (as occurred on September 11) concededly is not clear. On the one hand, characterizing something as an attack on our religiosity seems especially manipulable given such historical examples as our response to the Communist threat. *See supra* note 93 and accompanying text. At the same time, a too rigid reliance on this factor would presumably suggest the hypothetical in-school prayer for Christa McAuliffe presented at the beginning of this Essay and/or a similarly religious response to the assassination of a president or other national leader would be constitutionally impermissible.

104 Colo. River Water Conservatory Dist. v. United States, 424 U.S. 800, 826 (1976) (holding that only in exceptional circumstances may a federal court stay a proceeding properly before it in deference to a parallel state proceeding).

105 Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of* Colorado River, 44 U. CHI. L. REV. 641, 642 (1977).

106 *See* Dennis v. United States, 341 U.S. 494 (1951); DAVID HERBERT DONALD, LINCOLN 419–21 (1995) (describing the prosecution of Clement Vallandigham for expressing disloyal sentiments during the Civil War); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998); Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395 (1999) (reviewing REHNQUIST, *supra*).

107 *See* Safire, *supra* note 14.

108 William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993).

sponsored religious exercise can be permitted to affirm our religious identity in a time of religious war.

CONCLUSION

In the days following September 11, Americans gathered at public events all over this Nation to share their grief and affirm their solidarity. Religious exercise played a prominent role at these events. Participants prayed together, sang hymns together, and expressed their collective belief that, despite the terrorist attack, God would continue to bless America.

At one level, the fact that these events featured state-supported religious exercise would appear to be constitutionally problematic. The prayers and supplications offered at these events were deeply moving and deeply felt. They were also often deeply sectarian. The events embodied true religious exercise, not the watered-down versions commonly associated with public events.

In most circumstances, this would be seen as a classic, indeed egregious, Establishment Clause violation. Certainly, it transgressed most anti-establishment policies. State-sponsored religion is thought of as demeaning to religion, as compromising religious integrity, and as threatening religious pluralism. Religion is believed to be beyond state competence. Yet the post-September 11 events had public officials designing religious programs, selecting religious participants, and determining how best to meet their citizens' religious needs.

At the same time, any conclusion that the post-September events were unconstitutional is also problematic. The Nation's need for religious outlet was too strong. Adherence to such a secularism would be too rigid.

In the end, I suggest in this Essay that the tension between the constitutional commitment to anti-establishment and the societal need to engage in collective religious exercise can be accommodated by a doctrine that allows for government support for religions in limited and exceptional circumstances. But there are larger lessons about the interrelation between religion and state that can be learned from the post-September 11 events. While maintaining our secular status, we remain a deeply religious and spiritual society. This is not a paradox. The constitutional commitment to secularism serves to protect, and not to displace, our collective religiosity. The constitutional value of secularism is in its instrumental role, not in its own orthodoxy. As such, the adherence to secularism need not be absolute. There may be moments of national crisis and grief when instrumental values pale and it becomes constitutionally permissible to pierce the secular veneer.